

Statement before
The House Committee on Foreign Affairs
Subcommittee on Global Health, Global Human Rights, and International Organizations
Hearing on
"China's Political Prisoners: Where's Gao Zhisheng?"
Political Prisoners in Hong Kong: the Impact of the National Security Law

Written Statement

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I. Introduction

Both before and after the 1997 Hong Kong handover, Hong Kong played a special role in Chinese political and social life: it was a place where sensitive subjects could be discussed, more or less openly, and generally without fear of politically motivated punishment. Individuals whose writings had been banned on the Mainland often could still publish in Hong Kong-based Chinese-language media outlets, and they could speak out – sometimes in Hong Kong’s world-class university classrooms, sometimes only in closed-door sessions with a small, well-chosen group of colleagues – in ways that had become impossible for them inside China itself.

Just as important, Hong Kongers themselves could generally speak and write freely, could take advantage of Hong Kong’s free and open media to inform themselves on the issues of the day, and could participate in the political life of the Special Administrative Region (SAR) in a number of ways: as candidates for those offices that were directly elected, as discerning voters, or as lobbyists and activists who sought to influence legislation or government policy.

To be sure, Hong Kong’s post-1997 political-legal system was imperfect: Beijing could – and, sometimes, did – use its constitutional authority to “interpret” Hong Kong’s Basic Law in self-interested ways. Some of those interpretations had a direct, negative impact on the rights of Hong Kongers, and on Hong Kong’s autonomy. Neither Beijing nor the Hong Kong government honored promises made to the people of Hong Kong to advance democratic reforms that would have allowed Hong Kongers to elect all of their own political leaders – including the powerful post of Chief Executive – for the first time. And, increasingly over the last decade, Beijing started to steadily encroach on Hong Kong’s vaunted autonomy more and more often, at times in ways that suggested that Beijing had grown tired of the “One Country, Two Systems” formula that was meant to tie its hands on key matters of Hong Kong law and policy.

Still, in the run-up to the historic 2019 pro-democracy protests, the core elements of Hong Kong's autonomy, and of its open society, remained largely intact. In response to the 2019 protest movement, the Standing Committee of China's National People's Congress passed the Hong Kong National Security Law (NSL), which went into effect on July 1, 2020. As this short briefing paper will show, both the central government and the Hong Kong government have used the NSL to fundamentally reorder virtually all aspects of political and social life in Hong Kong, in ways that have been devastating for the rights and freedoms that the people of Hong Kong had previously enjoyed.

Over the nearly three years since the NSL went into effect, the Hong Kong government and Beijing have made regular use of its provisions to crack down on a range of political opponents, including pro-democracy politicians, civil society activists, journalists, and others. For the first time in Hong Kong's post-1997 history, Hong Kong has a significant and growing number of individuals who could be deemed political prisoners: individuals who have been prosecuted, either under the NSL or other laws, for their peaceful political activity, and who have been convicted and sentenced to prison merely for exercising their constitutionally protected rights to free expression, association, or assembly.

The Georgetown Center for Asian Law (GCAL) has tracked every national security arrest and prosecution under the NSL over the past nearly three years.¹ Since the NSL went into effect, 248 individuals have been arrested for national security crimes, and 140 individuals have been charged. Of those 140 cases, 66 individuals have either been convicted or have pled guilty in cases that have been concluded; the remaining 74 cases are still in process. As of this writing, no one charged with an NSL crime has been found not guilty. The prospects for a not guilty verdict in any pending national security case seem remote.

This short written statement attempts to describe some key aspects of how the NSL has been used as a tool to crack down on basic rights, and to silence dozens of top Hong Kong pro-democracy politicians and activists. It is far from comprehensive: due to space constraints, this document will only touch on a limited number of key issues, and will of necessity fail to touch on other elements of the ongoing crackdown. Because this written statement focuses on the NSL, it also does not address the Hong Kong government's use of other key legal tools – including the colonial-era Societies Ordinance and the Public Order Ordinance – to punish its peaceful critics or to otherwise limit basic rights.

