CENTER FOR ASIAN LAW

GEORGETOWN LAW

Georgetown Center for Asian Law (GCAL)

Submission on Hong Kong Government Public Consultation Document

Safeguarding National Security: Basic Law Article 23 Legislation

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**Chapter 1: Constitutional Duty to Safeguard National Security**

**and**

**Chapter 2: Addressing national security risks and improving the regime for safeguarding national security**

1.1 This submission is an analysis of the Hong Kong government's public consultation document, *Safeguarding National Security: Basic Law Article 23 Legislation*. As the below analysis makes clear, we find the government's proposals highly problematic. If new laws are enacted, and existing laws amended, along the lines put forward in the proposal, we believe that the impact on human rights and the rule of law in Hong Kong will be significant. We are also deeply concerned that the business environment will be affected as well.

1.2 This submission was drafted by the Georgetown Center for Asian Law (GCAL). One of the leading centers for teaching and research on Asian Law in the United States, GCAL has followed developments in Hong Kong quite closely since the 2019 pro-democracy protests. Since the 2020 National Security Law (NSL) went into effect, we have published a series of reports on its implementation. (These reports are all available on our website.) These reports have shown quite clearly that the NSL is a deeply flawed law. The government has used the NSL to crack down on its political opponents, including pro-democracy politicians, journalists, rights lawyers, civil society activists, and others.

1.3 Looking at the current situation in Hong Kong, and taking into account the government's abuse of the NSL and other security laws, **we believe that no new legislation is needed at this time.** Hong Kong faces no known national security threats. Instead, it faces a crisis of confidence in its legal and political institutions, one generated by the government's aggressive implementation of the NSL. **Further legislation will only exacerbate this crisis, and should therefore be avoided.**

1.4 In the analysis below, we refer, at times approvingly, to laws, practices, and jurisprudence in other jurisdictions, including the United States, the United Kingdom, and Australia. Our reference to these laws is not meant to suggest that these state governments are above criticism when it comes to national security and human rights. The United States, for example, committed serious and sustained rights abuses in its prosecution of the so-called war on terror after the September 11, 2001 attacks on the United States. An analysis of the failures of the United States and other countries is beyond the scope of this submission. But we want to signal our awareness of those failures briefly here. If anything, the Hong Kong government should learn from these

mistakes, and tailor any new national security laws carefully, in line with international human rights law and comparative best practice.[1]

1.5 In general, we find many of the parallels that the Consultation Document draws between its proposals and the laws of other countries to be disingenuous at best, or willfully misleading at worst. For all of their failures, most of the states named in the Consultation Document have not used their national security laws to jail opposition politicians, for example, or to close down media outlets that have published pieces critical of the government. Nor have the countries named in the Consultation Document claimed jurisdiction over foreign citizens based overseas, whose only alleged crime is to lobby their own government over rights abuses taking place elsewhere. Where possible, we try to draw attention to the Hong Kong government's unfortunate efforts to draw incomplete or even inaccurate parallels between its proposals and the laws of other countries.

1.6 One clear lesson that emerges from a comparative analysis is the importance of constitutional rights protections, and the role of the courts in protecting basic rights. Here, Hong Kong's own recent experience is instructive: quite simply, the courts have not been able to act as a check on government power, and have not been able to integrate Basic Law human rights protections into their national security verdicts in any outcome-influencing way. The numbers speak for themselves: the government can boast a 100% conviction rate in national security cases, and has seen virtually all key procedural decisions go its way as well. This track record does not bode well for any checks on expanded government power if – or, more likely, when – new Article 23 legislation goes into effect.

1.7 Another reason why the government should delay its Article 23 proposals: neither Hong Kong civil society nor the Legislative Council are in a position to push back against the government's preferences, or even to offer a critical assessment of the government's proposals. The government's NSL-fueled crackdown has left civil society in deep disarray: according to a forthcoming assessment by GCAL, over 100 civil society groups and media organizations have been shut down over the past three and a half years.[2] Many of the groups that remain open are a shadow of their former selves, and would probably face government harassment or even criminal prosecution if they were to put forward a full-throated critique of the Consultation Document or the likely soon-to-follow draft legislation.

1.8 The Legislative Council is also not currently up to the task of scrutinizing the government's legislative proposals. LegCo has never been a fully democratic institution.

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[1] For an analysis of Hong Kong's failure to draw upon international human rights law and comparative best practice in the context of the National Security Law, see Thomas E. Kellogg and Eric Yan-ho Lai, *The Tong Ying-kit NSL Verdict: An International and Comparative Law Analysis*, GCAL Briefing Paper, October 20, 2021.

[2] *Anatomy of a Crackdown: The Hong Kong National Security Law and Civil Society*, GCAL report, forthcoming, March 2024.

Remedying that shortcoming was part of what the 2019 pro-democratic protest movement was about. But after wide-ranging changes to the selection process for Legislative Councilors, the body is now fully bereft of pro-democratic politicians. The now 90-member body is more or less entirely composed of politicians from the pro-Beijing camp. In practice, the Legislative Council has not acted as a check on executive authority, and has largely rubber-stamped key bills that the government has put forward since the NSL went into effect.

1.9 We fear that it is this very situation – one of government dominance over both the legislature and the courts, and civic and media acquiescence – that led the government to put forward its Article 23 proposals at this time. In any case, it seems almost certain that the government's legislative bill will sail to final passage without any objection, or even meaningful debate and amendment, from LegCo. Public discussion within Hong Kong will also be a faint shadow of the broad-based public engagement and mobilization that emerged in 2003, the first time that the government tried to legislate under Article 23.

1.10 Given the deeply weakened domestic opposition, it seems clear that the government's Consultation Document was drafted with a very different audience in mind: the Chinese Communist Party (CCP) leadership in Beijing. The Consultation Document makes regular use of Mainland Chinese political terminology, including repeated reference to the alleged threat of "color revolutions," and the need to deal with "anti-China" groups and actions. Given that the CCP regularly uses such terminology to crack down on its own peaceful domestic critics, the use of such terms in the government's own Consultation Document is deeply disturbing.

1.11 It is also unfortunate that the government has approvingly cited the PRC's ever-expanding "holistic" conception of national security, dutifully listing the twenty issue areas to which the concept has been applied.[3] Over the past decade, this protean conception has been used as the justification for a range of rights abuses, ranging from the construction of mass internment camps in Xinjiang to the crackdown on civil society activists and rights lawyers.

1.12 At times, the Consultation Document also seeks to import into Hong Kong law Mainland Chinese legal language, which would be a nearly-unprecedented and deeply disturbing move with profound implications for Hong Kong's autonomy under the One Country, Two Systems framework. The section on state secrets, for example, uses language that parallels the Mainland's recently-revised State Secrets Law,[4] which has been used to censor media outlets and online commentary by the general public. This section of the law is discussed in more detail below.

[3] Consultation Document, paragraph 1.4.

[4] Kelly Ho, "Hong Kong's homegrown security law seeks to define 'state secrets' along China's legislative line," *Hong Kong Free Press*, January 30, 2024.

1.13 Last but not least, we believe that the consultation process announced by the government is inadequate. Given the breadth and likely impact of the government's proposals, a one-month consultation period is too short, and compares unfavorably with the three-month consultation period that the government put forward in 2003. If the government does move forward with new legislation, it should publish that draft Bill for public comment as well, and should signal to all sectors of society – including academic experts, civil society groups, business interests, and legislators themselves – that robust criticism is both welcome and a constitutional right.

1.14 There are some positive elements in the Consultation Document. The government repeatedly refers to the need for national security legislation to protect human rights and to respect the rule of law. The government also mentions Hong Kong's obligations under the International Covenant on Civil and Political Rights, which is welcome. More specifically, the government notes that it decided against a registration scheme for foreign NGOs operating in Hong Kong. These positive elements are welcome, but sadly they are few and far between. And they fail to influence the overall, extremely negative, tenor of the Consultation Document as a whole.

