

TrialWatch Submission to the UN Human Rights Committee, 135th Session, July 2022: Review of Hong Kong Special Administrative Region

Executive Summary

TrialWatch,¹ an initiative of the Clooney Foundation for Justice, presents this submission to the UN Human Rights Committee (the Committee) in advance of its review of compliance by Hong Kong Special Administrative Region (HKSAR) with the International Covenant on Civil and Political Rights (ICCPR).

Starting in 2020, TrialWatch has monitored and analysed four completed trials in Hong Kong: (1) the trial of Lai Chee Ying and eight others for participating in an unauthorised assembly in 2019 under the Public Order Ordinance; (2) the trial of journalist Bao Choy for alleged misrepresentations in accessing a government database under the Road Traffic Ordinance; (3) the trial of Tong Ying-kit, the first trial under the 2020 National Security Law (NSL); and (4) the trial of Tam Tak-chi for ‘uttering seditious words’ under the Crimes Ordinance, the first such trial in post-colonial Hong Kong.

For each of these cases, TrialWatch has produced a report based on the results of the monitoring and review of court decisions, with analysis by an eminent legal expert: Timothy Otty QC, in the unauthorised assembly case; an internationally recognized expert in media law, in the case of Bao Choy; Rebecca Mammen John, in the case of Tong Ying-kit; and Elizabeth Wilmshurst QC, in the case of Tam Tak-chi. This submission includes in Annex A summaries of each of the four cases and in Annex B descriptions of concerns identified in the reports.

In particular, these four reports shed light on how the Hong Kong authorities are using both old laws, like sedition, and new ones, like the NSL, to criminalize speech seen as challenging Hong Kong authorities—with increasingly disproportionate punishments. Further, two of reports describe how little is known about the operation of the NSL regime for designating “national security judges,” how they are assigned to cases, and what cases they will hear (since Tam Tak-chi’s case was heard by a national security judge, despite the fact that he was not charged with an offense under the NSL).

One recurrent concern, documented throughout these trials, is that the courts—rather than providing clarity regarding the meaning and scope of these laws—are taking vague and overbroad laws and applying them to a wide range of conduct. Of course, courts play a role in interpreting statutes; but in the trials monitored by TrialWatch, the judgments facilitate a potentially expansive use of these laws, leaving Hong Kongers with little guidance on what speech or conduct will be criminalized next.

Thus, while many important fair trial rights were respected in the trials monitored by TrialWatch, this Committee should take the opportunity of HKSAR’s review to seek clarity: on how the NSL and its specially-appointed judges operate; on how the laws are being interpreted by prosecutors and courts; and on how future proceedings will be handled.

¹ The Clooney Foundation for Justice (CFJ) advocates for justice through accountability for human rights abuses around the world. TrialWatch’s mission is to expose injustice, help to free those unjustly detained and promote the rule of law. 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.

Recommendations

We encourage the Committee to ask the following questions during its review of HKSAR:

1. In light of the right to trial “by a competent, independent and impartial tribunal,”
 - a. How are judges designated for “national security” trials and how are they assigned to particular cases?
 - b. Is this consistent with how judges were assigned to cases prior to promulgation of the NSL?
 - c. What types of cases that do not involve charges under the National Security Law can—or must—nevertheless be tried by designated national security judges (and/or are subject to the NSL’s restrictive bail provisions)?
2. What guidance exists for the Department of Justice in Hong Kong on when to pursue NSL charges, particularly when other non-NSL charges could also be brought for the conduct in question? What components of the Department of Justice, and/or other offices or agencies, participate in prosecutorial decision-making on NSL cases? To what extent is conduct pre-dating promulgation of the NSL considered in deciding whether to pursue charges under the NSL?
3. Considering the right to freedom of expression, including as elucidated by this Committee in its General Comment 34, and having regard to the need to know what conduct is considered criminal, what guidance exists for the Department of Justice and the public at large on the application of the NSL and the sedition provision of the Crimes Ordinance to speech on matters of political concern or about public officials? For instance, will Hong Kong authorities clarify:
 - a. Whether, in light of the General Comment’s conclusion that “States parties should not prohibit criticism of institutions, such as the army or the administration,” Hong Kong authorities can confirm that such speech is not subject to criminal penalties;
 - b. What limits there are to the concept of “incitement to secession” under the NSL and the standard to be applied in deciding whether speech is unlawful in this regard;
 - c. What entities are protected against ‘seditious words’ and why (e.g., the Court in Tam Tak-chi suggested that criticism of the Chinese Communist Party could constitute sedition, despite the fact that the CCP is not mentioned in the relevant provision of law);
 - d. The specific *mens rea* required under the NSL and the sedition provision of the Crimes Ordinance.
4. How does the NSL impact sentencing in non-NSL cases (for example, in Tam Tak-chi’s case a higher sentencing range was applied to post-July 1, 2020 charges) and what guidance exists for judges and other authorities explaining the implications of the NSL on sentencing?
5. In light of the right to a public hearing, what guidelines would be applied to determine when and if the HKSAR authorities would close any of the upcoming or ongoing NSL trials to the public?
6. In light of this Committee’s recent General Comment on the right of peaceful assembly, what guidance exists regarding when to pursue criminal charges for alleged non-violent breaches of the Public Order Ordinance?
7. What safeguards remain for freedom of assembly and protest at Government decisions or conduct in Hong Kong and what measures are in place to ensure that criminal proceedings and sanctions are not used in a disproportionate manner so as to stifle peaceful dissent?

Annex A: Factual Background on the Cases

A. HKSAR v. Lai Chee Ying, Lee Cheuk Yan, Ng Ngoi Yee Margaret, Leung Kwok Hung, Ho Sau Lan Cyd, Ho Chun Yan, Leung Yiu-Chung, Lee Chu Ming Martin, and Au Nok-hin²

The nine defendants in this case—Lai Chee Ying (Jimmy Lai), Lee Cheuk Yan, Ng Ngoi Yee Margaret (Margaret Ng), Leung Kwok Hung, Ho Sau Lan Cyd (Cyd Ho), Ho Chun Yan (Albert Ho), Leung Yiu-chung, Lee Chu Ming Martin (Martin Lee) and Au Nok-hin—are all well-known pro-democracy figures in Hong Kong.³ On April 18, 2020, these nine individuals were arrested and charged with knowingly participating in and organising an unlawful assembly in August 2019, in violation of the Public Order Ordinance (POO).⁴ All nine were convicted on April 1, 2021 (with two having pleaded guilty).⁵

Under the POO, any person planning to hold a public meeting⁶ or public procession⁷ in Hong Kong is required to notify the Commissioner of Police (CP) in advance and secure the CP’s ‘non-objection’ to the meeting or procession.⁸ Pursuant to this law, a public gathering or procession may only take place if the CP has been notified and not objected.⁹ Further, the CP is authorised to “control and direct the conduct of all public gatherings” in situations where they “reasonably consider it to be necessary” to prevent an “imminent threat” to national security, public safety, public order or for the protection of the rights and freedoms of others.¹⁰ Under Section 17A of the POO, a public meeting or procession is “unauthorised” when it takes places in contravention of the POO’s rules requiring notification of the CP *and* non-objection to the public gathering or procession; or when it involves “3 or more people taking part in or forming part of a public gathering [who] refuse or willfully neglect to obey an order” issued under the POO.¹¹ Anyone who “without lawful authority or reasonable excuse, knowingly takes or continues to take part in” or

² Timothy Otty QC & TrialWatch, HKSAR v. LAI CHEE YING ET AL. (2021), https://cfj.org/wp-content/uploads/2021/07/Jimmy-Lai-et-al_July-2021_Fairness-Report.pdf.

³ Martin Lee, SC, known as the ‘father of Hong Kong democracy,’ helped write the city’s ‘mini constitution’—the Basic Law—in 1990. Lee Cheuk Yan is a veteran labor leader and a former member of Hong Kong’s Legislative Council. Jimmy Lai is an entrepreneur and founder of the media company Next Digital and *Apple Daily*, previously one of the most popular daily newspapers in Hong Kong before it was closed. Margaret Ng is a barrister, journalist, and former member of the LegCo. Cyd Ho is also a former member of the LegCo, a founding member of the Labour Party, and an activist for social justice causes including LGBTQ+ rights. Leung Kwok Hung, known as “Long Hair,” is also a former member of the LegCo and a pro-democracy activist. Albert Ho is a human rights lawyer and another former member of the LegCo. Leung Yiu-chung is also a former member of the LegCo and social activist. Au Nok-hin is also a former member of the LegCo, a doctoral student, and a former convenor of the Civil Human Rights Front. *See id.* at 2-3.

