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THE TONG YING-KIT NSL VERDICT: AN INTERNATIONAL AND COMPARATIVE LAW ANALYSIS

A GCAL BRIEFING PAPER

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Cover Photo: Tong Ying-kit arrives at a West Kowloon court in Hong Kong on July 6, 2020. Tong, who was accused of driving his motorcycle into a group of police while carrying a pro-democracy banner during a July 1 protest, was convicted of inciting secession and terrorism and sentenced to 9 years in prison in July 2021. He is the first person to be convicted under Beijing's sweeping new National Security Law.

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On July 27, 2021, Tong Ying-kit became the first person to be convicted of a crime under Hong Kong's National Security Law. Tong was convicted of inciting secession under Article 21 of the NSL, and of terrorism under Article 24. He was later sentenced to 9 years in prison. Immediately after the verdict was issued, Tong's lawyer announced that he would appeal both the verdict and the sentence. As of this writing, no date has been set for the appeal.

Tong was also among the first to be arrested under the NSL, just hours after it went into effect on July 1, 2020. Tong took part in a demonstration on that day, but instead of marching along with other protesters, Tong drove his motorcycle while carrying a banner bearing the popular protest slogan "Liberate Hong Kong, Revolution of Our Times." Apparently as part of his act of protest, Tong drove his motorcycle around police checklines, at times at high speeds, earning cheers from some in the crowd as he did so. Tong eventually collided with a group of police officers, injuring three of them. He was immediately arrested.

Tong, 24, is a former waiter who lived with his father and younger sister before his arrest. He came from a family of limited means, and used his restaurant earnings to help support his family.¹ He also helped to care for his mother, who suffers from various health problems, and for his elderly grandmother. He was well-liked by his work colleagues, and was generally known for his strong work ethic and his frugal lifestyle.² Tong participated in the 2019 protest movement, at times acting as a medic for those injured in clashes with the police, which earned him the nickname “Heavy Armor.”³ Prior to his NSL arrest, Tong had no criminal record; his only known prior run-ins with the law involved fines for low-level traffic offenses.⁴

This briefing paper offers a human rights and international law analysis of the High Court verdict in Tong’s case. The High Court’s verdict is the first ever issued in an NSL case, and is therefore of vital importance to understanding how the courts will deal with the many challenges posed by the NSL. It offers at least some initial insights into the question of whether the courts can continue to act as a bulwark against overt efforts by the Hong Kong government and Beijing to restrict rights in the name of national security. For years, even as Beijing has increased its influence and control over other key political institutions in Hong Kong, the courts were seen as resistant to external pressure, and were largely — though by no means completely — able to continue to do their job effectively.⁵ In most cases, the courts were able to fulfil their constitutional mandate to safeguard the rule of law and protect human rights.

That period of relative insulation from the political storms transforming Hong Kong’s other core political institutions may now be over. The Tong Ying-kit verdict can only be seen as a deep disappointment, and as yet another example of the failure of the courts to mount an effective, rights-based response to the NSL. As this briefing paper documents, the verdict fails to even consider, much less integrate, international human rights law and best practice, and also ignores the domestic human rights jurisprudence that emerged under the Basic Law in the years after the 1997 Handover. Instead, the court relied on a series of obscure and often quite dated precedents that often seem cherry-picked to reach a certain result.⁶

Overall, the court’s reasoning was narrow and cramped, and highly deferential to the government’s view. On virtually all key points, the court uncritically accepted the prosecution’s arguments, and turned aside those put forward by the defense. The end product is a verdict that defines key elements of both crimes downward, and inflates the seriousness and impact of Tong’s actions in ways that many in Hong Kong and beyond find difficult to accept.

As a result, the High Court’s verdict fails to fulfil judiciary’s most basic function: to offer to the people of Hong Kong a clear explication of how the law applies to the facts of Tong’s case, in ways that can be accepted as rigorous and legitimate, even if disagreements over key elements of facts and law persist. The Tong verdict, especially if it is allowed to stand on appeal, will only deepen perceptions in Hong Kong that the courts are succumbing to enormous political pressure to deliver guilty verdicts in NSL cases, and that a fair trial under the NSL simply isn’t possible.

1 *HKSAR v Tong Ying Kit*, HCCC280C/2020 [2021] HKCFI 2239 (Reasons for Sentence), paragraphs 6 and 11.

2 CitizenNews, “為唐英傑出庭作證 茶飲店老闆Jessica: 佢係比較懂事, 有時調皮、會講廢話” [Jessica, former Employer and trial witness for Tong Ying Kit, said Tong as a mature but sometimes naughty person], July 31, 2021.

3 Holmes Chan, “Tong Ying-kit looked after people injured at 2019 protests, ex-boss testifies,” *Stand News*, July 15, 2021.

4 *HKSAR v Tong Ying Kit*, HCCC280C/2020 [2021] HKCFI 2239 (Reasons for Sentence), paragraphs 6 and 41.

5 For a detailed analysis of how the Hong Kong courts managed to maintain their balanced relationship with the sovereign without succumbing to political pressure, see Johannes Chan, “A Shrinking Space: A Dynamic Relationship between the Judiciary in a Liberal Society of Hong Kong and a Socialist Leninist Sovereign State,” *Current Legal Problems*, 72:1, 85.

6 The authors made a similar point immediately after the Tong verdict was issued. See Eric 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*, July 31, 2021.

Though this briefing paper does not focus on Tong’s due process rights, nonetheless it is worth noting that Tong’s detention and trial were marred by procedural decisions that impacted his right to a fair trial. As we noted in a prior briefing paper on due process rights under the NSL,⁷ the Hong Kong government has taken several steps to limit core due process rights of NSL defendants, including their rights to bail, to a jury trial, and to a counsel of their own choosing. Tong was no exception: he was held for more than 11 months before his trial began, and his request for a jury trial was denied.⁸ We believe that the limitations on Tong’s due process rights materially impacted his right to a fair trial, and undermined the legitimacy of the High Court’s verdict.

This briefing paper proceeds in three sections. In the first section, we analyze the court’s findings and reasoning behind the NSL Article 21 inciting secession guilty verdict, using international human rights law as our core analytical framework. We find that the court failed to engage in any human rights analysis whatsoever, despite the fact that Tong was charged with crime that clearly relates to his right to freedom of expression, which is protected by Article 27 of the Basic Law. The court’s failure to engage in a serious rights-based analysis is all the more strange, given that Article 39 of the Basic Law makes clear that the International Covenant on Civil and Political Rights (ICCPR) remains in force in Hong Kong.

If the court had engaged in a rights-based analysis of the facts of Tong’s case, it is almost certain that Tong would have been found not guilty on the inciting secession charge. According to the United Nations Human Rights Committee (UNHRC), states that seek to restrict speech on national security grounds must draw a direct causal link between the speech in question and the threat to national security, and must adopt the least restrictive means to achieve their national security objectives. No such specific security threat was cited in the Tong verdict, nor was any causal connection established between Tong’s actions and a specific and legitimate threat to national security.

Highly authoritative commentaries on the nexus between national security and human rights, including the 1984 Siracusa Principles on Limitation and Derogation Provisions in the ICCPR and the 1996 Johannesburg Principles on National Security, Freedom of Expression, and Access to Information, have offered further guidance to states. The Siracusa Principles, for example, forbid states from restricting rights except in cases in which a state is acting against “force or the threat of force.” Taking the force requirement even further, the Johannesburg Principles state that restrictions on free expression can only be justified in the context of an intent to incite imminent violence that is likely to succeed.

If the court had used these tools, then it would have been almost impossible to find Tong guilty of inciting secession. On appeal, the Court of Appeal should engage in a rigorous analysis of Tong’s right to free expression under the Basic Law, and ensure that the Hong Kong government is not allowed to use national security as a pretext to crack down on human rights.

In Section Two, we offer an in-depth analysis of the court’s findings on the NSL Article 24 terrorism prong. Here too, we use international and comparative law as our core framework, and we find that both the text of Article 24 and the court’s reading of that provision fall far short of international standards that have emerged in the two decades since the September 11, 2001 terrorist attacks on the United States. In its verdict, the court both expanded the already vague and overbroad NSL definition of terrorism, and also inflated the seriousness and impact of Tong’s actions to fit that definition.

7 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*, June 28, 2021.

