Departure from International Human Rights Law and Comparative Best Practice: HKSAR v Tong Ying Kit*

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This article examines the verdict in HKSAR v Tong Ying Kit, *the first criminal trial under the new National Security Law's secession and counter-terrorism criminal provisions. The article uses international human rights law and comparative law on counter-terrorism to argue that the verdict ignores rights-based jurisprudence, which could reconcile the tensions between human rights protections and safeguarding national security. As a result, the ruling sets an example of the local courts' failure to integrate international human rights law and comparative best practice and thus to mount an effective, rights-based response to the enforcement of the national security law. As Tong decided not to file an appeal, his case serves as a disturbing precedent that will influence other national security trials that are already making their way through the courts.*

1. Introduction

Just hours after the new national security law (NSL) came into effect on 1 July 2020, dozens of protesters were arrested for allegedly breaching the NSL. Tong Ying Kit was one of them. Instead of marching along with the other protesters, Tong drove his motorcycle while carrying a banner bearing the protest slogan "Liberate Hong Kong, Revolution of Our Times". He drove his motorcycle around police check lines, at times at high speed, earning cheers from some in the crowd as he did so. Tong eventually collided with a group of police officers, injuring three. He was charged with inciting others to secession and with terrorism under arts 21 and 24 of the NSL.

* This article draws on the authors' initial analysis of the case in their recent briefing paper: *The Tong Ying Kit NSL Verdict: An International & Comparative Law Analysis* (Georgetown Center for Asian Law 2021). The authors thank James V Feinerman, Michael C Davis, Carole J Petersen and Kent Roach for their insightful comments on the earlier drafts of the briefing paper. This article is based on that briefing paper, although it has been extensively revised and updated.

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Since the imposition of the NSL, the Hong Kong Government has taken several steps to limit the due process rights of NSL defendants, including their rights to bail, a jury trial and access to a counsel of their choice.[1] Tong was no exception. He was placed in pretrial detention for more than 11 months, and a jury trial was denied, although his right to counsel of his own choosing was respected.[2] On 27 July 2021, Tong became the first person to be found guilty of inciting secession and terrorism under the NSL. He was sentenced to nine years in prison.[3]

The Court of First Instance (CFI) verdict is the first issued in an NSL case and is therefore of utmost importance to gaining an understanding of how the courts will deal with the many challenges posed by the NSL. This article analyses the verdict in *Tong's case* from a perspective of international human rights and comparative law. We discuss why and how the verdict fails to follow the international and comparative jurisprudence on protecting human rights while safeguarding legitimate national security interests. We argue that, in the *Tong Ying Kit* verdict, the court failed to mount an effective, rights-based response to the NSL. International human rights law and best practice, which the court did not integrate into their verdict, have been recognised by domestic human rights jurisprudence since the 1997 Handover. Instead, the court relied on a series of obscure and outdated precedents that often seem cherry-picked to reach a particular result.[4]

Following this introduction, the article includes sections on Tong's incitement charge, his terrorism charge and a brief conclusion about the reasoning and implications of the verdict. With the incitement charge, we argue that the court failed to engage in any human rights analysis whatsoever, even though Tong was charged with a crime related to his right to freedom of expression. If the court had engaged in a rights-based analysis of the facts of *Tong's case*, referring to the Basic Law, the International Covenant on Civil and Political Rights (ICCPR), judgments from the European Court of Human Rights (ECtHR), the 1984 Siracusa Principles on Limitation and Derogation Provisions in the ICCPR (the

1 Lydia Wong, Thomas E Kellogg and (Eric) Yan-ho Lai, "Hong Kong's National Security Law and the Right to a Fair Trial: A GCAL Briefing Paper" (Georgetown Center for Asian Law, 2021), available at https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2021/06/HongKongNSLRightToFairTrial.pdf (visited 16 December 2021).

2 Thomas E Kellogg and (Eric) Yan-ho Lai, "Death by a Thousand Cuts: Chipping Away at Due Process Rights in HK NSL Cases" *Lawfare* (28 May 2021), available at https://www.lawfareblog.com/death-thousand-cuts-chipping-away-due-process-rights-hk-nsl-cases (visited 16 December 2021).

3 *HKSAR v Tong Ying Kit*, HCCC 280C/2020 [2021] CFI 2239 (Reasons for sentence), [46].

4 The authors made a similar point immediately after the Tong verdict was issued. See Yan-ho Lai and Thomas E Kellogg, "Judgment in Tong Ying Kit's Case Sets Dangerous Precedent, Ignores Human Rights Law" *Hong Kong Free Press* (31 July 2021), available at https://hongkongfp.com/2021/07/31/judgement-in-tong-ying-kits-case-sets-dangerous-precedent-ignores-human-rights-law/ (visited 16 December 2021).

Siracusa Principles) and the 1996 Johannesburg Principles on National Security, including both Freedom of Expression and Access to Information (the "Johannesburg Principles"), it would have been almost impossible to find Tong guilty of inciting secession. Section 3 uses the framework of the United Nations Security Council (UNSC) Resolution 1566 and other comparative jurisprudence to argue that Tong's actions would generally not be considered an act of terrorism in other jurisdictions or under international law.

2. The Incitement Charge

The incitement charge against Tong Ying Kit does not conform to the human rights protections found in the Basic Law and is also inconsistent with Hong Kong's obligations under the ICCPR. The Basic Law protects the right to free speech and makes clear that the ICCPR remains in force in Hong Kong with limited exceptions. Free expression is protected by art 19 of the ICCPR. The United Nations Human Rights Committee (UNHRC) and other key regional and international bodies have sought to concretise the requirements of art 19 to ensure that the core right to free expression is given the fullest possible protection by states. To comply with their obligations under the ICCPR, state parties can only impose restrictions on basic rights when exercising those rights causes a specific and articulable threat to national security. We argue that, in *Tong's case*, this high threshold was not met.

This section begins with an analysis of the framework of free speech protections under the Basic Law and international human rights law, then examines the consistency between the NSL provisions on inciting secession and that rights framework and finally explains its implications on *Tong's case*.