This statement proceeds as follows: in section II, I offer a brief analysis of key NSL criminal provisions, including some insights on how they can be used to prosecute Hong Kongers merely for exercising their basic rights. In section III, I turn to procedural rights under the Basic Law, with a focus on pre-trial detention. In section IV, I offer a brief account of how the NSL has been used over the past three years, making clear that, generally speaking, those who have been prosecuted for NSL crimes would generally not have been criminally charged in other, rights-respecting jurisdictions.

¹ GCAL has defined national security crimes to include both NSL crimes and the Crimes Ordinance crime of sedition, as well as those cases in which the individual was arrested by the National Security Department of the Hong Kong Police Force.

II. NSL Criminal Provisions: Targeting Beijing’s political opponents

The NSL has four core criminal provisions: it covers secession, subversion, terrorism, and collusion with foreign entities, as well as incitement to engage in these actions, or other forms of support for them.²

At the core of all four criminal provisions is the problem of vague and overbroad language, which could be used to punish peaceful acts of expression, association, and assembly. A core element of both international human rights law, and of the rule of law more generally, is the principle of legal certainty,³ which holds that criminal laws must be sufficiently narrowly defined, so that citizens are aware which behaviors constitute a criminal offense. Overly-broad laws can be arbitrarily applied to political opponents of a given government, and thus invite political targeting and other forms of abuse.⁴

Authoritative explications of the International Covenant on Civil and Political Rights (ICCPR) have also repeatedly referenced the importance of the principles of legality, proportionality, and necessity in the drafting of national security laws. Such concerns are present in the NSL’s criminal provisions: existing Hong Kong law already criminalizes such matters as intelligence gathering on behalf of foreign powers, and also acts of terrorism against the state. In that context, it is questionable whether additional provisions are truly necessary, particularly in the absence of any new or immediate national security threat to Hong Kong’s government. Given the stiff penalties that may be meted out under the NSL’s criminal provisions – which in many cases include up to 10 years in prison, and in certain circumstances can be punished by life imprisonment – the question of proportionality is also quite clear.

Each of the criminal provisions raise both overlapping and distinct concerns related to human rights and the rule of law.

Article 20, the provision on secession, prohibits (*inter alia*) “separating” the Hong Kong SAR from the People’s Republic; “altering by unlawful means the legal status” of Hong Kong; and “surrendering” the SAR to a foreign country. Use of force or the threat of force is not a required element of the crime. Article 21 of the NSL covers efforts to incite or to aid and abet secessionist acts, including the provision of financial support.

To be sure, states can, consistent with their obligations under international human rights law, prohibit acts of secession, provided that such provisions are narrowly tailored to primarily cover violent acts that are meant to overthrow the state, or to end its sovereignty or control over a particular piece of territory, or clear an unequivocal incitement to such acts of violence. That said, peaceful advocacy of political independence is generally protected by international law.

² This section is adapted from Lydia Wong and Thomas E. Kellogg, *Hong Kong’s National Security Law: A Human Rights and Rule of Law Analysis*, GCAL report, February 2021.

³ ICCPR, Article 15(1).

⁴ OL CHN 17/2020, 1 September 2020.

International jurisprudence and comparative law best practice generally shuns the notion that individuals can be punished merely for their writing and speaking on this topic.⁵

With its vague and overbroad language, Article 20 seems to do exactly that. Terms like “surrendering” and “altering by unlawful means” are both broad and lack a concrete legal basis, especially in common law jurisdictions similar to Hong Kong. Beijing has a particular sensitivity to pro-independence rhetoric, one that emerged even before the 2019 protests and the passage of the Basic Law.