1.15 That said, we find the Consultation Document's references to human rights and the rule of law to be strange and self-contradictory. Overall, the Consultation Document is schizophrenic: with several references to "color revolutions" and "anti-China destabilizing elements," it makes clear that the law will be used to crack down on the government's political opponents, in ways that violate basic human rights. But at the same time, it makes repeated reference to the laws of other countries, including rights-respecting jurisdictions that have much more robust and effective constitutional rights guarantees, which would generally prevent the weaponization of national security laws to attack domestic critics. The Consultation Document also claims to protect human rights and the rule of law, even as it uses coded language to signal that it won't allow human rights guarantees to get in the way of the ongoing national security crackdown.

1.16 This openly contradictory approach is probably related to the Hong Kong government's efforts to engage different audiences. First and foremost, the Consultation Document signals to Beijing that the Hong Kong government will continue to use national security laws, including the proposed new legal tools that will be created by the Article 23 legislation process, to crack down on peaceful critics of the Hong Kong government and Beijing. At the same time, the government seeks to signal to the international community that it will continue to respect human rights and maintain Hong Kong's world-class legal system, and that its Article 23 proposals are in line with comparative norms and best practice.

1.17 These conflicting promises can't both be true. It seems all too clear which of the conflicting promises the Hong Kong government will honor: its aggressive implementation of the NSL over the past three and a half years shows that it will follow

Beijing's orders to imprison or silence individuals that Beijing has deemed a threat. In this context, the government's human rights and rule of law promises should be seen as mere lip service, without any functional legal effect. From a legal perspective, absent efforts to strengthen human rights safeguards, these elements of the Consultation Document are all but meaningless.

1.18 In the sections below, we seek to analyze the government's legislative proposals. This assessment is by no means comprehensive: given time and resource constraints, we are not able to include an analysis of several proposals in the Consultation Document that raise serious concerns. Still, we have tried to cover many of the core flaws.

1.19 As this analysis makes clear, we believe that the government should refrain from any new legislation on national security law at this time. Still, we recognize that the government will likely move forward with its legislative proposals very soon. We remain ready to answer any questions you may have related to this submission, or questions related to national security law and human rights more generally. We can be reached via email at lawasia@georgetown.edu.

**Chapter 4: Insurrection, incitement to mutiny and disaffection, and acts with seditious intention**

2.1 The Hong Kong government proposes to revise the existing Crimes Ordinance language on "incitement to mutiny," "incitement to disaffection," and "seditious intention." It also proposes to create a new offense of "insurrection," which it suggests will be used to "deal with acts of serious civil disturbance within China." We believe that all of the proposed changes are unnecessary and present very real concerns from a human rights and rule of law perspective. **We therefore recommend that the government refrain from moving forward with these proposals at this time.**

2.2 In this section, we will focus our comments on the proposed changes to seditious intention in the Crimes Ordinance. While we have concerns about all of the proposals put forward in Chapter 4, nonetheless we believe that it is highly likely that the changes to the seditious intention language will be put to use much more often by the Hong Kong government. As the past three and a half years have shown, the sedition provision of the Crimes Ordinance has become a key government tool to suppress peaceful political speech, in violation of the human rights protections of the Hong Kong Basic Law, and also in clear contravention of Hong Kong's obligations under the International Covenant on Civil and Political Rights (ICCPR).

2.3 Sedition has become a core tool in the ongoing national security crackdown: as GCAL has documented, sedition is now a more regularly-charged crime than the four core NSL crimes.[5] During the third year after the NSL's passage, for example, a full eighty-five percent of arrests for national security crimes – including both arrests for sedition and for the four NSL crimes – were for sedition. All individuals charged by the government with sedition have been convicted, a trend that shows no sign of ending anytime soon.

2.4 Sedition is almost uniformly used to arrest and imprison individuals engaged in peaceful acts of expression, including peaceful criticism of the government. In March 2023, for example, three individuals – Alan Keung Kai-Wai, Alex Lee Lung-yin, and Cannis Chan Sheung-yan – were sentenced by a Hong Kong court to between five and ten months in prison, after being arrested for selling books about the 2019 protest movement. Others have been arrested and charged with sedition for chanting protest slogans in public, clapping their hands in court, or possessing or distributing pro-democracy or human rights-related materials.

2.5 The proposed revisions to the seditious intent provisions expand the scope of the crime of sedition, and clarify its coverage: the government's proposed revisions would directly reference the Hong Kong legislature and the judiciary, as well as all political and legal institutions on the Mainland (what the Consultation Document refers to as "the

[5] Thomas Kellogg and Charlotte Yeung, "Three Years in, Hong Kong's National Security Law Has Entrenched a New Status Quo," *ChinaFile*, September 6, 2023.

fundamental system of the State established by the Constitution").[6] The expanded language also covers efforts to "induce hatred or enmity amongst different residents of the HKSAR or amongst residents of different regions of China." The existing language covers only efforts to "incite disaffection" among citizens and residents of the Hong Kong SAR.

2.6 It's possible that the government's proposal to expand the scope of the sedition provision is meant to serve a key signaling function: going forward, it may focus more of its national security resources on speakers who are critical of the Hong Kong Legislative Council, or those who criticize Mainland officials and institutions. Such an approach reflects the evolving situation in Hong Kong, especially given the government's repeated references to "soft resistance" to threaten speakers and ideas it doesn't like, including relatively non-controversial policy proposals related to non-sensitive matters.

2.7 Shielding the Legislative Council from criticism may be a particularly central goal. Since the new Legislative Council was convened in January 2022, for example, concerns have been raised over the quality of its work. Some media outlets have raised questions over whether some pro-Beijing legislators are showing up to debate and vote on proposed new laws. It's possible that the Hong Kong government, rather than engaging with such constructive criticisms, may seek to use the revised and expanded sedition provision to threaten LegCo's critics, or even to arrest and prosecute them.

2.8 In any case, the proposed expansion of sedition suggests that the government plans to continue to use the law to police and punish free expression in Hong Kong. If so, this development is unfortunate: such a move would go against the recommendations of international human rights bodies that have directly called on the Hong Kong government to repeal the sedition provision, in line with its finding that the law is impermissibly vague and can be used to limit free expression. As recently as November 2022, The UN Human Rights Committee, the expert body responsible for monitoring state implementation of the International Covenant on Civil and Political Rights (ICCPR), called on Hong Kong to repeal the law.[7] Instead, the government's proposed amendments signal a desire to keep the law both on the books and in regular, active use.

2.9 The government's proposal to broaden the crime of sedition also goes against the global trend of abolishment of the crime. The UK Parliament abolished the crime in 2009,

[6] Consultation Document, paragraph 4.8. We believe that the Chinese Communist Party, as the governing party of the PRC that is at the core of China's governing system and whose role is enshrined in the state constitution, would also likely be covered by this proposed language.

[7] Human Rights Committee, Concluding observations on the fourth periodic report of Hong Kong, China, CCPR/C/CHN-HKG/CO/4, November 11, 2022.

finally following up on a recommendation put forward by the Law Commission in 1977.[8] Seven other Commonwealth states have also repealed their sedition laws, including Kenya, Ghana, New Zealand, Jamaica, the Maldives, Sierra Leone, and Singapore.[9] In many of these cases, officials and elected representatives advocating in favor of repeal directly cited the impact of sedition laws on free expression as the key reason to strike the law from the books. Hong Kong should follow the example of these states, and abolish its own colonial-era sedition provision.[10]

2.10 Because the sedition provision of the Crimes Ordinance serves no legitimate purpose, and has only been used to crack down on free expression, **GCAL recommends that the Hong Kong government should not move forward with the proposed amendments on seditious intention. Instead, the Hong Kong government should repeal the sedition provision of the Crimes Ordinance in its entirety.**

2.11 The government's Consultation Document analysis also argues that a force requirement is not needed, even for the proposed expanded sedition crime.[11] This point of view goes against comparative best practice: those rights-respecting states that have kept sedition crimes on their books have generally included a force requirement. The United States, for example, has retained the crime of seditious conspiracy, but that crime includes a force requirement, and cannot be applied to mere speech acts.[12] If the Hong Kong government is determined to keep the crime of sedition on its books, then **GCAL recommends that the law be amended to include a force requirement, in line with comparative best practice among states that have retained a crime of sedition.** Reference to U.S. laws and recent caselaw related to seditious conspiracy and to insurrection may serve as a useful model in this regard.[13]

2.12 Even where sedition laws as legislated do not include a force requirement, the common law position at the Commonwealth level now suggests that the force requirement be included when considering whether a seditious act has taken place.[14]

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[8] United Kingdom Law Commission Working Paper No. 72 (1977), paragraph 78. The Law Commission concluded that the crime of sedition was ill-defined and unnecessary, and that its use could be seen as potentially "political" in nature.