8 Thomas E. Kellogg and Eric Yan-ho Lai, “Death by a Thousand Cuts: Chipping Away at Due Process Rights in HK NSL Cases,” *Lawfare*, May 28, 2021.

Our analysis makes clear that, if the court had been guided by the more rigorous definition of terrorism put forward in U.N. Security Council resolution 1566, Tong almost certainly would not have been convicted of terrorism. To be clear, Tong’s actions during the pro-democratic protest on July 1, 2020, may well have been criminally actionable: the court was 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.”⁹ Such actions should be taken seriously, but they are the stuff of day-to-day criminal law cases, and not of high-level — and in Hong Kong’s case, first-ever — counter-terror prosecutions.

In the concluding section, we look at the Tong verdict in the context of the several pending NSL trials now before the Hong Kong courts. We believe that the judiciary is now engaged in an incredibly complex struggle to maintain both its independence and its public legitimacy. Public opinion surveys have shown that the courts are starting to lose credibility in the eyes of the public, in part because a number of recent rulings — including, we would argue, the verdict in Tong’s case — have been seen as insufficiently protective of defendants’ rights, overly accommodating of the government’s views, and therefore damaging to the rule of law in Hong Kong. If current trends continue, the political legitimacy of the courts will likely continue to decline, with potentially far-reaching implications for both the overall legitimacy of Hong Kong’s political system, and for the continued viability of the One Country, Two Systems framework.

No doubt, the courts are under extreme pressure. Senior Hong Kong and Mainland officials have put forward judicial reform proposals that could do deep damage to the institutional independence and integrity of the judiciary, moves which some have seen as an all-too-clear warning to the courts to deliver guilty verdicts, both in NSL cases and in other high-profile ones. There is no easy answer to the incredibly difficult challenge that judges face. And yet, a failure to deliver high-quality verdicts in pending NSL cases would itself signal a surrender to those who seek a more compliant and government-friendly judiciary. This in turn would do lasting damage to the judiciary’s reputation in the eyes of the people of Hong Kong, and beyond.



INCITING SECESSION: FREE EXPRESSION AND THE NATIONAL SECURITY EXEMPTION

The authors of this analysis believe that all NSL verdicts must conform with the human rights protections found in the Basic Law, and also with the core international human rights covenants that are themselves part of the fundamental architecture of Hong Kong’s legal system.

There should be no doubt that the Basic Law itself, including its core human rights provisions, applies to all criminal cases in Hong Kong, including NSL cases. The text of the NSL itself validates this view. Article 1 of the NSL states that the National Security Law is enacted “in accordance with” both the Chinese Constitution and the Basic Law. Article 4 of the NSL also makes clear that the rights protections of the Basic Law, and of the ICCPR as applied to the Special Administrative Region, continue to apply to Hong Kong, and also to NSL cases.

Although the drafters of the NSL took several steps to insulate the law from legal challenge, they did not place the NSL above the Basic Law itself: Article 62 places the NSL above all other Hong Kong laws in cases of conflict. But the Basic Law was passed by the National People’s Congress in Beijing, which means that it is not covered by Article 62 of the NSL.¹⁰ The Basic Law therefore maintains its superior position in Hong Kong’s legal framework,¹¹ which means that the NSL must be read in ways that harmonize apparent differences between it and the Basic Law itself.

It is true that the Court of Final Appeal has already held that the Hong Kong courts cannot engage in constitutional review of NSL provisions.¹² Because the NSL is a product of the NPCSC, the CFA held that the Hong Kong courts cannot pass judgment on the constitutionality of the NSL itself. That said, however, the courts can and should take steps to reconcile apparent conflicts between the Basic Law and the NSL.¹³ In particular, the Basic Law’s human rights provisions should inform the judiciary’s understanding of the NSL’s criminal provisions, and should also inform the application of those provisions to all NSL cases.

Because the Basic Law directly incorporates international human rights law into Hong Kong law, this means that key NSL provisions must be read in light of international human rights law, and that criminal cases brought under the NSL must be handled in ways that are fully consistent with international human rights law. In particular, Article 39 of the Basic Law makes clear that the International Covenant on Civil and Political Rights (ICCPR) “shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.”

It is imperative, therefore, to understand how the core provisions of the ICCPR, including Article 19, which covers the right to free expression, have been interpreted by key international authorities. Bodies such as the U.N. Human Rights Committee (UNHRC), whose General Comments are the most authoritative interpretations of the ICCPR, and regional-level courts, including the European Court of Human Rights, are key to understanding the full meaning of the ICCPR. Both the UNHRC and the ECtHR have done extensive work on defining the right balance between human rights and national security concerns, and on the steps that states can take to guard against the abuse of national security laws by governments looking to stifle criticism or censor unpopular views.

This section offers a brief overview of the ways in which both the UNHRC and other key regional and international bodies have sought to concretize the requirements of Article 19, often in response to efforts by states to restrict speech on national security grounds. As this overview makes clear, states often make broad and hard-to-justify claims about the risks posed by certain kinds of speech, and seek to justify often harsh crackdowns on speech on often quite vague national security grounds. In order to comply with their obligations under the ICCPR, however, states can only restrict basic rights when the exercise of those rights poses a clear and articulable threat to national security. As we discuss below, the facts of Tong’s case fail to rise to that level.

10 For an excellent overview of the Basic Law’s status in mainland Chinese law, see Danny Gittings, *Introduction to the Hong Kong Basic Law*, Hong Kong University Press, 2013, pp. 40-46.

11 Fu Hualing, “A Note on the Basic Law and the National Security Law,” HKU Legal Scholarship Blog, August 12, 2020. Prof Fu elaborates on this point in “National Security Law: Challenges and Prospects”, pre-publication draft on file with authors. Fu argues that the BL retains its higher status in part because it is a “quasi-constitutional” document, meant to lay out the basic structure of Hong Kong’s political-legal system, and thus also meant to stand above other laws, including those passed by Beijing and applied to Hong Kong. *Ibid.*

12 *HKSAR and Lai Chee Ying*, [2021] HKCFA 3, paragraph 37.

13 As the CFA put it, the BL 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. *HKSAR and Lai Chee Ying*, [2021] HKCFA 3, paragraphs 41-44.

DOMESTIC RIGHTS JURISPRUDENCE: CHALLENGES AND POSSIBILITIES

Though this briefing paper looks at the intersection between international human rights law and domestic jurisprudence, it does not analyze the rich Basic Law constitutional rights jurisprudence that has emerged since 1997. Over the past twenty-four years, the courts have made regular use of the Basic Law's rights provisions, often in ways that have had a direct impact on the lives of the people of Hong Kong. The courts have taken steps to protect the rights of LGBT people, for example, and have also issued rulings to protect the right to privacy against government intrusion.

At times, the courts have signaled a commitment to human rights even as they have ruled against those making rights claims. In *HKSAR v Ng Kung Siu and Another*, the Court of Final Appeal found that the government could in fact punish individuals for flag burning. The CFA held that such laws could be justified as a means to protect public order, in line with acceptable restrictions on the right to free expression under the International Covenant on Civil and Political Rights (ICCPR). At the same time, however, then Chief Justice Andrew Li made clear that freedom of expression "is a fundamental freedom in a democratic society," and that it "lies at the heart of civil society and Hong Kong's system and way of life." Free expression must, Chief Justice Li held, be vigorously protected by the courts, which meant that all restrictions on rights must be narrowly tailored and genuinely necessary in a democratic society.

And yet, since the 2014 Umbrella Movement, a disturbing counter-trend has emerged. In a number of cases, the courts have ruled against claimants making important rights claims. In 2016 and 2017, for example, the Court of First Instance ruled against six opposition lawmakers who had been removed from office by government officials who had held that their oath of office was insufficiently sincere. Those rulings, and others like it, allowed the government to pass judgment on the political views of elected legislators, and to remove from office those it found to be insufficiently supportive of the Basic Law. In 2020, the Court of Final Appeal upheld the constitutionality of the Emergency Regulations Ordinance (ERO), which grants broad powers to the Chief Executive in times of emergency, and upheld the government's ban on mask wearing during public protests. The decision was seen by many as undermining the Basic Law right to free expression.