Article 22 of the NSL covers subversion, which includes “overthrowing or undermining” the People’s Republic; “seriously interfering in, disrupting, or undermining the performance of duties and functions” of the People’s Republic of China (PRC) or the Hong Kong government; or “attacking or damaging the premises and facilities” of the Hong Kong government. Article 23 covers incitement and aiding and abetting individuals engaged in subversive acts, including the provision of financial support.

As with secession, force or the threat of force is not an element of the crime.

The subversion provision is deeply troubling: subversion is generally seen by legal experts as a “political” criminal provision, used to punish a government’s political enemies, and generally not used to tackle genuine threats to the existing political order. As a group of U.N. experts put it in a letter to President Xi Jinping about the NSL, “(s)ubversion is almost uniformly directed towards the regulation of activity viewed as political under domestic law.”⁶ For this reason, few if any common law legal regimes include a subversion provision in their criminal codes, a fact that the Hong Kong government itself acknowledged in 2003, when it first tried – and failed – to incorporate a subversion provision into Hong Kong law.

The same problem with broad and imprecise language that dogs Article 20 on secession can also be found in Article 22: peaceful political protests that block access to government buildings, for example, could easily be swept up in the provision that prohibits interfering in or disrupting government duties and functions of the Hong Kong government, especially given the absence of a strict violence or threat of violence requirement. Acts of vandalism against government buildings or other state property – which certainly could be subject to legal sanction using other, narrower, criminal provisions – might also be deemed subversion under the NSL.

Article 24 covers terrorist activities, and targets the use or threat of violent acts as part of an effort to “coerce” the central government or the Hong Kong government. Listed actions include “serious violence against a person or persons” and “explosion, arson, or dissemination of poisonous or radioactive substances.” Article 25 covers individuals who organize terrorist

⁵ For an excellent summary of international law related to pro-independence advocacy, see Carole J. Petersen, “Prohibiting the Hong Kong National Party: Has Hong Kong Violated the International Covenant on Civil and Political Rights?”, 48 Hong Kong L. J. 789, 796-802 (2018).

⁶ CHN 17/2020, p. 8. The experts also point out that subversion as a crime is generally “deployed to punish individuals for what they think (or what they are thought to think) rather than on the basis of action or activities which pose a defined criminal threat.”

organizations, and Article 26 covers those who aid and abet such activities. Finally, Article 27 covers advocacy of and incitement to terrorism.

Many of the key elements of Article 24 track with efforts by the international community to develop legal language for counter-terrorism laws that are consistent with international human rights norms.⁷ In particular, the U.N. Security Council has concluded that efforts to criminalize terrorism should include reference to death or serious bodily harm, and should also include a requirement of actual intent to terrorize a population.⁸

More troublingly, however, Article 24 also includes references to damage to physical property, including “sabotage of means of transport,” or “sabotage of electronic control systems for... public services such as water, electric power, (or) gas.” Such provisions can be used to punish protestors who engage in destruction of public property, either accidentally or intentionally, and can also be used to publicly smear a protest movement as engaged in terrorism, one of the most politically-charged terms in the contemporary political lexicon.⁹

Article 29 of the NSL considers collusion with a foreign country or entity, including efforts to provide “state secrets or intelligence concerning national security.” Article 30 creates a harsher penalty for those who engage in secession or subversion under NSL articles 20 and 22, if that activity includes contact with a foreign country or organization.

To be sure, most jurisdictions have laws that outlaw collusion with foreign powers in ways that are detrimental to national security. Such laws generally cover matters such as intelligence gathering, or efforts to impede or degrade a state’s national defense.

If Articles 29 and 30 were limited to such matters, they would be much less concerning. But Article 29 in particular uses broad language that could be used to criminalize peaceful – and exceedingly common – civil society activity, such as contacts between human rights groups in Hong Kong and international non-governmental organizations in the United States, Europe, and elsewhere. Article 29(1), for example, refers to efforts to collaborate with a foreign organization to “seriously disrupt... the formulation and implementation of laws or policies by the Government of the Hong Kong Special Administrative Region.” Such a provision could all too easily be used to cover lobbying efforts to change Hong Kong laws carried out jointly by Hong Kong citizens and international groups, or merely to efforts by Western foundations to fund such efforts by Hong Kong activist organizations.