⁴ *Id.* at 3.

⁵ *Id.* at 3, 18.

⁶ A “public meeting” is defined as “any meeting held or to be held in a public place.” Public Order Ordinance [hereinafter POO], Cap. 245, Sec. 2(1) (1967), *available at* https://www.elegislation.gov.hk/hk/cap245?xpid=ID_1438402885716_002.

⁷ A “public procession” is defined in Section 2(1) of the POO as “any procession in, to or from a public place.” A “public place” is defined in Section 2(1) of the POO as “any place to which for the time being the public or any section of the public are entitled or permitted to have access, whether on payment or otherwise, and, in relation to any meeting, includes any place which is or will be, on the occasion and for the purposes of such meeting a public place.”

⁸ Sections 6-8, 13A-14 of the POO.

⁹ Sections 7, 13 of the POO.

¹⁰ Section 6(1), (2) of the POO. The phrase “reasonably considers...to be necessary” is the litmus test as to whether the CP can legitimately exercise their powers.

¹¹ Section 17A of the POO.

“holds” or “organises” an unauthorised meeting or procession is subject to criminal prosecution and penalties of up to five years’ imprisonment.¹²

The POO has been repeatedly criticised for its over-broad restrictions on peaceful assembly and for allowing the criminalization of protestors.¹³ Indeed, this Committee has warned that this ordinance can operate as an “excessive restriction”¹⁴ on the right to freedom of assembly and has said it is out of step with article 21 of the ICCPR,¹⁵ and several UN experts have said that the law’s authorization process is “contrary to international human rights standards.”¹⁶ The use of this law against unauthorised events has increased in recent years and in particular, during and in response to the 2019 protests; according to Hong Kong police, for example, around 370 people were arrested for unauthorised assembly on July 1, 2020 alone, the first day the NSL went into effect.¹⁷ According to one study by the (now shuttered) *Apple Daily*, between 2003-2013, there were 18 convictions for unauthorised assembly, none of which resulted in imprisonment.¹⁸ This trend has now reversed, starting with the case described here, resulting in prison sentences even for peaceful protests.

The assembly at issue in this case took place on August 18, 2019—eight months before the defendants were arrested and charged—during a summer of pro-democracy protests, initially sparked by the Hong Kong government’s proposed extradition bill. The August 18 event was organised to protest police brutality and reiterate the “five demands”¹⁹ of pro-democracy activists in Hong Kong.²⁰ In accordance with Hong Kong law, the organisers notified the police of their intent to hold a meeting and subsequent procession ahead of time.²¹ Although the public meeting organised by the Civil Human Rights Front (a coalition of prodemocracy civil society organisations) was authorised, a subsequent procession out of the meeting area (Victoria Park in Central Hong Kong) was objected to by the police.²² The public meeting on August 18 ended peacefully, with thousands of people filing out of the park and walking through central

¹² Section 17A(3) of the POO.

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

¹⁴ UN Human Rights Committee, Concluding observations on the third periodic report of Hong Kong, China, Apr. 29, 2013, CCPR/C/CHN-HKG/CO/R.3, para. 10.

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

¹⁶ OHCHR, Press Statement, “Hong Kong urged not to silence peaceful protest with criminal charges,” May 13, 2020, available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25880&LangID=E>.

¹⁷ *Al Jazeera*, “Hong Kong activists jailed for unauthorised protest in 2020,” Oct. 16, 2021, available at <https://www.aljazeera.com/news/2021/10/16/seven-hong-kong-activists-jailed-over-unauthorised-protest-in-2020>.

¹⁸ *Apple Daily*, “和平集會有罪 越罰越重 自簽\$500變囚一年半,” May 17, 2021, available at <https://hk.appledaily.com/local/20210517/BNCWB4ZUAZEYHJEJFMXIWSJLF4/> (accessed June 20, 2021).

¹⁹ The “five demands” repeated in the 2019 protests are 1. Unconditionally withdraw the Extradition Bill; 2. Convene a commission to look into allegations of police brutality during the 2019 protests; 3. Cease referring to protesters as “rioters”; 4. Declare amnesty for all protesters; and 5. Realize universal suffrage for election of the Hong Kong Chief Executive and the Legislative Council (LegCo).

²⁰ Cf. Office of the High Commissioner for Human Rights (OHCHR), “Press briefing note on Hong Kong, China,” Aug. 13, 2019, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24888&LangID=E>.

²¹ Timothy Otty QC & TrialWatch, *HKSAR v. LAI CHEE YING ET AL.*, *supra*, at 3, 16.

²² *Id.* at 16.

Hong Kong.²³ The Prosecution maintained that his procession was an unauthorised assembly in defiance of police orders²⁴; the Defence argued that this procession grew from a “water flow” approach to managing the crowd’s exit from Victoria Park, where the crowds had gathered for the approved meeting.²⁵

At trial, it was undisputed that there was no violence during the rally or subsequent exit of the crowd along Causeway; the only allegation of such misconduct presented by the Prosecution, in their closing submission, was the suggestion that a single protestor had kicked a traffic cone (disputed by the Defence).²⁶ The Prosecution maintained that the Ordinance (and its notification requirement) was not an unconstitutional limitation on the right to peaceful assembly and further served an important deterrent and preventative function—ensuring that peaceful protests did not turn violent.²⁷ The Prosecution maintained that this deterrent role was critical because “[t]here is no simple dichotomy between peaceful and violent protesters.”²⁸

On April 1, 2021, the Court found all the defendants guilty of both ‘participating in’ and ‘organising’ an unauthorised assembly.²⁹ The Court rejected the defendants’ constitutional challenge, finding that the restrictions on free speech and peaceful assembly contemplated by the POO were proportionate: “Hong Kong people do enjoy the same freedoms of assembly, speech, procession and demonstration as other advanced and free societies worldwide. ... That means Hong Kong people are obliged to respect the laws that are in force even those that restrict these rights.”³⁰ The Court also observed that even if the procession in this case did not involve any violence, it did cause “major traffic disruption”³¹; and anyway, the Court held:

[I]t cannot be right that to arrest and prosecute is disproportionate in this case because no actual violence broke out. That would give the law no teeth and make a mockery of it. It cannot be right for an offender to argue that although his act was unauthorised, (unauthorised because the legitimate aim behind it is public order) but because it was ultimately peaceful and there was no violence he should not be arrested, prosecuted or convicted.³²

On April 16, 2021, the Court issued its sentences, with the most severe punishments given to Leung Kwok Hung (18 months’ imprisonment), Jimmy Lai (12 months), and Lee Cheuk-yan (12 months).³³ In its reasoning, the Court reiterated that “the defendants deliberately defied the law and circumvented the

²³ *Id.* at 3, 17.

²⁴ *Id.* at 22.

²⁵ *Id.* (“The defence case, in essence, was that in leading the rally participants out of the overcrowded park at the end of the approved rally, they had sought to facilitate the exit of crowds from Victoria Park. This was, alternatively, an argument that the prosecution had not met its burden or that they could avail themselves of a defence of necessity.”).

²⁶ *Id.* at 24.

²⁷ *Id.* at 25 (“[T]he Prosecution argued that the legislative history of the POO showed that the legislature thought the provision struck an appropriate balance between the right to free expression and the need for public order, and that the Ordinance (and its notification requirement) served an important deterrent and preventative function--ensuring that peaceful protests did not turn violent.”).

²⁸ *Id.*

²⁹ *Id.* at 26.

³⁰ *HKSAR v. Lai Chee Ying et al.*, DCCC 536/2020, [2021] HKDC 398, Reasons for Verdict, paras. 219-220.

³¹ *Id.* at para. 229.

³² *Id.* at para. 267.

³³ Timothy Otty QC & TrialWatch, *HKSAR v. LAI CHEE YING ET AL.*, *supra*, at 28.

[procession] ban”³⁴ and that their course of action in leading the public out of the park “was not a dispersal plan implemented with the assistance of the defendants but a planned unauthorised assembly to challenge the authority of the Police.”³⁵ The Court said its decision reflected that this was “an unauthorised not an unlawful assembly” but that the “relentless” and “violent” nature of the social unrest in Hong Kong during the summer of 2019 must also be taken into account,³⁶ also referring in the judgment to “an unhealthy wind [] blowing in Hong Kong” and escalating during the 2019 protests.³⁷

The TrialWatch report on the case found that the prosecution’s application of severe criminal penalties for alleged violations of Hong Kong’s protest rules raised “significant concerns with respect to the defendants’ rights to freedom of peaceful assembly.” It also found that there are “concerns that the Prosecution’s decision to prosecute was tainted and constituted an abuse of process or, adopting a different form of analysis, that the prosecution and sentences were disproportionate on this basis also.”³⁸

B. HKSAR v. Bao Choy³⁹

Bao Choy Yuk-ling (“Bao Choy”) is an award-winning investigative journalist and documentary film producer. In the fall of 2019, she worked with Radio Television Hong Kong (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, 2019.⁴⁰ 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.⁴¹ 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.

