

**Civil Society Parallel Report on the
Fourth Report
on the Implementation of the
International Covenant on Economic, Social and Cultural Rights
by the
Hong Kong Special Administrative Region of
the People's Republic of China's**

*Submitted to the
UN Committee on Economic, Social and Cultural Rights
for consideration in the formulation of the List of Issues during the
68th Pre-Sessional Working Group (08 – 12 March 2021)*

Submitted by:

*International Human Rights Center
Loyola Law School, Los Angeles*



Loyola Law School
Loyola Marymount University
Los Angeles

919 Albany Street
90015, Los Angeles, CA
United States of America
Contact: Prof. Cesare Romano
cesare.romano@lls.edu

and

Science for Democracy

**SCIENCE FOR
DEMOCRACY**

Rue d'Arlon, 53
B-1040 Brussels
Belgium
Contact: Marco Perduca
info@sciencefordemocracy.org

I) PURPOSE OF THIS REPORT

1) The purpose of this report is to assist the Committee on Economic, Social and Cultural Rights in the formulation of the List of Issues during the 68th Pre-Sessional Working Group (08 – 12 March 2021) leading to the discussion of the Fourth Periodic Report of the Hong Kong Special Administrative Region (HKSAR) of the People’s Republic of China (PRC or China)¹ on its implementation of the International Covenant on Economic, Social and Cultural Rights (CESCR or Covenant).

2) The PRC ratified the Covenant on 27 March 2001.² Upon ratification of the Covenant, the PRC declared: “... the International Covenant on Economic, Social and Cultural Rights shall be applicable to the Hong Kong Special Administrative Region of the People's Republic of China ... and shall, pursuant to the provisions of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ... be implemented through the respective law of the ... special administrative region.”³

3) This report focuses on the *Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region* (National Security Law),⁴ and how some of its provisions pose serious risks to academic freedom protected by articles 13 and 15(1)(b), (2), (3) and (4) of the Covenant (right to education and the right to science). Because the National Security Law was enacted after HKSAR’s submission of its Fourth Periodic Report, the HKSAR’s Fourth Report does not mention it. This Parallel Report intends to fill this gap and bring to the attention of the Committee facts and points of law that might otherwise escape its scrutiny.

¹ United Nations Committee on Economic, Social and Cultural Rights, *Fourth Periodic Report Submitted by Hong Kong, China, under Articles 16 and 17 of the Covenant, due in 2019*, (date received 19 Dec. 2019), U.N. Doc. E/C.12/CHN-HKG/4.

² United Nations Office of the High Commissioner for Human Rights, *Status of Ratification Interactive Dashboard*, (last updated 29 Sept. 2020) <https://indicators.ohchr.org/> (last visited 15 Dec. 2020).

³ *Id.*

⁴ Official English translation, *Hong Kong National Security Law Full Text*, South China Morning Post (2 July 2020), available here: <https://www.scmp.com/news/hong-kong/politics/article/3091595/hong-kong-national-security-law-read-full-text>, (last visited 15 Dec. 2020).

II) ABOUT THE AUTHORS

4) This report has been prepared by Dalanee Hester, JD Candidate 2021, and Justin Small, JD Candidate 2022, of the International Human Rights International Human Rights Center of Loyola Law School, Los Angeles, under the supervision of Prof. Cesare Romano.

5) The International Human Rights Center of Loyola Law School, Los Angeles is committed to achieving the full exercise of human rights by all persons and seeks to maximize the use of international and regional political, judicial, and quasi-judicial bodies through litigation, advocacy, and capacity-building.⁵ Loyola Law School, Los Angeles is the school of law of Loyola Marymount University, a Jesuit university.

6) Science for Democracy is an international non-governmental organization, based in Brussels, Belgium.⁶ Its aim is to promote the human right to benefit from progress in science and technology (the “right to science”) by fostering a dialogue between the scientific community and national and international decision-makers to urge States to fulfil their international human rights international obligations and to promote universally the right to science.

III) BACKGROUND

A) The Human Right to Academic Freedom

7) Academic freedom underpins the right to education and the freedom of research within institutions of higher education. It is a philosophical and legal tenet that demands that members of academia be free to inquire, express, teach or communicate ideas or facts, including those that are inconvenient to authorities, without repercussions for themselves or the academic institutions to which they belong.⁷ Although “academic freedom” is not mentioned as such in the Covenant, there is no doubt that Articles 13 and 15 of the ICESCR, read together, “promote rights at the

⁵ See *International Human Rights Clinic*, Loyola Law School, Los Angeles, <https://www.lls.edu/academics/experientiallearning/clinics/internationalhumanrightscenter/> (last visited 15 Dec. 2020).