In a sense, the Tong Ying-kit verdict represents both a departure from Hong Kong's post-1997 tradition of rights-based jurisprudence, and also a troubling continuation of the post-2014 trend of judicial conservatism in the face of politically-fraught human rights cases. As we discuss in more detail in our conclusion, we believe that the public legitimacy of the courts depends in part on finding a way to protect rights, even in the face of very real pressure from pro-Beijing forces and from the central government itself. As the courts grapple with the challenging question of how to protect human rights in NSL cases, they can look to the body of human rights jurisprudence that has sprung up in the years since 1997 as a source of inspiration. Those cases can also serve as a reminder: the Hong Kong courts have faced deeply fraught moments before, and have found ways to fulfil their function as the ultimate guarantor of human rights under the Basic Law.

INTERNATIONAL HUMAN RIGHTS LAW AND NATIONAL SECURITY: A CORE CHALLENGE

Free expression is protected by Article 19 of the ICCPR, and also by Article 27 of the Basic Law.

The ICCPR does state that national security — appropriately and narrowly defined — can be a legitimate ground for restricting the exercise of free speech. In order to guard against the abuse of national security laws by governments seeking to crack down on peaceful critics, both the UNHRC,

as well as other key bodies, have offered legal guidance to states on the requirements of Article 19, and the appropriate limits that can be put on free expression by states seeking to preserve national security.

In response to a 1994 complaint filed by a Korean student activist, for example, the UNHRC stated that governments cannot use national security as a blank check for restricting free expression and association. Instead, the government must “specify the precise nature of the threat” to national security that justifies the specific restriction.¹⁴ A failure to both describe the nature of the threat, and to establish a clear link between the threat and the action taken, would mean that a restriction on free expression would not pass muster under ICCPR Article 19.

In a 2011 General Comment on Article 19, the HRC elaborated on the connection between national security and free expression. The Committee noted that states are required to take “extreme care” to make sure any provisions relating to national security are crafted and applied in “a manner that conforms to the strict requirements” of the legitimate grounds provided by Article 19(3) of the ICCPR.¹⁵ According to the Committee, states cannot restrict key forms of peaceful political speech, including “any advocacy of multi-party democracy, democratic tenets, and human rights,” on national security grounds.¹⁶

The Committee has also highlighted the importance of ensuring that restrictions on free speech are both necessary and proportionate. General Comment 34, quoting from a prior Committee statement, calls on states to use the “least intrusive instrument” possible to achieve their goals:

[R]estrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected... The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities applying the law.¹⁷

In other words, reference to national security grounds does not end an inquiry into whether a restriction on free speech is justified; instead, it is the first step in a deeper analysis into whether that restriction is necessary, proportionate, and as minimally intrusive as possible.

Two key “soft law” documents provide more detailed guidance to states on how to balance free expression and national security concerns. The 1984 Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR provide extremely clear and direct guidance to states on how national security concerns can effectively be balanced with human rights. Principle 29 states that:

National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or the threat of force.¹⁸

Such a clear and direct standard helps to ensure that states will not abuse national security powers in order to crack down on speech that they don’t like, or that is politically difficult or damaging.

14 *Tae-Hoon Park v. Republic of Korea* (1998), Comm No. 628/1995, 20 October 1998, paragraph 10.3. The Park case was also cited in 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, p. 241. This section draws on that piece, as well as Prof. Petersen’s article, “Prohibiting the Hong Kong National Party: Has Hong Kong Violated the International Covenant on Civil and Political Rights?” (2018) HKLJ, Vol. 48, Part 3, pp. 789-805.

15 United Nations Human Rights Committee, General Comment No. 34, CCPR/C/GC/34, paragraph 30.

16 *Ibid.*, paragraph 23.

17 United Nations Human Rights Committee, General Comment No. 34, CCPR/C/GC/34, paragraphs 33-35.

18 Siracusa Principles, principle 29.

As is discussed in more detail below, neither the language of NSL Articles 20 and 21, nor the Tong Ying-kit verdict, live up to this more rigorous standard.

The 1996 Johannesburg Principles on National Security, Freedom of Expression and Access to Information take the Siracusa Principles analysis one step further, offering states a more rigorous three-pronged test by which to judge whether a statement can genuinely be considered as a threat to national security, and thus subject to criminal sanction. Principle 6 states that:

[E]xpression may be punished as a threat to national security only if a government can demonstrate that:

- The expression intended to incite imminent violence;
- It is likely to incite such violence; and
- There is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.¹⁹

This three-pronged test, which is drawn from the 1969 U.S. Supreme Court case *Brandenburg v Ohio*,²⁰ offers the highest and most protective standard by which speech can be judged. The principle 6 test ensures that political speech will remain robust and wide-open, and generally not subject to criminal sanction, unless all three prongs of the test are met. Principle 6 also implicitly acknowledges that almost all political speech, on its own, is simply not capable of threatening national security in ways that require a criminal justice response.

While the legal status of both the Siracusa Principles and the Johannesburg Principles are below those of, for example, the General Comments of the UNHRC, nonetheless both documents should be viewed as highly authoritative statements of best practice on balancing national security and human rights. The UNHRC endorsed the Siracusa Principles the same year that they were issued, and the Johannesburg Principles have been cited approvingly by other key U.N. human rights bodies.²¹ Both the Siracusa and Johannesburg Principles have been directly applied to cases by the European Court of Human Rights and by national-level courts, further testament to their legal stature and authoritativeness.²²

The Hong Kong courts and the SAR government have made direct reference to the Siracusa Principles and the Johannesburg Principles. In 2003, during the debate over the government's proposed Article 23 national security legislation, the government "recognize(d) 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."²³ In at least two cases, Hong Kong courts have cited the Siracusa principles, a practice that should be revisited as a steady stream of NSL cases make their way through the courts.²⁴

19 Johannesburg Principles on National Security, Freedom of Expression and Access to Information, principle 6.

20 *Brandenburg v Ohio* (1969), 395 U.S. 444.

21 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 note of the Johannesburg Principles in its resolutions on Freedom of Expression.

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

23 Security Bureau, "Proposals to Implement Article 23 Broadly Consistent with Johannesburg Principles," (LC Paper No. CB(2)1577/02-03(02)), March 2003.

24 The Siracusa Principles are cited in *HKSAR v Ng Kung Siu and Another* (1999) FACC4/1999, paragraph 52 and *Leung Kwok Hung and Others v HKSAR* (2005), FACC1&2/2005, paragraphs 32 and 71.

Given the Basic Law's direct tie to international human rights law, Hong Kong courts should perhaps look first to both the ICCPR and to authoritative Comments by the Human Rights Committee. At the same time, however, key decisions of the European Court of Human Rights provide invaluable comparative insights on striking the balance between national security and human rights. Though Hong Kong courts not bound by ECtHR decisions, they have at times drawn upon those decisions in their own jurisprudence. In one 2008 case, the Court of Final Appeal noted that ECtHR verdicts are of "high persuasive authority" in Hong Kong.²⁵

Some key ECtHR decisions are particularly relevant since the Court has weighed in directly on how states should handle speech related to territorial independence. In a 2001 decision, *Stankov and the United Macedonian Organisation Ilinden v Bulgaria*, the court ruled that the mere fact that a group of persons was likely to call for autonomy or secession did not justify prohibiting a group's public meetings, since "advocating for territorial changes in speeches and demonstrations does not automatically amount to a threat to the country's territorial integrity and national security."²⁶ In other cases, the Court has also ruled against states that have sought to criminalize peaceful political speech,²⁷ making clear that, generally speaking, states must allow their citizens to speak freely unless they are directly inciting violence in ways that would pass muster under the Johannesburg principle 6 test.

The Hong Kong Court of Final Appeal has also made use of ECtHR decisions in its own verdicts in years past; both the CFA and lower courts should continue this practice as they continue to grapple with the difficult challenges posed by the NSL.²⁸

NSL Article 20 explicitly excludes a requirement that acts include "force or the threat of force," which makes it quite hard to reconcile that provision of the NSL with the free expression protections found in ICCPR Article 19. NSL Article 21, which covers incitement to secession, is also inconsistent with ICCPR Article 19, in that it refers back to the overbroad language of Article 20. Articles 20 and 21 also fail to pass muster under Siracusa Principle 29 and Johannesburg Principle 6, both of which also make direct reference to the use or threat of force or imminent violence.

Article 20 and 21's conflict with the ICCPR raises the question of an internal conflict within the text of the NSL itself: NSL Article 4 makes explicit reference to the ICCPR as applied to Hong Kong, which means that the above standards also apply in all NSL criminal prosecutions. We have argued elsewhere that it remains to be seen whether and how Article 4 will be used by the courts to rein in the NSL's various textual problems.²⁹ Serious doubts persist as to whether Article 4 will provide any significant protection to NSL defendants whose basic human rights are at risk.