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 to access the vehicle information.⁴² Her case proceeded to trial on March 24, 2021.⁴³ On April 22, 2021, Bao Choy was convicted after a one-day trial and sentenced to pay a fine of HKD 6,000 (USD \$775).⁴⁴

Specifically, Bao Choy was convicted 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.⁴⁵ The maximum sentence for this offense is a fine and imprisonment of

³⁴ *HKSAR v. Lai Chee Ying et al.*, [2021] HKDC 457, Reasons for Sentence, para. 8.

³⁵ *Id.* at para 10.

³⁶ *Id.* at para. 50.

³⁷ *HKSAR v. Lai Chee Ying et al.*, DCCC 536/2020, [2021] HKDC 398, Reasons for Verdict, para. 221.

³⁸ Timothy Otty QC & TrialWatch, *HKSAR v. LAI CHEE YING ET AL.* (2021), *supra*, at 2.

³⁹ TrialWatch, *HKSAR v. BAO CHOY* (2021), https://cfj.org/wp-content/uploads/2021/07/Bao-Choy_July-2021_Fairness-Report.pdf.

⁴⁰ 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).

⁴¹ *Id.*

⁴² *Id.* at 2, 16.

⁴³ *Id.* at 14.

⁴⁴ *Id.* at 17.

⁴⁵ Road Traffic Ordinance, Cap. 374 of the Laws of Hong Kong, Sec. 111(3) (1984), *available at* <https://www.elegislation.gov.hk/hk/cap374>. This section of the Ordinance, titled “Forgery of documents,” speaks to criminal penalties for, among other things, forging a driver’s license or documents for showing or transferring title of a vehicle. Its

six months. At trial, the Prosecution alleged she had engaged in fraud by checking the box “other traffic and transport related matters” as the reason for requesting the information, based on the theory that investigative reporting is not an approved basis for accessing the vehicle database under the Road Traffic Ordinance.⁴⁶ The Defence 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 as the reason for requesting information was broad enough to encompass what she did.⁴⁷ Further, 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.⁴⁸

As documented in the TrialWatch report, Bao Choy’s trial and conviction, almost a year after the documentary aired, took place amidst a growing crackdown on press freedom and RTHK in particular. While this case was ongoing, for example, Hong Kong Chief Executive Carrie Lam stated that the Hong Kong government was the “biggest victim of fake news”;⁴⁹ 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.⁵⁰ 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.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.⁵⁴

apparent purpose is to sanction fraudulent acts in connection with offenses like theft, parking illegally or driving without a license. 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.

⁴⁶ TrialWatch, *HKSAR v. BAO CHOY* (2021), *supra*, at 18.

⁴⁷ *Id.* at 19.

⁴⁸ *Id.*

⁴⁹ Kelly Ho, “Hong Kong gov’t is the ‘biggest victim of fake news,’ Chief Exec. Carrie Lam says,” *Hong Kong Free Press*, 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/>.

⁵⁰ Kelly Ho, “Hong Kong press club urges police chief to clarify comments about action against ‘fake news,’” *Hong Kong Free Press*, 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/>.

⁵¹ *Id.*

⁵² Candice Chau, “Hong Kong broadcaster RTHK rejects media award for TV doc about police handling of mob attack,” *Hong Kong Free Press*, 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, “Hong Kong’s latest star TV host? City leader Carrie Lam,” *Washington Post*, Apr. 29, 2021, <https://www.washingtonpost.com/world/2021/04/29/hong-kong-carrie-lam-china/>.

⁵⁴ Michael Shum, “RTHK plan to delete content spurs online push,” *The Standard*, 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 broadcaster RTHK deletes shows over a year old from internet as viewers scramble to save backups,”

The TrialWatch report on this case concluded that “the charges and prosecution give rise to concerns under the principle of legality” and that “the prosecution raises concerns that it was an abuse of process, brought selectively and with improper motives to chill exercise of free expression.”⁵⁵ Bao Choy’s appeal of her conviction is currently pending and scheduled for hearing in August 2022.

C. HKSAR v. Tong Ying-kit⁵⁶

Tong Ying-kit, then 24 years old, was the first person to be arrested and then tried under the 2020 National Security Law (NSL). He was arrested on July 1, 2020, the first day the NSL went into effect, for driving a motorcycle at a protest against the NSL, flying a black flag with the words “光復香港時代革” and “Liberate Hong Kong: Revolution of our Times,” and colliding with police.⁵⁷ The words on the flag, according to the Prosecution (a theory ultimately accepted by the Court), connote separation between Hong Kong and the People’s Republic of China or “Hong Kong independence.”⁵⁸ The State argued that Tong Ying-kit refused to stop his motorcycle despite repeated attempts by the police to intervene and eventually rammed into police officers at a checkline on the road, injuring three police officers as well as himself (Tong Ying-kit maintained it was an accident and that he attempted to slow down, with the collision caused by the police).⁵⁹ At his first appearance before the Chief Magistrate on July 6, 2020, Tong Ying-kit was charged with (a) incitement to secession, in violation of Articles 20 and 21 of the NSL;⁶⁰ (b) terrorist activities, in violation of Article 24 of the NSL;⁶¹ and (c) an alternative count of causing grievous bodily

Hong Kong Free Press, 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 TrialWatch, HKSAR v. BAO CHOY (2021), *supra*, at 2.

⁵⁶ Rebecca Mammen John & TrialWatch, HKSAR v. TONG YING-KIT (2021), <https://cfj.org/wp-content/uploads/2021/12/Tong-Ying-kit-Fairness-Report-December-2021.pdf>.

⁵⁷ *Id.* at 2, 13.

⁵⁸ *Id.* at 13.

⁵⁹ *Id.* at 18 (“One of the key questions was whether the defendant had intentionally or recklessly driven into the police or whether it had been an accident.”).

⁶⁰ Article 20 of the NSL defines ‘secession’ as: “A person who organises, plans, commits or participates in any of the following acts, whether or not by force or threat of force, with a view to committing secession or undermining national unification shall be guilty of an offence:

- (1) separating the Hong Kong Special Administrative Region or any other part of the People’s Republic of China from the People’s Republic of China;
- (2) altering by unlawful means the legal status of the Hong Kong Special Administrative Region or of any other part of the People’s Republic of China; or
- (3) surrendering the Hong Kong Special Administrative Region or any other part of the People’s Republic of China to a foreign country.”

Article 21 of the NSL makes it an offence to “incite” secession, punishable by five to 10 years in prison.

⁶¹ Article 24 defines terrorist activities as follows: “A person who organises, plans, commits, participates in or threatens to commit any of the following terrorist activities causing or intended to cause grave harm to the society with a view to coercing the Central People’s Government, the Government of the Hong Kong Special Administrative Region or an international organisation or intimidating the public in order to pursue political agenda shall be guilty of an offence:

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

harm by dangerous driving, contrary to section 36A of the Road Traffic Ordinance.⁶² He was denied bail and detained throughout trial.⁶³ On February 5, 2021, the Secretary for Justice, exercising their authority under Article 46 of the NSL, issued a certificate directing that Tong Ying-kit's criminal case would be tried without a jury, by a panel of three designated national security judges.⁶⁴

Tong Ying-kit's trial commenced on June 23, 2021, before the Court of First Instance of the High Court in Hong Kong, and concluded on July 30, 2021.⁶⁵ Central to the trial was competing expert witness testimony on the meaning of the common protest slogan Tong Ying-kit used: “光復香港時代革命” (“Liberate Hong Kong: Revolution of our Times”). The expert for the Prosecution, Lau Chi-pang, Professor of History and Associate Vice President of Lingnan University, testified that the words “光復香港” have the meaning of recovering the HKSAR, which has fallen into enemy hands, and so implies that the PRC is an outside and enemy regime.⁶⁶ Specifically, according to the expert witness, the slogan means to ‘take back’ Hong Kong through ‘violent means.’ Professor Lau agreed, however, that his understanding of the slogan might not be the same as the defendant's.⁶⁷ Questioned by the Defence as to his own attendance at a 2019 rally with the slogan “Reclaim Yuen Long,” the expert agreed that “reclaim” (which shares the same Chinese characters as the slogan — gwong fuk 光) could mean ‘restore’ and not necessarily ‘secede.’⁶⁸

On July 27, 2021, the Court of First Instance found Tong Ying-kit guilty of “incitement to secession” under Articles 20 and 21 and “terrorist activities” under Article 24 of the NSL.⁶⁹ On the secession charge, the Court stated that all the experts (including the Defence) acknowledged that one meaning of the slogan was for “Hong Kong Independence” and, as such, it was *capable* of having a secessionist meaning (i.e., to

(5) other dangerous activities which seriously jeopardise public health, safety or security.