⁶ See *Science for Democracy*, <https://sciencefordemocracy.org/> (last visited 15 Dec. 2020).

⁷ A fixed and precise definition academic freedom remains elusive. However, the Committee’s remarks in its general comments and the UNESCO *Recommendation Concerning the Status of Higher Education Teaching Personnel* are widely cited as providing a conceptual framework for academic freedom. See Klaus D. Beiter, *Where Have All the Scientific and Academic Freedoms Gone?*, *Israel Law Review* Vol. 52:2, p. 242 (2019); Jogchum Vrielink et al., *Academic Freedom as a Fundamental Right*, *League of European Research Universities*, Advice Paper No. 6, paras. 17-21 (Dec. 2010); United Nations General Assembly, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, para. 6-7 (28 July 2020) U.N. Doc. A/75/261; Debbie Sayers, *The EU Charter of Fundamental Rights; A Commentary; Part 1- Commentary on the Articles of the EU Charter; Art 13- Freedom of Arts and Sciences*, pp. 385-386 paras. 13.27-13.29 (Oxford 2014).

centre of academic freedom.”⁸ Indeed, the Committee’s own general comments on Article 13,⁹ and on Article 15(1)(b),(2),(3) and(4),¹⁰ make it clear that the Covenant protects academic freedom.

8) In General Comment No. 13 on the right to education, the Committee noted: “Members of the academic community, individually or collectively, are free to pursue, develop and transmit knowledge and ideas, through research, teaching, study, discussion, documentation, production, creation or writing. Academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfil their functions without discrimination or fear of repression by the State or any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognized human rights applicable to other individuals in the same jurisdiction.”¹¹

9) Academic freedom is both an individual and a collective right. Individually, it protects the scholar from interferences with her freedom of expression by the institutions that employ her, the government and third parties. As the European Court of Human Rights underlined in *Sorguç v. Turkey*, academic freedom guarantees academics the right to “express freely their opinion about the institution or system in which they work and freedom to distribute knowledge and truth without restriction.”¹² The right extends to academics’ activities both within their institutions and outside, because “all too often, academics are targeted for their public perception as sceptics and objective knowledge-seekers, especially when they engage in public debate.”¹³

⁸ United Nations General Assembly, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, para. 5 (28 July 2020) U.N. Doc. A/75/261.

⁹ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 13 (Twenty-First Session 1999) The Right to Education*, paras. 38-40 (8 Dec. 1999) U.N. Doc. E/C.12/1999/10 (reading academic freedom as an accompanying right to the article 13’s right to education).

¹⁰ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 25 (2020) on Science and Economic, Social and Cultural Rights*, para. 46 (30 Apr. 2020) U.N. Doc. E/C.12/GC/25 (clarifying that the positive State duty to actively promote the advancement of science “implies inter alia, protection and promotion of academic and scientific freedom.)

¹¹ *Supra*. n. 9.

¹² *Sorguç v. Turkey*, App. No. 17089/03, European Court of Human Rights, Judgement, para. 35 (23 June 2009) <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22%3A%5B%5D%2C%22documentcollectionid%22%3A%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%5D%2C%22itemid%22%3A%5B%22001-93161%22%5D%7D>.

¹³ United Nations General Assembly, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, para. 56(c) (28 July 2020) U.N. Doc. A/75/261.

10) Collectively, academic freedom protects academic institutions from encroachment by the government and private actors. As the United Nations Educational, Scientific and Cultural Organization's (UNESCO) Recommendation Concerning the Status of Higher-Education Teaching Personnel noted: “[s]elf-governance, collegiality and appropriate academic leadership are essential components of meaningful autonomy for institutions of higher education.”¹⁴ The autonomy of higher education institutions is a “precondition to guarantee the proper fulfillment of the functions entrusted to higher-education teaching personnel and institutions.”¹⁵ As the Committee stressed, academic freedom necessarily “requires the autonomy of higher institutions,”¹⁶ and autonomy is defined as the “degree of self-governance necessary for effective decision-making ... in relation to their [the institution's] academic work, standards, management and related activities.”¹⁷ The “[e]xternal interference in the selection, appointment, and dismissal of leadership and professors”¹⁸ is one example of how the collective and individual right to academic freedom might be encroached.

11) Finally, academic freedom imposes on States obligations, such as the duty to ensure the respect the academic freedom of others, the fair discussion of contrary views, and the treatment of everyone without discrimination on any of the prohibited grounds.¹⁹ It also confers on the State positive obligations, such as the duty to foster an enabling environment that ensures protection of academic freedom.²⁰

¹⁴ United Nations Educational, Scientific and Cultural Organization, *Recommendation Concerning the Status of Higher-Education Teaching Personnel*, UNESCO General Conference, 29th Paris, para. 21 (11 Nov. 1997).