(a) The Legal Framework: The Basic Law and International Human Rights Law

The right to free expression is protected by art 27 of the Basic Law and art 19 of the ICCPR, which remain in force and are implemented in Hong Kong under art 39 of the Basic Law. Undoubtedly, the Basic Law and its human rights provisions apply to all criminal cases in the city, with no exception for NSL cases. Since the Basic Law directly incorporates the ICCPR and other international human rights treaties into local law, the key NSL provisions must be read consistent with those conventions.

Provisions of the NSL reinforce this view. Article 1 of the NSL states that the NSL is enacted "in accordance with" both the People's Republic

of China (PRC) Constitution and the Basic Law. Article 4 also states that rights protection in provisions of the Basic Law and the ICCPR as applied to Hong Kong remain applicable to NSL cases. There is no suggestion in the text of the NSL that the NSL is placed above the Basic Law, even though art 62 places the NSL above all other local laws in cases of conflict. According to Fu, the Basic Law upholds its superior status in Hong Kong's legal framework.[5] Therefore, the NSL must be interpreted and enforced in ways that harmonise apparent tensions with the Basic Law. In *HKSAR v Lai Chee Ying*, the Court of Final Appeal (CFA) held that the Basic Law and the NSL should be viewed as "a coherent whole", with the provisions of the two laws being read whenever possible as in harmony with each other; thus, the courts are still able to, and should, make efforts to reconcile apparent conflicts between the human rights provisions in the Basic Law and the criminal and other NSL provisions.[6]

Human rights protections under the Basic Law, including free speech and free expression protections, should be consistent with the ICCPR under art 39 of the Basic Law. Article 19(3) of the ICCPR provides that national security can be a legitimate ground for restricting the exercise of free speech. Yet the scope of national security must be appropriately and narrowly defined, in accordance with the jurisprudence of the UNHRC and ECtHR. In 1994, in its ruling on a complaint filed by a Korean student activist to the UN, the UNHRC stressed that governments cannot use national security as a blank cheque for restricting free expression and association. Rather, they must "specify the precise nature of the threat" to national security that justifies the specific restriction.[7]

In 2011, the UNHRC's General Comment on art 19 of the ICCPR restated that state parties have to take "extreme care" to ensure that any provisions relating to national security are drafted and enforced in "a manner that conforms to the strict requirements" of the legitimate grounds provided by art 19(3) of the ICCPR.[8] The UNHRC further stated that the state parties cannot restrict key forms of peaceful political speech, including "any advocacy of multi-party democracy, democratic

5 Fu Hualing, "A Note on the Basic Law and the National Security Law" *HKU Legal Scholarship Blog* (12 August 2020), available at https://researchblog.law.hku.hk/2020/08/hualing-fu-on-relationship-between-hong.html (16 December 2021).

6 *HKSAR v Lai Chee Ying* [2021] HKCFA 3, [41]–[44].

7 *Tae-Hoon Park v Republic of Korea* [1998] Comm No. 628/1995, 20 October 1998, [10.3]; Carole J Petersen, "Prohibiting the Hong Kong National Party: Has Hong Kong Violated the International Covenant on Civil and Political Rights?" (2018) 48 *HKLJ* 3, 789–805; Carole J Petersen, "Article 23 of the Basic Law: International Law and Institutions as Sources of Resilience" in Cora Chan and Fiona de Londras (eds), *China's National Security: Endangering Hong Kong's Rule of Law?* (Oxford: Hart Publishing 2020) p 241.

8 UNHRC, *General Comment No. 34*, CCPR/C/GC/34, para 30.

tenets, and human rights", on national security grounds.[9] States should only employ the "least intrusive instrument" possible and conform to the principle of proportionality to achieve their goal.[10] In short, reference to the notion of "national security" in the ICCPR does not end an inquiry into whether restricting free speech shall be justifiable. Instead, a deeper analysis of the necessity and proportionality of that restriction is necessary.

Apart from UNHRC's analysis, two key soft law documents offer more detailed guidance on balancing free expression and national security concerns: the Siracusa and the Johannesburg Principles. Principle 29 of the Siracusa Principles states that, instead of abusing its national security powers to crack down on speech that it does not like, a state must limit its use of national security measures to combat force or the threat of force that endangers the existence of the nation, its territorial integrity or its political independence.[11] Principle 6 of the Johannesburg Principles further qualifies the use of national security measures by a three-pronged test:

> "[E]xpression may be punished as a threat to national security only if a government can demonstrate that:
> (a) The expression is intended to incite imminent violence;
> (b) It is likely to incite such violence; and
> (c) There is a direct and immediate connection between the expression and the likelihood of occurrence of such violence".[12]

This three-pronged test, which is drawn from the 1969 US Supreme Court case *Brandenburg v Ohio*,[13] provides a rigorous and effective standard by which speech can be judged. The test states that political speech will generally not be subject to criminal sanction unless all three prongs of the test are met. Following the Sixth Principle, most peaceful political speech *per se* should not be capable of threatening national security and therefore should not be the subject of criminal prosecution.

As soft laws, both the Siracusa and Johannesburg Principles do not enjoy official legal standing. Nonetheless, they should be considered highly authoritative statements of best practice in balancing national security and human rights. The UNHRC endorsed the Siracusa Principles the year they were released, and the Johannesburg Principles have

[9] *Ibid.*, para 23.
[10] *Ibid.*, paras 33–35.
[11] The Siracusa Principles, Principle 29.
[12] The Johannesburg Principles, Principle 6.
[13] [1969] 395 US 444.

been cited approvingly by other key UN human rights bodies.[14] Both documents have been directly applied to rulings of the ECtHR and by some national-level courts, enhancing their legal stature and authoritativeness.[15] The Hong Kong Government and courts have also made direct reference to both sets of Principles. In at least two court judgments, Hong Kong courts have cited the Siracusa Principles,[16] and during the debate over the government's proposed national security legislation in 2003, the government stated that "the Johannesburg Principles provide a useful benchmark against which the proposals may be judged" and claimed that its bill was "broadly in line with the principles".[17]

Key decisions of the ECtHR provide invaluable comparative insights into striking the balance between national security and rights protections. These decisions are particularly relevant since the court has weighed in directly on how states should handle speech related to territorial independence. In *Stankov and the United Macedonian Organisation Ilinden v Bulgaria*, the Court ruled that "advocating for territorial changes in speeches and demonstrations does not automatically amount to a threat to the country's territorial integrity and national security", and thus the prohibition of public assemblies that might have attendants or organisers calling for autonomy or secession is not justifiable.[18] In other cases, the court has ruled against member states that have sought to criminalise peaceful political speech, stressing that member states must allow their citizens to speak freely unless they are directly inciting violence.[19]

Though Hong Kong courts are not bound by ECtHR decisions, they have at times drawn on those decisions in their own jurisprudence. For instance the CFA once noted that ECtHR verdicts are of "high persuasive authority" in Hong Kong.[20] Local courts should continue the practice of

[14] Then-UN Special Rapporteur on Freedom of Opinion and Expression Abid Hussain referenced the Johannesburg Principles in various reports; the UN Commission on Human Rights similarly made a note of the Johannesburg Principles in its resolutions on Freedom of Expression.