[9] Adam M. Smith et al., *The Crime of Sedition: At the Crossroads of Reform and Resurgence*, TrialWatch Fairness Report, April 2022, pp. 8-9.

[10] For more on the history of the sedition provision's colonial-era history and its recent revival, *see* Eric Yan-ho Lai, "Hong Kong's edition law is back," *The Diplomat*, September 3, 2021. For a broader history of the use of law as a censorship tool in Hong Kong, *see* Michael Ng, *Political Censorship in British Hong Kong: Freedom of Expression and the Law (1842-1997)*, Cambridge University Press, 2022.

[11] Consultation Document, paragraph 4.8(c).

[12] USC 18, section 2384. In applying section 2384, U.S. courts have generally held that a conviction for seditious conspiracy requires that an individual "conspire to use force, [and] not just advocate… the use of force." *U.S. v. Rahman*, 189 F. 3d (1999), p. 103.

[13] *See, e.g.*, "Court Sentences Two Oath Keepers Leaders on Seditious Conspiracy and Other Charges Related to U.S. Capitol Breach," U.S. Justice Department press release, May 25, 2023.

[14] *Attorney General of Trinidad and Tobago v. Maharaj*, UKPC 36 (2023).

2.13 Last but not least, the government also proposes to stiffen the criminal penalties for the crime of sedition. We believe that such a proposal is deeply misguided. Such a move would allow the government to more heavily punish individuals merely for exercising their basic right to free expression. Heavier criminal penalties could also lead to a stronger chilling effect on individuals who fear that their peaceful criticism of the Hong Kong government or the central government in Beijing could be viewed as seditious. Given the deleterious impact that such a move would have on free expression in Hong Kong, **we recommend that the government should not move forward with expanded criminal penalties for sedition at this time.**

2.14 In an earlier analysis of the Hong Kong government's use of the NSL and the sedition provision of the Crimes Ordinance, GCAL posited that the government was turning to the sedition provision with greater frequency in part precisely because of its lesser penalties: the government could enforce speech-related red lines without having to use the heavier stick of one of the four core NSL crimes.[15] The move to increase the criminal penalties for sedition may suggest that the government is no longer content to merely punish speech it doesn't like with prison terms of up to two years for a first offense. Instead, the government may be seeking to more strongly curb speech that is critical of the government. We fear that such an effort may well succeed: a move to increase the criminal penalties for sedition would likely induce more self-censorship in Hong Kong. More importantly, such a move would constitute a major step backward for free expression in the SAR.

[15] Kellogg and Yeung, "Three Years in, Hong Kong's National Security Law…", *ChinaFile*, September 6, 2023.

**Chapter 5: Theft of State Secrets and Espionage**

*State Secrets*

3.1 Chapter 5 of the Consultation Document proposes a significant expansion of the Hong Kong government's classification scheme, modeled on the PRC's Safeguarding State Secrets Law. Chapter 5 also proposes an expansion of the crime of espionage. We believe that these proposals, if enacted, could be used to criminalize peaceful political activity, and also to attack foreign-based non-governmental organizations and foreign citizens. Given their extremely vague overbroad nature, these proposals, if enacted, will be highly damaging to Hong Kong's status as a global media and finance hub: they will increase legal and political uncertainty for local and international media outlets operating in Hong Kong, and will also make it more difficult for local and international businesses to fulfil their basic auditing and transparency requirements, as required by leading equities markets in the U.S. and elsewhere. **We therefore recommend that the government make no changes to its laws governing secrecy and official classification at this time, including the Official Secrets Act.**

3.2 The government's proposals are based on a false premise: that Hong Kong's classification regime should mirror that of Mainland China's. "All types of state secrets should be protected in every place within one country," according to the Consultation Document.[16] But the core element of the One Country, Two Systems framework is a toleration of very different legal systems: Beijing's promise of autonomy to Hong Kong includes the acknowledgment that the SAR's legal institutions and specific laws can and should look very different. China's state secrets regime is deeply flawed, and is regularly used to keep vital information from the public, including information regarding ongoing public health and safety threats. State secrets laws have also been used to crack down on the government's critics. Such laws simply do not mesh with Hong Kong's liberal character and common law legal system, and therefore should not be imported into Hong Kong law.

3.3 The broad classification categories put forward in the Consultation Document are based on China's Safeguarding State Secrets Law.[17] That law has been used to maintain a black box-like system of government, in which a lack of transparency is the rule, rather than the exception.[18] This system stretches back to the founding of the People's Republic of China (PRC) in 1949, and has proved resistant to Reform-era reform efforts meant to

[16] Consultation Document, paragraph 5.7.

[17] To be fair, the Hong Kong proposal does not include a catch-all category of state secrets, "other secret matters determined by the administrative departments of state security." John Burns, "When secrecy can spell disaster: Hong Kong's new security law must protect whistleblowers," *Hong Kong Free Press*, February 11, 2024. Still, this slight narrowing, though welcome, is likely to be immaterial: the other broad categories of classification will give the Hong Kong government more than enough legal room to classify any and all materials as they see fit.

[18] For an authoritative assessment of China's state secrets system, see *State Secrets: China's Legal Labyrinth*, Human Rights in China report, 2007.

increase state transparency, including the adoption of open government information laws and open budget laws, all of which have failed to alter the fundamental nature of China's closed system of government. Under Xi Jinping, the Chinese system has become even less transparent: an official database of court judgments, for example, has been dramatically scaled back, with millions of verdicts removed from public view in recent years.[19]

3.4 The State Secrets Law is also a tool to punish those who criticize the CCP, including those who leak information that is embarrassing to local or national officials. Under Article 111 of China's Criminal Law, individuals who disclose state secrets can be sentenced to 5 to 10 years in prison; in serious cases, the individual can be imprisoned for 10 years to life. The law has been used to regularly crack down on activists and private citizens who have disclosed information that was embarrassing to the government.

3.5 In 2014, for example, state security officials in Beijing detained prominent journalist Gao Yu, alleging that she had violated China's State Secrets Law. Gao was later sentenced to 7 years in prison, apparently for sending a Communist Party document, known as Document No. 9, to overseas journalists.[20] The document contained no sensitive national security information, and summaries of it had already appeared on Party-run websites. Instead, the document referred to the Party's efforts to crack down on the domestic circulation of key liberal ideas, including books and articles about human rights, democracy, and constitutionalism.

3.6 In recent years, the government has used the State Secrets Law to target foreign nationals engaged in journalism or research: former Chinese state television journalist Cheng Lei, for example, was detained in 2020 over alleged violations of the State Secrets Law. Though information regarding her alleged crimes remains scarce, Cheng apparently broke a press embargo on a government briefing by a few minutes, leading to her years-long ordeal. Cheng, an Australian citizen, was detained for roughly three years before being allowed to return to Australia in October 2023. According to press reports, her prolonged detention was tied to diplomatic and trade tensions between China and Australia.[21]

3.7 If Hong Kong follows through with its proposal to adopt a law similar to the Mainland's Safeguarding State Secrets Law, we fear that a similar structure of non-transparency will follow: what was once a dialogue between government and the governed, mediated in part through a free press, academic and think tank research, and expert commentary, will instead become a stilted and partially stifled conversation, conducted in the shadow

[19] Luo Jiajun and Thomas E. Kellogg, "Verdicts from China's Courts Used to Be Accessible Online. Now They're Disappearing," *ChinaFile*, February 1, 2022.
[20] Chris Buckley, "China to Release Journalist Gao Yu From Prison Over Illness," *New York Times*, November 26, 2015. Gao released on health grounds.
[21] Alexandra Stevenson, "China Releases Australian Journalist Three Years After Arrest," *New York Times*, October 11, 2023.

of the bulk of information that has not been disclosed to the public at large. Government officials will only release information to the public when it is in the government's interest to do so, leaving the public very much in the dark regarding much of their own government's day-to-day workings and decisions.