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

⁶² Road Traffic Ordinance, Cap 374, Section 36A. A person convicted of causing “grievous bodily harm” to another person due to “dangerous driving” can face up to seven years in prison for a first such offense.

⁶³ On August 3, 2020, he filed a motion for habeas corpus and for bail review to the Court of First Instance, which refused both. *See* Between HKSAR and Tong Ying-kit, HCCP 463/2020, [2020] HKCFI 2196, Aug. 25, 2020, *available at* https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=130396&currpage=T; Between HKSAR and Tong Ying-kit, HCAL 1601/2020, [2020] HKCFI 2133, Aug. 21, 2020, *available at* https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=130336&QS=%2B&TP=JU&ILAN=en.

⁶⁴ Teresa Cheng, SC, Secretary for Justice, Certificate re Tong Ying Kit, Feb. 5, 2021, cited by the Court of First Instance in Between Tong Ying-kit and Secretary for Justice, HCAL 473/2021, [2021] HKCFI 1397, May 20, 2021, *available at* https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=135853&currpage=T. The Court rejected Tong Ying-kit's challenge to this denial of a jury trial. Tong Ying-kit and Secretary for Justice, HCAL 473/2021, [2021] HKCFI 1397, May 20, 2021. The High Court also rejected this challenge on appeal, observing that the right to a jury trial was not absolute and that the decision of the Secretary for Justice to issue a certificate under NSL 46(1) is a prosecutorial decision, made in its sole discretion. In the Appeal of Tong Ying-kit and Secretary for Justice, [2021] HKCA 912, June 22, 2021, at para.71.

⁶⁵ The High Court has both an appellate court and the Court of First Instance, which has original jurisdiction over the most serious criminal cases in Hong Kong. *See generally* Hong Kong Judiciary, Court Services & Facilities, *available at* https://www.judiciary.hk/en/court_services_facilities/hc.html.

⁶⁶ HKSAR v. Tong Ying Kit, [2021] HKCFI 2200, July 27, 2021 at para. 103.

⁶⁷ Rebecca Mammen John & TrialWatch, HKSAR v. TONG YING-KIT (2021), *supra*, at 19

⁶⁸ *Id.*; Stand News, “Trial debates Tong Ying-kit's perception of ‘Liberate Hong Kong’ slogan,” July 7, 2021, *available at* <https://www.thestandnews.com/english/trial-debates-tong-ying-kits-perception-of-liberate-hong-kong-slogan> (accessed July 10, 2021).

⁶⁹ Rebecca Mammen John & TrialWatch, HKSAR v. TONG YING-KIT (2021), *supra*, at 22.

separate the HKSAR from the PRC).⁷⁰ The Court said this finding was further supported by the surrounding context, namely the date of the protest (July 1st—the anniversary of resumption of sovereignty over Hong Kong by the PRC and also the first day the NSL was in effect), the defendant’s conduct in driving with the flag in plain view of the public, and his refusal to obey instructions from law enforcement.⁷¹ The Court also found Tong Ying-kit guilty of terrorist activities because he had engaged in “dangerous activities” through his dangerous driving (allegedly endangering police officers and the public), refusal to obey orders, and collision with the police.⁷² It further held that the Defendant’s actions targeted the police as an institution and as such threatened serious harm to society⁷³ and that he acted with an intent “to arouse public attention on the agenda of separating the HKSAR from the PRC, which clearly is a political agenda.”⁷⁴

On July 30, 2021, the Court pronounced a sentence of 9 years (6.5 years for the charge of inciting secession and 8 years for the charge of terrorist activities—with 2.5 of the years for the terrorism charge running consecutively with the secession charge). The Court considered the mitigating evidence of the accused’s youth and family circumstances but held that despite the Defendant’s expressions of remorse, “the greatest manifestation of such remorse” would have been pleading guilty, which he did not do.⁷⁵

The TrialWatch report on the case concluded that Tong Ying-kit’s trial entailed “violations of the right to an independent and impartial tribunal; (b) violations of the principle of legality; and (c) abuse of process.”⁷⁶ Tong Ying-kit filed an appeal in August 2021 but withdrew it in January 2022⁷⁷ and is currently serving his sentence.

D. HKSAR v. Tam Tak-chi⁷⁸

Tam Tak-chi is a former radio host and opposition politician in Hong Kong. On September 6, 2020, he was arrested and charged with 8 counts of “uttering seditious words” under the Crimes Ordinance and several public order offences including disorderly conduct in a public place, and organising an unauthorised assembly and inciting others to take part in an unauthorised assembly in violation of the POO.⁷⁹ According to the authorities, Tam Tak-chi set up a series of street stands between January and July 2020 where he led the crowd in shouting political slogans like “Liberate Hong Kong: Revolution of our Times” and gave speeches condemning police for violence against the public, against the NSL, insulting police and the Communist Party of China and pro-Establishment politicians, and calling upon the public to nominate him

⁷⁰ HKSAR v. Tong Ying Kit, [2021] HKCFI 2200, Reasons for Verdict, July 27, 2021, at paras. 137-139.

⁷¹ *Id.* at paras. 40-41.

⁷² *Id.* at paras. 152, 158, 160.

⁷³ *Id.* at para 162.

⁷⁴ *Id.* at para. 164.

⁷⁵ HKSAR v. Tong Ying-kit, [2021] HKCFI 2239, Reasons for Sentence, July 30, 2021, at para. 40.

⁷⁶ Rebecca Mammen John & TrialWatch, HKSAR v. TONG YING-KIT (2021), *supra*, at 2.

⁷⁷ Kelly Ho, “First Hong Kong activist jailed under national security law drops appeal in ‘surprise’ move,” *Hong Kong Free Press*, Jan. 13, 2022, available at <https://hongkongfp.com/2022/01/13/first-hong-kong-activist-jailed-under-national-security-law-drops-appeal-in-surprise-move/>.

⁷⁸ Elizabeth Wilmshurst QC & TrialWatch, HKSAR v. TAM TAK-CHI (2022), <https://cfj.org/wp-content/uploads/2022/05/Tam-Tak-Chi-Fairness-Report-May-2022.pdf>.

⁷⁹ *Id.* at 14.

to the Legislative Council (LegCo) in Hong Kong.⁸⁰ Tam Tak-chi was denied bail and detained throughout his trial, which started nine months later in June 2021 and concluded with his sentencing in April 2022.⁸¹

In November 2020, the prosecution moved to put Tam Tak-chi's trial under the direction of a designated national security judge, even though he was not charged with an NSL offence.⁸² This was accepted by the court in December 2020.⁸³ The trial, due to start in May 2021, was delayed until June 2021, when it was briefly suspended pending the decision in the *Tong Ying-kit* case, which centred on the "Liberate Hong Kong" slogan also at issue in Tam Tak-chi's case.⁸⁴

At trial, in addition to police testimony about the public assemblies, the Court heard from the same expert who testified for the prosecution in *Tong Ying-kit* on the phrase "Liberate Hong Kong: Revolution of our Times." The expert, Professor Lau, opined again that the slogan meant to "overthrow the government" or "take back Hong Kong" from "enemy hands"⁸⁵; he further testified that the slogan originated with Hong Kong activist and legislative candidate Edward Leung in 2016 and had been popularised in the 2019 protests.⁸⁶ The prosecution showed several additional videos including of the July 28, 2019 protest at the PRC liaison office in Hong Kong and other 2019 protests where people were chanting slogans including "Liberate Hong Kong: Revolution of our Times" "Five Demands: Not One Less," and "Fight for Freedom: Stand with Hong Kong." In some videos, people were shown to be smashing Bank of China windows with bricks and metal poles; in others, they are carrying United States of America flags. These videos did not include images of the defendant.⁸⁷

In its closing in December 2021, the Defence argued that the legal term "seditious intention" criminalized an extremely broad range of conduct, from bringing "hatred" to raising "discontent" to "promoting ill-will" and "enmity," with some of those words being ambiguous. As such, the defence argued, the law failed the constitutional requirement (under the Basic Law, incorporating the ICCPR) that any restriction on freedom of expression be "provided by law."⁸⁸ The Court disputed that the terms were ambiguous or that the law on sedition violated constitutional rights, noting that all laws issued by a lawful government must be viewed as legitimate.⁸⁹

⁸⁰ *Id.* at 2-3.