[15] The ECtHR referred to the Johannesburg Principles in *Ten Human Rights Organisations v United Kingdom*, 24960/15; Canadian courts have cited them in *Khadr v Canada (Attorney General)* [2008] FC 549, [88] and *Canada (Attorney General) v Almalki* [2010] FC 1106, [72]–[74].

[16] The Siracusa Principles are cited in *HKSAR v Ng Kung Siu* [1999] FACC4/1999, [52] and *Leung Kwok Hung v HKSAR* [2005] FACC1&2/2005, [32] and [71].

[17] Security Bureau of the Hong Kong Special Administrative Region, Proposals to Implement Article 23 Broadly Consistent with Johannesburg Principles (LC Paper No. CB(2)1577/02–03(02), March 2003).

[18] *Stankov and the United Macedonian Organisation Ilinden v Bulgaria* [2001], ECtHR (First Section), Applications nos 29221/95 and 29225/95; Petersen, 2020 (n 7 above) p 243.

[19] *Incal v Turkey* [1998] ECtHR 48, Application no. 22678/93; *Ceylan v Turkey* [1999], ECtHR, Application no. 23556/94; Petersen, 2018 (n 7 above) pp 798–799.

[20] *Koon Wing Yee v Insider Dealing Tribunal* [2008] HKCFA 21, [27]; Petersen, 2020 (n 7 above) p 234.

applying authoritative soft law and cases from the ECtHR as they begin to apply key NSL provisions in specific cases.[21]

(b) Compatibility with the NSL

Article 20 of the NSL provides:

> "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".

This provision makes clear that there is no requirement that acts include "force or the threat of force", which makes it more difficult to reconcile that provision of the NSL with the international and comparative best practice on free expression discussed above. Article 21 of the NSL, which covers incitement to secession, is also inconsistent with the ICCPR and other international standards as it refers to the overbroad language of art 20. The two articles fail to meet the requirements of Siracusa Principle 29 and the Sixth Johannesburg Principle, which make direct reference to the use or threat of force or imminent violence.

The internal conflict within the text of the NSL is quite clear; while art 4 makes explicit reference to the ICCPR as applied to Hong Kong, meaning that these standards apply in all NSL criminal prosecutions, arts 20 and 21 display an obvious inconsistency to the proper enforcement of the free speech protections under the ICCPR.[22] The flaws in arts 20 and 21 could have been addressed by the CFI in *Tong's case*, but unfortunately, it failed to do so; rather, it justified and expanded the NSL's vague and overbroad language in determining the facts of the case.

[21] The CFA, for example, drew upon ECtHR jurisprudence in *Leung Kwok Hung v HKSAR* [2005] HKCFA 41.

[22] Lydia Wong and Thomas E Kellogg, "Hong Kong's National Security Law: A Human Rights and Rule of Law Analysis" (Georgetown Center for Asian Law, 2021), available at https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2021/02/GT-HK-Report-Accessible.pdf (visited 26 February 2022).

(c) Application in Tong's Case

The verdict in *Tong's case* from the CFI ignored the human rights protections in the Basic Law, as well as arts 4 and 5 of the NSL, which reiterate that human rights protections apply to all NSL cases. The court also ignored all international human rights conventions that remain applicable in Hong Kong and comparative jurisprudence, which seek to balance national security and human rights concerns.

Following the Siracusa and the Johannesburg Principles, alongside rulings from the ECtHR, even if Tong made a more direct and overt statement in favour of political independence for Hong Kong, he should not have been convicted unless his speech was both intended to incite imminent violence and likely to do so. Any court adopting this more rigorous international law-based standard would almost certainly find Tong not guilty of inciting secession since he did not make any specific call to violence. The violence requirement is meant to guarantee that provocative public speech is protected even if the government finds it offensive or determines that it undermines political legitimacy.

If the NSL was part of the ordinary criminal law in Hong Kong, the CFI would not have ignored the free speech provisions in both the Bill of Rights Ordinance (BORO) and the Basic Law. However, there is limited room for the CFI to challenge the constitutionality of NSL provisions, and it cannot interpret the NSL provisions beyond the plain and expressive meaning. As the CFA has held, the Hong Kong courts cannot engage in a constitutional review of NSL provisions.[23] The CFI had no way of engaging with a direct facial challenge against the inclusion of both violent and non-violent acts as possible constituent elements of the crime of secession under the NSL. That said, the court could at least have cited art 4 of the NSL and the CFA ruling to reassert that the NSL should be interpreted and applied consistently with the ICCPR to the maximum possible extent.[24] The CFI could also have done more to explain how to reconcile the apparent inconsistencies between arts 4, 20 and 21 of the NSL. Such approaches would have signalled to the public that the courts still give weight to protecting free speech in their judgments and ensure that human rights remain at the core of Hong Kong law.

Instead, the CFI chose to focus quite heavily on the meaning of the slogan on Tong's banner, "Liberate Hong Kong, Revolution of our

[23] *HKSAR v Lai Chee Ying* (n 6 above) [37].

[24] *Ibid.*, [41] and [46]. See also Carole J Petersen, "Hong Kong's First Conviction for Incitement to Secession: What Role for the ICCPR?" (13 October 2021) 25(22) *American Society of International Law (ASIL) Insights*, available at https://www.asil.org/insights/volume/25/issue/22 (visited 26 February 2022).