III. Pre-Trial Release: Long-term political detention without trial

Pre-trial release, generally known as bail in the U.S., is a vitally important aspect of any criminal justice system’s commitment to protect the due process rights of the accused. Pre-trial release allows defendants to continue to live their lives prior to trial, minimizing the impact that at times lengthy delays in the start of a criminal trial can have on an individual who, at that stage, has not

⁷ CHN 17/2020, p. 5.

⁸ U.N. Security Council resolution 1566 (2004).

⁹ U.N. Human Rights Committee, General Comment 35 on the Right to Liberty and Security of Person, CCPR/C/GC.35.

been convicted of any crime. Pre-trial release also makes it easier for criminal defendants to prepare for trial, and to work directly with their legal counsel to mount the strongest possible defense.¹⁰

Prior to the implementation of the NSL, Hong Kong criminal law generally followed international law and comparative best practice in granting bail to criminal defendants in most cases, unless a judge held that there was a sufficient risk that the defendant would reoffend or abscond. The presumption in favor of bail has been removed for NSL cases: under Article 42(2) of the NSL, “(n)o bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security.”

Given the broad scope and vague nature of national security crimes, Article 42(2)’s prove-a-negative standard is an impossibly high bar that most defendants cannot overcome. According to data collected by GCAL, 71 percent of defendants charged with national security crimes were denied bail.¹¹ In the most politically high-profile cases, denial of bail by the courts is virtually guaranteed.

At times, the courts have cited defendants’ exercise of their basic human rights as grounds to deny bail.¹² In the case of *HKSAR v. Mo Man Ching Claudia* (HCCC 134/2021), for example, the court denied bail to former legislator Claudia Mo, after she was arrested over her conversations with foreign journalists on WhatsApp. In *HKSAR v. Tam Man Ho Jeremy* (HCCC 114/2021), the court denied bail to former legislator Jeremy Tam, citing email messages that he had received from staff at the U.S. Consulate in Hong Kong.

Once bail is denied, pre-trial detention can become a form of indefinite detention without trial. In many cases, pre-trial detention can last up to six months or more: according to data collected by GCAL, as of April 2022, seventy-six individuals had served six months or more in pre-trial detention as they awaited trial for national security crimes.¹³ For the several dozen politicians and activists charged with subversion on February 28, 2021, pre-trial detention lasted for close to two years. Their trial began on February 6, 2023.¹⁴

Article 42(2)’s presumption against bail has also begun to be applied to some cases involving non-NSL crimes. In *HKSAR v. Ng Hau Yi Sidney* (FAMC 31/2021), the court reaffirmed a lower court’s ruling that Article 42(2)’s higher standard for granting bail could be applied to cases involving non-NSL national security crimes, including sedition. Given the steady growth of the

¹⁰ This section is drawn from Georgetown Center for Asian Law’s Submission to the UN Human Rights Committee on the Review of China’s (Hong Kong SAR) Fourth Periodic Report under the ICCPR, May 2022.

¹¹ Lydia Wong, Eric Yan-ho Lai, Charlotte Yeung, and Thomas E. Kellogg, “Tracking the Impact of Hong Kong’s National Security Law,” *ChinaFile*, April 13, 2023.

¹² 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](#), Center for Asian Law, Georgetown University, June 28, 2021.

¹³ Lai and Kellogg, “Arrest Data Show...,” [ChinaFile](#), April 5, 2022. GCAL is in the process of updating this data to reflect the trends over the past year.