The flaws of A20 and 21 are significant, and speak to Beijing's overarching political goals for the implementation of the law itself. That said, those flaws could be at least partially addressed through judicial narrowing in application in specific cases. As we will see below, the court didn't do this in Tong's case. Instead, it further expanded the NSL's vague and overbroad language.

25 *Koon Wing Yee v Insider Dealing Tribunal (2008) 11 HKCFAR 170 [27]*, cited in Carole J. Petersen, supra note 14, p. 234.

26 *Stankov and the United Macedonian Organisation Ilinden v Bulgaria* (2001), ECtHR (First Section), Applications nos 29221/95 and 29225/95. Also cited in Carole J Petersen, (2020) "Article 23 of the Hong Kong 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, pp. 243.

27 ECtHR, *Incal v Turkey* (1998); *Ceylon v Turkey* (1999). Both cases were cited in Carole J. Petersen, "Prohibiting the Hong Kong National Party: Has Hong Kong Violated the International Covenant on Civil and Political Rights?," *Hong Kong Law Journal*, 48(3), 2018, p. 798-9.

28 The Court of Final Appeal, for example, drew upon ECtHR jurisprudence in *Leung Kwok Hung and Others v HKSAR*, [2005] HKCFA 41.

29 Wong and Kellogg, *Hong Kong's National Security Law: A Human Rights and Rule of Law Analysis*, GCAL report, February 2021, pp. 25-26.

THE TONG YING-KIT VERDICT: IGNORING HUMAN RIGHTS

In a way, the High Court's verdict is difficult to parse: it simply ignored virtually all of the human rights protections in Hong Kong law, including the constitutional-level Basic Law protection for free speech, and Articles 4 and 5 of the NSL, which reiterate that human rights protections apply to all NSL cases. At the same time, the court also completely ignored all international human rights covenants to which Hong Kong is a party, and all comparative jurisprudence seeking to balance national security and human rights concerns, including the authoritative UNHRC commentaries and well-known case law cited above.

The High Court's decision to completely disregard Hong Kong's own constitution, and international and comparative human rights law, is deeply perplexing. Hong Kong courts regularly cite to Basic Law human rights provisions, and, as noted above, have rich experience in citing to international treaties and best practice. Simply put, there is no reason why the court should have turned a blind eye to one of the key elements of the case. Its failure to do so leaves its verdict incomplete, and leaves readers wondering whether and how the courts will reconcile NSL charges with fundamental human rights norms in other cases.

Instead of proceeding with a rights-based analysis, the court instead focused heavily on the meaning of the slogan on Tong's banner, *Liberate Hong Kong, Revolution of our Times*. After an extensive discussion, the court concluded that slogan is in fact "capable of inciting others to commit secession," and therefore actionable as a violation of Article 21.³⁰ The court then focused on Tong's intent, and concluded that his actions were such that "he intended to incite others to commit acts separating the HKSAR from the PRC."³¹

To be sure, the meaning of the slogan in question is not totally irrelevant: no one should be criminally prosecuted for inciting secession over speech that has nothing to do with a territory's political status, for example. That said, the court's unduly heavy focus on the exact meaning of the slogan is a bit of a red herring: even if Tong made a more direct and overt statement in favor of political independence for Hong Kong, under the Siracusa and the Johannesburg Principles tests, he would not be guilty of a national security offense unless his speech was both intended to incite imminent violence, and also concretely likely to do so.

The court also should have taken the vagueness of the slogan into account: it is capable of any number of different interpretations, and has been used by many to signal support for peaceful political reform, including reforms that are called for in the Basic Law itself.³² In other words, the secessionist message is in the eye of the beholder. Under the court's broad reasoning, the use of any language — including criticism of government officials and the police, and other forms of core political speech — that could be interpreted as secessionist is now potentially actionable under Articles 20 and 21 of the NSL.

Given the absence of any specific call to violence by Tong, any court adopting the more rigorous international law-based best practice analysis of Tong's actions would almost certainly have to find him not guilty of inciting secession. The violence requirement is meant to ensure that even controversial and provocative political speech is protected, even if some observers or the government itself would find the language objectionable or offensive. Tong's decision to hoist a banner with the slogan cannot really be said to incite violence, however, and therefore highlights the conflict between the Basic Law's rights protections and the overbroad text of the NSL itself. While

30 Paragraph 141.

31 Paragraph 150.

32 Michael C. Davis, "National security trial ruling a setback for human rights in Hong Kong," *South China Morning Post*, August 4, 2021.

the Court of First Instance could not have blithely ignored the text of the NSL, nor should it have ignored Article 27 of the Basic Law. Instead, it should have found a way to give weight to both in its judgment. To the maximum extent possible, the court should have moved to reconcile these very real differences, in ways that ensure that human rights remain at the core of Hong Kong law.

The court's analysis of Tong's intent, which is both an element of the Article 21 offense and the Johannesburg principle 6 test, is remarkably weak. Beyond repeated references to the more provocative aspects of Tong's behavior, including his "repeated challenge to police checklines,"³³ and the fact that he launched his protest on July 1, 2020, on the anniversary of the 1997 handover, the court was unable to demonstrate any particular specific effort by Tong to spur others to *any* specific action, much less acts of secessionary violence. Instead, Tong was engaged in provocative political sloganeering, which, by itself, should not be criminally actionable. Much as the court attempted to conflate Tong's dangerous driving with the display of his banner, inciting secession is a speech crime, and in this case, Tong's actions did not meet the rigorous test posed by the Johannesburg Principles, or by Article 27 of the Basic Law.

Finally, was Tong's action likely to spur other Hong Kongers to engage in secessionist violence, as required by the final prong of the Johannesburg test? It seems highly unlikely that mere political sloganeering, even when combined with Tong's provocative act of display, would be enough to stir others to take violent action. No doubt many in the crowd supported Tong's display of the slogan, an act which has taken on a more charged and confrontational significance since the NSL was passed. And no doubt many in the crowd cheered Tong's efforts to evade the police. But Tong's provocative actions did not in fact stir the crowd to secessionist violence, nor would they easily be categorized as likely to do so in a more general sense.

The court's verdict has clear implications that could resonate well beyond Tong's own case. Its finding that the meaning of the slogan is inherently secessionist, and to infer intent to incite others from the mere act of — admittedly provocative in Tong's case — public display suggests that *any* public display of the now-forbidden slogan could be a violation of NSL Article 21. If adopted by other courts, this reasoning would have significant implications for other pending NSL trials: the police have arrested other individuals merely for displaying or chanting the forbidden slogan, as part of an apparent effort to effectively prohibit its use in Hong Kong in any public venue, at any time.

As this briefing paper was being finalized for publication, the NSL trial of pro-democratic protester Ma Chun-man, also known as "Captain America 2.0," drew to a close.³⁴ Ma was arrested for peacefully chanting various pro-democratic phrases during public rallies, including the same slogan that Tong carried on his banner. Ma's lawyers have sought to defend Ma's actions in part on the basis of Ma's Basic Law right to free expression, a contention which the prosecution has heavily contested. A verdict in Ma's case is expected soon.

A number of other cases, also based on the use of now-forbidden slogan and other language, continue to make their way through the courts. Given the pressure that the courts are under, it is hard to be optimistic about the final outcome in those cases. Sadly, Tong might be the first pro-democratic protester to be jailed under the NSL over his use of a now-forbidden political slogan, but it increasingly looks as though he won't be the last.

33 Paragraph 149.

34 Holmes Chan, "Slogan-chanter wanted to test free speech protections under Hong Kong security law, court told," *Stand News*, October 5, 2021.



COUNTER-TERRORISM AND INTERNATIONAL LAW: THE POST-9/11 EVOLUTION

Over the more than two decades since the September 11, 2001, terror attacks on the United States, both key U.N bodies and individual member states have accumulated a body of knowledge and experience on counter-terrorism law, and the ways to balance counter-terrorism with human rights. Although the international community has yet to reach consensus on a long-stalled Draft Comprehensive Convention on Terrorism,³⁵ nonetheless it has taken several steps toward forging a definition of terrorism that both highlights the seriousness of the crime, and the need for a rigorous and narrow definition of the term that guards against abuse.

