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“The End of One Country, Two Systems? Implications of Beijing’s National Security Law”

Updated Testimony (July 1, 2020)

Thank you for the opportunity to testify on the “Law of the People’s Republic of China on Safeguarding National Security in Hong Kong” (the NSL). I taught law in Hong Kong from 1989-2006 and co-edited a book on the local government’s attempt to enact “national security” legislation.¹ I also co-authored a book on academic freedom in Hong Kong.² Although I now teach in Hawaii, I continue to visit Hong Kong for research.³

I am testifying in my personal capacity and not on behalf of my university or any organization. This document updates the testimony that I submitted on June 29, which was based on the summary of the draft law. Now that the actual law has been published (see http://www.xinhuanet.com/english/2020-07/01/c_139178753.htm), I have no doubt that it violates China’s obligations under the Sino-British Joint Declaration, as well as the International Covenant on Civil and Political Rights (ICCPR), and the Hong Kong Basic Law. In addition, many provisions are extremely vague, generating more questions than answers.

Beijing’s Direct Role in the Enforcement of the NSL

The Sino-British Joint Declaration makes it clear that Hong Kong is to operate a separate criminal justice system. It states that Hong Kong shall maintain its common law legal system, that it “shall control criminal prosecutions free from any interference,” and that it will exercise independent judicial power, including the power of final adjudication. Unfortunately, numerous articles in the NSL destroy the “firewall” between the two jurisdictions, allowing Mainland China’s security personnel to operate openly in Hong Kong and, in some cases, to remove individuals from the protections of the Hong Kong legal system.

The NSL establishes new institutions in Hong Kong, including a “Committee for Safeguarding National Security” (Article 14), which has a “National Security Advisor”

¹ See NATIONAL SECURITY AND FUNDAMENTAL FREEDOMS: HONG KONG’S ARTICLE 23 UNDER SCRUTINY (Hong Kong University Press 2005) (co-edited by Fu Hualing, Carole J. Petersen, and Simon N.M. Young).

² Jan Currie, Carole J. Petersen, and Ka-Ho Mok, ACADEMIC FREEDOM IN HONG KONG (Lexington Books 2006).

³ See, e.g. Carole J. Petersen, *Article 23 of the Hong Kong Basic Law: International Law and Institutions as Sources of Resilience*, Ch. 13 in Cora Chan and Fiona De Londras (eds), CHINA’S NATIONAL SECURITY: ENDANGERING HONG KONG’S RULE OF LAW? (Hart/ Bloomsbury, 2020); Carole J. Petersen, *Not an Internal Affair: Hong Kong’s Right to Autonomy and Self-Determination Under International Law*, 49 HONG KONG LAW JOURNAL 883 (2019); and Carole J. Petersen, *Prohibiting the Hong Kong National Party: Has Hong Kong Violated the International Covenant on Civil and Political Rights?* 48 HONG KONG LAW JOURNAL 789 (2018).

appointed by the Central Government (Article 15) and is “under the supervision of and accountable” to the Central Government. Information relating to the work of this Committee “shall not be subject to disclosure” and its decisions “shall not be amenable to judicial review” in Hong Kong.

The law also provides for a new “Office for Safeguarding National Security of the Central People’s Government” which will be functioning in Hong Kong (Articles 48-55). It will collect and analyze intelligence information and guide, coordinate, support, and generally supervise all of the relevant authorities in the Hong Kong government. Although Article 50 states that the staff shall abide by Hong Kong laws, there is no mechanism for enforcing local laws against them. They are subject only to national supervisory authorities (Article 50) and not to the jurisdiction of the Hong Kong SAR (Article 60).

This new Office will also be take charge of policing “organs of foreign countries and international organizations,” as well as “non-governmental organizations and news agencies” from outside Hong Kong and China (Article 54).

The NSL also provides for a new department within the Hong Kong Police Force (Article 16) to investigate NSL offences. It has broad powers (see Article 17) and can recruit personnel from Mainland China. The Central Government’s Office for Safeguarding National Security will advise the Chief Executive on who will lead this special branch of the police.

Article 18 directs Hong Kong’s Department of Justice to establish a special prosecution division for NSL offenses. The prosecutors shall be appointed by the Secretary for Justice after obtaining consent from the Committee for Safeguarding National Security (which is supervised by the Central Government). The Office for Safeguarding National Security will advise the Chief Executive on who should head this division.

If these mechanisms do not give Beijing the desired level of control, it can take complete jurisdiction over a case and remove it from Hong Kong’s legal system. Under Article 55, the Office for Safeguarding National Security can exercise jurisdiction in three broadly defined situations: (1) the case is “complex due to the involvement of a foreign country or external elements; or (2) a serious situation occurs where the Hong Kong government is unable to effectively enforce the law; or (3) a major and imminent threat to national security has occurred.