Times". After an extensive discussion, the Court concluded that the slogan, which can have multiple interpretations of its meaning, is "capable of inciting others to commit secession" and thus actionable as a violation of art 21 of the NSL.[25] The Court then suggested that Tong's actions were such that "he intended to incite others to commit acts separating the HKSAR from the PRC".[26] This reasoning is deeply problematic. The Court disregarded the fact that the slogan could be interpreted in several ways, and many valid interpretations would be neither secessionist nor threatening to national security. Instead, it reached for the strongest interpretation of Tong's use of the slogan, which in turn supported a guilty verdict. Thus, the Court avoided a narrow interpretation of the statutory text and also took a very specific, government-friendly view of Tong's actions, one that amplified the allegedly threatening nature of his expression. This approach does not bode well for future speech-based prosecutions under the NSL.

While repeating the more provocative aspects of Tong's behaviour, such as Tong's "repeated challenge to police check lines"[27] and his protest on the anniversary of the handover, the court was incapable of demonstrating any effort by Tong to incite others to any *specific* action. No doubt, many in the crowd applauded Tong's display of the slogan, which could be seen as conveying a more confrontational stance, given that the NSL was enacted a day before that protest. Yet it was also indisputable that Tong's provocative actions did not stir the crowd to any act of secessionist violence nor would they easily be classified as likely to do so in general. In short, the court's attempt to conflate Tong's dangerous driving and the display of his banner with the speech crime of inciting secession fails the three-prong test under the Johannesburg Principles.

Hong Kong courts have rich experience in citing international treaties, ECtHR case law and best practices from other common law jurisdictions. It is therefore hard to justify the CFI's decision to turn a blind eye to human rights jurisprudence in *Tong's case*. The court's undue heavy focus on one of the possible meanings of the slogan is highly misleading, as the court failed to take the vagueness of the slogan into account. As other scholars have pointed out, the slogan is capable of any number of different interpretations and has been adopted by many to show support for peaceful political reform, including reforms specifically contemplated by the Basic Law.[28] The secessionist message proposed by the prosecution

[25] *HKSAR v Tong Ying Kit* [2021] HKCFI 2200, [141].
[26] *Ibid*., [150].
[27] *Ibid*., [149].
[28] Michael C Davis, "National Security Trial Ruling a Setback for Human Rights in Hong Kong" *South China Morning Post* (4 August 2021), available https://www.scmp.com/comment/opinion/

and the judges is only in the eye of the beholder. If adopted by other Hong Kong courts, this reasoning will have significant implications for other pending NSL trials and future enforcement of the NSL. Various other forms of peaceful political speech, including criticism of government officials and the courts and other forms of anti-government speech, could be interpreted as secessionist and thus potentially actionable under the NSL. This potential anti-free speech jurisprudence could give the Hong Kong Government broad licence to effectively prohibit the use of both key slogans from the 2019 protest movement and serve as a warning to the would-be critics of the government that the authorities have the power to crack down on speech that they do not like. The CFI's verdict failed to give a clear boundary of the limits of free speech or whether and how the courts will reconcile NSL charges with fundamental human rights norms.

3. The Terrorism Charge

(a) Counter-Terrorism and International Law: The Post-9/11 Evolution

Over more than two decades since the 11 September 2001 terror attacks on the United States, both key UN bodies and individual member states have accumulated a body of knowledge and experience on counter-terrorism law and how to balance counter-terrorism with human rights. Although the international community has yet to reach a consensus on a long-stalled Draft Comprehensive Convention on Terrorism,[29] it has taken several steps towards forging a definition of terrorism that highlights both the seriousness of the crime and the need for a rigorous and narrow definition of the term to guard against abuse.

Any assessment of art 24 of the NSL and its application in the *Tong Ying Kit* verdict needs to be seen through the prism of that body of international and comparative law and the extent to which art 24 draws from the counter-terror laws of other countries, and the international law definition; the extent to which the court absorbed the accumulated learning of the international community on how to balance counter-terror goals with the need to protect human rights and whether Tong would have

article/3143634/national-security-trial-ruling-setback-human-rights-hong-kong (visited 16 December 2021).

[29] The Draft Convention is generally considered to have stalled, with no immediate prospects for its resuscitation. See Elizabeth Stubbins Bates, *Terrorism and International Law: Accountability, Remedies, and Reform* (Oxford: Oxford University Press, 2011) p 2.

been convicted of terrorism had he committed the same acts in another jurisdiction.

As this section shows, these issues are clear. Although art 24 does draw on certain elements of international and comparative counter-terrorism law, it diverges significantly in terms of its scope and precision from the narrower definition put forward by the international community in the years after 9/11. The court largely ignored international best practice and comparative jurisprudence in its verdict, delivering a conviction against Tong for terrorism that would find little support among global counter-terror experts.

(b) The Aftermath of 9/11—Struggling for a Workable Definition of Terrorism

Both before and after 9/11, the international community struggled to agree on a legal definition of terrorism. Before that day, it seemed more comfortable dealing with key specific elements of terrorism, such as plane hijackings or the financing terror groups, rather than tackling the broader questions of how terrorism should be defined in law or how counter-terror concerns should be balanced with human rights.

The 9/11 attacks led to a flurry of activity at the international and national levels around the world. Just weeks later, the UNSC passed UN Security Council Resolution 1373, which called on all member states to criminalise terrorism in state law and to ensure that the individuals engaged in such activities were held fully accountable.[30] Resolution 1373 also focused on the need for states to criminalise funding and other forms of support to terrorist groups and to ensure that states took other necessary measures to combat terrorism.

The response from member states to Resolution 1373 was quite robust. Many states moved to implement new counter-terrorism laws or strengthen existing ones. Yet all of these legal reforms took place even though there was no universally agreed-upon definition of terrorism that could serve as the basis for domestic legislation. The failure of the international community to agree on such a definition was directly tied to the fact that terrorism itself is a political crime, one that is tied to the core political questions on the right of the state to maintain its monopoly on the use of force.[31]

[30] UNSC Resolution 1373, S/RES/1373, 2001.

[31] Mahmoud Hmoud, "Negotiating the Draft Comprehensive Convention on International Terrorism: Major Bones of Contention" (2006) 4 *Journal of International Criminal Justice* 1031, 1032–1037.

In the absence of a rigorous and narrowly tailored definition of terrorism, many observers felt that the call to action in UNSC Resolution 1373 was an outright invitation to political repression and abuse in the name of counter-terrorism.[32] States could, and in all too many cases did, introduce overly vague definitions of terrorism in domestic laws and then moved quickly to use those laws to crack down on political opponents.