¹⁵ *Id.* at para. 18.

¹⁶ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 13 (Twenty-First Session 1999) The Right to Education*, paras. 40 (8 Dec. 1999) U.N. Doc. E/C.12/1999/10.

¹⁷ *Id.*

¹⁸ United Nations General Assembly, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, para. 39 (28 July 2020) U.N. Doc. A/75/261.

¹⁹ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 13 (Twenty-First Session 1999) The Right to Education*, paras. 39 (8 Dec. 1999) U.N. Doc. E/C.12/1999/10

²⁰ United Nations General Assembly, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, paras. 9-10 (28 July 2020) U.N. Doc. A/75/261.

B) Academic Freedom in Hong Kong and the PRC

12) Unfortunately, the PRC has a history of infringing on academic freedom of expression. For example, in 2014, Prof. Ilham Tohti, an economist, was arrested, tried and sentenced to life on separatism-related charges for expressing his views on issues facing the ethnic Uighur community.²¹ Tohti's arrest and trial were condemned by the United Nations Human Rights Council's Working Group on Arbitrary Detention.²² Prof. Tohti is just one of many academics in China who have been punished for his expression, many others have been censored. A "tip sharing system" encourages students to report professor's "inappropriate speech", which tends to be any views critical of the PRC.²³ For example, Prof. Yang Shozheng, who taught game theory and microeconomic at Guizhou university, was fired for criticizing the PRC's economic policy.²⁴

13) The PRC consistently undercuts Hong Kong's attempts to foster and protect academic freedom within the HKSAR. Over the years, as the PRC tightened its control over Hong Kong, academic freedom in the territory has declined. According to the Academic Freedom Index (AFI),²⁵ a measurement of State's academic freedom by Global Public Policy Institute (GPPI), the HKSAR is one of 10 countries or territories in the world cited as showing a statistically significant deterioration of academic freedom in the last five years.²⁶

14) Equally problematic is the PRC's increasingly insidious influence within the HKSAR's academic institutions and their everyday operations. In Hong Kong, there are 22 degree-awarding higher education institutions.²⁷ Eight of those are "University Grant Committee Funded

²¹ United Nations Human Rights Council: Working Group on Arbitrary Detention, *Opinion No. 3/2014*, para. 24 (21 July 2014) U.N. Doc. A/HRC/WGAD/2014/3.

²² *Id.* at para. 29.

²³ Dahai Han, *Malicious Tip-Offs Stifle Academic Freedom in China*, VOA (20 Nov. 2020) <https://www.voanews.com/east-asia-pacific/voa-news-china/malicious-tip-offs-stifle-academic-freedom-china-analysts-say>.

²⁴ *A Professor Dared to Tell the Truth and was Fired*, Washington Post (23 Aug. 2018) https://www.washingtonpost.com/opinions/a-professor-dared-to-tell-the-truth-in-china--and-was-fired/2018/08/23/9fd81ee-a653-11e8-a656-943eefab5daf_story.html.

²⁵ See Janika Spannagel et al., *The Academic Freedom Index and Other New Indicators Relating to the Academic Space*, The Varieties of Democracy Institute, Series 2020:26

²⁶ See Katrin Kinzelbach et al., *Free Universities: Putting Academic Freedom Index into Action*, Global Public Policy Institute, p. 16 fig. 5 (March 2020).

²⁷ See *Institutions*, The Government of the Hong Kong Special Administrative Region, Education Bureau, <https://www.edb.gov.hk/en/edu-system/postsecondary/local-higher-edu/institutions/index.html> (last visited 15 Dec. 2020).

Universities”, or UGC-funded, meaning their funding comes directly from the government.²⁸ In addition, the Government of the HKSAR plays a direct role in UGC-funded universities’ governance. For example, the Chancellor of the University of Hong Kong, Hong Kong’s oldest higher education institutions and one of Asia’s best universities, is the Honorable Mrs. Carrie Lam.²⁹ Mrs. Lam is the Chief Executive of Hong Kong, the head of the Government of Hong Kong.³⁰ The Hong Kong University Council is the body “responsible for the management of financial and human resources of the University.”³¹ The University Council is composed of 14 lay members (i.e. members who are neither students nor employees of the university). Lay members on the Council outnumber student and university faculty/staff by a ratio of 2:1 (14/7).³² Crucially, the Chief Executive/Chancellor directly appoints six of the “lay members”.³³ This way, the Chief Executive is able to directly appoint and influence council members who oversee and manage the financial and human resource decisions of Hong Kong University, including the promoting, hiring, and firing of professors.

