

Hong Kong's First Conviction for Incitement to Secession: What Role for the ICCPR?

Introduction

On July 1, 1997, Hong Kong ceased to be a British colony and became a Special Administrative Region of China, pursuant to the Sino-British Joint Declaration (JD), a bilateral treaty registered with the United Nations.¹ The JD provides that Hong Kong will maintain its separate common-law legal system and that the International Covenant on Civil and Political Rights (ICCPR) shall remain in force in the territory after 1997. Although the ICCPR has applied to Hong Kong since 1976 (by virtue of the United Kingdom's ratification), it was further entrenched during the transition period leading to 1997. This was accomplished in part through the Hong Kong Bill of Rights Ordinance, which was largely copied from the ICCPR and enacted in 1990. More importantly, the Hong Kong Basic Law, which has served as the regional constitution since 1997, provides that the ICCPR "as applied to Hong Kong shall remain in force and shall be implemented through the laws" of Hong Kong.² Since 1997, Hong Kong's highest court, the Court of Final Appeal (CFA), has consistently held that the Basic Law gives constitutional status to the ICCPR.³

How does Beijing's decision to impose a new National Security Law (NSL) in Hong Kong impact adherence to the ICCPR?⁴ The local government has reassured the UN Human Rights Committee—the body that oversees implementation of the ICCPR—that it is still in force. It points to Articles 4 and 5 of the NSL, which state that human rights—including those in Hong Kong's Basic Law and the ICCPR—will continue to be protected.⁵ Hong Kong's CFA has also emphasized these articles, noting that they "expressly stipulate" that the rights, freedoms, and values of the Basic Law and Bill of Rights "are to be protected and adhered to in applying the NSL."⁶ The first conviction under the NSL—the

Tong Ying Kit case—provides an opportunity to assess whether trial judges are following that approach.

Background to the Tong Ying Kit Case

On July 1, 2020, during a pro-democracy protest, Tong Ying Kit drove his motorcycle through the streets of Hong Kong, refusing to stop at police barricades and flying a banner that stated: “Liberate Hong Kong. Revolution of our Times.” Tong was certainly not the first to display this slogan. Indeed, it was ubiquitous during the anti-extradition protests, having been printed on thousands of banners and shirts. He was, however, the first person to be tried under the NSL, which had been brought into force shortly before midnight on the night of June 30. Tong was denied bail, and the Secretary for Justice exercised her power to set aside his request for a jury trial.⁷ Instead, Tong was tried by a panel of three judges from a pool of judges designated by the Chief Executive to try NSL-related cases.⁸ Tong was convicted of “incitement to secession” (Article 21) and “terrorist activities” (Article 24) and given a combined sentence of nine years.⁹ He is appealing both convictions.

This *Insight* analyzes the conviction for the offense of “incitement to secession” and its relationship to the ICCPR. The court’s analysis of that offense—and the success or failure of Tong’s appeal—could have significant repercussions for many other individuals who are awaiting trial under the NSL.¹⁰

The Tong Ying Kit Judgment

Tong was charged under Article 21 of the NSL, which creates criminal liability for a person who “incites” other persons to commit an offence of secession under Article 20, which provides:

A person who organises, plans, commits or participates in any of the following acts, whether or not by force or threat of force, with a view to committing secession or undermining national unification shall be guilty of an offence:

- (1) separating the Hong Kong Special Administrative Region or any other part of the People’s Republic of China from the People’s Republic of China;
- (2) altering by unlawful means the legal status of the Hong Kong Special Administrative Region or of any other part of the People’s Republic of China; or

(3) surrendering Hong Kong or any part of China to a foreign country.

Notably, this definition of secession does not require force or threat of force. Articles 20 and 21 thus criminalize even peaceful acts that might lead to the separation of Hong Kong from the People's Republic of China.

The trial court acknowledged that “incitement to secession” was a new offence in Hong Kong and that the parties disagreed as to the elements. In light of this disagreement—and the fact that Article 21 constitutes a restriction on freedom of expression—one would expect the court to refer to Article 4 of the NSL and to make an effort to interpret and apply Article 21 in a manner that complies with the ICCPR. In fact, the trial court never mentioned Article 4 of the NSL or the ICCPR. Instead, it adopted a very broad interpretation of the *actus reas* of incitement to secession, deciding that the prosecution need only prove that a pro-independence message was *one* of the possible meanings of the slogan and that its display was *capable* of inciting others to commit secession.¹¹ As a result, expert testimony demonstrating that the slogan meant different things to different people became irrelevant. The trial court also rejected the defense’s argument that the prosecution should be required to adduce at least some evidence as to how the “incited act” of separating Hong Kong from China could be carried out.¹² The trial court justified this approach by comparing Article 21 to the offense of incitement to murder, which does not require the inciter to specify a method. This was a poor analogy because murder is an achievable goal, one that an incitee could accomplish in a number of ways. In contrast, it was impossible for the people who witnessed Tong’s banner to separate Hong Kong from China. Hearing evidence on the likelihood that Tong’s banner could actually incite an act of secession would have helped the court to interpret and apply Article 21 in manner that is consistent with the ICCPR. Article 19 of the ICCPR does permit governments to place certain restrictions on freedom of expression in order to protect national security. But the UN Human Rights Committee has consistently reminded governments that such restrictions must be a necessary and proportionate means of addressing a concrete threat, rather than a purely hypothetical threat to national security.¹³