⁸¹ *Id.* at 2.

⁸² *Id.* at 16-17.

⁸³ *Id.* at 17. In March 2021, Tam Tak-chi applied for a stay of proceedings on the sedition charges (seven charges of uttering seditious words and one charge of conspiracy to utter seditious words) on the grounds that the charges didn't comply with the indictment rules in light of the absence of necessary particulars about the offences; the charges were unconstitutional; and that the transfer of the case to a national security judge amounted to an abuse of process or was done without jurisdiction based on the classification of the offence. On April 9, 2021, the District Court ruled on the jurisdiction issue, finding that sedition offences are indictable offences endangering national security, and under the NSL, can be heard in any of the Hong Kong courts including the District Court. *HKSAR v. Tam Tak-chi*, [2021] HKDC 424, April 9, 2021 (Ruling on Transfer & Stay). On April 26, 2021, the District Court ruled in favour of the prosecution on the sufficiency of the indictment and also rejected a further challenge from the defence, which alleged that charges were a disproportionate restriction on freedom of expression and violated the Basic Law and the principle of legality. *HKSAR v. Tam Tak-chi*, [2021] HKDC 505, April 26, 2021 (Ruling on the Stay Application).

⁸⁴ Elizabeth Wilmschurst QC & TrialWatch, *HKSAR v. TAM TAK-CHI* (2022), *supra*, at 18.

⁸⁵ *Id.* at 22.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 24.

⁸⁹ *Id.* at 25.

On March 2, 2022, the Court convicted Tam Tak-chi of 11 of the 14 charges, including seven counts of “uttering seditious words” for a range of phrases he used, including “Liberate Hong Kong: Revolution of our Times,” “Five Demands: Not One Less” insults to the police (because the police “plays an important role for the Government of the SAR”⁹⁰) and to the Communist Party (as an attack on the central authorities⁹¹), and words criticising the NSL, which it described as “inciting others to not pay attention to the National Security Law, challenge the authority of the police, hold in contempt, and violently attack the pro-establishment camp in the legislative assembly, and to call out far and wide for Legislative Council members that are well known by the public to be attacked.”⁹²

On April 20, 2022, the District Court ordered Tam Tak-chi sentenced to 40 months in prison and a HK \$5,000 fine after his conviction on 11 of the 14 charges. Specifically, the Court issued a two-year sentence for the first charge (inciting others to knowingly participate in an unauthorised assembly on January 17, 2020); for the seven sedition charges, the Court ordered a sentence of 21 months (12 months of which would be served consecutively to the other sentences). The Court also ordered Tam Tak-chi sentenced to one month in prison for disorderly conduct in a public place (charge three) and one-and-a-half years for holding an unauthorised assembly, three months to be served consecutively with the full sentence. Finally, the Court issued a HK \$5,000 fine for charge 8, refusing or wilfully neglecting to obey an order given by an authorized officer on May 24, 2020.⁹³

The Court noted that four of the counts of sedition took place after July 1, 2020, when the NSL became law, and gave these four charges a higher sentence, setting the range at 18 months (compared to 15 months for the three other sedition charges) then ordering that three of the 15 months for the first set of charges be served consecutively with the 18 months for the post-NSL charges.⁹⁴

⁹⁰ *HKSAR v. Tam Tak-chi*, DCCC 927, 928 and 930/2020 (consolidated), [2022] HKDC 208, Reasons for Verdict, para. 82.

⁹¹ *Id.* at para. 73.

⁹² *Id.* at para. 72.

⁹³ *HKSAR v. Tam Tak-chi*, [2022] HKDC 343, Summary of Judgment, April 20, 2022.

⁹⁴ *Id.* The Court also noted that the Defendant committed the offences when he was on court bail. *Id.*

Annex B: Concerns under the International Covenant on Civil and Political Rights Identified in the Reports

Each of these cases raises different factual and legal issues; however, the TrialWatch reports document several common concerns: (1) the impact of the NSL’s procedures regarding the appointment, removal and tenure of ‘national security’ judges on the right to an independent and impartial court; (2) lack of foreseeability regarding the application of the law, in particular resulting in the criminalisation of protected speech and other activities; and (3) the disproportionate application of criminal penalties to peaceful conduct or conduct that could have been handled more routinely (such as allegedly dangerous driving).

A. The Right to an Independent and Impartial Tribunal

Under the ICCPR, “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”⁹⁵ As explained by this Committee, this requirement of competence, independence and impartiality “is an absolute right that is not subject to any exception.”⁹⁶

Judicial Independence

This Committee has held that the requirement of judicial independence encompasses:

the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.⁹⁷

It has further noted that a “situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.”⁹⁸ As the Special Rapporteur on the Independence of Judges and Lawyers has likewise observed, “undermining [judges’] independence jeopardizes most judicial guarantees.”⁹⁹

The trials of Tong Ying-kit and Tam Tak-chi were each presided over by a designated “national security” judge. The 2020 NSL created this new category of judges and procedures for their appointment.

Article 44 of the NSL states:

⁹⁵ ICCPR, art. 14(1).

⁹⁶ Human Rights Committee, General Comment No. 32: Article 14, Right to equality before courts and tribunals and to fair trial, U.N. Doc. CCPR/C/GC/32, Aug. 23, 2007, para. 19.

⁹⁷ *Id.*

⁹⁸ *Id.*; Human Rights Committee, *Oló Bahamonde v. Equatorial Guinea*, U.N. Doc. CCPR/C/49/D/468/1991, Nov. 10, 1993, para. 9.4.

⁹⁹ Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. A/63/271, Aug. 12, 2008, para. 36.

The Chief Executive shall designate a number of judges ... to handle cases concerning offence endangering national security. . . . The term of office for the aforementioned designated judges shall be one year. A person shall not be designated as a judge to adjudicate a case concerning offence endangering national security if he or she has made any statement or behaved in any manner endangering national security. A designated judge shall be removed from the designation list if he or she makes any statement or behaves in any manner endangering national security during the term of office.¹⁰⁰

The TrialWatch reports on the trials of Tong Ying-kit and Tam Tak-chi concluded that this regime for the appointment and removal of NSL judges presents several concerning elements.¹⁰¹ First, “there is no public information at this point on the criteria by which the Chief Executive selects national security judges, but the text of the law suggests that there are no checks or limiting principles.”¹⁰² While appointment by the Executive may not in and of itself be evidence of a violation, here, given the highly politicized nature of the law and in light of the lack of transparency, the report on Tong Ying-kit’s case concludes that “an objective observer would have serious grounds for concern.”¹⁰³ The UN Special Rapporteur on the Independence of Judges and Lawyers has observed that “a non-transparent and subjective case-assignment system is vulnerable to manipulation and corruption.”¹⁰⁴ The reports assess that this process raises similar concerns.¹⁰⁵

Article 44 also provides expansive grounds for removal. While stating a designated judge can be removed for statements or acts endangering ‘national security,’ it does not explain who can make that discretionary decision and based on what standard. Indeed, given the inclusion of this provision in the NSL, one might assume that Article 44 covers speech or actions that do not constitute national security *offences* and yet still implicate national security—but there is no clarity on what that difference entails.¹⁰⁶ This lack of clarity and the apparently discretionary nature of decisions on removal suggest, according to the TrialWatch reports, that national security judges “may struggle to remain independent and also suggests that the speech and actions of judges will be closely monitored and policed.”¹⁰⁷ Moreover, not only can

¹⁰⁰ NSL, art. 44, *available at*: <https://www.gld.gov.hk/egazette/pdf/20202448e/egn2020244872.pdf>.

¹⁰¹ See Rebecca Mammen John & TrialWatch, *HKSAR v. TONG YING-KIT*, *supra*, at 28-33; Elizabeth Wilmschurst QC & TrialWatch, *HKSAR v. TAM TAK-CHI* (2022), *supra*, at 30-34.

¹⁰² Rebecca Mammen John & TrialWatch, *HKSAR v. TONG YING-KIT*, *supra*, at 30.

¹⁰³ *Id.*; see also Elizabeth Wilmschurst QC & TrialWatch, *HKSAR v. TAM TAK-CHI* (2022), *supra*, at 32 (“[T]he continued lack of transparency surrounding assignment procedures, in the context of the highly politicized nature of the law, must give ground for serious concern.”).