15) For example, in 2015, the Council of the University of Hong Kong deferred and ultimately rejected Professor Johannes Chan’s appointment for the Pro-Vice Chancellor position.³⁴ Professor Chan, the former Dean of the Faculty of Law, was an outspoken democracy

²⁸ See *Mission Statement of the University Grants Committee*, University Grants Committee, <https://www.ugc.edu.hk/eng/ugc/about/overview/mission.html> (23 Jan 2017) (The University Grant Committee is “a non-statutory body that advises the [HK]SAR on the funding and strategic development of higher education in Hong Kong.”).

²⁹ See *Officers of the University*, The University of Hong Kong, <https://www.hku.hk/about/officers.html#chancellor>, (last visited 15 Dec. 2020).

³⁰ See *Chief Executive Hong Kong Special Administrative Region*, <https://www.ceo.gov.hk/eng/>, (last visited 15 Dec. 2020).

³¹ *Governance Structure*, The University of Hong Kong, https://www.hku.hk/about/governance/governance_structure.html, (last visited 19 Oct. 2020).

³² *Id.*

³³ University of Hong Kong, *Guide and Code of Practice for Members of the Council*, p. 27, part b, para. 5.18 (Aug. 2015) https://www.hku.hk/f/page/7538/guide_n_code_2015.pdf (last visited 15 Dec. 2020).

³⁴ See Kris Cheng, *Explainer: The HKU Council Pro-Vice Chancellor Debacle*, Hong Kong Free Press (30 Sept. 2015) <https://hongkongfp.com/2015/09/30/explainer-hku-council-rejects-johannes-chan-appointment-to-pro-vice-chancellor/>.

advocate who opposed the PRC's growing control over the HKSAR.³⁵ His appointment was rejected even though a Selection Committee chaired by the Vice-Chancellor of Hong Kong University had unanimously recommended him.³⁶

16) More recently, the Hong Kong University Council voted to fire Prof. Benny Tai Yui-ting, an associate professor of law at the University of Hong Kong.³⁷ In 2019, Prof. Tai Yui-ting was convicted of two counts of conspiracy and incitement to commit public nuisance, and sentenced to 16 months of imprisonment in connection with his participation in pro-democracy protests.³⁸ At the time of his firing, Prof. Tai Yui-ting expressed concern that academic staff “are no longer free to make controversial statements to the general public about ... politically or socially controversial matters.”³⁹ Although initially the University of Hong Kong's Senate voted that Prof. Tai Yui-ting's conduct did not warrant dismissal, in July 2020, the Hong Kong University Council dismissed him in contravention of the Senate recommendation.⁴⁰ The Hong Kong-

³⁵ Johannes Chan and Douglas Kerr, *Academic Freedom, Political Interference and Public Accountability*, (2016) 7 *Journal of Academic Freedom* 1-21.

³⁶ See Kris Cheng, *Explainer: The HKU Council Pro-Vice Chancellor Debacle*, Hong Kong Free Press (30 Sept. 2015) <https://hongkongfp.com/2015/09/30/explainer-hku-council-rejects-johannes-chan-appointment-to-pro-vice-chancellor/>, (last visited 15 Dec. 2020).

³⁷ *Benny Tai: Hong Kong University Fires Professor Who Led Protests*, BBC News (28 July 2020) <https://www.bbc.com/news/world-asia-china-53567333>; See *Research Profile: Benny Tai Yui-ting*, University of Hong Kong (archived from original on 7 Jan 2015, retrieved on 22 Oct. 2020).

³⁸ Holmes Chan, *Leading Hong Kong Umbrella Activists found Guilty of Public Nuisance*, Hong Kong Free Press (9 Apr. 2019) (<https://hongkongfp.com/2019/04/09/breaking-hong-kong-umbrella-movement-activists-handed-verbatim-public-nuisance-trial/>); Natalie Lung, *Hong Kong Sentences Occupy Leaders Up to 16 Months in Prison*, Bloomberg (24 Apr. 2019) (<https://www.bloomberg.com/news/articles/2019-04-24/hong-kong-occupy-leader-benny-tai-sentenced-to-16-months-in-jail>); *Hong Kong 'Umbrella' Protestors Sentenced to Jail Terms*, BBC News (24 Apr. 2019) (<https://www.bbc.com/news/world-asia-china-48033156>).

³⁹ Tai Yui-ting, Benny, “*The decision to terminate my appointment was made not by the University of Hong Kong but by an authority beyond the University through its agents. It marks the end of academic freedom in Hong Kong. Academic staff in education institutions in Hong Kong are no longer free to make controversial statements to the general public about politically or socially controversial matters. Academic institutions in Hong Kong cannot protect their members from internal and outside interference. If there is still any doubt of the advancement of “One Country, One System” in the territory, my case should be able to remove it. I am very grateful to the University of Hong Kong for nurturing me as a law student, a law teacher, a legal researcher and a guardian of the rule of law. I am heart-broken to witness the demise of my beloved university. Yet, I will continue my research and teaching on the rule of law in another capacity. My fight for Hong Kong's rule of law also will not stop. I have the confidence to see the rebirth of a free HKU in the future.*” Facebook (28 July 2020) (<https://www.facebook.com/BennyTaiHK/posts/1455230568004033>).