3.8 We also fear that Hong Kong's once-vibrant media scene, already deeply wounded by the NSL, will be further curtailed by the threat of prosecution under new state secrets criminal provisions proposed by the government. Once routine disclosure of government and legislative policy discussions, including by journalistic platforms and academic researchers, could be subject to criminal sanction, regardless of whether such disclosures are genuinely damaging to national security or not. Given the broad scope of the proposed state secrets provisions put forward by the government, day-to-day reporting on internal government economic policy discussions, for example, could be prosecuted under the new law. The chilling effect on the media would be significant.

3.9 New state secrets laws modeled on the PRC Safeguarding State Secrets Law will also likely damage the informational transparency that underpins Hong Kong's status as a global business hub. This concern is borne out by an analysis of the impact of the PRC State Secrets Law on business transparency in Hong Kong and China.

3.10 For over a decade since the 2000s, Hong Kong and Mainland China auditors of U.S.-listed Chinese companies resisted producing their audit papers to the U.S. Public Company Accounting Oversight Board (PCAOB), on the basis that compliance with PCAOB's requests would lead the auditors to violate China's State Secrets Law. It took until 2022 for China Securities Regulatory Commission (CSRC) and the PCAOB to reach agreement for the auditors to give some access to its papers to PCAOB,[22] which meant that the identification of shortcomings in auditor standards during the period since the late 2000s was significantly delayed.[23] It is too early to tell whether the 2022 agreement will fully resolve the problem.

3.11 We therefore fear that the implementation of a Mainland-style state secrets law in Hong Kong could create a further barrier to transparency among Hong Kong-based companies and professional services firms. The breadth and vagueness of the term "state secrets" creates perverse incentives for these firms to decline to make even those disclosures required by relevant foreign regulatory regimes.

3.12 Further, Hong Kong courts and financial regulators that previously fought the use of China's State Secrets Law by companies to resist their disclosure obligations may change

[22] *See* Public Company Accounting Oversight Board, *PCAOB Secures Complete Access to Inspect, Investigate Chinese Firms for First Time in History*, December 15, 2022; Soyoung Ho, "U.S. and China Sign Historic Agreement on Audit Firm Supervision," Reuters, August 29, 2022.

[23] *See, e.g.*, Public Company Accounting Oversight Board, "Imposing $7.9 Million in Total Fines, PCAOB Sanctions Three China-Based Firms and Four Individuals in Historic Settlements," PCAOB press release, November 30, 2023.

course if a similar law is adopted in Hong Kong.[24] Such developments would significantly undercut Hong Kong's status as a global financial hub, and make it more difficult for Hong Kong-based companies to maintain their role as a gateway between China and the global business community.

3.13 In addition to PRC laws, the government's state secrets proposals also reference the laws of other states, including the UK, Australia, the United States, and others. While reference to comparative best practice is always welcome, such references must be rigorous and fact-based in order to shed light on new legislative proposals. Unfortunately, that is not the case with the government's official secrets proposals: generally speaking, the government's references to the laws of other jurisdictions relating to disclosure of protected information are largely inaccurate. Given the extensive research resources that the Hong Kong government has at its disposal, we fear that the references to the laws of other countries are, at best, disingenuous, and at worst, intentionally misleading.

3.14 Take, for example, the government's reference to Section 1 of the United Kingdom National Security Act 2023.[25] It is true that the UK National Security Act (NSA) defines protected information somewhat broadly, along the lines laid out in the Hong Kong government's Consultation Document. That said, obtaining or disclosing protected information is only an offense under the UK National Security Act if such action is taken on behalf of a "foreign power," which the Act clearly defines as limited to state actors or political parties that are the governing parties of a state.[26] Foreign non-governmental organizations engaged in peaceful political activity – and that are, generally speaking, independent of state governments – would not be covered by this definition. Any such limitation to actions taken on behalf of state governments or governing political parties is absent from the Hong Kong government proposal. The Consultation Document also declines to discuss why this key element of the UK crime goes unmentioned, even as the Hong Kong government seeks to draw broader parallels between its proposals and those of other jurisdictions like the United Kingdom.

3.15 During the debate in the United Kingdom over the drafting and passage of the National Security Act, the scope and meaning of the term "foreign power" was widely debated. Several media organizations and free expression groups, for example, expressed concerns that normal journalistic activity could be covered by legal reforms that eventually became the National Security Act.[27] In particular, several groups worried that a vague and overbroad definition of "foreign power" could include foreign non-governmental groups that have no ties to a foreign government. This concern was noted

[24] *See, e.g.*, *Securities and Futures Commission v Ernst & Young* [2015] 5 HKLRD 293.
[25] Consultation Document, paragraph, 5.4(a).
[26] UK National Security Act 2023, sections 31-32.
[27] UK Law Commission, *Protection of Official Data Report*, September 2020, paragraph 3.21. For the Law Commission's excellent discussion of the need for an appropriately narrow definition of "foreign power," drawing heavily on submissions by media organizations and non-governmental organizations, see pp. 24-30.

by the UK Law Commission in its study of the proposed National Security Act, and was adopted in its recommendations to the UK government. As noted above, this narrower definition was included in the final version of the NSA.

3.16 It seems impossible to imagine that the Hong Kong government did not review the extensive paper trail of legislative recommendations and commentary put forward by various actors as part of the debate over the UK National Security Act. We find the omission of references to this important element of the debate to be highly selective, and also deeply disturbing.

3.17 In any case, we recommend that no expansion of the Hong Kong government's existing laws is needed at this time. If the government does decide to move forward with reform of its official state secrets laws, then we recommend that any criminal provisions related to acquisition, possession, or disclosure of protected material include a requirement that such acts be **undertaken on behalf of a foreign power,** and that the **definition of a foreign power be narrowly defined to encompass only foreign governments and foreign political parties that are the governing political party of a state.**

*Espionage*

3.18 The government also proposes to revise the criminal offense of espionage. States can, of course, pass laws to criminalize espionage. The problem with the government's proposal is that it can be easily used to crack down on peaceful civil society activity. Under the government's proposal, certain acts that are done on behalf of, or in "collusion" with, an "external force" can be considered espionage. As the government makes clear, the definition of external force includes not just a "government of a foreign country," but also an "external political organization," including, presumably peaceful political non-governmental organizations engaged in lobbying efforts related to Hong Kong human rights and the rule of law.[28]

3.19 The acts covered by the proposed offense include speech acts, such as working with external forces to publish "statements of fact" that are "false or misleading to the public."[29] This vague language could easily be used to target individuals or organizations in Hong Kong that circulate documents or analyses that the government doesn't like, as long as those documents are published by foreign NGOs. We fear that the language is so broad that it could also cover news organizations that report on the work of Hong Kong diaspora groups.

3.20 The government makes reference to the laws of other countries in its discussion of its espionage proposals, but these parallels are largely inaccurate. In some cases, they seem to be deliberately disingenuous or misleading. The government cites Sections 3 and 17

[28] Consultation Document, paragraph 5.19.
[29] Consultation Document, paragraph 5.20(b).

of the UK National Security Act 2023, for example, in support of its proposed new offense of receiving support from external intelligence organizations. As the Hong Kong government makes clear in its Consultation Document, "external intelligence organizations" includes "an organization established by an *external force*."[30] (Emphasis added.) As a result, almost any form of contact with foreign NGOs, including those engaged in peaceful political activity, can be subject to criminal sanction, including membership, donation, or receiving financial support.

3.21 The UK law only covers foreign governments and governing political parties. Under Section 3 of the UK National Security Act 2023, individuals can be charged with a crime if they "materially assist" a "foreign intelligence service." The phrase *foreign intelligence service* is much less capable of manipulation than *external force*. At the same time, Section 3 also makes clear that a foreign intelligence service must be acting on behalf of a "foreign power," which the law defines as a foreign government or a political party that is the governing party of a foreign government. In other words, *genuine state action or participation* is required under Section 3 of the UK National Security Act. Presumably by design, such state action or involvement is *not* required by the Hong Kong government's Consultation Document proposals.