The only procedural requirement for shifting jurisdiction in these situations is that the Central Government must approve a request from the Chief Executive (who will certainly make that request if told to do so). Once the Mainland authorities assert jurisdiction, they take charge of the investigation and designate a prosecutor. The Supreme People’s Court will designate a court to adjudicate the case. The Criminal Procedure Law of the People’s Republic of China and all other relevant national laws will apply, including those relating to investigations, interrogation, prosecution, trial, and penalties (Article 57). Thus, while no explicit provision provides for extradition to the Mainland, it appears that the NSL accomplishes what Carrie Lam tried to achieve in 2019: case-by-case extradition to the Mainland’s legal system, where the ICCPR does not apply and there is no guarantee of a right to fair trial.

Article 59 further states that any person who has information pertaining to a case that falls within Article 55 is “obliged to testify truthfully.” This seems to imply that even individuals who have not been charged with an offense under the NSL could be compelled to testify in a case in which the Central authorities have asserted jurisdiction.

The extensive involvement of China’s Central government in the enforcement of the NSL is particularly worrying when combined with the broadly defined offenses. Time does not allow us to explore them all today but one example is “Collusion with a Foreign Country or With External Forces to Endanger National Security.” Under Article 29, a person commits this offense if s/he requests a foreign country or institution or organization from outside China to impose “sanctions or blockade” or “other hostile activities” against Hong Kong or the People’s Republic of China (see Article 29(4)). While the term “sanctions or blockade” is fairly clear, the term “other hostile activities” is extremely vague.

Consider, for example, the June 26 statement by a group of UN independent human rights experts, which asked the UN Human Rights Council to establish “an impartial and independent United Nations mechanism . . . to closely monitor, analyze and report annually on the human rights situation in China, particularly, in view of the urgency of the situations in the Hong Kong SAR, the Xinjiang Autonomous Region and the Tibet Autonomous Region.” While I would not regard that as a request for “hostile activities” towards China, I cannot be certain that the NPC Standing Committee, which will interpret the NSL, would agree with me.

It is important to note that under Article 36, anyone, regardless of nationality or residency, can be prosecuted under the NSL for acts committed inside Hong Kong. Moreover, Article 36 deems an act to have been committed inside Hong Kong as long as the consequences of the act occur in Hong Kong. Suppose, for example, that an American citizen successfully lobbies the US government to impose sanctions against Hong Kong or China. The act of requesting sanctions would appear to violate Article 29(4) and the consequences of the sanctions would likely be felt in Hong Kong.

For individuals who are permanent residents of Hong Kong (and thousands of American citizens are in that category), the coverage of the law is even broader. Under Article 37, a permanent resident can be held criminally liable for acts outside Hong Kong even if there are no proven consequences inside the territory. So, if a permanent resident of Hong Kong who is now living in the US merely requests sanctions against Hong Kong or China then that individual could be held criminally liable, even if the requested sanctions were never ordered. Moreover, if Beijing wanted to prosecute that person in the Mainland, it might decide to invoke Article 55.

Questions Concerning the Interpretation of the NSL and the Interaction with the ICCPR

Despite the potentially wide scope of Article 55, the Chief Executive claims that the vast majority of cases will be tried in Hong Kong courts. The Chief Executive is directed (by Article 44) to designate an approved list of judges for these cases. Although the presumption is that trials will be conducted in open court, Article 41 allows for a closed trial, not only to protect state secrets but also for reasons of public order. We have no idea how often that may occur.

Another key question is whether Hong Kong judges have the power to interpret vague provisions in the NSL. Article 65 of the NSL states that the power of interpretation shall be vested in the NPC Standing Committee. But there is no language expressly prohibiting Hong Kong courts from exercising their normal powers of statutory interpretation in the course of adjudicating cases. This matters to defendants because Article 4 of the NSL provides that the rights protected by the Basic Law and the ICCPR shall continue to be respected. So, if there are two possible interpretations of language in the NSL (e.g. in the definitions of the new criminal offenses), then the interpretation that complies with the ICCPR and the Basic Law should prevail.

This could be important, particularly if the government prosecutes individuals for entirely peaceful expressions of dissent or disagreement with one-party rule in China. Granted, Articles 19, 21 and 22 of the ICCPR allow governments to adopt restrictions on the freedoms of expression, assembly, and association if they are provided by law and necessary in a democratic society for the protection of certain legitimate aims, including national security. But the UN Human Rights Committee (which is the treaty-monitoring body for the ICCPR) has frequently reminded governments that “national security” is not synonymous with the security of a particular political party or government. In other words, if “national security” is relied upon to prohibit and prosecute advocacy for multiparty democracy⁴ then the prosecution would violate the ICCPR.