⁴⁰ *Benny Tai: Hong Kong University Fires Professor Who Led Protests*, BBC News (28 July 2020) (<https://www.bbc.com/news/world-asia-china-53567333>).

Beijing Liaison Office, the PRC's representation in the HKSAR, applauded the decision as a "move that punishes evil and praises the virtuous."⁴¹

17) Despite the PRC's growing influence over academia in Hong Kong, the HKSAR's Fourth Periodic Report affirms that education "remains among the Government's highest priorities."⁴² Article 137 of Chapter VI of Hong Kong Basic Law declares: "Educational institutes of all kinds may retain their autonomy and enjoy academic freedom. They may continue to recruit staff and use teaching materials from outside the Hong Kong Special Administrative Region."⁴³ Yet, educational institutions in Hong Kong, and in particular those of higher education, are, by design, far from free and autonomous.

IV) THE HKSAR NATIONAL SECURITY LAW

18) Against this backdrop of steady eroding academic freedom, on 28 May 2020, the National People's Congress Standing Committee (Standing Committee) of the People's Republic of China adopted the *Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region*.⁴⁴ The national security Law came into effect on 30 June 2020, an hour before the 23rd anniversary of the city's handover to China from British rule. Several provisions of the National Security Law pose significant threats to academic freedom in Hong Kong.

A) Background of the HKSAR National Security Law

19) Article 23 of the Basic Law of the HKSAR⁴⁵ (Basic Law), Hong Kong's "Constitution", provides: "The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting

⁴¹ *Id.*

⁴² United Nations Committee on Economic, Social and Cultural Rights, *Fourth Periodic Report Submitted by Hong Kong, China, under Articles 16 and 17 of the Covenant, due in 2019*, para. 161 *supra*. n. 1.

⁴³ Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Ch. VI, art. 137 (effective 1 July 1997) available at: https://www.basiclaw.gov.hk/en/basiclawtext/b_chapter_1.html (last visited 15 Dec. 2020).

⁴⁴ *Supra*. n. 4.

⁴⁵ Basic Law Of the Hong Kong Special Administrative Region of the People's Republic of China, Ch I, Art. 23 (https://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf).

political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.”⁴⁶

20) The Hong Kong Government’s past attempts to enact a national security law, as called for by Article 23, was met with public condemnation from the international community and local protests. In 2003, after 500,000 people protested, the HKSAR Legislative Council withdrew a national security bill,⁴⁷ which was perceived as “a real threat to the rights and freedoms of the residents of Hong Kong, in particular, to their freedom of political expression and of seeking information through the media.”⁴⁸ Subsequent attempts to amend the legislation were met with scrutiny and perceived as threatening the delicate balance of the “one country, two systems.” In early 2019, Hong Kong’s Security Bureau proposed amendments to extradition laws that would allow extraditions to mainland China and other countries not covered by existing treaties, triggering a series of protests that rocked the HKSAR for much of 2019 and into 2020. University students sometimes accompanied by faculty, featured prominently in the protests.⁴⁹

21) Frustrated with the ongoing unrest in Hong Kong, the PRC Government moved to impose unilaterally a National Security Law on Hong Kong.⁵⁰ On 30 June 2020, the National

⁴⁶ *Id.*

⁴⁷ See Elson Tong, *Reviving Article 23 (Part 1): The Rise and Fall of Hong Kong’s 2003 National Security Bill*, Hong Kong Free Press (17 Feb. 2018) (<https://hongkongfp.com/2018/02/17/reviving-article-23-part-i-rise-fall-hong-kong-2003-national-security-bill/>).

⁴⁸ See Natalie Wong, *National Security Law: Five Differences Between Hong Kong’s New Legislation and 2003’s Shelved Article 23 Bill*, South China Morning Post (9 July 2020) (<https://www.scmp.com/news/hong-kong/politics/article/3092396/national-security-law-five-differences-between-hong-kongs>).

⁴⁹ “Between November 17 and 29, 2019, a protracted, at-times fiery siege, of the Hong Kong Polytechnic University took place. Police surrounded the campus after students and activists barricaded themselves inside. More than 1,100 mostly young activists were arrested in what was widely seen as the police’s first major success against the protest movement. Key Dates in Hong Kong’s Anti-Government Protests, Reuters (2 June 2020) (<https://www.reuters.com/article/us-hongkong-protests-anniversary-timelin/key-dates-in-hong-kongs-anti-government-protests-idUSKBN23A0QD>).