Perhaps recognising the negative effect that national and international counter-terror efforts were having on human rights, the UNSC and other UN bodies started to slowly shift direction as early as 2003 when, for example, the UNSC unanimously issued Resolution 1456, which called on states to "ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law".[33] Future UNSC Resolutions on terrorism would generally include similar language on human rights.[34]

For states seeking to revise their domestic counter-terror laws, the meaning of Resolution 1456 was quite clear. Criminal definitions of terrorism must be narrowly tailored so that they cannot easily be used to target a regime's peaceful political opponents and others not engaged in genuine acts of terrorism. Resolution 1456's reference to international human rights law also highlights the need to protect the basic due process rights of the accused in all criminal trials related to terrorism.

The UNSC took another step towards integrating a rights-based approach into its counter-terror efforts in 2004 with the adoption of Resolution 1566,[35] which reiterated the need for all counter-terror efforts to comply with international law, and in particular with international human rights law. It also gave further guidance to states on their domestic counter-terror laws.

The key provision of art 3 of the Resolution 1566 takes a significant step forward in terms of a clear and narrowly tailored definition of terrorism under international law. The definition was subsequently endorsed by other key UN bodies, including those with a human rights mandate.[36] The definition of terrorism under Resolution 1566 has three prongs that must

[32] Kent Roach, "Comparative Counter-Terrorism Law Comes of Age" in Kent Roach (ed), *Comparative Counter-Terrorism Law* (Cambridge: Cambridge University Press, 2015) p 4.

[33] UNSC Resolution 1456, S/RES/1456, 2003.

[34] Manfred Nowak and Anne Charbord, "Key Trends in the Fight Against Terrorism and Key Aspects of International Human Rights Law" in M Nowak and A Charbord (eds), *Using Human Rights to Counter Terrorism* (Cheltenham: Edward Elgar, 2018) p 22.

[35] UNSC Resolution 1566, S/RES/1566, 2004.

[36] Martin Scheinin, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, E/CN.4/2006/98, 2005, paras 26–42.

be met. It must: (1) have the intended purpose of causing death, causing serious bodily injury or the taking of hostages; (2) have the intended purpose of provoking a state of terror in the general public or particular subgroups, intimidating a population or compelling a government to take an action or refrain from taking action and (3) constitute offences within the scope of international conventions and protocols relating to terrorism. These three prongs are *cumulative*; all three elements must be satisfied for an act to be considered terrorist in nature.[37]

Other definitions of terrorism, including those put forward by academic experts and those adopted by some states such as Canada, Australia and New Zealand, have included a provision exempting non-premeditated protest-related violence from the definition.[38] This approach has much to commend it, in that it insures against potential abuse by prosecutors seeking to punish individuals who engage in protest-related violence or destruction of property that does not rise to the level of terrorism.

Resolution 1566 would have benefited from the inclusion of such a protest-related exception. However, when properly applied, its three prongs help prevent unrelated cases from moving forward with criminal charges of terrorism under domestic law.[39] The exclusion of non-premeditated protest-related violence from the definition of terrorism would extend to acts of serious violence undertaken with other criminal acts, given that such acts generally are not meant to provoke a state of terror in the general public. The definition would also exclude destruction of property or even low-level acts of violence that occur in public protests, given that such acts are generally not intended to cause death or serious bodily injury.[40]

Many acts that fall short of this definition of terrorism may well be criminally actionable under other provisions of a state's domestic criminal law. Low-level acts of spontaneous violence, which take place during

[37] As former Special Rapporteur Scheinin has noted, the cumulative approach embodied by Resolution 1566 "acts as a safety threshold to ensure that it is only conduct of a terrorist nature that is identified as terrorist conduct". *Ibid*., para 38.

[38] In Australia, for example, acts of "advocacy, protest, dissent or industrial action" are not considered terrorism if those actions are not intended to cause death, serious physical harm to a person, or serious risk to public health or safety, or to endanger life. See Ben Saul, *Defining Terrorism in International Law* (Oxford University Press 2006) p 65.

[39] *Ibid*., p. 66.

[40] 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, *Letter to the People's Republic of China* (OL/CHN 17/2020, 1 September 2020), available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25487 (visited 16 December 2021).

a public protest, for example, could be actionable under criminal provisions relating to assault or the destruction of property. The key is to ensure that, given their politically charged and highly stigmatising nature and their heavy criminal penalties, criminal provisions relating to terrorism are only used against genuine acts of terrorism and not as a tool to deal with other crimes.[41]

Resolution 1566 has had a positive effect on global debates over the need to narrowly define terrorism in domestic law. It remains an important model for states while revising the criminal laws related to counter-terrorism. Sadly, in drafting art 24 of the NSL, the Standing Committee of the National People's Congress largely ignored both Resolution 1566 and the broader literature on counter-terrorism and human rights as it relates to domestic criminal law. As a result, the definition of terrorism under art 24 is vague, overbroad and vulnerable to manipulation and abuse by counter-terror authorities in Hong Kong.

(c) NSL of the Article 24: Departing from the International Norm

Article 24 of the NSL is much broader than the model definition put forward by Resolution 1566. First, its structure is different. Instead of a series of cumulative triggers, all of which must be present to move forward with a terrorism prosecution, art 24 creates an open-ended list of examples that are then linked to the core elements of the crime. The core elements of terrorism described by art 24 include an action that causes or is intended to cause grave harm to society, to coerce the central government or the Hong Kong Government or to intimidate the public. The action must also be taken "to pursue a political agenda". These criteria and the list of actions create a less rigorous definition than Resolution 1566's definition and are much more susceptible to manipulation and abuse.

Article 24's most troubling prong is the first one, determining that an action causes or is intended to cause "grave harm to the society". This language is much broader and more subjective than Resolution 1566's reference to intent to cause death or serious bodily injury, making it much more vulnerable to manipulation by Hong Kong and Mainland authorities. Article 24 also replaces Resolution 1566's clear intent requirement with broader language that includes the actual, presumably including the accidental or unintended causing of harm, in addition to the intent to cause harm. This is a key divergence from Resolution 1566, which was very important in the *Tong Ying Kit* verdict.

[41] Scheinin (n 36 above) paras 47–50.