¹⁰⁴ Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. A/67/305, Aug. 13, 2012, para. 65.

¹⁰⁵ Rebecca Mammen John & TrialWatch, *HKSAR v. TONG YING-KIT*, *supra*, 30; Elizabeth Wilmschurst QC & TrialWatch, *HKSAR v. TAM TAK-CHI* (2022), *supra*, 32.

¹⁰⁶ Absent further clarity on what speech or conduct is prohibited, the reports note that this provision may also infringe on the judges’ own rights to freedom of expression. As the UN Basic Principles on the Independence of the Judiciary state, “In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.” UN Basic Principles on the Independence of the Judiciary, Principle 8. Cf. Rebecca Mammen John & TrialWatch, *HKSAR v. TONG YING-KIT*, *supra*, at 30 & n.137; Elizabeth Wilmschurst QC & TrialWatch, *HKSAR v. TAM TAK-CHI* (2022), *supra*, at 32 & n. 124.

¹⁰⁷ Elizabeth Wilmschurst QC & TrialWatch, *HKSAR v. TAM TAK-CHI* (2022), *supra*, at 32; see also Rebecca Mammen John & TrialWatch, *HKSAR v. TONG YING-KIT*, *supra*, at 30.

national security-designated judges be removed, but they only serve in this capacity for one year, which is similar to a five-year regime previously criticized by this Committee,¹⁰⁸ and which the TrialWatch reports conclude may not provide sufficient length of tenure to insulate them from political pressure.¹⁰⁹

Judicial Impartiality

Article 14 of the ICCPR also requires that courts be impartial. This has two components: “First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial.”¹¹⁰ The first component of this test is subjective—referring to the individual judge and whether their conduct or bias might impact their decision-making in a specific case. The second component is objective and is tied to the principle that “[n]ot only must Justice be done; it must also be seen to be done.”¹¹¹ If there is evidence that gives rise to justifiable doubts in the mind of this reasonable observer as to the court’s impartiality, that court cannot be deemed impartial.¹¹²

Even without any allegations of personal bias, the reports on both *Tong Ying-kit* and *Tam Tak-chi* found that the potential for a lack of judicial independence surrounding the judges’ appointments and terms of tenure meant that the trials failed the objective test.¹¹³

More specifically, both Tong Ying-kit and Tam Tak-chi were charged for actions or words seen as opposing the NSL—and yet they were tried by judges selected by the Chief Executive, who has called those opposing the NSL “the enemy of the people” and said they were “colluding with foreign forces” and undermining security.¹¹⁴ The reports find that such comments from the political official who appointed the judges in these cases—without any oversight or transparency—could leave the public with the impression that the opinions and biases of the Executive might influence the judges, thus undermining the

¹⁰⁸ Human Rights Committee, Concluding Observations: Democratic People’s Republic of Korea, U.N. Doc. CCPR/CO/72/PRK, Aug. 27, 2001, para. 8.

¹⁰⁹ See Rebecca Mammen John & TrialWatch, *HKSAR v. TONG YING-KIT*, *supra*, at 30; Elizabeth Wilmshurst QC & TrialWatch, *HKSAR v. TAM TAK-CHI* (2022), *supra*, at 32.

¹¹⁰ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, Aug. 23, 2007, para. 21. See also Human Rights Committee, *Karttunen v. Finland*, U.N. Doc. CCPR/C/46/D/387/1989, Nov. 5, 1992, para. 7.2.

¹¹¹ *R v Sussex Justices, ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233).

¹¹² European Court of Human Rights, *Incal v Turkey*, App. No. 41/1997/825/1031, June 9, 1998, para. 71.

¹¹³ See Rebecca Mammen John & TrialWatch, *HKSAR v. TONG YING-KIT*, *supra*, at 28-33; Elizabeth Wilmshurst QC & TrialWatch, *HKSAR v. TAM TAK-CHI* (2022), *supra*, at 33 (“[T]he trial fails the objective test.”).

¹¹⁴ *Reuters*, “Hong Kong leader says opponents of security law are ‘enemy of the people,’” June 15, 2020, *available at* <https://www.reuters.com/article/us-hongkong-protests/hong-kong-leader-says-opponents-of-security-law-are-enemy-of-the-people-idUSKBN23N08U>. Even beyond demonstrations related to the NSL, the Chief Executive had warned that some protests in Hong Kong were “terrorist” acts and serious security threats. *RTHK*, “Violence, hate speech threaten national security: CE,” Apr. 15, 2020, *available at* <https://news.rthk.hk/rthk/en/component/k2/1520716-20200415.htm>; Helen Davidson, “China’s top official in Hong Kong pushes for national security law,” *The Guardian*, Apr. 15, 2020, *available at* <https://www.theguardian.com/world/2020/apr/15/china-official-hong-kong-luo-huining-pushes-national-security-law>; *The Times*, “Hong Kong politician condemns protest violence as ‘terrorism,’ echoing Beijing,” May 26, 2020, *available at* <https://www.thetimes.co.uk/article/china-defends-new-hong-kong-security-laws-as-protests-return-f7bb85kxx>; Anthony Dapiran, “Hong Kong’s Alarming New Reality: Peaceful Protest as Terrorism,” *AsiaLink*, July 29, 2020, *available at* <https://asialink.unimelb.edu.au/insights/Hong-Kongs-Alarming-New-Reality-Peaceful-Protest-as-Terrorism>.

impartiality of the tribunal.¹¹⁵ As the report on Tam Tak-chi’s case concluded, this “gives rise to doubts, in light of the political context in which the charges emerged, as to whether justice can be seen to be done.”¹¹⁶

B. Principle of Legality

The principle of legality, at the core of criminal law and the rule of law overall, requires that offenses be clearly defined and prohibits retroactive application of a law. This ensures that a person is not punished for an act or omission they would not have known to be a crime at the time and protects against arbitrary application of the law. The principle is embodied in Article 15 of the ICCPR, which states: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”¹¹⁷

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.¹¹⁸ 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.”¹¹⁹

Several of the TrialWatch reports found violations of the principle of legality. Tong Ying-kit, for example, was convicted of two offenses under the National Security Law, a law that was criticized by human rights experts at its introduction for the overbreadth and vagueness of its provisions.¹²⁰ In his case, the report found that “the Court made a series of inferences regarding what the slogan meant (separation of the HKSAR from the PRC by force), then what its use meant (incitement to secession), assigning criminal liability and a six-and-a-half year sentence in prison to the Defendant without seeking to show what the slogan meant to the Defendant or what the likely impact of displaying this flag—a common fixture at protests—would be.”¹²¹ As the report concluded, “[t]his expansive interpretation allowed the Court to sidestep a more critical inquiry into whether all the elements of the offence were either clear or actually met.”¹²²

¹¹⁵ See Rebecca Mammen John & TrialWatch, *HKSAR v. TONG YING-KIT*, *supra*, at 32; Elizabeth Wilmschurst QC & TrialWatch, *HKSAR v. TAM TAK-CHI* (2022), *supra*, at 34.

¹¹⁶ Elizabeth Wilmschurst QC & TrialWatch, *HKSAR v. TAM TAK-CHI* (2022), *supra*, at 33.

¹¹⁷ ICCPR, art. 15. 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.” 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.

¹¹⁸ European Court of Human Rights, *Kokkinakis v. Greece*, App. No. 14307/88, May 25, 1993, para. 52.

¹¹⁹ Inter-American Court of Human Rights, *Castillo Petruzzi et al. v. Peru*, Series C, No. 52, May 30, 1999, para. 121.

¹²⁰ Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Working Group on Arbitrary Detention; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on minority issues, “Comments on The Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (‘National Security Law’),” OL CHN 17/2020, Sept. 1, 2020, available at

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25487>.

¹²¹ Rebecca Mammen John & TrialWatch, *HKSAR v. TONG YING-KIT*, *supra*, at 34.

¹²² *Id.*

On the terrorism charge, building on the already broad language of the statute (terms like “serious violence,” for example) the Court held that “a blatant and serious challenge mounted against the police force” even without physical harm would constitute “grave harm” because the police force is “a symbol of law and order.”¹²³ The TrialWatch report found that this could imply “that any criticism of or challenge to the police could be considered ‘grave harm’ even though under international human rights law, speech critical of government authorities is protected.”¹²⁴

Likewise, Tam Tak-chi’s case involved the offense of sedition—an offense that has been repeatedly criticized by this Committee, including in Hong Kong,¹²⁵ and an offense that has been the subject of significant reform efforts in other jurisdictions due to its vagueness.¹²⁶ This case was the first trial in decades under Hong Kong’s sedition law. The Court in Tam Tak-chi’s case nevertheless held that the vagueness of the statutory terms criminalising sedition was not problematic because “ordinances move together with the times following changes in the environment, era, or the general mood of society” and so courts are entrusted “to explain and interpret conceptual words, such as ‘hostility’, ‘ill will’, ‘disaffection’, ‘contempt’, and ‘hatred’ as appropriate to the situation.”¹²⁷ Further, in applying this colonial-era statute, the Court adopted a broad application of its provisions to a range of speech, activities, and actors.