⁵⁰ “With Article 23 continuing to lie dormant and with Hong Kong’s national security law enforcement capabilities lacking, national security and Hong Kong’s long-term prosperity are under threat, says the Decision’s explanation. The central government thus decided to take matters into its own hands.” Changhao Wei, *2020 NPC Session: NPC’s Decision on National Security in Hong Kong Explained*, NPC Observer (28 May 2020) (<https://npcobserver.com/2020/05/22/2020-npc-session-npcs-imminent-decision-on-national-security-in-hong-kong-explained/>).

Security Law was incorporated in Annex III of Basic Law.⁵¹ In what appears to be a strategic decision from the PRC, the law's sixty-six articles were kept secret until after it was passed. The bill's most alarming provisions introduce severe punishment, including life imprisonment, for acts of secession, subversion, terrorism and collusion with foreign or external forces, under the guise of "safeguarding national security; preventing, suppressing, organization and perpetration of terrorists activities, and collusion with a foreign country or with external elements to endanger national security in relation to the Hong Kong Special Administrative Region."⁵²

22) In addition to criminalizing a wide range of conduct, the National Security Law reduced Hong Kong's autonomy to administer the law. The law will apply to both Hong Kong residents and non-permanent residents and people "from outside [Hong Kong] ... who are not permanent residents of Hong Kong."⁵³ Zhang Xioming, Deputy Director of the Central Chinese Government Office for Hong Kong confirmed that the most serious violations of the National Security Law will be prosecuted in the mainland.⁵⁴

23) Under Article 55 of the National Security Law, the PRC Government established a new security body in Hong Kong, called the "Office for Safeguarding National Security in Hong Kong" (the "Office").⁵⁵ The Office has the authority to investigate national security matters that are too complex due to foreign involvement or external forces, situations where the Hong Kong Government is unable to enforce the law, or major threats to national security.⁵⁶ In addition, the Office may request Beijing's permission to conduct investigations outside of the aforementioned contexts.⁵⁷ The Office and its personnel are not within Hong Kong's jurisdiction, which means

⁵¹ Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China: Annex III: National Laws to be Applied in the Hong Kong Special Administrative Region, instrument 9 (30 June 2020) available at https://www.basiclaw.gov.hk/en/basiclawtext/images/basiclawtext_doc9.pdf (last visited 15 Dec. 2020).

⁵² *Id.* at art. 1.

⁵³ *Id.* at art. 38.

⁵⁴ Javier C. Hernandez, *Harsh Penalties, Vaguely Defined Crimes: Hong Kong's National Security Law Explained*, New York Times (13 July 2020) (<https://www.nytimes.com/2020/06/30/world/asia/hong-kong-security-law-explain.html>).

⁵⁵ Amnesty International, *Hong Kong's National Security Law 10 Things You Need to Know*, (17 July 2020) (<https://www.amnesty.org/en/latest/news/2020/07/hong-kong-national-security-law-10-things-you-need-to-know/>).

⁵⁶ *Id.*

⁵⁷ *Id.*

neither are subject to local laws. Effectively the Office maintains complete immunity from Hong Kong law.⁵⁸

24) Pursuant to the National Security Law, Hong Kong established its own national security commission (the Committee for Safeguarding National Security or the “Committee), “advised” by a delegate from the Chinese central government. The Committee has the authority to appoint law enforcement personnel and judges. The Committee is not required to disclose its work and its decisions are not reviewable by Hong Kong courts. Finally, the Hong Kong Police Force created a new national security division that can conduct surveillance without consulting judicial authority.⁵⁹

25) Several observers have expressed concerns about the National Security Law’s compliance with both China’s and Hong Kong’s obligations under international law. The Chinese government must abide by the International Covenant on Civil and Political Rights (ICCPR), pursuant to the 1984 Sino-British Joint Declaration, which transferred control of the HKSAR from the United Kingdom to the PRC.⁶⁰ Article 39 of the HKSAR Basic Law provides that the ICCPR shall remain in effect.⁶¹ The HKSAR Legislative Council implemented the rights enshrined in the ICCPR in the Hong Kong Bill of Rights Ordinance.⁶² However, Article 62 of the National Security Law states that it supersedes all Hong Kong local laws, such as the Bill of Rights Ordinance.⁶³ It is unclear as to whether the law supersedes the Basic Law as well, which would limit the Hong Kong judiciary’s ability to interpret the National Security Law and its application.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See *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*, Annex I Sec. XIV, 19 Dec. 1984 (<https://www.refworld.org/docid/3ae6b525c.html>).