¹⁴ Chris Lau and Brian Wong, “Hong Kong national security trial: prosecutors accuse 47 opposition figures of plotting to turn legislature into ‘lethal constitutional weapon’ against Beijing,” *South China Morning Post*, February 6, 2023.

government's use of the Crimes Ordinance's sedition provision over the past two years, this ruling has meant that a growing number of individuals not charged with NSL crimes are also being held in lengthy pre-trial detention, stretching on for several months.

Pre-trial detention is fast becoming yet another tool for the government to suppress human rights: the government now has the nearly unfettered authority to detain without trial almost any individual it chooses for months at a time, without any effective judicial oversight, as long as that person has been accused of a national security crime.

In a small number of cases in which bail was in fact granted, individuals had to agree to a broad list of restrictive conditions. In some cases, these restrictions amounted to a near complete surrender of their basic political rights, including their rights to free speech, free association, and free assembly. On January 13, 2022, for example, pro-democratic activist Owen Chow had his bail revoked after he made various peaceful political comments on social media; those comments constituted a violation of his bail conditions. Chow was among the 47 pro-democratic activists and politicians arrested for subversion on January 6, 2022.

The government's approach to bail in NSL cases contravenes key international law standards. The United Nations Human Rights Committee's General Comment on the right to a fair trial (No. 32), for example, makes clear that the deprivation of liberty of criminal defendants denied bail by the court must not last longer than necessary, and that individuals charged with crimes must be tried as expeditiously as possible.¹⁵ In the HRC's General Comment on liberty and security of persons (No. 35), the Committee states that arbitrary detention, even when lawfully applied, is unjust. Therefore, pre-trial detention must be reasonable and necessary in all circumstances.¹⁶ If trials are delayed, the court should consider alternatives to pretrial detention.¹⁷

IV. Analysis: Hong Kong national security laws in practice, 2020-2023

As noted above, GCAL has tracked each and every national security arrest and prosecution since the NSL went into effect.¹⁸ Our analysis makes clear that the NSL remains a key tool for suppressing human rights and pro-democratic activism in Hong Kong. Save for a small number of cases involving allegations of planning of acts of politically-motivated violence, the vast majority of cases involve apparent efforts by the Hong Kong government to punish individuals for their exercise of their basic rights in ways that the Hong Kong government or Beijing did not like. Generally speaking, the vast majority of national security cases brought over the past nearly three years would not have been considered potential national security crimes in other, rights-

¹⁵ UN Human Rights Committee, General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 2007, paragraph 35; also in *Sextus v. Trinidad and Tobago*, Communication No. 818/1998, paragraph 7.2.

¹⁶ UN Human Rights Committee, General Comment No. 35: Article 9 (Liberty and security of person), CCPR/C/CG32, 2014, paragraph 12; also in *Kulov v. Kyrgyzstan*, Communication No. 1369/2005, paragraph 8.3.

¹⁷ *Ibid.*, paragraph 37; also in *Taright v. Algeria*, Communication No. 1085/2002, paragraph 8.3.

¹⁸ That data has been published in collaboration with the Asia Society's *ChinaFile*, and is available online, on *ChinaFile*'s website. See Lydia Wong, Eric Yan-ho Lai, Charlotte Yeung, and Thomas Kellogg, "Tracking the Impact of Hong Kong's National Security Law," *ChinaFile*, April 13, 2023. The data cited in this section extends to March 31, 2023.

respecting jurisdictions. The acts that formed the basis of most of the cases thus far would not have been subject to prosecution.

Suppression of speech remains at the core of the government's use of national security crimes.¹⁹ According to GCAL data, speech-related national security arrests constitute a full 42 percent of total arrests since July 1, 2020. Silencing pro-independence and pro-democracy statements remains a high priority for the government. This accounts for the arrests of individuals for wearing t-shirts or possessing stickers bearing slogans like “Liberate Hong Kong, Revolution of Our Times,” or of individuals who merely possessed printed materials advocating Hong Kong independence. To be fair, the government did decline to prosecute some of those arrested for what it apparently viewed as lower-level speech crimes, although others have been tried, convicted, and sentenced to prison for their peaceful political speech.