3.22 To be sure, the UK National Security Act could be improved: the fact that it is substantially narrower than the Hong Kong government's Consultation Document proposals does not make it a perfect law. But it simply does not define espionage in the vague and overbroad way that the Hong Kong government seeks to. Indeed, in its public discussion of its proposals, the UK government made clear that "legitimate acts, such as journalism, or forms of civil society activity" are not covered by the new law.[31]

3.23 Even the UK government's critics seem to agree that the law does not generally target contacts between UK citizens and foreign NGOs, including foreign NGOs that are critical of the UK government. Instead, the law's critics expressed more targeted concerns that some forms of journalistic and civil society activity that are, for example, funded by foreign government-affiliated foundations or foreign aid and development departments, could be covered by the law.[32] The UK government specifically addressed this much narrower concern with changes to the text of the proposed law.

3.24 No doubt some UK-based groups continue to have concerns about the UK National Security Act. But the fact remains that the law's provisions cannot easily be abused to cover peaceful political activity, including acts of expression and association that are protected by international human rights law. And if the British government does seek to use the law to attack its political enemies, then the courts would be able to push back

[30] Consultation Document, paragraph 5.22, footnote 46.
[31] U.K. Government Home Office, *Journalistic freedoms: National Security Bill factsheet*, February 12, 2024.
[32] *See, e.g.*, Campaign for Freedom of Information and Article 19, "Briefing for Commons 2nd Reading of the National Security Bill on June 6, 2022."

against any such ill-conceived effort, applying the core human rights protections to limit the scope of the law. As we noted above, the Hong Kong courts have not been able to use Basic Law human rights provisions to limit the scope of the National Security Law, and we fear that Hong Kong judges would similarly struggle to limit the government's use of any new Article 23 criminal provisions.

3.25 **Our primary recommendation on espionage is that the government leave the existing law as-is, given that the government does not face any new security threats at this time.** Failing that, we recommend that the government **narrow its espionage proposals,** and make clear that any proposed crime of espionage be linked to a **foreign state actor, or governing political party.**

**Chapter 7: external interference and organizations engaging in activities endangering national security**

*External interference*

4.1 Chapter 7 of the Consultation Document suggests the creation of a new criminal offense, that of "external interference," and also suggests expanding the government's authority to shut down Hong Kong-based organizations that have ties to foreign organizations that are, in the government's view, a threat to national security. For the reasons laid out below, **we recommend against both proposals.**

4.2 The government's proposals are based on a false premise: that the 2019 protest movement was instigated by "external forces" – often referred to by the CCP as "hostile foreign forces" – that pose an ongoing threat to Hong Kong's security, more than four years after the protest movement ended. These claims by the Hong Kong government are false: Hong Kong faces no such external threats that would justify new laws that could infringe on Hong Kongers' right to free association. And the 2019 protest movement was a bottom-up grassroots society-wide mobilization, in which hundreds of thousands of Hong Kongers took to the streets to protest the government's decades-long stonewalling on long-promised democratic reforms.

4.3 The government's effort to frame the historic 2019 protests as driven by external forces draws directly from the CCP's playbook: the Party has long tarred domestic protest movements as being instigated by "hostile foreign forces," intent, according to Party leaders, on undermining China's socialist system.[33] Examples abound: the Party falsely claimed that the 1989 Tiananmen Square protests were driven by foreign forces, and also (again, falsely) labeled the late 2022 so-called White Paper Protests as the product of foreign agitators.[34] The Hong Kong government's decision to mirror this longstanding Party approach to its critics is deeply disturbing, and illustrates the Hong Kong government's failure to grapple with the deep-seated and legitimate concerns that drove Hong Kongers to take to the streets in protest in 2019.

4.4 The government's proposed language on a criminal provision related to external interference is extremely broad: the term "improper means," for example, includes acts that are "damaging or threatening to damage a person's reputation," regardless of whether such actions – presumably in the form of public criticism – are based in fact or not.[35] Actions that "cause spiritual injury" to the targeted individual – a seemingly highly

[33] One recent assessment of the Party's use of the term traces it back to 1948, with regular use in the decades since. Especially during the Maoist era, the term was used to refer to both alleged foreign and domestic enemies, but the primary use of the term in recent decades has been on (again, alleged) overseas threats. Stella Chen, "The CMP Dictionary: Hostile Forces," China Media Project, June 10, 2022.

[34] "China threatens crackdown on 'hostile forces' as COVID protests continue," Associated Press, November 30, 2022.

[35] Consultation Document, paragraph 7.6.

subjective and difficult to measure element – are also covered, as are acts that "cause financial loss" to an individual.

4.5 Hong Kong-based academics have expressed concern that the term could also be used to target research collaboration and academic exchange with foreign universities on "sensitive" topics. GCAL shares their concern that the term could be stretched to cover international collaborative research efforts, especially if those academic research collaborations result in final products that are critical of government policy.[36]

4.6 Such a definition can all too easily be manipulated to cover peaceful political activity, including expressive acts by individuals based overseas. If the government deems peaceful political criticism by overseas actors to be reputationally damaging or spiritually harmful to local officials, then they could presumably prosecute those actors for "external interference." In other words, this provision could be used to target overseas groups that are critical of Hong Kong government policies and actions, including its assertive use of the NSL to crack down on its political opponents. Though the formal legal impact of such a move might be limited – it is impossible to imagine that rights-respecting states would respond to an extradition request from the Hong Kong government over alleged Article 23 crimes – nonetheless the likely expansion of the government's overseas legal harassment toolkit is deeply troubling.

4.7 We also worry that this new tool can be easily applied to new targets, including groups that have no connection to the 2019 protest movement. The sedition provision of the Crimes Ordinance, for example, has been used to limit basic rights in new ways: in February 2022, for example, police arrested two Hong Kongers over social media posts that were critical of the Hong Kong government's Covid-19 policies.[37] We fear that the proposed external interference provision could similarly be used to target groups and individuals unrelated to the 2019 protests, and could mirror the evolving and seemingly ever-expanding crackdown on civil society on the Mainland.

4.8 One potential new target: economic and business analysts, especially those who have ties to foreign business research or consulting firms. As the Chinese economy has slowed, the central government in Beijing has used its extensive censorship apparatus to limit basic economic and financial news reporting, and to censor analysts with more pessimistic views.[38] At the same time, national security officials at the powerful Ministry of State Security have suggested that foreign actors are trying to use the financial

[36] "Scholars express concerns on overseas collaboration: 'how to know the funding sources of the partners?,'" *Ming Pao* (in Chinese), February 22, 2024.
[37] Selina Cheng, "Covid-19: Hong Kong national security police arrest 2 for sedition over anti-vaxx posts," *Hong Kong Free Press*, February 25, 2022.
[38] Daisuke Wakabayashi and Claire Fu, "China's Censorship Dragnet Targets Critics of the Economy," *New York Times*, January 31, 2024. In its public comments on China's economic woes, the Ministry of State Security made direct reference to "financial security," as a key component of overall national security.

markets to undermine China.[39] These same officials also suggested that certain market actions, such as short selling, and some (presumably bearish) economic commentary and analysis, should be viewed through a security lens.

4.9 Such statements, especially when coupled by Beijing's use of security laws to detain foreign business executives and conduct raids on foreign firms' China-based offices, are deeply troubling.[40] We fear that the Hong Kong government's proposed external interference criminal provision could be used to threaten economic analysts and journalists, or even to detain them, especially when they have ties to foreign news organizations or business research firms. The mere addition of such a criminal provision to Hong Kong law would likely have a chilling effect. And the potential damage to Hong Kong's reputation as a leading global business and finance center could be significant.

*Expanding the Societies Ordinance*

4.10 The government also proposes an important – and, in our view, quite worrying – expansion of existing law relating to civil society: the government seeks to expand its authority under the Societies Ordinance to force the closure of local groups that, in the government's view, pose a security threat. As the government notes, other organizations – including private companies and other economic entities – aren't covered by the Societies Ordinance, and thus are not subject to the Secretary for Security's national security oversight. The government proposes to fix that gap by expanding its authority to close down "*any* local organization" (emphasis added) that the government views as a threat to national security.

4.11 As many experts have noted, the colonial-era Societies Ordinance is deeply flawed: it allows the Hong Kong government to shut down civil society organizations that it doesn't like, on vaguely-defined national security grounds.[41] As noted above, the government's conception of national security is extremely broad, and has expanded to include peaceful political activity. Under this broad conception of national security, the government has criminally prosecuted civil society activists, opposition politicians, journalists, and others.