⁶¹ Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China: Ch. III, art. 39. available at: https://www.basiclaw.gov.hk/en/basiclawtext/b_chapter_1.html (last visited 15 Dec. 2020).

⁶² *Id.*

⁶³ Human Rights Watch *China: New Hong Kong Law a Roadmap for Repression*, (29 July 2020) <https://www.hrw.org/news/2020/07/29/china-new-hong-kong-law-roadmap-repression>

26) In September 2020, several holders of special mandates of the UN Human Rights Council penned a collective public letter to President Xi Jinping, expressing their concern about the National Security Law.⁶⁴ With respect to academic freedom, they expressed “...[concern] that subversion’s application may not be limited to a narrow purpose but may instead be used to detain, try and criminalise persons engaged in political activities, as well as social and educational targets.”⁶⁵ The group recommended reviewing and reconsidering the law to ensure it complies with both China’s and the HKSAR commitments under international law.⁶⁶

B) How the HKSAR National Security Law Threatens Academic Freedom

27) Article 4 of the National Security Law promotes the protection and respect of human rights, including obligations under the ICESCR and ICCPR.⁶⁷ While the authors of this report applaud the inclusion and acknowledgement of the importance of protecting human rights and honoring Covenant obligations, nowhere in the National Security Law is it explained how these obligations will be protected. The authors of this report express deep concern that the National Security Law, contrary to Article 4, creates opportunities to violate the very rights it purports to protect.

28) Article 9 of the National Security Law empowers the HKSAR Government to carry out the “supervision and regulation over matters concerning national security, including, those relating to schools, [and] universities.”⁶⁸ This presents the opportunity for a further degradation of the autonomy of higher education institutions. The broad authorization implied by the term “necessary measures”, complemented by the equally broad definitions of “secession, subversion, organization and preparation of terrorists activities” found in Articles 20-30 of the National

⁶⁴ Mandate of the Special Rapporteur on the Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism *et al*, *OL CHN 17/2020*, (1 Sept. 2020) (<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25487>).

⁶⁵ *Id.* at p. 8.

⁶⁶ *Id.* at p. 3.

⁶⁷ Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China: Annex III: National Laws to be Applied in the Hong Kong Special Administrative Region, instrument 9, art. 4 (30 June 2020) available at https://www.basiclaw.gov.hk/en/basiclawtext/images/basiclawtext_doc9.pdf (last visited 15 Dec. 2020).

⁶⁸ *Id.* at art. 9.

Security Law,⁶⁹ make it so that almost any measure can be justified as protecting national security.

29) Article 10 clarifies what the goal of supervision and regulation is: the HKSAR “shall promote national security education in schools and universities through social organisations, the media, the internet and other means to raise awareness... of the obligation to abide by the law.”⁷⁰ When read together, Articles 9 and 10 presents an existential challenge to the concept of academic freedom. The National Security Law enables the PRC, through the HKSAR Government, to direct what and how material is taught at universities and penalizes and sanctions professors who do not comply.

30) Article 16 of the National Security Law further erodes academic freedom by appointing the Chief Executive of the HKSAR also to head the Department of Safeguarding National Security.⁷¹ The authors of this report seek clarification about how the Chief Executives dual roles as the Head of the Department of Safeguarding National Security and as the Chancellor of the University of Hong Kong intersect and what if any framework is provided to balance the protection of academic freedom and institutional autonomy against matters of national security.

31) Article 38 asserts that the law applies to conduct that takes place outside of Hong Kong, to persons from outside the HKSAR and/or China, granting China extraterritorial jurisdiction. As a result, any individual in the world who criticizes the Hong Kong or Chinese governments may be charged with violating the law and face extradition, depending on their own governments policies.⁷² The extraterritorial reach of the HKSAR National Security Law is probably the most widely commented and controversial aspect of the law.⁷³ We will not know whether and how this

⁶⁹ *Id.* at arts. 20-30.

⁷⁰ *Id.* at art. 10.

⁷¹ *Id.* at art. 16.

⁷² Human Rights Watch, *China: New Hong Kong Law a Roadmap for Repression*, (29 July 2020) (<https://www.hrw.org/news/2020/07/29/china-new-hong-kong-law-roadmap-repression>).