³⁵ The Draft Convention is generally considered to have stalled, with no immediate prospects for its resuscitation. Elizabeth Stubbins Bates, *Terrorism and International Law: Accountability, Remedies, and Reform*, Oxford University Press, 2011, p. 2.

Any assessment of NSL Article 24, and of its application in the Tong Ying-kit verdict, needs to be understood through the prism of that body of international and comparative law. To what extent does Article 24 draw from the counter-terror laws of other countries, and from the international law definition? And to what extent did the court in Tong Ying-kit absorb the accumulated learning of the international community on how to balance counter-terror goals with the need to protect human rights? Would Tong be convicted of terrorism if he had committed the same acts in another jurisdiction, one that had adopted a more narrowly-tailored definition of the term?

As this section documents, the answers to these questions are all too clear: although Article 24 does in fact draw upon 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. And 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 and human rights advocates who have spent decades shaping the post-9/11 global norms in these areas.

Although this briefing paper uses international law and comparative best practice as the benchmark against which Article 24 and the Tong Ying-kit verdict should be judged, nonetheless we don't want to suggest that Western countries have consistently lived up to the values, norms, and legal standards that we explore in this section. At the risk of stating the obvious, a number of leading constitutional democracies — including the United States, the United Kingdom, and Canada, among others — have committed serious and enduring abuses in the name of counter-terrorism. All too often, they have failed to bring those who committed those abuses to account. Indeed, the standards and best practices that we point to in this section were born in part out of the mistakes made and outright abuses committed by the US and other countries in the years after 9/11.

In other words, our citation to international and comparative standards here is not meant to gloss over human rights abuses committed by Western states in the name of counter-terrorism. Instead, we want to hold China and the Hong Kong government to the same standards that we believe all countries should be held to.

THE AFTERMATH OF 9/11 — STRUGGLING FOR A WORKABLE DEFINITION OF TERRORISM

Both before and after September 11, 2001, the international community struggled to put forward a legal definition of terrorism. Prior to September 11, the international community took a largely reactive approach, creating new legal instruments to deal with specific elements of terrorism. One expert referred to the 13 anti-terrorism conventions as “operational in nature and confined to specific subjects.”³⁶ Especially prior to September 11, the international community seemed more comfortable dealing with key specific elements of terrorism — including such issues as plane hijackings and the financing of terror groups — rather than tackling the broader questions of how terrorism should be defined in law, and how counter-terror concerns should be balanced with human rights.

The September 11 attacks led to a flurry of activity, both at the international level and by national-level governments around the world. Just weeks after September 11, the United Nations Security Council passed U.N. Security Council Resolution 1373, which called on all member states to (*inter alia*) criminalize terrorism in state law, and to ensure that individuals engaged in such

36 Economic and Social Council, Commission on Human Rights, Promotion and Protection of Human Rights: *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Martin Scheinin, E/CN.4/2006/98, 28 December 2005, paragraph 28.

activity were held fully accountable.³⁷ Resolution 1373 also focused on the need for states to criminalize 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 moved to implement new counter-terrorism laws, or to strengthen existing ones. Member state engagement with the newly-created U.N. Counter-Terrorism Committee remained strong for years after September 11, with over a hundred countries filing at least one report with the CTC by 2006. By 2009, the CTC was able to document a truly global revolution in domestic counter-terrorism law, noting that a number of states had put into place comprehensive counter-terrorism legislation, in line with the Resolution 1373 mandate to do so.³⁸

And yet, all of these legal reforms took place despite the fact that 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 put forward such a definition was directly tied to the fact that terrorism itself is a political crime, one that is tied to core political — even philosophical — questions on the right of the state to maintain its monopoly on the use of force, and to questions of where the line should be drawn between counter-terror laws and international humanitarian law.³⁹

In the absence of a rigorous and narrowly-tailored definition of terrorism, many observers felt that UNSC Resolution 1373's call to action was an outright invitation to political repression and abuse in the name of counter-terrorism.⁴⁰ States could — and, in all too many cases, did — revise their domestic laws to include overly-vague definitions of terrorism. They then moved quickly to use those laws to crack down on political opponents.⁴¹ According to one leading expert, Resolution 1373 quickly became a “handy tool for repressive regimes around the world,” one that led to the promulgation of laws that were used against “political opposition, trade unions, religious movements, minority and indigenous groups, and human rights defenders.”⁴²

It is perhaps not surprising that governments around the world would reach for this particular tool in the immediate aftermath of 9/11. The political environment was such that governments were given much more leeway to impose harsh measures on those they deemed terrorists. At the same time, the increasingly mixed human rights record of Western governments in the conduct of the so-called War on Terror made it much more difficult for them to call out rights abuses by other states.

Perhaps recognizing the negative impact that national and international counter-terror efforts were having on human rights, both the Security Council and other UN bodies started to slowly shift direction as early as 2003. In January 2003, for example, the Security Council 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

37 UNSC Res. 1373, Article 2(e), September 28, 2001. According to the Resolution, states must “ensure that... such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.”

38 Kim Lane Scheppelle, “The International Standardization of National Security Law,” *Journal of National Security Law and Policy*, Vol. 4:437, p. 442-3.

39 Mahmoud Hmoud, “Negotiating the Draft Comprehensive Convention on International Terrorism: Major Bones of Contention,” *Journal of International Criminal Justice* 4 (2006) 1031, pp. 1032-37.

40 As one leading expert notes, in response to the direct encouragement of the Security Council, “there has been a trend to the enactment of broad definitions of terrorism and broad terrorism offences” by states. Kent Roach, “Comparative Counter-Terrorism Law Comes of Age,” in Kent Roach, ed., *Comparative Counter-Terrorism Law*, Cambridge University Press, 2015, p. 4.

41 International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, Geneva, 2009, pp. 124-5.

42 Martin Scheinin, “Impact of post-9/11 counter-terrorism measures on all human rights,” in Nowak and Charbord, eds., *Using Human Rights to Counter Terrorism*, Edward Elgar, 2018, p. 97.

accordance with international law, in particular international human rights, refugee, and humanitarian law.”⁴³ Future Security Council resolutions on terrorism would generally include similar language on human rights, as would documents and statements put out by other key U.N. bodies.⁴⁴

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 as 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 basic due process rights of the accused in all criminal trials related to terrorism.⁴⁵

The Security Council took another step forward in terms of integrating a rights-based approach into its counter-terror efforts with the adoption of Resolution 1566 in 2004.⁴⁶ That resolution both reiterated the need for all counter-terror efforts to comply with international law, and in particular international human rights law. It also gave further guidance to states on their domestic counter-terror laws.

The key provision of Resolution 1566 is Article 3, which takes a significant step forward in terms of a clear and narrowly-tailored definition of terrorism under international law. The definition put forward in resolution 1566 was subsequently endorsed by other key UN bodies, including those with a human rights mandate. In a 2006 report, for example, Martin Scheinin, the then-U.N. Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, approvingly cited Resolution 1566, praising its rigorous and more narrowly-tailored language, as well as its emphasis on a cumulative approach.⁴⁷ Scheinin referred to Resolution 1566 as “indispensable” to states looking to guard against abuse of counter-terror laws.⁴⁸

The definition of terrorism under Resolution 1566 has three prongs. In order to be considered an act of terrorism, an act must (1) have the intent to cause death or serious bodily injury, or the taking of hostages; (2) with the purpose of provoking a state of terror in the general public or in particular sub-groups, intimidating a population, or compelling a government to take an action or refrain from taking action; and (3) also constituting offenses within the scope of international conventions and protocols relating to terrorism. It’s important to note that these three prongs are *cumulative*: all three elements must be satisfied in order for an act to be considered terrorist in nature.⁴⁹

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.⁵⁰ This approach has much to recommend it, in that it ensures 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. As will be discussed in more detail below, Tong’s actions fall into just such a

43 UNSC Resolution 1456 (2003), S/RES/1456 (2003), January 26, 2003.

44 Manfred Nowak and Anne Charbord, “Key Trends in the fight against terrorism and key aspects of international human rights law,” in Nowak and Charbord, eds., *Using Human Rights to Counter Terrorism*, Edward Elgar, 2018, p. 22. Nowak and Charbord put forward an excellent summary of the evolution of both the Security Council and other U.N. bodies on the need to embrace a rights-based approach.