4.12 If the proposed expansion of the Societies Ordinance moves forward, then the government could use the newly-revised law to engage in stepped-up political monitoring of *all* organizations in Hong Kong, regardless of type, including private companies and other entities. Companies that criticize the government's data security

[39] William Zheng, "China's top spy agency takes swipe at 'some countries' trying to disrupt financial system," *South China Morning Post*, November 2, 2023.
[40] Daisuke Wakabayashi et al., "In China, the Police Came for the Consultants. Now the C.E.O.s Are Alarmed," *New York Times*, May 12, 2023.
[41] For an excellent brief overview of the Societies Ordinance, see Harris et al., "A Connecting Door: The Proscription of Local Organizations," in Fu Hualing, et al., *National Security and Fundamental Freedoms: Hong Kong's Article 23 Under Scrutiny*, Hong Kong University Press, 2005, pp. 303-330.

proposals, for example, could face the threat of closure under the Societies Ordinance.[42] A mere reminder that private companies are subject to such oversight could be enough to nudge some companies to self-censor. They may avoid any public criticism of government reform proposals, including those that directly impact their day-to-day operations.

4.13 Lastly, the government also proposes to bar certain foreign organizations from operating in Hong Kong, if the government views their overseas activities as a threat to national security in Hong Kong. Hong Kongers still based in Hong Kong can face criminal charges if they maintain any ties with any overseas organization that is barred from Hong Kong under this proposed new provision. The Consultation Document focuses on what it calls "shadow organizations," set up by "some individuals" who have "endanger[ed] national security."[43] This seems to be a thinly-veiled reference to Hong Kong exile organizations that have sprung up in the UK, the U.S., Australia, and elsewhere in the years since the 2019 protests.[44] In 2023, the Hong Kong government threatened prominent exile activists with prosecution under the NSL over their peaceful political activities conducted outside Hong Kong, further escalating its campaign of threats and harassment against overseas activists and groups.

4.14 The government's likely goal for this provision seems all too clear: to further criminalize any ties between Hong Kong activists and the overseas political groups that have emerged since the 2019 protest movement. As GCAL has previously noted, a core goal of the NSL itself was to break ties between local groups and their supporters in the international community.[45] This goal has largely been achieved: international human rights groups, for example, have largely shut down their Hong Kong-based offices, and many have refrained from even contacting local activists since the NSL went into effect. The proposed amendments to the Societies Ordinance will expand the government's toolkit for policing contacts between local and international groups. It could also be used to threaten individuals whose public comments too closely mirror those of exile groups who have been formally barred from Hong Kong.

4.15 If enacted, the proposed expansion of the Societies Ordinance to cover so-called "shadow organizations" will also increase legal and political friction between Hong Kong and other leading jurisdictions. The peaceful political advocacy of the exile groups that

[42] Some companies have already begun to put up permeable data access barriers between their Hong Kong-based staff and their global offices, essentially treating Hong Kong as similar to Mainland China in terms of data security. Other firms will likely take similar steps if and when the proposed changes to the Societies Ordinance go into effect. Kay Wiggins et al., "Latham & Watkins cuts off its Hong Kong lawyers from international databases," *Financial Times*, February 12, 2024.

[43] Hong Kong Government Consultation Document, paragraph 7.11.

[44] The Consultation Document also makes indirect reference to overseas organizations in paragraph 2.6(h), with references to "external forces" that "fight for rights" or "monitor human rights," which the Hong Kong government suggests is cover for efforts to engage in "color revolution."

[45] Lydia Wong and Thomas E. Kellogg, *Hong Kong's National Security Law: A Human Rights and Rule of Law Analysis*, GCAL report, February 2021, p. 29.

are the likely target of the law is protected by both international law and the laws of host countries. If the Hong Kong government uses the proposed "shadow organizations" provision to specifically bar, for example, UK or U.S.-based groups from operating in Hong Kong, the UK or U.S. government will likely have to respond to a direct threat against a legally-registered organization based on their soil. The resulting increase in tensions, as well as the damage done to Hong Kong's reputation as a liberal jurisdiction that respects human rights, would not be in Hong Kong's interests. **The government should therefore leave the Societies Ordinance alone, and not pursue any expansion of it at this time.**

**Chapter 8: Extra-territorial application of the proposed ordinance**

5.1 In its Consultation Document proposals, the Hong Kong government makes an extremely broad assertion of extra-territorial jurisdiction for its proposed Article 23 national security crimes. In essence, the government proposes to follow the precedent set with Article 38 of the NSL, which asserts jurisdiction over any individual, anywhere in the world, regardless of citizenship or other factors.[46]

5.2 In justifying its assertion of extremely broad extraterritorial jurisdiction for Article 23 national security crimes, the Hong Kong government claims that it is merely following well-established international norms and state practice. But as the below analysis makes clear, the Hong Kong government's assertion of such broad jurisdiction is actually *not* in line with generally-accepted state practice. **We therefore recommend to the Hong Kong government that it refrain from assertion of extraterritorial jurisdiction for any proposed new Article 23 national security crimes.**

5.3 The Hong Kong government is right on the basic point that all states have laws that assert overseas jurisdiction. But the Hong Kong government is wrong to suggest that there are clear parallels between its actions and those of other states. In its public defense of the NSL's extraterritorial reach, for example, the Hong Kong government has regularly referred to the national security laws of other states, including the United States, the UK, and Australia. To be sure, all of these countries, as well as virtually all other states, assert jurisdiction over foreign nationals who commit national security crimes overseas. It is indeed standard practice for states to include provisions on extraterritorial jurisdiction in criminal provisions covering crimes such as espionage, for example.[47]

5.4 But, as GCAL has documented elsewhere, Hong Kong's NSL is not geared toward protecting – and criminalizing – *national* security. Instead, the NSL is meant to protect *domestic regime* security and stability, a much broader concept that, all too often, encompasses peaceful political activity and speech.[48] The extensive use of the NSL as a political weapon to crack down on the government's peaceful critics differentiates the NSL from the national security laws of other states. And the government's assertion of extraterritorial jurisdiction to punish peaceful speech and political activity in third

[46] This section is based on a soon-to-be-published GCAL report, *Anatomy of a Crackdown: The Hong Kong National Security Law and Civil Society*, forthcoming, March 2024.

[47] For an excellent assessment of the U.S. government's assertion of extraterritorial jurisdiction, see *Extraterritorial Application of American Criminal Law,* Congressional Research Service report, March 21, 2023.

[48] As one leading scholar of Chinese and Hong Kong law puts it, "the Party, in its typical authoritarian fashion, exerts extensive ideological and organizational control over society." In this context, "political challenges principally take the form of creating alternative political thinking, nurturing political opposition forces, and mobilizing civil society to rally in support of certain legal or political changes," and are thus criminalized under national security law. Fu Hualing, "China's Imperatives for National Security Legislation," in Chan and de Londras, *China's National Security: Endangering Hong Kong's Rule of Law?*, Hart Publishing, 2020, pp. 44.

countries by its own citizens and third country citizens is an effort to export this fundamental flaw in the NSL. We fear that the government's Article 23 proposals will similarly be geared toward protecting regime security, such that its assertion of extraterritorial jurisdiction is similarly flawed and without a basis in the practice of other states.

5.5 But there is a second important concern that differentiates Hong Kong's extremely broad extraterritorial jurisdiction claims from those of other states. In order to target non-citizens based overseas, the government asserts jurisdiction under a doctrine known as the protective principle. Under the protective principle, states can assert jurisdiction over individuals who are non-citizens, if those actions represent a threat to a core – but necessarily limited – set of vital state interests, including national security.[49] The Hong Kong government explicitly invoked the protective principle in its assertion of jurisdiction over foreign nationals it targeted with warrants and bounties.[50]

5.6 Without doubt, states can – and regularly do – assert jurisdiction over foreign nationals who they allege have committed national security crimes. And there are other commonly-accepted uses of the protective principle by states to assert jurisdiction over foreign nationals to protect vital state interests: foreign nationals engaged in counterfeiting of a state's currency, for example, are engaged in actions which have a negative impact on that state's core interest in protecting the soundness of its currency. In recent decades, other crimes have been included by some states in their assertion of protective jurisdiction, as part of a broader expansion of the protective principle to cover other crimes.[51]

5.7 What states have generally *not* done is accept the right of other states – or, in the case of Hong Kong, other legal systems – to assert jurisdiction over political crimes. Such efforts are not geared toward protecting a government's genuine security interests or the smooth operation of normal government functions. Instead, the Hong Kong government is mobilizing both the criminal justice system and its overbroad jurisdictional claims to harass and, it clearly hopes, silence, its overseas critics. In doing so, it is abusing the protective principle, and infringing on the sovereignty of other states.