The government has also used national security laws to target individuals who have been critical of government policy in other areas, unrelated to the 2019 protests. In February and March of 2022, for example, five individuals were arrested for sedition, in part over comments they made on social media critical of the government's COVID-19 policies. On February 15, 2022, the National Security Department (NSD) arrested Cantopop singer and democracy activist Tommy Yuen after he made comments on social media that, according to the government, “vilified” the government's COVID-19 policies. Yuen also posted comments online criticizing the Hong Kong judiciary and the police. Just days after Yuen's arrest, the NSD arrested two women after they took to social media to urge people not to get vaccinated against COVID-19 and to resist newly-imposed government COVID-19 restrictions. They too were charged with sedition.

These cases and others like them make clear that the limits on free speech extend well beyond a narrow list of pro-democracy slogans and statements related to Hong Kong independence. They also signal that the government is adapting and expanding its censorship regime to accord with its perceived need for broader social control, especially in key policy areas.

Around 12 percent of national security arrests relate to “colluding with foreign forces.” Attracting foreign support was a key element of the pro-democracy movement's strategy in 2019, and authorities appear to have crafted the NSL in part as a tool to break ties between activists in Hong Kong and their supporters abroad. In June 2021, for example, police arrested five senior executives from the now-defunct pro-democracy newspaper *Apple Daily* for alleged collusion with foreign forces. Prosecutors later affirmed that the arrests stemmed in part from editorials published in *Apple Daily* calling on Western countries to impose sanctions on Hong Kong officials over rights abuses committed during the 2019 protests.

The NSD has cited “subversion” as a justification for roughly 28 percent of arrests. Unsurprisingly, given how imprecisely the authorities define subversion, allegations of crime in this category span a broad range of activities. Most notably, the police have used “subversion” to crack down on the formal pro-democratic opposition in Hong Kong: 55 pro-democratic legislators and activists were arrested on January 6, 2021 for subversion. But the authorities have

¹⁹ This analysis draws from Eric Yan-ho Lai and Thomas Kellogg, “Arrest Data Show National Security Law Has Dealt a Hard Blow to Free Expression in Hong Kong,” *ChinaFile*, April 5, 2022. As noted above, the data have been revised to reflect patterns in the government's NSL usage up to March 31, 2023.

deployed NSL subversion provisions against other targets as well, such as seven members of the Hong Kong Alliance in Support of Patriotic Democratic Movements of China who were arrested in September 2021. Their crime? Five of them were charged with refusing to turn over information to the NSD related to the group’s activities, and three of them were charged with inciting subversion because of the group’s stated goal to “end one-party dictatorship.”

There are also a small but growing number of cases in which individuals have been accused of planning acts of politically-motivated violence. The government has charged more than two dozen such individuals with either subversion or terrorism under the NSL. Those arrested include members of Returning Valiant, a student group which advocates Hong Kong independence.

The impact of national security cases can extend beyond the injury to the individuals arrested. This appears intentional. In the case of prominent news outlet *Stand News*, for instance, the seven arrests led not only to *Stand News*’ closure, but to the shuttering of other leading news outlets as well, such as *Citizen News*, another digital news outlet known for its independent journalism. Similarly, the Hong Kong Alliance in Support of Patriotic Democratic Movements of China—the group that held the annual June 4 candlelight vigil in Hong Kong’s Victoria Park—voted to disband just two weeks after police arrested its top leadership. For other organizations, like the China Human Rights Lawyers Concern Group, the opening of a police investigation was enough to prompt an immediate closure.

From the beginning of 2021 to the end of January 2022, 68 civil society organizations had disbanded or closed. As these closures make clear, the NSL is reshaping civil society in Hong Kong and dramatically limiting the scope of acceptable civic activity and public discourse.