If Hong Kong judges are permitted to exercise their normal powers of statutory interpretation then I believe that they will try to interpret vague language in the NSL in a manner that complies with the ICCPR and other human rights provisions in the Basic Law. However, if there is a clear conflict between the NSL and the ICCPR (or some other right stated in the Hong Kong Basic Law), then the NSL provision will prevail (see Article 62).

A good example of a clear conflict is Article 42 of the NSL, which states that: “No bail shall be granted” unless the judge has “sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security.” This violates Article 9 of the ICCPR (which states that pretrial detention shall not be the normal rule). The statement in Article 42 also seems to contradict the presumption of innocence (which is protected by the ICCPR and also by Article 5 of the NSL itself).

These and other conflicts with protected human rights violate the commitment that China made in the Sino-British Joint Declaration, which is that the ICCPR shall “remain in force” in the Hong Kong Special Administrative Region. It should be noted that the UN Human Rights Committee plans to adopt, this summer, its “list of issues” for the review of Hong Kong’s Fourth Periodic Report on implementation of the ICCPR. The Committee will certainly ask the Hong Kong government to describe the new NSL and the enforcement processes. Once the Hong Kong government has answered those questions the Committee will schedule its full review of Hong Kong, hopefully for some time in 2021. Normally this review process includes many “shadow reports” from civil society organizations. However, Beijing may be hoping that the

⁴ See, e.g. UN Human Rights Committee, *Mukong v. Cameroon*, Communication No. 458/91 (21 July 1994), U.N. Doc. CCPR/C/51/D/458/1991 (1994), at <http://hrlibrary.umn.edu/undocs/html/vws458.htm>.

vague language of Article 29 and the threat of criminal punishment will dissuade organizations from submitting such reports for the upcoming review by the Human Rights Committee.

Conclusion: why was Beijing in such a rush to enact and enforce the NSL?

Beijing's decision to impose the NSL contradicts several provisions in the Hong Kong Basic Law. Article 18 provides that the laws in force in Hong Kong shall consist of: the Basic Law itself; the laws in force prior to July 1, 1997 (including the common law and rules of equity); and the laws enacted by Hong Kong's local legislature. In contrast, national laws "shall not be applied" in Hong Kong except for those listed in Annex III of the Basic Law, which "shall be confined" to matters relating to defense or foreign affairs.

Although a casual interpretation of the word "defense" might include some laws relating to national security, in this case Article 23 of the Basic Law expressly assigns to the Hong Kong legislature the responsibility to enact "on its own" laws relating to treason, secession, sedition, subversion against the Central Government, and theft of state secrets. This is an important part of the legal firewall that was supposed to protect Hong Kong's autonomy.

Some pro-Beijing commentators have complained that Hong Kong failed to implement Article 23 and that this is why some protests have turned violent. It is true that the National Security (Legislative Principles) Bill of 2003 was ultimately withdrawn (due to public opposition and the local government's missteps). But Hong Kong has legislation prohibiting violence and those laws are being enforced against those who allegedly committed acts of violence during the recent protests. Hong Kong also has its own statutes prohibiting most of the activities specified in Article 23, as well as laws prohibiting terrorism. The legal gap, if there was one, was small and there is no reason why the local legislature could not have completed the process of implementing Article 23 in a manner that complies with the ICCPR.⁵

Perhaps the real motivation for the NSL was a desire to criminalize peaceful political speech that has proven embarrassing to the Chinese Communist Party, both locally and on the international stage. The NSL may also be used as a pretense for disqualifying pro-democracy candidates for the local Legislative Council, a tactic that has been used in the past.⁶ Indeed, Eric Tsang, Hong Kong's current Secretary for Constitutional and Mainland Affairs, recently expressed doubts as to whether someone who opposed the NSL can be considered fit for office. This may explain the haste to bring the law into force prior to the September 2020 Legislative Council elections, although this meant doing away with the normal period of public consultation.

⁵ For suggestions on how to do so, see note 1 above and Simon N.M. Young, *Old Law in New Bottles: Reintroducing National Security Legislation in Hong Kong*, Ch. 12 in Cora Chan and Fiona De Londras (eds), *CHINA'S NATIONAL SECURITY: ENDANGERING HONG KONG'S RULE OF LAW?* (Hart/ Bloomsbury 2020).

⁶ See *Political Screening in Hong Kong: A Report on the Disqualification of Candidates and Lawmakers* (Hong Kong Watch 2018).