5.8 The Hong Kong government's effort to assert global jurisdiction over its overseas critics, even in the face of well-established norms, is nothing new: state manipulation of

[49] For an excellent book-length study of the protective principle, see Iain Cameron, *The Protective Principle of International Criminal Jurisdiction*, Dartmouth Publishing Company, 1994.
[50] Government of the Hong Kong Special Administrative Region, "The jurisdiction of Hong Kong National Security Law accords with international norms and double-standard criticisms are for an ulterior motive," Hong Kong government press release, July 6, 2023.
[51] Kenneth S. Gallant, *International Criminal Jurisdiction: Whose Law Must We Obey?*, Oxford University Press, 2022, pp. 419-20, 430-31. The U.S., for example, has used the protective principle to assert jurisdiction over foreign nationals accused of violating U.S. drug laws.

jurisdiction claims is a well-known problem, one that government officials and legal experts have been grappling with for decades, if not centuries. Some proposals have emerged to formally limit the abuse of jurisdiction by states, rather than – as is usually the case – dealing with them on an *ad hoc* basis. In 1935, for example, a group of American scholars at Harvard University proposed a treaty on state assertion of jurisdiction that was meant to deal with the problem. Under their proposal, a state could assert protective jurisdiction to protect its "security, territorial integrity, or political independence," but only if the alleged crime was not in fact the "exercise of a liberty guaranteed the alien by the law of the place where it was committed."[52]

5.9 The Harvard proposal never gained traction, perhaps because the post-World War II human rights revolution meant that states could rely on international human rights obligations, as well as the basic principle of double criminality, to block extradition.[53] And, as noted above, there is virtually no chance of extradition in any of the Hong Kong warrants that were announced in 2023.

5.10 Still, even though the named individuals won't be extradited back to Hong Kong, they still face very real harms as a result of the Hong Kong government's arrest warrants: they need to be careful about travel to third countries that could extradite them back to Hong Kong, for example. Though it hasn't done so yet, the Hong Kong government could contact Interpol to issue a so-called "red notice," which would signal to other governments that they are meant to detain and extradite the individuals so named.[54] Even if those red notices aren't honored, they are yet another form of harassment that named individuals need to deal with. Just as important, those targeted have to deal with the stresses and difficulties of being named by the Hong Kong government as an alleged criminal, including day-to-day safety concerns, social stigma, and online harassment and abuse by pro-Beijing voices.[55]

5.11 The Hong Kong government's assertion of jurisdiction over foreign nationals living overseas – often in their own home country – is also a violation of the sovereignty of other states whose nationals are threatened with criminal prosecution. The Hong Kong government's recent affronts to the sovereignty of other states has not gone unnoticed: in a July 2023 statement responding to the Hong Kong government's issuance of warrants and bounties under the NSL, the U.S. Department of State called on the Hong

[52] Research in International Law under the Auspices of the Faculty of Harvard Law School, Draft Treaty, art. 7, quoted in Gallant, *International Criminal Jurisdiction*, p. 421. The Harvard Research Project's authors were primarily concerned with threats made against "aliens," or a state's own nationals who were living overseas, but the same concerns apply to threats made against foreign nationals as well.

[53] In order for a state to extradite an individual to a requesting state for criminal prosecution, the criminal charge against the individual must be on the books in both states; this is known as the double criminality requirement.

[54] For more on China's use of Interpol red notices against overseas activists, see Safeguard Defenders, *No Room to Run: China's expanded mis(use) of Interpol since the rise of Xi Jinping*, Safeguard Defenders report, November 2021.

[55] Anna Kwok, "Written Testimony of Anna Kwok," U.S. Select Committee on the Chinese Communist Party, CCP Transnational Repression: The Party's Effort to Silence and Coerce Critics Overseas," December 13, 2023.

Kong government to "respect other countries' sovereignty," and to immediately withdraw the offending warrants.[56] Instead, the government followed up with additional warrants several months later, including warrants that targeted a U.S. citizen and a U.S. resident.

5.12 If the government moves forward with its assertion of extremely broad extraterritorial jurisdiction, as laid out in the Consultation Document, it will further damage Hong Kong's reputation in the eyes of the international community. At the same time, such a move will also increase political and legal friction between Hong Kong and those states who are named as violators of new Article 23 national security crimes. For these reasons, **the government should refrain from any assertion of extraterritorial jurisdiction for Article 23 crimes in its legislative proposals.**

[56] Matthew Miller, "Hong Kong's Extra-Territorial Application of the National Security Law," U.S. Department of State Press Statement, July 3, 2023. *See also* Frances Vinall, "Blinken denounces Hong Kong government's bounties on overseas activists," *Washington Post*, December 16, 2023.

**Chapter 9: Other matters relating to improving the legal system and enforcement mechanisms for safeguarding national security**

*Due process rights and the right to a fair trial*

6.1 The government's proposals on due process for Article 23 national security crimes, as well as its other Chapter 9 proposals, are deeply problematic from a human rights and rule of law perspective. This section will focus primarily on due process rights in the context of Article 23 national security crimes. In general, **we recommend that the government refrain from adoption of any new, more limited due process provisions as part of its Article 23 legislative reforms.** Generally speaking, existing Hong Kong criminal procedure law is more than adequate to deal with any alleged acts of criminal activity.

6.2 The government's discussion of procedural rights in Chapter 9 proceeds from a false premise: the government suggests that Hong Kong's own domestic laws should "achieve further convergence, compatibility and complementarity with the HKNSL."[57] One of the core strengths of the One Country, Two Systems model – perhaps *the* core strength – is that it allows for divergence on key matters related to legal system structure and the content of specific laws. Imperfect though it may be, the law and governance structure laid out in the Basic Law is fundamentally different from the constitutional structure on the Mainland. It guarantees the independence of the judiciary, for example, a core element of Hong Kong's common law legal system that is absent from the Mainland legal system. Such diversity is to be valued and celebrated, and calls for greater "convergence," especially on a matter as vital as national security laws, should be closely scrutinized.

6.3 Since the NSL went into effect, GCAL has closely studied the government's implementation of the law. One of our key areas of focus has been the government's approach to basic due process rights. Our ongoing research has made clear that the government has limited basic due process rights in a number of ways.[58] The limits on basic due process rights include limits on the right to pre-trial release, also known as bail; the right to a jury trial; and the right to an attorney of one's own choosing. Taken together, these and other limits on core due process rights put the fundamental right to a fair trial, which is guaranteed both by Hong Kong's Basic Law and by international human rights law, at risk.

6.4 Other elements of the NSL limit judicial independence, and also expand the Hong Kong government's search and surveillance powers. Under Article 44 of the NSL, for example, the Hong Kong Chief Executive is empowered to designate a pool of judges who try national security cases. We fear that NSL Article 44 judges are being selected by the

[57] Consultation Document, paragraph 9.3.

[58] See, e.g., 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.

Chief Executive on the basis of presumed political reliability and willingness to deliver guilty verdicts in all national security cases, and not on the basis of expertise or other relevant factors. More than three and a half years after the NSL went into effect, the results speak for themselves: the government has yet to lose a single national security case, and has not even suffered a loss on any procedural matter of any consequence.