Unfortunately, art 24's list of actions that constitute terrorist activity includes potentially criminally actionable acts that would not rise to the level of terrorism under Resolution 1566, in addition to actions likely to conform to Resolution 1566's definition, such as the dissemination of poisonous or radioactive substances. Article 24(3) and 24(4), for example, refers to the damage to public property. Depending on the circumstances of the case, these articles could be used to target individuals who really should not be charged with terrorism, including public protesters who do damage to government property.

Finally, art 24(5), which refers to "other dangerous activities which seriously jeopardise public health, safety, or security", functions as a broad catch-all. Article 24(5) could allow both prosecutors and judges to categorise a number of actions as terrorism, even if they do not fit the more rigorous Resolution 1566 definition.

The other elements of the crime of terrorism under art 24 include an intent to coerce the Central People's Government or the Hong Kong Government or an effort to intimidate the public. Both of these elements of the crime track closely with the elements laid out in Resolution 1566 and are less vulnerable to manipulation or abuse. Article 24 also includes a requirement that the action be taken in pursuit of a political agenda, an element that is included in other expert definitions of terrorism but is not directly included in Resolution 1566.[42]

Article 24 draws on the counter-terror laws of other countries. Much of the vague and overbroad language described earlier can also be found in the laws of the countries that apparently served as a basis for art 24. Some of its language appears to be drawn from the definition found in the UK's Terrorism Act, for example. The language in the UK law has been criticised for being vague and overbroad, and some UK politicians have called for the language to be revised to guard against abuse.[43] In the United Kingdom and elsewhere, both the court system and public oversight, including the media, the public and elected representatives, have been able to play an active role in guarding against the abuse of counter-terror laws.

International experts on counter-terrorism and human rights have also criticised art 24's definition of terrorism. In September 2020, for example, a group of prominent UN human rights experts expressed concern that

[42] Saul (n 38 above) pp 65–66; Ken Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge: Cambridge University Press, 2011).

[43] Keith Syrett, "The United Kingdom" in Kent Roach (ed), *Comparative Counter-Terrorism Law* (New York: Cambridge University Press, 2015) pp 168–170.

art 24's inclusion of damage to physical property as part of its definition of terrorism pushed it beyond the definition provided by Resolution 1566.[44]

(d) The Tong Ying Kit Verdict: Defining Terrorism Downwards

As this analysis shows, art 24's textual flaws are quite serious. However, they could have been addressed by the High Court in *Tong Ying Kit*. In every rights-respecting jurisdiction around the world, courts play a key role in ensuring that counter-terror laws are not abused. When governments attempt to stretch terror laws to cover defendants whose actions simply do not fit the definition, it is the job of the court system to reject such attempts, even in those cases in which defendants may well be guilty of other crimes.

In *Tong's case*, the Court failed to judicially limit art 24's vague and overbroad language. Instead, it further stretched the already loose text, inflating the seriousness and exaggerating the impact of Tong's actions to fit its core elements.

Despite the international community's heavy focus on counter-terrorism and human rights over the past 20 years, the Court ignored both international and comparative laws on counter-terrorism in its verdict. Instead, it retreated to a series of obscure, outdated and often irrelevant precedents in pursuit of a final verdict that will fail to persuade any but Beijing's most ardent supporters. Most experts would not consider the cases cited by the Court to represent cutting-edge jurisprudence on balancing legitimate counter-terrorism imperatives with protecting human rights. This failure to grapple with international and comparative law is perplexing, especially given the Hong Kong's rich history of cosmopolitan and outward-facing jurisprudence.

The Court's broad interpretation of one of art 24's core elements of terrorism — that an action causes harm to society — is at the core of the *Tong Ying Kit* verdict. The Court also set a very low threshold for art 24(1)'s action prong that an action constitutes serious violence against a person or persons. In our analysis, we show that the Court both adopted the broad interpretations of these prongs and embraced an expansive view of Tong's actions. The combination of these moves led directly to the court's guilty verdict against Tong on the terrorism charge.

The Court was right in holding that Tong's actions were in pursuit of a political agenda; he was indeed attempting to make a political statement, both by carrying a banner bearing slogans and by driving recklessly

[44] Letter of the Permanent Mission of the People's Republic of China to the United Nations Office at Geneva, No. GJ/64/2020 (30 October 2020).

around and through police lines. The specific requirement of art 24 was rightly found to be met by the court.

It is perhaps surprising that the Court did not link Tong's actions to art 24(5), the broader catch-all provision which refers to "other dangerous activities", but rather to art 24(1), which refers to "serious violence against a person or persons".[45] That language more closely tracks the Resolution 1566 definition, even if it falls short of its more stringent language.

In its analysis, the court relied heavily on the prosecution's submission that "serious violence against persons does not mean serious injuries caused to the persons".[46] In essence, the Court took the view that Tong's actions were of such an inherently reckless and dangerous nature that they should satisfy the requirements of art 24(1) even in the absence of any serious injuries.

But this analysis confuses the nature of the terrorist act. In most cases, death or serious injury is very much an intended outcome, indeed a core goal, and not an accidental or unintended by-product. It seems clear, even from the factual recitation put forward by the prosecution, that Tong was attempting to *evade* the police, and in so doing continue his protest. He was clearly *not* attempting to use violence as a means to make a political statement, as is almost always the case in counter-terror cases. The requisite intent to cause serious bodily injury or death required by the Resolution 1566 definition is absent.

Tong's actions are almost certainly criminally actionable under other provisions of Hong Kong's Crimes Ordinance. The Court is right to conclude that Tong "created a dangerous situation where police officers had to jump out of his way and pedestrians . . . were potentially put at risk and in harm's way".[47] Such actions should be taken seriously, but they are the stuff of day-to-day criminal law cases and not of high-level counter-terror prosecutions.