It is also surprising that the trial judges did not cite prior judgments by Hong Kong’s CFA, which provide guidance on how to interpret and apply a criminal statute that restricts ICCPR-protected rights. Indeed, there is a wealth of jurisprudence in Hong Kong on this subject. For example, in *HKSAR v. Chow Nok Hang*, the CFA interpreted a statute that prohibited persons from acting in a disorderly fashion at a public gathering “for the purpose of preventing the transaction of the business for which the gathering was called.”¹⁴ The CFA decided that the provision must be narrowly construed because it

restricts the freedoms of speech and assembly. It interpreted the statute so as to apply only when the defendant's purpose was "to make it impossible in practical terms to hold or continue with the gathering; or, at least, to interrupt the gathering for such a duration or by using such means as substantially to impair the intended transaction of business."¹⁵ Thus, if a statutory provision can "properly be given a range of meanings" a Hong Kong court should always adopt a meaning that "preserves a wider ambit for the relevant rights."¹⁶

Instead of looking to this body of Hong Kong jurisprudence, the trial judges focused on case law on the general offense of incitement. The cases cited by the court are all easily distinguishable, either because they pre-date the ICCPR or because they addressed communications that would be outside the scope of its protection.¹⁷

Conclusion

The courts cannot reasonably be expected to address all the concerns with the NSL. Indeed, the NSL expressly precludes judicial review of many decisions made by the police and government officials.¹⁸ But the courts should adopt ICCPR-compliant interpretations of the new offences wherever possible. In addition to Article 19 of the ICCPR, judges should also give careful consideration to Article 14 (right to fair trial), Article 21 (freedom of assembly), and Article 22 (freedom of association). Article 25 (the right to political participation) is also highly relevant because 47 pro-democracy politicians and activists have been charged with "conspiracy to commit subversion" due to their participation in or support for a political primary. The government claims that the primary was part of a "scheme" to enable pro-democracy candidates to gain a majority in the local legislature and "paralyze" the operations of government. These prosecutions will require trial judges to interpret Article 22 of the NSL, which defines subversion in vague terms. The world will surely be watching, as the defendants include many prominent lawyers and politicians.

Article 4 of the NSL indicates that Beijing wants to credibly claim that the ICCPR is still in force in Hong Kong. The local government has also emphasized Article 4 in its replies to the UN Human Rights Committee's List of Issues for the upcoming review of Hong Kong's compliance with the ICCPR. Those claims will, however, ring hollow if trial judges continue to ignore the ICCPR when interpreting the NSL.

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¹ Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong 1399 UNTS 33 (1984).

² Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (enacted by the National People's Congress in 1990 and brought into force on July 1, 1997), art. 39, <https://www.basiclaw.gov.hk/en/basiclaw/index.html>.

³ See, e.g., *HKSAR v. Chow Nok Hang* (2013) 16 HKCFAR 837, ¶¶ 28-29; and *HKSAR v. Fong Kwok Shan Christine* (2017) 20 HKCFAR 425 (CFA), ¶¶ 12-15.

⁴ See Law of the People's Republic of China on Safeguarding National Security in Hong Kong, English translation at: [www.elegislation.gov.hk/fwddoc/hk/a406/eng_translation_\(a406\)_en.pdf](http://www.elegislation.gov.hk/fwddoc/hk/a406/eng_translation_(a406)_en.pdf).

⁵ Replies of Hong Kong, China to the List of Issues in Relation to Its Fourth Periodic Report (Sept. 28, 2021), U.N. Doc. CCPR/C/CHN-HKG/RQ/4, ¶ 9.

⁶ *HKSAR v. Lai Chee Ying* (2021) 24 HKCFAR 33, ¶ 42.

⁷ See NSL, art. 42 (reversing Hong Kong's normal presumption in favor of bail in NSL cases) and art. 46 (empowering the Secretary for Justice to deny a request for jury trial).

⁸ See NSL, art. 44.

⁹ The basis for the terrorism charge, which is not analyzed in this article, is that Tong's refusal to stop at police checkpoints ultimately caused him to lose control of his motorcycle and collide with a group of police officers. Three officers sustained injuries; the most serious was an injury to an officer's thumb. *HKSAR v. Tong Ying Kit* [2021] 16 HKCFI 2020, ¶¶ 84-86.

¹⁰ For example, university students were arrested for "inciting secession" after marching peacefully through campus, chanting and displaying slogans. See Selina Cheng, "Hong Kong Police Confirm 8 Arrested for Unlawful Assembly and 'Inciting Secession' During Peaceful CUHK Campus Demo," *Hong Kong Free Press* (Dec. 7, 2020), <https://hongkongfp.com/2020/12/07/hong-kong-police-confirm-8-arrested-for-unlawful-assembly-and-inciting-secession-during-peaceful-cuhk-campus-demo/>.

¹¹ *HKSAR v. Tong Ying Kit*, ¶¶ 34, 141.

¹² *Id.* ¶¶ 136-137, 142-143.

¹³ U.N. Human Rights Committee, General Comment 34, Article 19, Freedoms of Opinion and Expression, CCPR/C/GC/34 (Sept. 12, 2011); and *Jeong-Eun Lee v. Republic of Korea*, Comm. No. 1119/2002, U.N. Doc. CCPR/C/84/D/1119/2002 (2005).

¹⁴ *HKSAR v. Chow Nok Hang*, ¶ 21.

¹⁵ *Id.* ¶ 58.

¹⁶ *Id.* ¶ 60.

¹⁷ *HKSAR v. Tong Ying Kit*, ¶¶ 16-33 (analyzing, among other examples, a note designed to incite a child to engage in sex with the defendant).

¹⁸ For examples, see Carole J. Petersen, *The Disappearing Firewall: The International Consequences of Beijing's Decision to Impose a National Security Law and Operate National Security Institutions in Hong Kong*, 50(2) H.K.L.J. 633 (2020).