6.5 We worry that these core elements of the NSL will be duplicated in the government's Article 23 legislation: the government's Consultation Document proposals strongly suggests as much. Such a move would restrict basic due process rights in deeply damaging ways, and could effectively frustrate a defendant's right to a fair trial. We worry, for example, that the government will propose that the same designated judges selection scheme be extended to cover judges who hear Article 23 cases. We are also concerned that the government will propose that the same NSL rules for pre-trial release, jury trial, right to an attorney of one's own choosing, and police investigation powers should apply to Article 23 crimes as well. **Such proposals would be a major mistake, and should be avoided.**

6.6 GCAL is also concerned that the government's suggested parallels to the UK National Security Act 2023 are inaccurate, and therefore should not serve as either the justification for restrictions on due process rights under proposed Article 23 legislation. Take the Hong Kong government's reference to the NSA's provisions on pre-trial detention, for example. It is true that the NSA and other UK laws do allow for detention of individuals for up to 14 days without charge in some cases. But Schedule 6 of the NSA makes clear that any such detention must be judicially approved, and that the judge must find that there are reasonable grounds "for believing that the further detention of the person to whom the application relates is necessary, and that "the investigation… is being conducted diligently and expeditiously."[59]

6.7 GCAL is deeply concerned that judicial oversight of expanded pre-trial detention powers may not work in the current Hong Kong context. As noted above, since the NSL went into effect, the Hong Kong courts have generally declined to apply Basic Law constitutional human rights norms to check the Hong Kong government's use of its extensive NSL powers. This includes pre-trial detention: generally speaking, individuals detained under the NSL have not been able to win pre-trial release from the courts over the objections of the Hong Kong government. This includes a number of prominent NSL defendants whose alleged crimes are seen as political in nature, including media mogul Jimmy Lai, pro-democracy advocate Joshua Wong, and former Legislative Councilor Claudia Mo.

6.8 Other core structural elements of the UK political system provide additional safeguards against abuse of the government's NSA powers. UK members of Parliament, for example, can oversee the government's implementation of the NSA, and have ample means to press the government on specific concerns. The UK's free press and robust civil society

[59] UK NSA 2023, Schedule 6, section 40(1).

can and do also play an important oversight role.[60] Sadly, these structural elements are largely absent in Hong Kong right now: after reforms to the election system for the Hong Kong Legislative Council, for example, pro-democratic voices are now completely absent. Pro-Beijing politicians have generally refrained from meaningful public oversight of the government, particularly on more sensitive issues like the implementation of the NSL.

6.9 The deep damage done to political institutions like LegCo make it more difficult for the Hong Kong government to create effective institutional safeguards that can serve as a check on government power. Under the UK NSA, for example, the UK government must appoint an Independent Reviewer of State Threats Legislation.[61] This Independent Reviewer writes an annual report on implementation of both the NSA and other national security laws, which is then reviewed by Parliament. She or he has the mandate to engage in a review of the government's use of its powers under key elements of various national security laws, and also to review individual cases of detention under the NSA.

6.10 It is not clear whether such an Independent Reviewer mechanism could be effective in the Hong Kong context, given institutional shortcomings in LegCo, as well as limits on press freedom and civil society activity. **Nonetheless, we recommend that the Hong Kong government include such an Independent Reviewer mechanism in any proposed new Article 23 legislation.** Doing so would bring Hong Kong's legislative proposals closer to the model of the UK NSA that it approvingly cites in its own Consultation Document.

*Absconding and the right to travel*

6.11 The government also proposes to expand its authority to cancel the passports, and thus to limit the right to travel, of individuals accused of national security crimes. The government's Consultation Document does not provide much in the way of concrete detail, making it difficult to assess the strengths and weaknesses of its proposals. That said, the government does refer to 13 individuals who "absconded overseas" in 2023. Though the government does not list these individuals by name, nonetheless it's clear that it is referring to arrest warrants and bounties issued against several prominent pro-democratic politicians and activists, all of whom are now living overseas. Contrary to the Hong Kong government's claims, these individuals are generally engaged in peaceful political activity, and therefore should not have been targeted with arrest warrants under the NSL.

6.12 The reference to these individuals suggests that the government will use any enhanced powers related to cancellation of passports or cancellation of government benefits as a political tool, either to limit the right of its peaceful critics to travel, or to deny them

[60] GCAL has documented the Hong Kong government's crackdown on civil society since the NSL went into effect in a forthcoming report, to be published in March 2024. See Chow, Kellogg, and Lai, *Anatomy of a Crackdown: The Hong Kong National Security Law and Restrictions on Civil Society*, forthcoming.
[61] UK National Security Act 2023, s. 63 and 64.

access to government benefits to which they are otherwise entitled. **GCAL recommends that no changes be made to Hong Kong laws relating to the issuance of passports, nor should the government's power to deny government benefits on national security grounds be expanded.**

6.13 We fear that such provisions would bring Hong Kong a step closer to Mainland China's approach, which includes extensive restrictions on travel for Chinese citizens. Under Chinese law, a number of different bureaucratic actors have the authority to bar individuals from traveling overseas. Under China's Exit and Entry Administration Law, for example, individuals can be barred from leaving China if the government believes that their departure would impact national security, or for a number of other reasons.[62] This provision and others like it have been regularly used to bar Chinese activists, intellectuals, and academics from leaving China to attend overseas meetings, academic conferences, and civil society trainings.

6.14 A recent study by one of the co-authors of this submission identified a full 149 Chinese citizens who were barred from exit from China over a 15-year period.[63] In virtually all cases, these individuals had been barred for political reasons, and not due to any genuine national security concerns. None of the individuals whose cases we identified were able to obtain effective judicial review of their exit ban. Instead, they had to either give up on their travel plans altogether, or attempt to negotiate with Chinese authorities. Though the vast majority of individuals subjected to exit bans by Chinese authorities are Chinese citizens, a small but growing number of foreign nationals have been subjected to exit bans, including a U.S. citizen who was studying at Georgetown University at the time the exit ban against him went into effect.[64]

6.15 Politically-motivated restrictions on the right to travel are a violation of international human rights law.[65] Under Article 12.2 of the International Covenant on Civil and Political Rights (ICCPR), "(e)veryone shall be free to leave any country, including his own." Article 12.3 of the ICCPR makes clear that restrictions on the right to travel are permissible, but such restrictions must be based on legitimate national security grounds. Such grounds would not include the exercise of an individual's basic human rights. Hong Kong is covered by the ICCPR, and has also integrated the ICCPR into the Basic Law through Article 39. The ICCPR has also been incorporated into domestic law in Hong Kong through the 1991 Bill of Rights Ordinance.

6.16 The Hong Kong government's Consultation Document also distorts the balance struck by U.S. law between national security and the right to travel. It is true, as the Consultation

[62] Thomas E. Kellogg and Zhao Sile, "China's Dissidents Can't Leave," *Foreign Policy*, July 23, 2019.
[63] Kellogg and Zhao, "China's Dissidents…"
[64] Edward Wong and Michael Forsythe, "China's Tactic to Catch a Fugitive Official: Hold His Two American Children," *New York Times*, November 25, 2018.
[65] For a study of China's approach to exit bans and the requirements of international law, see Thomas E. Kellogg, "No Exit: China's Growing Use of Exit Bans Violates International Law" *Lawfare*, January 16, 2019.

Document points out, that there are legal restrictions on the right to travel under U.S. law, and that the U.S. can rescind an individual's passport under certain circumstances. That said, the U.S. Supreme Court has held that the U.S. constitution protects an individual's right to travel, which means that the right – and thus to obtain a passport from the U.S. government – cannot be restricted in constitutionally impermissible ways.[66]

6.17 To be sure, the U.S. can restrict an individual's right to travel on genuine national security grounds. The U.S. Supreme Court has upheld this governmental authority in various cases, stretching back to the 1960s.[67] That said, the U.S. Supreme Court would only recognize genuine and legitimate national security interests as proper grounds for limiting an individual's right to travel. Any effort to restrict a citizen's right to travel, or his or her access to a passport, on the basis of a citizen's peaceful exercise of his or her rights of free expression, association, or assembly, would simply not pass muster.

6.18 As even this brief overview makes clear, the Hong Kong government cannot justify its proposed limits on the right to travel, and on access to government benefits, with reference to relevant U.S. law. And, as noted above, any effort by the Hong Kong government to impose politically motivated restrictions on the right to travel would constitute a violation of Hong Kong's obligations under the ICCPR. Such a move would also damage Hong Kong's already bruised reputation as a leading international business hub. **We therefore recommend that the Hong Kong government refrain from any national security-based expansion of its authority to rescind passports for Hong Kong citizens, or otherwise restrict the right to travel for persons based in Hong Kong.**

[66] *Kent v. Dulles*, 357 U.S. 116 (1958); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).
[67] *Zemel v. Rusk*, 381 U.S. 1 (1965); *Haig v. Agee*, 453 U.S. 280 (1981).