45 For an in-depth analysis of the importance of protecting due process rights in counter-terror trials, see International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism, and Human Rights*, Geneva, 2009, pp. 136-158.

46 UNSC Resolution 1566 (2004), S/RES/1566 (2004), October 8, 2004.

47 E/CN.4/2006/98, December 28, 2005, paragraphs 26-42.

48 *Ibid.*, paragraph 50.

49 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.” Scheinin, paragraph 38.

50 Saul, *Defining Terrorism in International Law*, p. 65. 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.

category: he would have been excluded from prosecution for terrorism if such an exemption had been included in Article 24.⁵¹

Resolution 1566 would have benefited from the inclusion of such a protest-related exception. Still, its three rather stringent prongs, when properly applied, create a reasonably high bar to moving forward with a criminal charge of terrorism in the domestic context.⁵² This definition would exclude, for example, acts of serious violence undertaken in the context of 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 acts of destruction of property, or even low-level acts of violence, that occur in the context of public protest, given that such acts are generally not intended to cause death or serious bodily injury.⁵³

At the risk of stating the obvious, many acts that fall short of this definition may well be criminally actionable under other provisions of a state's domestic criminal law. Low-level acts of spontaneous violence that take place during a public protest, for example, could be actionable under criminal provisions relating to assault or destruction of property. The key is to ensure that, given their politically-charged and highly stigmatizing nature, as well as their heavy criminal penalties, criminal provisions relating to terrorism are only used in the context of genuine acts of terrorism, and not as a tool to deal with other crimes. As one leading expert on counter-terrorism and human rights put it, "(c)rimes not having the quality of terrorism [as defined by resolution 1566], regardless of how serious, should not be the subject of counter-terrorist legislation."⁵⁴

Some scholars have pointed out that the definition of terrorism put forward in resolution 1566, while useful, came a bit late.⁵⁵ After all, the Security Council called on states to strengthen their counter-terror laws in the immediate aftermath of the 9/11 attacks; by the time resolution 1566 was issued, roughly three years later, many states had already taken steps to revise relevant domestic laws, often in ways that were significantly broader than the resolution 1566 definition.⁵⁶

Nonetheless, resolution 1566 definition has had a positive impact on global debates over the need to narrowly define terrorism in domestic law. It remains an important model for states to draw upon in revising criminal laws related to counter-terrorism.

Sadly, in drafting Article 24 of the NSL, the Standing Committee of the National People's Congress largely ignored both resolution 1566, and also the broader literature on counter-terrorism and human rights as relates to domestic criminal law. As a result, the definition of terrorism under Article 24 is vague and overbroad, and all too capable of manipulation and abuse by counter-terror authorities in Hong Kong.

51 Indeed, Hong Kong's own pre-NSL anti-terrorism law, the United Nations (Anti-Terrorism Measures) Ordinance includes just such an exception for certain actions taken "in the course of any advocacy, protest, dissent, or industrial action." Kent Roach, "Old and New Visions of Security: Article 23 Compared to Post-September 11 Security Laws," in Fu Hualing et al., eds., *National Security and Fundamental Freedoms*, Hong Kong University Press (2005), pp. 137-8.

52 The cumulative nature of the definition is key. One expert, writing on his own — very similar in key respects — proposed definition of terrorism, noted that, "(t)he cumulative elements of this proposed definition ensure that the stigma of the terrorist label is reserved only for the most serious kinds of unjustifiable political violence. Its limited application also prevents the symbolic power of the term from being diluted or eroded." Ben Saul, *Defining Terrorism in International Law*, Oxford University Press, 2006, p. 66.

53 Special Rapporteurs letter on NSL, September 2020.

54 Scheinin report, E/CN.4/2006/98 (2005), paragraph 47. In that same document, Scheinin went on to say that "(i)t is essential... to ensure that the term "terrorism" is confined in its use to conduct that is genuinely of a terrorist nature. The three-step characterization of conduct to be prevented — and if not prevented, punished — in the fight against terrorism in Security Council resolution 1566 (2004) is indispensable in that regard." *Ibid.*, paragraph 50.

55 Roach, *Comparative Counter-Terrorism*, supra note 40, p. 14. See also Sudha Setty, "What's in a Name? How Nations Define Terrorism Ten Years After 9/11," 33 U. Pa. J. Int'l L. 1, 55-58 (2011). Setty argues that the U.N.'s course correction on counter-terrorism, while welcome, did little to influence the actions of member states, many of whom continued to make use of vague and overbroad counter-terror laws, often at the expense of human rights.

56 Roach, supra, pp. 692-4. According to Roach, the definitions adopted by the U.K., the European Council, and Egypt have all proved significantly more influential than the resolution 1566 definition; in all three cases, the legal definition of terrorism is troublingly broad.

NSL ARTICLE 24: DEPARTING FROM THE INTERNATIONAL NORM

NSL Article 24 is much broader than the model definition put forward by resolution 1566. First and foremost, Article 24's structure is different: instead of a series of cumulative triggers, all of which must be present in order to move forward with a terrorism prosecution, Article 24 creates an open-ended list of example-like actions that are then linked to core elements of the crime, specifically causing or intending to cause grave harm to society, in order to coerce the central government or the government of Hong Kong, or intimidate the public. The action must also be taken "in order to pursue a political agenda."

These three prongs, plus the action requirement, add up to a much less rigorous definition, one that is much more susceptible to manipulation and abuse.

The most troubling prong is the first one, that of causing or intending 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 capable of manipulation by Hong Kong and Mainland authorities. Importantly, Article 24 also removes resolution 1566's clear intent requirement, replacing it with broader language that includes the actual — including, presumably, accidental or unintended — causing of harm, in addition to the intent to cause harm. This too is a key divergence from resolution 1566, one that proved highly relevant in the Tong Ying-kit verdict.

Unfortunately, Article 24's list of actions that constitute terrorist activity includes both actions that would likely pass muster under resolution 1566, such as dissemination of poisonous or radioactive substances, and also actions that, while potentially criminally actionable, would not rise to the level of terrorism under the resolution 1566 definition. Articles 24(3) and (4), for example, make reference to 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.

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

The other elements of the crime of terrorism under Article 24 include an intent to coerce the Central People's Government or the Hong Kong SAR 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 therefore less capable of 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 1566.⁵⁷

It's worth noting that Article 24 draws on the counter-terror laws of other countries: much of the vague and overbroad language described above can also be found in the laws of the countries that apparently served as a basis for Article 24.⁵⁸ Some of its language appears to be drawn from the definition found in the UK's Terrorism Act, for example. The language in the U.K. law has itself been criticized for being vague and overbroad, and some U.K. politicians have called for the language to

57 Ben Saul, *Defining Terrorism in International Law*, pp. 65-6. For a critique of the inclusion of this prong in a legal definition of terrorism as a crime, see Roach, *The 9/11 Effect: Comparative Counter-Terrorism*, Cambridge University Press, 2011.

58 The Chinese government has publicly referred to its use of comparative counter-terror laws in the drafting of Article 24, and the NSL more generally. For one of many such examples, see letter of the Permanent Mission of the People's Republic of China to the United Nations Office at Geneva, No.GJ/64/2020, October 30, 2020.

be revised in order to guard against abuse.⁵⁹ At the same time, in the U.K. 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 abuse of counter-terror laws, and in ensuring that they are not used to target peaceful opposition figures. Given the extensive impact of the NSL, and the chilling effect it has had on free speech and other basic rights, it's not clear that key institutions could play the same role in Hong Kong today.⁶⁰

International experts on counter-terrorism and human rights have also criticized Article 24's definition of terrorism. In September 2020, for example, a group of prominent U.N. human rights experts noted Article 24's inclusion of damage to physical property as part of its definition of terrorism, and expressed concern that those elements of Article 24 pushed it beyond the definition provided by resolution 1566.⁶¹ Writing just weeks after the NSL was issued, rights group Amnesty International criticized the vague and overbroad nature of all of the NSL's criminal provisions, including Article 24,⁶² and other expert analyses have highlighted Article 24's deviance from international standards and best practice.⁶³

As documented in the section below, Article 24's vagueness had a direct impact on Tong's case, setting a deeply troubling precedent for the first criminal prosecution for terrorism in Hong Kong history. Had Article 24 been more tightly drafted in line with the requirements of resolution 1566, it is much less likely that the prosecution could have secured a conviction against Tong on the terrorism charge.