With respect to the specific speech and conduct at issue in the case, the Court held not only that the slogan “Liberate Hong Kong: Revolution of our Times” was seditious on similar logic to that applied in Tong Ying-kit’s case, but it further suggested that it was seditious to criticize the Communist Party (as representatives of the central authorities) and the police (due to their “important role” in governance)—neither of which are mentioned in the Crime Ordinance itself.¹²⁸ The Court seemed to go so far as to hold that Tam Tak-chi’s criticism of the NSL itself—a law—was seditious,¹²⁹ with the report on the case finding that “expanding sedition to include any criticism of a law—here, the NSL—is a significant shift in the use of the law on its face that both limits the space for public debate and fails to meet any necessity test.”¹³⁰

¹²³ HKSAR v. Tong Ying Kit, [2021] HKCFI 2200, Reasons for Verdict, July 27, 2021, at para. 162.

¹²⁴ See Rebecca Mammen John & TrialWatch, HKSAR v. TONG YING-KIT, *supra*, at 40; cf. Human Rights Committee, General Comment No. 37, UN Doc. CCPR/C/GC/37, Sept. 17, 2020, at para. 32 (“Given that peaceful assemblies often have expressive functions, and that political speech enjoys particular protection as a form of expression, it follows that assemblies with a political message should enjoy a heightened level of accommodation and protection.”)

¹²⁵ UN Human Rights Committee: Concluding Observations: Hong Kong Special Administrative Region, CCPR/C/79/Add.117, Nov. 15, 1999, para. 18; UN Human Rights Committee, Concluding Observations, Hong Kong Special Administrative Region, CCPR/C/HKG/CO/2, Apr. 21, 2006, para. 14; UN Human Rights Committee, Concluding observations on the third periodic report of Hong Kong, China, CCPR/C/CHN-HKG/CO/3, Apr. 29, 2013, para. 14.

¹²⁶ Adam M. Smith, Charline Yim, Marryum Kahloon, and Columbia Law School Human Rights Institute, TrialWatch Report: The Crime of Sedition: At the Crossroads of Reform and Resurgence (April 2022), <https://cfj.org/wp-content/uploads/2022/04/Sedition-Report-April-2022.pdf>.

¹²⁷ HKSAR v. Tam Tak-chi, Reasons for Verdict, para. 54.

¹²⁸ See *supra*.

¹²⁹ HKSAR v. Tam Tak-chi, Reasons for Verdict, paras. 70, 72 (“The defendant has a low opinion of the scope and coverage of the text of the National Security Law, as well as the scope of Article 23 of the National Security Law and Basic Law. These are precisely the tricks and schemes employed by political figures to rouse others. . . . The defendant is inciting others to not pay attention to the National Security Law.”); see also Elizabeth Wilmshurst QC & TrialWatch, HKSAR v. TAM TAK-CHI (2022), *supra*, at 3 (“The judgment in this case expanded the already broad colonial-era law to take in new conduct [including] . . . criticism of a law.”).

¹³⁰ Elizabeth Wilmshurst QC & TrialWatch, HKSAR v. TAM TAK-CHI (2022), *supra*, at 45.

As noted in the TrialWatch report, the Court also seemed to criticise Tam Tak-chi for “using seditious expressions to make declarations hoping to win the favour of some of voters from Kowloon East, just for the purpose of winning the favour of the voters” and so inciting people “to hate or despise the Communist Party and the SAR government, wanting to defeat the Establishment Camp.”¹³¹ The report explains that “the Court does not explain how these campaign statements (which it refers to as ‘inciting’ people to vote for the defendant) violate the statute. Nor does this analysis explain how or why campaigning and ‘inciting’ people to vote for him is sedition—or if it is just commentary by the Court.”¹³²

The TrialWatch reports on Tong Ying-kit’s trial, as the first NSL case, Tam Tak-chi’s trial, as the first sedition trial in decades, and Bao Choy’s trial, as the first and only case brought to trial for misuse of the vehicle database,¹³³ also raised questions regarding “arbitrary prosecution, conviction and punishment,” which is protected by the principle of legality’s insistence on foreseeability.¹³⁴ Although courts have an inevitable role in clarifying the law through judicial interpretation, they must ensure that any such development and construal is both consistent with the essence of the offence and also could reasonably be foreseen.¹³⁵ Foreseeability is particularly important the first time the courts interpret a new law¹³⁶—or correspondingly revive a law after a long period of desuetude.

In Tong Ying-kit’s case, the first under the NSL, the report found that it was simply not foreseeable that displaying a flag with a slogan commonly used at Hong Kong protests that did not call for violence would constitute “inciting secession” and be a national security offence under this new law. Put differently: even if the Defendant or the general public did not associate the slogan with a call for secession (a question the Court did not seek to resolve), the Court found that his decision to display the flag at one of many protests in Hong Kong on July 1, 2020 met the ‘intent’ requirement for inciting secession.¹³⁷

In Bao Choy’s case, the TrialWatch report noted that many journalists had previously procured information using the vehicle registration database and the same form as she did without any sanction¹³⁸; and “even if the terms did not explicitly authorize Bao Choy’s exact use of the database, a good-faith

¹³¹ *Id.* at 41.

¹³² *Id.* at 42.

¹³³ On the day of Bao 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, but the Prosecution ultimately withdrew the charges against him in June 2021. See Rhoda Kwan, “Charge dropped against Hong Kong state media reporter over improper access to public records, despite RTHK case,” Hong Kong Free Press, Jun. 17, 2021, available at <https://hongkongfp.com/2021/06/17/charge-dropped-against-hong-kong-state-media-reporter-over-improper-access-to-public-records-despite-rthk-case/>.

¹³⁴ European Court of Human Rights, *S.W. v. the United Kingdom*, Nov. 22 1995, para. 34, Series A no. 335-B; European Court of Human Rights, *C.R. v. the United Kingdom*, Nov. 22 1995, para. 32, Series A no. 335-C; European Court of Human Rights, *Case of Del Rio Prada v. Spain*, App. No. 42750/09, Oct. 21, 2013, para. 77

¹³⁵ European Court of Human Rights, *Vasiliauskas v. Lithuania*, App. No. 35343/05, Oct. 20, 2015, para. 155; *S.W. v. the United Kingdom*, *supra*, para. 36, Series A no. 335-B; *C.R. v. the United Kingdom*, *supra*, para. 34; *Case of Del Rio Prada v. Spain*, *supra*, para. 93.

¹³⁶ See European Court of Human Rights, *Jorgic v. Germany*, App. No. 74613/01, July 12, 2007, para. 109; see generally European Court of Human Rights, Guide on Article 7 of the European Convention on Human Rights p. 16 (April 2021), available at https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf.

¹³⁷ Rebecca Mammen John & TrialWatch, *HKSAR v. TONG YING-KIT*, *supra*, at 35. Tam Tak-chi was charged with sedition for, among other things, chanting this same slogan. And yet it was not until nine months after his arrest—at the time of Tong Ying-kit’s conviction—that there would have been any clarity that this common protest slogan would have been deemed a national security offense. Elizabeth Wilmschurst QC & TrialWatch, *HKSAR v. TAM TAK-CHI* (2022), *supra*, at 42.