Although the Court repeatedly characterises the violence engaged in by Tong as "serious", its own analysis suggests that the actual level of violence involved in *Tong's case* was quite low. The Court is right to point out that a motorcycle can be a deadly weapon,[48] and no doubt one could imagine situations in which a motorcycle is used as a key element of a terrorist attack, but that is not what happened in *Tong's case*, as evidenced by

[45] *HKSAR v Tong Ying Kit* (n 25 above) [160].
[46] *Ibid.*, [159].
[47] *Ibid.*, [152].
[48] *Ibid.*, [158].

the fact that the injuries sustained by three of the police officers involved, though not trivial, were also by no means grave or life-threatening.[49]

This aspect of the Court's analysis is especially troubling, given its potential application to future cases. If art 24(1) can be satisfied by acts that are neither aggressively violent nor result in serious harm to others, then any number of acts including fistfights between protesters and police or accidental contact between protesters and police officers resulting in minor injury could also be swept up into an art 24 terrorism charge. In essence, the Court's reasoning on this prong represents a serious watering down of the action requirement of art 24(1) and a significant departure from the "intent to cause death or serious bodily injury" language of Resolution 1566.

The Court's harm to society analysis involves a similar watering down of the legal requirement and a similar inflation of the effect of Tong's actions. The Court begins its analysis of the harm requirement by what it acknowledges as a "wide" definition of harm, one that goes beyond physical harm to embrace a range of other kinds of social and political effects.[50] It concludes that Tong's actions caused "law-abiding citizens to fear for their own safety and to worry about the public security of Hong Kong".[51]

This is a rather significant conclusion to draw, and yet the only evidence that the court cites in support of it is the testimony of two witnesses to Tong's actions, who were apparently "shocked" by what happened.[52] Their subjective reactions should indeed be taken at face value, but it seems strange to gauge the response of an entire city of 7.5 million on the basis of two eyewitnesses, especially when the legal stakes are so high.

Even more perplexing is the Court's decision to heavily link its analysis of the harm to society prong to the fact that Tong struck police officers. According to the Court, his reckless driving constituted a "blatant and serious challenge mounted against the police force [that] will certainly instil a sense of fear amongst the law-abiding members of the public".[53] That fear will quickly, the court argues, morph into "apprehension of a breakdown of a safe and peaceful society into a lawless one".[54]

Terrorists often strike at symbolic targets to use violence to communicate a political message and to undermine the credibility of those targets, which are often state-affiliated. In some cases, attacks on state entities are also meant to create a sense of fear in the general public and to send a

[49] Holmes Chan, "Inside the Surreal Trial of the 'Most Benevolent Terrorist in the World'" *Vice World News* (20 September 2021), available at https://www.vice.com/en/article/93y47p/hong-kong-national-security-trial-tong-Ying Kit (visited 16 December 2021).
[50] *HKSAR v Tong Ying Kit* (n 25 above) [161].
[51] *Ibid*., [163].
[52] *Ibid*.
[53] *Ibid*., [162].
[54] *Ibid*.

message that the state cannot protect either itself or its citizenry. In such cases, criminal prosecution on terrorism charges may well be warranted.

We do not believe that such dramatic dynamics are in play in *Tong's case*. Taken at face value, the court's analysis would seem to suggest that *any* physical confrontation between police and civilians that results in physical injury to police officers would, as long as political motives are involved, rise to the level of terrorism or at least "instil a sense of fear amongst law-abiding members of the public", which in turn causes great harm to society. Confrontations between police and the public are by no means unknown in countries around the world and are generally subject to criminal sanctions but, with an absent "intent to cause death or serious bodily injury", to use the Resolution 1566 language, they should not be considered terrorism.

It does seem clear that Tong was attempting to make a negative statement about the police through his actions and perhaps to embarrass them as well. If that was indeed his intent, such taunting is a familiar part of life in an open society. But such acts should not be considered terrorism and should not be treated as such by the criminal justice system.

4. Conclusion

As this article has documented, the challenges posed by the NSL to the Hong Kong court system are both real and significant. Some have expressed concerns about external political pressure on the judiciary.[55] The Hong Kong government must do its best to safeguard judicial independence and the rule of law. Any pressure on courts to deliver guilty verdicts in NSL cases will have potentially wide-ranging consequences for the judiciary's public legitimacy.

As numerous international studies and surveys have shown, Hong Kong's judiciary is widely respected, and its judgments are often cited by other common law courts around the world.[56] In 2019, for example, Hong Kong was ranked 16th among 126 countries and jurisdictions in the World Justice Project Rule of Law Index, beating such countries as

[55] See Carole Petersen, "The Disappearing Firewall" (2020) 50 *HKLJ* 655. See also Kelly Ho, "Top Hong Kong Barrister Raises Concerns Over 'Executive Interference' into Judiciary" *HKFP* (22 June 2020), available at https://hongkongfp.com/2020/06/22/security-law-top-hong-kong-barrister-raises-concerns-over-executive-interference-into-judiciary/; and Tommy Walker, "Legal Experts Question Hong Kong Chief Justice's Independence Claims" *VOA News* (27 January 2022), available at https://www.voanews.com/a/legal-experts-question-hong-kong-chief-justice-s-independence-claims-/6416303.html.

[56] Pui Yin Lo, "Impact of Jurisprudence beyond Hong Kong" in Simon NM Young and Y Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge: Cambridge University Press, 2014) pp 579–607.

the United States, France and South Korea.[57] The success of the courts in maintaining their independence and commitment to the rule of law has been integral to Hong Kong's ability to preserve its stature as a key global financial hub.

And yet, even before the 2019 protests, confidence in the judiciary among Hongkongers had begun to slip. According to various public opinion surveys, public confidence in judicial fairness and impartiality dropped to all-time lows in 2021, as did public faith in the rule of law in the special administrative region. According to the Hong Kong Public Opinion Research Institute, public scoring of the rule of law in Hong Kong has dropped from 6.9 (out of a possible 10) just after the 1997 Handover to 4.5 in July 2021.[58] No doubt, some of the fall can be attributed to the system-wide loss of public confidence in Hong Kong's political system in the wake of the 2019 protests,[59] but it seems likely that broader trends in the administration of justice in Hong Kong are also core factors that drive the growing public discontent with the courts.

The conundrum that the courts face is all too clear. As they deliver more verdicts favourable to the government, they may be seen as less institutionally independent, and public trust in the courts declines.[60] However, if they fail to deliver government-favoured outcomes, especially in key high-profile cases, they face the very real risk of a backlash.

Over the past two years, pro-Beijing politicians in Hong Kong have called for reforms that would undercut judicial independence.[61] The authorities may also act to limit the power of the courts if necessary.[62]

In the past, the courts have used various strategies to balance competing pressures from Beijing and the people of Hong Kong, including extensive use of comparative and international law, a deep commitment

[57] World Justice Project, *The WJP Rule of Law Index 2019*, available at https://worldjusticeproject.org/sites/default/files/documents/ROLI-2019-Reduced.pdf (visited 15 March 2022).