THE TONG YING-KIT VERDICT: DEFINING TERRORISM DOWNWARD

As the above analysis shows, Article 24's textual flaws are quite serious. But those flaws could have been addressed — and at least partially remedied — by the High Court in its verdict in Tong Ying-kit's case. 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 don't 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 Article 24's vague and overbroad language. Instead, it further stretched the already loose text. Throughout the verdict, the court defined key elements of the crime downward, while at the same time inflating the seriousness and exaggerating the impact of Tong's actions to fit those core elements.

Despite the international community's heavy focus on counter-terrorism and human rights over the past twenty years, the court ignored both international and comparative law on counter terrorism in its verdict. Instead, the court retreated to a series of obscure, quite dated and often less than fully relevant precedents, all in pursuit of a final verdict that will fail to persuade any but Beijing's most ardent supporters. At times, it seems as though the precedents cited by the court were

59 Keith Syrett, "The United Kingdom," in Kent Roach, ed., *Comparative Counter-Terrorism Law*, pp. 168-70.

60 For more on the extensive impact of the NSL on virtually all aspects of public life in Hong Kong, see Wong and Kellogg, *Hong Kong's National Security Law: A Human Rights and Rule of Law Analysis*, Georgetown Center for Asian Law report, February 2021.

61 OL CHN 17 2020, September 1, 2020, pp. 4-5.

62 Amnesty International, "Hong Kong's national security law: 10 things you need to know," July 17, 2020.

63 See, e.g., Kent Roach, "Echoes that Build to a Cacophony: Hong Kong's Security Law Compared to Illiberal Elements of the Security Laws of Liberal Democracies," pre-publication draft on file with author. Roach acknowledges that Article 24 does incorporate some elements of comparative counter-terror laws from other jurisdictions, but notes that the final product "remains very broad"; he rightly concludes that Article 24 will indeed fail to ease public concerns over potential abuse. *Ibid.*, p. 5.

cherry-picked in order to reach a particular outcome. None of the cases cited by the court would be considered by most experts as representing cutting-edge jurisprudence on balancing legitimate counter-terrorism imperatives while protecting human rights.

This failure to grapple with international and comparative law is perplexing, especially given Hong Kong's rich history of cosmopolitan and outward-facing jurisprudence. Indeed, Hong Kong is somewhat unique, in that its constitution, the Basic Law, is directly tied to international law, particularly international human rights law.⁶⁴ The High Court's verdict also represents a missed opportunity: given that Tong's case is the first terrorism trial in Hong Kong history, and given that his was the first verdict issued under the NSL, the court could have made a strong statement on the need to ensure that all NSL verdicts make vigorous use of international and comparative law when appropriate, including international human rights law.

At the core of the verdict is the court's very broad view of one of the key elements of Article 24, that of causing grave harm to society. The court also set a very low threshold for the action prong of article 24(1), that of serious violence against a person or persons. In our analysis, we take each of these elements one by one, and show that the court both adopted broad readings of each of these two prongs, while at the same time embracing 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.

To be fair, 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 a slogan, and by driving in a reckless manner around and through police checklines. For what it's worth, that specific requirement of Article 24 was rightly found to be fulfilled by the court.⁶⁵

It is perhaps surprising that the court did not link Tong's actions to Article 24(5), the arguably broader catch-all provision which refers to "other dangerous activities," but rather to Article 24(1), which refers to "serious violence against a person or persons."⁶⁶ That language more closely tracks with the resolution 1566 definition, even if it falls somewhat short of 1566's 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."⁶⁷ 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 Article 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 court, that Tong was attempting to *evade* the police, and in so doing, continue his protest action. 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 here.

64 Basic Law Article 39.

65 Some scholars have worried that this element, when included in a criminal definition of terrorism, rather than definitionally narrowing the crime, instead opens the door to the abuse: this prong specifically singles out individuals whose actions are politically-motivated, including protesters, activists, and others. See, e.g., Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism*, Cambridge University Press, 2011. While a full analysis of this question is beyond the scope of this briefing paper, nonetheless the potential for the abuse of this prong of the crime of terrorism under Article 24 is a real one.

66 Verdict, paragraph 160.

67 Tong Ying-kit verdict, paragraph 159.

It's worth emphasizing that Tong's actions are almost certainly criminally actionable under other provisions of Hong Kong's criminal law. 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."⁶⁸ Such actions should be taken seriously, but they are the stuff of day-to-day criminal law cases, and not of high-level — and in Hong Kong's case, first-ever — counter-terror prosecutions.

Although the court repeatedly characterizes the violence engaged in by Tong as "serious," the court's own analysis also suggests that the actual level of violence involved in Tong's case was actually quite low. The court is right to point out that a motorcycle can be a deadly weapon,⁶⁹ and no doubt one could imagine fact patterns where a motorcycle is used as a key element of a terrorist attack. But that's not what happened in Tong's case, as evidenced by 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.⁷⁰

This aspect of the court's analysis is especially troubling, given its potential application to future cases. If Article 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 Article 24 terrorism charge. In essence, the court's reasoning on this prong represents a serious watering-down of the action requirement of Article 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 impact 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 harms to embrace a range of other kinds of social and political impacts.⁷¹ The court goes on to conclude that Tong's actions caused "law-abiding citizens to fear for their own safety and to worry about the public security of Hong Kong."

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.⁷² 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 of doing so 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, Tong's reckless driving constituted a "blatant and serious challenge mounted against the police force," one that "will certainly instill a sense of fear amongst the law-abiding members of the public."⁷³ That fear will quickly, the court argues, morph into "apprehension of a breakdown of a safe and peaceful society into a lawless one."⁷⁴

68 Verdict, paragraph 152.

69 Verdict, paragraph 158.

70 As one recent media report noted, the three police officers "were briefly hospitalized, with the most serious injury being a thumb dislocation." Holmes Chan, "Inside the Surreal Trial of the 'Most Benevolent Terrorist in the World,'" *Vice World News*, September 20, 2021.

71 Verdict, paragraph 161.

72 Paragraph 163.

73 Paragraph 162.

74 Ibid.

To be sure, terrorists often strike at symbolic targets, in order to both use violence to communicate a political message, and also 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 message that the state cannot protect either itself or its citizenry. In such cases, criminal prosecution on terrorism charges may well be warranted.

That said, are such dramatic dynamics really 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 would be considered to “instill a sense of fear amongst law-abiding members of the public,” which in turn creates a great harm to society. Confrontations between police and the public are by no means unknown in countries across the world, and are generally subject to criminal sanctions, but absent an intent to cause truly significant harm — a genuine “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.

As noted above, Tong's crashing of his motorcycle into police was almost certainly unintentional, and did not actually cause serious physical harm to the officers who were injured in the incident. In this context, the reaction of the public would likely be much more sanguine, as compared with a direct and premeditated attack on officers of the state, with the intent to cause death or serious bodily harm. Tong's actions simply don't meet that standard.

The court's foregrounding of the role of the police in its verdict is of a piece with a small but growing number of prosecutions in Hong Kong in recent years. In the wake of the 2019 protests, a troubling trend has emerged: in many cases, prosecutors and the courts are highly, even at times perhaps somewhat excessively, attentive to the growing political clout of the police, and seek to prosecute and convict those who challenge the authority of the HKPF.

In one recent case, Hong Kong-based lawyer Samuel Bickett was convicted for assaulting a police officer after intervening to stop an altercation on the MTR, Hong Kong's subway system. Bickett, an American citizen, was both charged with assault and convicted, despite the fact that the police officer did not identify himself to Bickett or others; indeed, the officer denied to onlookers that he was a police officer. The December 2019 incident, and Bickett's subsequent conviction, were seen by many in Hong Kong as sending a signal that the legal system would protect the police, even in cases in which the law and the facts point toward a different outcome.⁷⁵

A similar dynamic may well be in play in Tong's case. If the prosecution and the courts develop a reputation for handling cases involving the police in an especially heavy-handed or punitive manner, the damage to human rights and rule of law in Hong Kong would be immense.

75 Shibani Mahtani, American lawyer imprisoned in Hong Kong speaks out about his treatment, *Washington Post*, September 12, 2021.

