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Human rights situations that require the Council's attention

Written statement* submitted by Human Rights Now, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[6 February 2023]

* Issued as received, in the language of submission only.

Human Rights Now Criticizes the Erosion of Judicial Independence in Hong Kong

In addition to our deep concern over the collapse of civil society and deteriorating human rights situation in Hong Kong, Human Rights Now (HRN) strongly criticizes the erosion of judicial independence and judicial capacity to protect people's rights in Hong Kong, leaving civil society vulnerable to unchecked harassment and arbitrary arrest. In a previous report, HRN highlighted attacks against judicial independence in Hong Kong by political interference.[1] In this statement, we highlight how the situation has only deteriorated over the last year.

To place this in context, since the National Security Law (NSL) passed in June 2020, more than 150 persons have been arrested under the NSL, most for expression or assembly; virtually every independent civil society organization (CSO) has dissolved under threat of punishment; and there has been an exodus of lawyers and pro-democracy politicians.[2] Following the police raid and closing of two of the largest independent media outlets, Apple Daily and Stand News, at least seven other media outlets have also shut down in fear. Hong Kong's Legislative Council has ousted almost all pro-democracy members after electoral changes mandated by China's National People's Congress (NPC) allowed official vetting of candidates and reduced the number of seats citizens could directly elect, leading pro-democracy candidates to lose all but one seat in the last election.[3] (They had won 90% of seats in the previous district council election.) This has made it almost impossible for new legislation to end abuses.

Currently, the independence of the final guardian of civil and political rights, the judiciary, is also being destroyed. The ongoing trial of Jimmy Lai, the head of Apple Daily, provides a snapshot of the many ways Hong Kong's judiciary has lost its independence and is being used as another tool for crackdowns. The following points summarize them.

1. Violations of Freedom of Speech

Hong Kong authorities have a double duty to guarantee the freedoms of speech, press, publication, and association under both its Basic Law article 27 and by the Basic Law's explicit incorporation of the ICCPR, which also guarantees these rights, in article 39.

Lai, along with six co-defendants, is currently being tried and faces life in prison for three alleged crimes, one count of collusion and two counts of conspiracy to collude with foreign forces under the NSL, and one count of conspiracy to spread seditious materials under the sedition law. At their root is the NSL's criminalization of speech, in this case targeting Lai's tweets, statements, and articles published by his newspaper, particularly those calling for sanctions against Hong Kong, which are neither seditious nor any threat to national security.[4] The management of Stand News was similarly arrested, according to the prosecutor in their trial, explicitly for the content of their editorials.[5]

2. Criminalization of International Engagement

A particularly troubling part of the criminalization of "foreign collusion" is the inability for civil society to engage, or even communicate, with international actors on projects in the public interest. In a previous statement, we pointed out how even work with the United Nations itself was listed as evidence of criminal foreign collusion.[6]

3. Judicial Harassment

Last October, Lai was also convicted of two counts of fraud for five years and nine months of prison for not disclosing private actions at the newspaper's headquarters, allegedly breaching its land lease. The circumstances left no doubt that the prosecution was politically motivated and a form of judicial harassment.[7] The conviction was consistent

with similar judicial harassment faced by CSOs detailed in a previous HRN statement which led to the total collapse of CSOs in Hong Kong.[8]

4. Violations of Freedom of Assembly

Last April, Lai was convicted and sentenced to 20 months in prison for three counts of “unauthorized assembly” for engaging in peaceful protests in April, May, and December 2021, adding him to the list of over 10,000 people arrested and over 1,100 convicted in connection with the protests, a number indicating the government’s assault against freedom of assembly.[9]

5. Prolonged Pretrial Detention and Denial of Rights to Bail and Trial by Jury

Lai has been in pretrial detention since December 2020, and there has been an unreasonably long delay for his trial, inconsistent with the right to trial without undue delay expressed by ICCPR articles 9 and 14.

Contributing to this violation is the court’s decision in February 2021 to deny Lai bail without evidence of necessity per NSL article 42, which establishes a presumption of no bail for NSL cases. This continues the precedence for denials of bail under the NSL since the Lai Chee Ying case in 2021, and it is inconsistent with Hong Kong’s common law presumption of bail that has always been the basic standard of protection for defendants. Also per the NSL and the precedent set since the Tong Ying Kit case in 2021, the court denied Lai the common law protection of a trial by jury traditionally presumed for High Court criminal trials.[10] Both denials are inconsistent with the Human Rights Committee’s admonition that courts have duty not to use different standards of protection in comparable criminal trials without reasonable justification.[11]