⁷³ See Bethany Allen-Ebrahimian, *With the New Security Law, China Outlaws Global Activism*, Axios (7 July 2020) (<https://www.axios.com/china-hong-kong-law-global-activism-ff1ea6d1-0589-4a71-a462-eda5bea3f78f.html>); Jun Mai & Sarah Zheng, *Hong Kong National Security Law's Long-Arm Jurisdiction 'Extraordinary and Chilling'*, South China Morning Post (2 July 2020) (<https://www.scmp.com/news/china/politics/article/3091428/hong-kong-national-security-laws-long-arm-jurisdiction>); Patrick Wintour, *Academics Warn of 'Chilling Effect' of Hong Kong Security Law*, The Guardian (12 Oct. 2020) (<https://www.theguardian.com/education/2020/oct/12/academics-warn-of-chilling-effect-of-hong-kong-security-law>).

article is enforced until the first individual is extradited. However, much like the National Security Law's other articles, Article 38's intended effect has already been achieved because the threat of extraterritorial jurisdiction combined with the law's ambiguities have already chilled and suppressed academic expression.

32) Article 38 is hardly consistent with the obligations of Hong Kong and the PRC under the Covenant. Recalling State obligations under article 15(4) of the Covenant to "recognize the benefits derived from the encouragement and development of international contacts and co-operation in scientific and cultural fields."⁷⁴ The Committee has clarified this obligation includes "extraterritorial obligations with regard to the full realization of the right to participate in and enjoy the benefits of scientific progress and its applications."⁷⁵

33) The authors of this report submit that as academic freedom is at the center of obligations under articles 13 and 15,⁷⁶ the extraterritorial obligations of article 15(1)(b) and (4) necessarily implicate the obligation to respect and protect academic freedom as it pertains to the promotion of international co-operation. This is reinforced by the Committee's observation that "States should take steps to promote and... to enable scientific researchers to freely share data and educational resources internationally."⁷⁷

34) As of October 2020, a group of over 100 academics from around the world⁷⁸ have expressed deep concern for the implications of article 38 of the National Security Law, in particular, how it can interfere with academic research. As article 38 of the National Security Law applies to offenses committed "outside the region by a person who is not a permanent

⁷⁴ International Covenant on Economic, Social and Cultural Rights, art. 15(4), Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3]. *States Party to the International Covenant on Economic, Social and Cultural Rights*, United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en. (last visited 15 Dec. 2020).

⁷⁵ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 25 (2020) on Science and Economic, Social and Cultural Rights*, para. 83 (30 Apr. 2020) U.N. Doc. E/C.12/GC/25.

⁷⁶ See paras. 6-7.

⁷⁷ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 25 (2020) on Science and Economic, Social and Cultural Rights*, para. 78 (30 Apr. 2020) U.N. Doc. E/C.12/GC/25.

⁷⁸ Patrick Wintour, *Academics Warn of 'Chilling Effect' of Hong Kong Security Law*, The Guardian (12 Oct. 2020) (<https://www.theguardian.com/education/2020/oct/12/academics-warn-of-chilling-effect-of-hong-kong-security-law>).

resident of the region,”⁷⁹ implies that the crimes of secession, subversion, terrorism and collusion⁸⁰ are applicable to persons outside of the HKSAR and PRC. The authors of this report express concern that the broad scope of article 38 conflicts with the HKSAR’s obligations to foster and develop international co-operation. The authors express concern that further clarification on the application of article 38 is necessary to prevent repression and restriction of international scientific and academic co-operation. This is highlighted by the Committee’s noting that “the most acute risks to the world relating to science and technology... cannot be adequately addressed without robust international cooperation.”⁸¹

IV) RECOMMENDATIONS

35) We respectfully request the Honorable Committee include at least one of the following questions in the List of Issues it will prepare for the Hong Kong Special Administrative Region of the People’s Republic of China:

- Please, explain how the general principles of article 4 of the National Security Law will be applied in practice, with specific regard for obligations under articles 13 and 15 of the ICESCR, article 19 of the ICCPR, and article 137 of Chapter VI of HKSAR Basic Law.
- Please, clarify how individual freedoms of academic community members will be protected and respected considering article 9 of the National Security Law.
- Please, explain how the institutional autonomy of higher education institutions in Hong Kong is protected, considering the dual role of the Chief Executive as Chancellor of the University of Hong Kong and the head of the Department for Safeguarding National Security with Law Enforcement Capacity, pursuant to article 16 of the National Security Law.
- Please, clarify how the application of article 38 of the National Security Law complies with core obligations the PRC/Hong Kong has to foster and develop

⁷⁹ Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China: Annex III: National Laws to be Applied in the Hong Kong Special Administrative Region, instrument 9, art. 38 (30 June 2020) available at https://www.basiclaw.gov.hk/en/basiclawtext/images/basiclawtext_doc9.pdf (last visited 15 Oct. 2020).

⁸⁰ As defined in articles 20-30 of the National Security Law. *Supra.* n. 69.

⁸¹ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 25 (2020) on Science and Economic, Social and Cultural Rights*, para. 81 (30 Apr. 2020) U.N. Doc. E/C.12/GC/25.

international contacts and co-operation in the scientific field under articles 15(1)(b) and (4) of the Covenant.