NSL ARTICLE 24 AND COMPARATIVE COUNTER-TERROR LAW: DIVERGENCE AND COMMON GROUND

As the above analysis makes clear, the court strays far from international norms and from comparative best practice in its verdict. Simply put, Tong should not have been charged with terrorism, since his actions don't fit the resolution 1566 definition of the term. The decision to prosecute him under Article 24 of the NSL represents an abuse of counter-terror law, one that effectively stigmatizes both Tong himself and also the broader pro-democratic movement in Hong Kong. Sadly, the court's guilty verdict represents just the sort of abuse of counter-terror laws that resolution 1566 — and so many other international instruments and documents meant to better harmonize counter-terror laws with international human rights law — was meant to guard against.

There is one way in which the Tong verdict fits in with comparative post-9/11 counter-terror jurisprudence: it is yet another example of the use of counter-terror legislation to crack down on a government's perceived political opponents, and to send a signal that the government is firmly in charge and will deal sternly with those who it deems as threats to national security, however broadly defined. In the years after 9/11, all too many governments took advantage of the political environment to crack down on domestic critics under the guise of counter-terror. This case fits all too neatly into that ongoing tradition.

Tong is currently pursuing an appeal, which will be heard in the Court of Appeal; the appeal is not yet scheduled. As it considers Tong's appeal, the Court of Appeal should view the facts of Tong's case in the context of international counter-terror laws and comparative best practice, and should ensure that Article 24 is used only to punish individuals who are engaged in actual acts of terrorism, in line with the resolution 1566 definition of the term. Given that Tong's case is the first to be tried under the NSL, and is the first criminal trial for terrorism in Hong Kong history, the court has an obligation to try Tong's appeal with special care: it will set a key precedent that will influence other NSL Article 24 terrorism cases that are already making their way through the courts.



As this briefing paper has documented, the challenges posed by the NSL to the Hong Kong court system are immense. The failure of the High Court’s Court of First Instance to deliver a high-quality verdict in Tong’s case deepens concerns that pressure from the Communist Party and from pro-Beijing politicians in Hong Kong is having a direct impact on judicial outcomes. Continued pressure to deliver guilty verdicts in most or all future NSL cases may push the court system past the breaking point, with potentially wide-ranging consequences for the judiciary’s public legitimacy.

Both Beijing and the Hong Kong government should think twice before taking steps to further undercut judicial independence and the rule of law. As numerous international studies and surveys have documented, Hong Kong's judiciary is widely respected, and its judgments are often cited by other common law courts around the world.⁷⁶ In 2019, for example, Hong Kong was ranked 16th out of 126 countries and jurisdictions in the World Justice Project Rule of Law Index, beating out such countries as the United States, France, and South Korea. The success of the courts in maintaining their independence, their stature, and their commitment to the rule of law have all 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 Hong Kongers themselves 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 has public faith in the rule of law in the SAR.⁷⁷ 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 points) just after the 1997 Handover to 4.5 in July 2021. No doubt some of the drop can be attributed to the system-wide loss of public confidence in Hong Kong's political system in the wake of the 2019 protests,⁷⁸ but it seems likely that broader trends in the administration of justice in Hong Kong are also a core factor driving growing public discontent with the courts.

The conundrum that the courts face is all too clear: as the courts are pressed to deliver ever more favorable verdicts to the government, even at the cost of human rights and the rule of law, they are seen as less institutionally independent, and public trust in the courts declines.⁷⁹ At the same time, if the courts fail to deliver regime-favored outcomes, especially in high-profile cases in which the Communist Party has made its preferences all too clear, then the courts face the very real risk of a backlash, either from the Hong Kong government or from Beijing itself. Over the past two years, pro-Beijing politicians in Hong Kong have called for reforms that would undercut judicial independence.⁸⁰ Senior Communist Party leaders have also made clear that they are willing to limit the power of the courts if necessary.⁸¹

In the past, the courts have used various strategies to balance between competing pressures from Beijing and the people of Hong Kong, including extensive use of comparative and international law, a deep commitment to procedural justice, and a differential approach to cases based on the political imperatives involved.⁸² 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, along with a strong commitment to procedural justice, can signal to the public that the courts value core rule of law principles, and will, when possible, align Hong Kong's jurisprudence with those of other, demonstrably rights-respecting jurisdictions.

The NSL seems almost designed to frustrate these strategies. The NSL's 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

76 Pui Yin Lo, "Impact of Jurisprudence beyond Hong Kong," in Young and Ghai, eds., *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong*, Cambridge University Press, 2014.

77 Eric Yan-Ho Lai, "The Judiciary in Post-Handover Hong Kong," draft paper on file with authors.

78 Julius Yam, "Approaching the Legitimacy Paradox in Hong Kong: Lessons for Hybrid Regime Courts," *Law and Social Inquiry*, Vol. 46, Issue 1 (February 2021), p. 182.

79 In his excellent paper on the subject, Julius Yam refers to this as the "legitimacy paradox" faced by courts operating under non-democratic regimes. Yam, *supra* note 78.

80 Ng Kang-chung, "Hong Kong not an 'independent judicial kingdom': pro-Beijing heavyweight doubles down on reform calls," *South China Morning Post*, January 4, 2021; Primrose Riordan, "Pro-Beijing reforms threaten 'end' of HK's legal system, top lawyer warns," *Financial Times*, February 20, 2021.

81 Jerome A. Cohen, "The Intensifying Pressures to Further 'Reform' Hong Kong's Courts," *The Diplomat*, November 23, 2020.

82 Yam, *supra* note 79, pp. 162-178.

the next year or more, making a delaying or differentiation strategy impossible to implement. As we have documented elsewhere, 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 emphasize procedural fairness as a means to win public support.⁸³ Finally, both the text of the NSL — which, as discussed above, diverges markedly at times from comparative and international standards — and the government's choice of cases have made it virtually impossible thus far for the courts to successfully draw upon comparative sources to rationalize regime-friendly verdicts in ways that would bolster judicial legitimacy.

Thus far, the courts have yet to come up with an effective response to the deep and real challenges posed by the NSL. It seems likely that the judiciary's public legitimacy crisis will continue to deepen, unless and until the courts are able to 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 the courts.

Declining public trust in the legal system in Hong Kong should be viewed as a deeply troubling warning sign for both the Hong Kong government and the Communist Party leadership. It is now clear that the aggressive implementation of the NSL is generating a number of ancillary costs, including deep damage to the institutional legitimacy of the court system. Once squandered, public trust can be extremely difficult to win back, and can make effective governance all the more difficult. The Party leadership should ask itself whether further damage to the court system, and to the broader One Country, Two Systems framework, is truly worth it, especially in the absence of any apparent ongoing threat to national security.

For the court system, the time may come soon to embrace alternative strategies in NSL cases. With roughly 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 only continue, and the suffering inflicted on peaceful protesters, civil society activists, politicians, and lawyers charged with NSL crimes will spread. While there is no easy answer to the NSL-imposed legitimacy paradox that the Hong Kong courts face, one thing is clear: meek continuation of the status quo will only deepen the current crisis, rather than ending it.

APPENDIX

ON SECESSION

Article 20 A person who organizes, 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:

- 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;
- 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
- Surrendering the Hong Kong Special Administrative Region or any other part of the People's Republic of China to a foreign country.

A person who is a principal offender or a person who commits an offence of a grave nature shall be sentenced to life imprisonment or fixed-term imprisonment of not less than ten years; a person who actively participates in the offence shall be sentenced to fixed-term imprisonment of not less than three years but not more than ten years; and other participants in the offence shall be sentenced to fixed-term imprisonment of not more than three years, short-term detention or restriction.

Article 21 A person who incites, assists in, abets or provides pecuniary or other financial assistance or property for the commission by other persons of the offence under Article 20 of this Law shall be guilty of an offence. If the circumstances of the offence committed by a person are of a serious nature, the person shall be sentenced to fixed-term imprisonment of not less than five years but not more

than ten years; if the circumstances of the offence committed by a person are of a minor nature, the person shall be sentenced to fixed-term imprisonment of not more than five years, short-term detention or restriction.

ON TERRORIST ACTIVITIES

Article 24 A person who organizes, 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 organization or intimidating the public in order to pursue political agenda shall be guilty of an offence:

- serious violence against a person or persons;
- explosion, arson, or dissemination of poisonous or radioactive substances, pathogens of infectious diseases or other substances;
- sabotage of means of transport, transport facilities, electric power or gas facilities, or other combustible or explosible facilities;
- 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
- other dangerous activities which seriously jeopardize 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.



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