6. Attacks on the right to a Lawyer of One’s Own Choosing

In a previous report, HRN criticized the decision of Hong Kong authorities to end the right of legal aid recipients to a lawyer of their own choosing under circumstances indicating that the purpose was to appoint lawyers with agendas contrary to the interests of their clients’ protection.[12] The attacks on this right have become even more severe under Lai’s case, as the government requested China’s NPC Standing Committee (NPCSC) to interpret the NSL on whether it allowed the rejection of representation of foreign lawyers, including Lai’s chosen lawyer, UK barrister Tim Owen, in NSL cases. The NPCSC answered that courts must get a certificate from Hong Kong’s chief executive whether it involves national security, and the Committee for Safeguarding National Security can also intervene in the absence of a certificate, either allowing the rejection and both without judicial review. It is also concerning that the Committee has introduced amendments to ban all foreign lawyers in NSL cases.[13]

Such attacks on the right to council of one’s own choosing are contrary to ICCPR article 14, para. 3(d) and articles 1 and 5 of the UN Basic Principles on the Role of Lawyers (BPR), which explicitly uphold the right, as well as BPR articles 14 and 15, which require lawyers to act freely and loyally in their clients’ interest, and article 16, calling on states to ensure lawyers can perform their professional duties without hindrance or interference. The interference by governmental bodies in the judicial process is also contrary to the UN Basic Principles on the independence of the judiciary (BPIJ) article 4, which rejects unwarranted interference with or revision of the judicial process.

7. Hand-Selected Judges for the Trial

The judges presiding in Lai’s case were selected by Hong Kong’s chief executive, again contrary to the BPIJ and judicial independence. There have also been proposals for rules to limit foreign judges, and most foreign judges withdrew in March 2022 to avoid complicity with the authoritarian turn in Hong Kong since the NSL passed.[14]

8. Threats of moving trials to China

At the root of many of these abuses is the expressed threat in NSL cases, including in Lai's case by the Hong Kong representative to the NPCSC "if difficulties arise",^[15] to transfer troublesome defendants to Chinese courts where there is a total absence of independence and meaningful protections and justified fears of torture and other abuses. This threat coerces defendants, as in Lai's case, to accept abusive treatment in Hong Kong courts to avoid transfer to China, and it is another blatant affront to judicial independence.

9. No complaint against judiciary upheld in 2022

In addition to all of the above problems, particularly indicative of the judiciary's loss of credibility is a recent official report noting that not one out of more than 8,600 complaints against judges or judicial officials in 2022 was determined justified, and defendants on average waited almost a year for trial.^[16]

Recommendations

HRN criticizes the erosion of judicial independence in Hong Kong and calls on the government to:

- Respect common law protections in NSL cases, including the rights to presumption of bail and jury trial, and to be represented by a lawyer of one's own choosing;
- Avoid any interference in the judiciary, including in the selection of judges and lawyers;
- End the harassment and arrests of media outlets, protestors, and CSOs;
- Repeal the NSL and bring Hong Kong's law in conformity with its civil and political rights obligations.

1. https://hrn.or.jp/eng/wp-content/uploads/2022/05/HRN_-_Information_on_State_parties_to_be_examined_by_the_Committee_China-Hong_Kong_2022.pdf, paras. 46-53.

2. <https://hrn.or.jp/eng/news/2021/08/23/hrc48-statement-hong-kong/>

3. <https://www.nytimes.com/2021/12/18/world/asia/hong-kong-patriots-elections.html>

4. <https://www.theguardian.com/world/2020/dec/11/jimmy-lai-charged-under-national-security-law-as-hong-kong-crackdown-worsens>

5. <https://hongkongfp.com/2023/01/20/opinion-pieces-should-have-views-on-both-sides-prosecution-claims-at-stand-news-sedition-trial/>

6. *Supra*, note 2.

7. <https://www.taipetimes.com/News/front/archives/2022/12/11/2003790517>

8. *Supra*, note 2.

9. <https://www.latimes.com/world-nation/story/2022-07-27/hong-kong-protesters-prison-release>

10. <https://thewitnesshk.com/47人黎智英國按案不認陪審 律政司長首引涉外因素> (in Chinese)

11. <https://digitallibrary.un.org/record/606075?ln=en>

12. *Supra*, note 1, paras. 40-45.

13. <https://hongkongfp.com/2023/01/12/hong-kong-should-change-law-to-bar-overseas-lawyers-from-security-trials-says-national-security-committee/>; <https://hongkongfp.com/2023/01/20/hong-kong-bar-association-urges-against-blanket-ban-on-overseas-lawyers-in-national-security-law-cases/>

14. <https://www.washingtonpost.com/world/2022/03/30/hong-kong-uk-withdrawal-judges/>

15. <https://www.taipetimes.com/News/world/archives/2022/12/08/2003790353>

16. <https://hongkongfp.com/2023/01/19/not-one-of-8625-complaints-against-hong-kong-judiciary-upheld-in-2022/>