[58] Hong Kong Public Opinion Research Institute, "Appraisal of Degree of Compliance with the Rule of Law", available at https://www.pori.hk/pop-poll/rule-law-indicators-en/g002.html?lang=en (visited 15 March 2022).

[59] Julius Yam, "Approaching the Legitimacy Paradox in Hong Kong: Lessons for Hybrid Regime Courts" (2021) 46 *Law and Social Inquiry* 1, 182.

[60] *Ibid*.

[61] Ng Kang-Chung, "Hong Kong Not an 'Independent Judicial Kingdom': Pro-Beijing Heavyweight Doubles Down on Reform Calls" *South China Morning Post* (4 January 2021), available at https://www.scmp.com/news/hong-kong/politics/article/3116411/hong-kong-not-independent-judicial-kingdom-pro-beijing (visited 15 March 2022); Primrose Riordan, "Pro-Beijing Reforms Threaten 'End' of HK's Legal System, Top Lawyer Warns" *Financial Times* (20 February 2021), available at https://www.ft.com/content/da312e66-bea5-464f-bc5a-490729f3fbca (visited 15 March 2022).

[62] Jerome A Cohen, "The Intensifying Pressures to Further 'Reform' Hong Kong's Courts" *The Diplomat* (23 November 2020), available at https://thediplomat.com/2020/11/the-intensifying-pressures-to-further-reform-hong-kongs-courts/.

to procedural justice and a differential approach to cases based on the political imperatives involved.[63] The use of such strategies allows the courts to signal to Beijing that its interests will be protected in key cases such as those involving democratic reform. At the same time, the use of comparative and international law and a strong commitment to procedural justice can signal to the public that the courts value the core rule of law principles and will, when possible, align Hong Kong's jurisprudence with that of other, demonstrably rights-respecting jurisdictions.

The NSL seems almost designed to frustrate these strategies. Its criminal provisions, for example, necessitate a court hearing. The aggressive use of these criminal provisions by the government means that the courts are expected to deliver verdicts in a large volume of cases over the next year or more, making a delaying or differentiation strategy impossible to implement. At the same time, both the NSL and its Implementing Regulations limit the due process rights of those accused of NSL crimes, making it more difficult for the courts to emphasise procedural fairness as a means to win public support.[64] Finally, both the text of the NSL and the government's choice of cases have thus far made it virtually impossible for the courts to successfully draw upon comparative sources to rationalise guilty verdicts in ways that would bolster judicial legitimacy.

The courts have yet to come up with an effective response to the deep and real challenges posed by the NSL. The judiciary's public legitimacy crisis could well continue to deepen, unless the courts can develop effective mitigation strategies that will allow them to handle future NSL cases in ways that will bolster or at least not continue to undercut public confidence in them.

Declining public trust in the Hong Kong legal system should be viewed as a deeply troubling warning sign. The aggressive implementation of the NSL is generating many ancillary costs, including deep damage to the institutional legitimacy of the court system.

For the court system, the time may soon come to embrace alternative strategies for handling future NSL cases. With dozens of NSL cases currently pending, the judiciary will have to test Beijing's willingness to accept more rights-protective outcomes at some point. Otherwise, the downward spiral in public trust will likely continue. While there is no easy answer to the NSL-imposed legitimacy paradox that the Hong Kong courts face, it is clear that a continuation of the *status quo* will only deepen the current crisis, rather than end it.

[63] Yam (n 59 above) pp 162–178.
[64] Wong, Kellogg and Lai (n 1 above).

The CFI's verdict has already influenced the outcomes of a subsequent NSL case and a non-NSL national security case on seditious speech over the past few months: *HKSAR v Ma Chun Man* and *HKSAR v Tam Tak Chi*. The judge in both cases, Judge Stanley Chan, cited the CFI's verdict in *Tong Ying Kit* in both the *Ma Chun Man* and *Tam Tak Chi* verdicts. Ma was convicted of incitement to secession and then sentenced to jail for five-and-a-half years. Tam was convicted of uttering seditious words, and one of the pieces of evidence cited in Chan's final verdict was his utterance of the slogan "Liberate Hong Kong, Revolution of Our Times", the same slogan that Tong had emblazoned on a banner that he carried during the 1 July 2020 protest, the meaning of which was a focal point of his trial. On 20 April 2022, Tam was sentenced to 40 months in jail.[65] As these two verdicts make clear, the decision in *Tong's case* will resonate in other NSL and national security verdicts, likely, for years to come.

As this article was being finalised for publication, Tong decided to drop his appeal against the verdict. His reasons for doing so are not publicly known.[66] While it is not possible to discern the reasons behind his decision, the immediate legal effect is clear: the CFI's verdict will stand and will serve as a precedent for other NSL cases currently making their way through the courts, including other secession and terrorism cases. Any chance that the Court of Appeal would have overturned the CFI's flawed verdict has now been lost, and Tong will continue to serve his nine-year sentence.

[65] *HKSAR v Ma Chun Man*, DCCC0122/2021; [2021] HKDC 1325, [43] and [81]; *HKSAR v Tam Tak Chi*, DCCC 927, 928 & 930/2020; [2022] HKDC 208, [60], 927, 928 & 930/2020; [2022] HKDC 343. Also see (Eric) Yan-ho Lai, "Hong Kong's Sedition Law is Back" *The Diplomat* (3 September 2021), available at https://thediplomat.com/2021/09/hong-kongs-sedition-law-is-back/ (visited 26 February 2022); (Eric) Yan-ho Lai and Thomas Kellogg, "NSL Verdict a Major Blow to Free Speech in Hong Kong" *Lawfare* (19 November 2021), available at https://www.lawfareblog.com/nsl-verdict-major-blow-free-speech-hong-kong (visited 26 February 2022).

[66] Kelly Ho, "First Hong Kong Activist Jailed under National Security Law Drops Appeal in 'Surprise' Move" *Hong Kong Free Press* (13 January 2022), available at https://hongkongfp.com/2022/01/13/first-hong-kong-activist-jailed-under-national-security-law-drops-appeal-in-surprise-move/ (visited 26 February 2022).