¹³⁸ TrialWatch, *HKSAR v. BAO CHOY* (2021), *supra*, at 23.

reading of the form did not suggest her use was prohibited.”¹³⁹ The report concludes that “it is not clear that a person would think [the Road Traffic Ordinance] applies to situations like the present, where there could be a reasonable and good-faith reason for using the database.”¹⁴⁰

These concerns regarding foreseeability are exacerbated by the fact that this quartet of trials all concern at least in part, political expression and activity (public assemblies, journalism, and political slogans and campaigning). This 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 ... on those charged with its execution,”¹⁴¹ 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.”¹⁴²

This means, according to this Committee, that legislation restricting freedom of expression must be “formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.”¹⁴³ As noted recently by the Special Rapporteur on Freedom of Opinion and Expression, “[v]ague laws confer undue discretion on executive authorities, enabling them to violate individual rights while disingenuously claiming adherence to the law.”¹⁴⁴

As found by the report on his case, some of the ‘secessionist’ conduct Tong Ying-kit is accused of—for example waving a flag—is a “public profession of political opinion.”¹⁴⁵ “It is, as such, protected speech.”¹⁴⁶ The Court acknowledged that Tong Ying-kit’s conduct was not the “worst of its kind.”¹⁴⁷ Instead, the Court considered that “the Slogan was a general call for the separation of the HKSAR from the PRC, without an elaborate plan being conveyed to the public at the same time,”¹⁴⁸ thus, according to the report, “making clear that it was focused on the *speech* and not any actual act of secession.”¹⁴⁹

C. Equality Before the Courts & Disproportionate Penalties

In each of the cases examined, the TrialWatch report also raises concerns regarding the choice to prosecute and the penalties pursued.

¹³⁹ *Id.* at 23, 27-28.

¹⁴⁰ *Id.* at 27.

¹⁴¹ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34 (hereinafter “General Comment No. 34”), Sept. 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.

¹⁴² Human Rights Committee, *Kim v. Republic of Korea*, U.N. Doc. CCPR/C/64/D/574/1994, 1999, para. 12.2.

¹⁴³ 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.

¹⁴⁴ 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,” UN Doc. A/HRC/44/49, Apr. 23, 2020.

¹⁴⁵ Rebecca Mammen John & TrialWatch, *HKSAR v. TONG YING-KIT*, *supra*, at 38.

¹⁴⁶ *Id.*

¹⁴⁷ *HKSAR v. Tong Ying-kit*, [2021] HKCFI 2239, Reasons for Sentence, July 30, 2021, para. 24.

¹⁴⁸ *Id.* at paras. 24-25.

¹⁴⁹ Rebecca Mammen John & TrialWatch, *HKSAR v. TONG YING-KIT*, *supra*, at 38.

In the unlawful assembly and Bao Choy cases, the timing of the charges was of concern, being brought months after the alleged offences and after a notable decline in the political context in Hong Kong with respect to freedoms of expression and peaceful assembly.¹⁵⁰

The timing of the August 2019 assembly case, for example, was according to the report concerning in two respects: “The defendants were charged shortly after an array of public figures urged a crackdown on protesters; and the defendants were only charged 8 months after the events in question.”¹⁵¹ At trial, the defendants repeatedly questioned the reasons for delay, with no justification given by the Prosecution. Defence counsel for Jimmy Lai, for instance, noted that the conduct of the authorities in arresting the defendants and searching their homes eight months after the rally was akin to bringing “a sledgehammer to a nut” and would “cause people to fear participating in lawful assemblies.”¹⁵² The report concluded that “the timing appears inconsistent with the justifications offered for the arrests and prosecution—in particular, the deterrence rationale referred to both by the prosecution and the Court.”¹⁵³

Similarly, in the trial of Bao Choy, charges were not brought immediately after her alleged offense took place. Rather she was arrested months later, during which time, as discussed above, the Hong Kong authorities had intensified their pressure on RTHK, for which she had made her documentary.¹⁵⁴ A day after Bao Choy’s conviction, RTHK announced it was giving government media regulators internal positions at RTHK.¹⁵⁵ Given the significant discretion prosecutors enjoy in deciding whether to initiate

¹⁵⁰ See Timothy Otty QC & TrialWatch, *HKSAR v. LAI CHEE YING ET AL.*, *supra*, at 38-40; TrialWatch, *HKSAR v. BAO CHOY* (2021), *supra*, at 26.

¹⁵¹ Timothy Otty QC & TrialWatch, *HKSAR v. LAI CHEE YING ET AL.*, *supra*, at 38.

¹⁵² *Id.*

¹⁵³ *Id.* at 41; *cf. HKSAR v. Lai Chee Ying et al.*, DCCC 536/2020, [2021] HKDC 457 Reasons for Sentencing, paras. 50, 52, 66, 74. It is also worth noting that the same Court later referred to the defendants’ convictions in this first case (and related participation in the protests at issue) in its sentencing decisions in later case against some of the same defendants. See *HKSAR v. Lai Chee Ying, Yeung Sum & Lee Cheuk Yan*, DCCC 537/2020 [2021] HKDC 447, April 16, 2021; *HKSAR v. Chan Ho Wun, Lee Cheuk Yan, Leung Kwok Hung, Ho Chun Yan, Yeung Sum, Ho Sau Lan Cyd, Ng Man Yuen Avery, Lai Chee Ying, Sin Chung Kai, Tsoi Yiu Cheong Richard*, DCCC 534/2020 [2021] HKDC 645, May 28, 2021. See also Timothy Otty QC & TrialWatch, *HKSAR v. LAI CHEE YING ET AL.*, *supra*, at 17 (discussing deteriorating environment in the leadup to the defendants’ arrests).

¹⁵⁴ See also Jessie Pang, “Hong Kong signals overhaul of public broadcaster RTHK, stoking media freedom concerns,” *Reuters*, 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, “Explainer: How the Hong Kong authorities cracked down on public broadcaster RTHK” *Hong Kong Free Press*, 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, “Hong Kong’s RTHK under siege: should it be a public broadcaster or government mouthpiece?” *South China Morning Press*, 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, “Hong Kong’s Move to Overhaul Broadcaster Fans Fears of Media Crackdown,” *New York Times*, Feb. 19, 2021, available at <https://www.nytimes.com/2021/02/19/world/asia/hong-kong-rthk-crackdown.html>; Theodora Yu & Shibani Mahtani, “Hong Kong reels in public broadcaster RTHK as media clampdown intensifies,” *Washington Post*, 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 gov’t is the ‘biggest victim of fake news,’ Chief Exec. Carrie Lam says,” *Hong Kong Free Press*, 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/>.

¹⁵⁵ *RTHK*, “Media regulator officials given new posts at RTHK,” Apr. 23, 2021, available at https://news.rthk.hk/rthk/en/component/k2/1587339-20210423.htm?archive_date=2021-04-23

proceedings—including “whether or not the offence is trivial, technical in nature, obsolete or obscure”¹⁵⁶ and “the availability and efficacy of alternatives to prosecution, such as a caution, warning or other acceptable form of diversion”¹⁵⁷—the report on her case concludes that the 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.”¹⁵⁸ Notably, 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.¹⁵⁹ Further, as of the date of her conviction almost two years after the Yuen Long violent attack at issue in her documentary, Bao Choy—a journalist whose reporting was intended to hold perpetrators accountable—was the only person who had been convicted of any offense related to the attack.¹⁶⁰

The reports on all four cases also raise concerns regarding the disproportionate penalties imposed for expression and peaceful assemblies.¹⁶¹ For instance, in the unauthorised assembly case, several of the defendants were given prison sentences for a peaceful assembly. Likewise, in *Tam Tak-chi*, he was given prison sentences—two years for one count alone—for inciting participation in and holding unauthorized assemblies.

¹⁵⁶ 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

¹⁵⁷ *Id.* at sec. 5.9(n).

¹⁵⁸ TrialWatch, *HKSAR v. BAO CHOY* (2021), *supra*, at 26.

¹⁵⁹ Brian Wong, “Hong Kong prosecutors questioned by magistrate after letting reporter from pro-Beijing newspaper walk on same charge pursued against RTHK freelancer,” *South China Morning Post*, 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, “Double standard fear as Ta Kung Pao charge nixed” *The Standard*, June 18, 2021, *available at* <https://www.thestandard.com.hk/section-news/section/50037571/231304/double-standard-fear-as-Ta-kung-Pao-charge-nixed>.

¹⁶⁰ Viola Zhou, “The First Person Convicted Over a Mob Attack on Hong Kong Protesters Is a Reporter,” *Vice*, Apr. 22, 2021, *available at* <https://www.vice.com/en/article/m7ejd4/hong-kong-press-freedom-bao-choy>.

¹⁶¹ *See* Timothy Otty QC & TrialWatch, *HKSAR v. LAI CHEE YING ET AL.*, *supra*, at 45; TrialWatch, *HKSAR v. BAO CHOY* (2021), *supra*, at 28; Rebecca Mammen John & TrialWatch, *HKSAR v. TONG YING-KIT*, *supra*, at 39; Elizabeth Wilmshurst QC & TrialWatch, *HKSAR v. TAM TAK-CHI* (2022), *supra*, at 44-47. *Cf.* Human Rights Committee, General Comment No. 37, UN Doc. CCPR/C/GC/37, Sept. 17, 2020.