Submission by the
Joseph R. Crowley Program in International Human Rights
at Fordham Law School

International Human Rights Law Provisions Applicable to The National Security (Legislative Provision) Bill Pending Before the Legislative Council of the Hong Kong Special Administrative Region

This submission is intended to complement the earlier legal analysis provided by the Committee on International Human Rights of the Association of the Bar of New York and the Joseph R. Crowley Program on certain provisions of The National Security (Legislative Provision) Bill pending before the Legislative Council of the Hong Kong Special Administrative Region.[1] Whereas that submission identified particular drafting concerns with the Bill and made reference to applicable, comparative U.S. experience; the following submission focuses on applicable provisions of international human rights law, specifically the International Covenant on Civil and Political Rights (ICCPR), as incorporated by Article 39 of the Basic Law, and the Johannesburg Principles.

The Offense of Treason

The proposed offense of treason would criminalizes the conduct of individuals, who with intent to overthrow or intimidate the Central People's Government or compel it to change its policies or measures, "joins or is part of foreign armed forces at war with

[1] Available at: http://www.abcny.org/

the People's Republic of China; (b) instigates foreign armed forces at war with the People's Republic of China with force; or (c) assists any public enemy at war with the People's Republic of China by doing any act with intent to prejudice the position of the People's Republic of China in the war."

As several submissions have pointed out, the offense is unjustifiably broad – allowing for the arrests of those who might have publicly criticized the government's policies prior to the onset of hostilities with another foreign state and those who may unwittingly assist those at war with the PRC, without any intent of having done so, even if intending "to prejudice the position of the People's Republic of China in the war."

The Johannesburg Principles

To the extent that such instigation or assistance may, and indeed is likely to, constitute public expression or the dissemination of information, it conflicts with Principle 1.1.of the Johannesburg Principles: " Any restriction on expression or information must be prescribed by law. The law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful." Moreover, the Principles require that expression may only be punished as a threat to national security if "a government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence." Given that instigation and assistance may consist of the expression of particular views, and the proposed legislation's failure to stipulate how close and direct the connection between the alleged instigation and the foreign military action must be, this Principle is also potentially violated. In the same

vein, Principle 8 may also be breached – requiring that expression "not be punished merely because it transmits information issued by or about an organization that a government has declared threatens national security or a related interest."

ICCPR

Similar legislation and convictions secured thereunder were the subject of submissions before the U.N. Human Rights Committee in the cases of *Park v. Republic of Korea* (628/1995), ICCPR, A/54/40 vol II (20 October 1998) 85 (CCPR/C/64/D/628/1995) and *Kim v. Republic of Korea* (594/1994), ICCPR, A/54/40 vol II (3 November 1998) 1 (CCPR/C/64/D/574/1994).[2] In both cases, limitations to expression on the grounds of national security failed to meet the threshold set by the Committee.

In the first case, the applicant's conviction was secured on the basis of his membership in an American organization, composed of young Koreans, the aim of which was to discuss issues of peace and unification between North and South Korea. The organization was vocal in its criticisms of the then military government of the Republic of Korea and of U.S. support for that government. A Korean Court held that the organization had as its objectives "siding with and furthering the activities of the North Korean Government" and was thus an "enemy-benefitting organization".

[2] The impugned legislation provided:

(1) Any person who has benefited the anti-State organization by way of praising, encouraging, or siding with or through other means the activities of an anti-State organization, its members or a person who had been under instruction from such an organization, shall be punished by imprisonment for not more than 7 years.

(2) Any person who has formed or joined the organization which aims at committing the actions as stipulated in paragraph 1 of this article shall be punished by imprisonment for more than one year.

The Committee, in evaluating the impugned legislation, observed that: "the right to freedom of expression is of paramount importance in any democratic society, and any restrictions to the exercise of this right must meet a strict test of justification . . . The Committee considers that the State party has failed to specify the precise nature of the threat which it contends that the author's exercise of freedom of expression posed and finds that none of the arguments advanced by the State party suffice to render the restriction of the author's right to freedom of expression compatible with paragraph 3 of article 19."

The second case involved an office-bearer in the National Coalition for Democratic Movement, a group that had criticized the Government of the Republic of Korea and its foreign allies, and had appealed for national reunification. The applicant was convicted by a Korean Court for having sided with and benefited an anti-State organization (North Korea).

In a telling appraisal, the Human Rights Committee observed that: "the author was convicted for having read out and distributed printed material which were seen as coinciding with the policy statements of the DPRK (North Korea), with which country the State party was in a state of war. He was convicted by the courts on the basis of a finding that he had done this with the intention of siding with the activities of the DPRK. The Supreme Court held that the mere knowledge that the activity could be of benefit to North Korea was sufficient to establish guilt." The Committee proceeded on the assumption that even if mere knowledge was sufficient to establish guilt, "it is not clear how the (undefined) "benefit" that might arise for the DPRK from the publication of views similar to their own created a risk to national security, nor is it clear what was the

nature and extent of any such risk. There is no indication that the courts, at any level, addressed those questions or considered whether the contents of the speech or the documents had any additional effect upon the audience or readers such as to threaten public security, the protection of which would justify restriction within the terms of the Covenant as being necessary." Accordingly the Committee found that the State party had failed to establish specific justifications for the limitation to the rights of freedom of expression.

In a later observation in response to the Republic of Korea's annual Human Rights Report, the Committee again addressed its National Security Law and specifically the correlation between views held by nationals and those of entities considered enemies of the state. The Committee remarked: "the Covenant (ICCPR) does not permit restrictions on the expression of ideas, merely because they coincide with those held by an enemy entity or may be considered to create sympathy for that entity." *See* Republic of Korea, ICCPR, A/55/40 vol I (2000) 29.

The Offense of Subversion

The proposed formulation of subversion would criminalize those who disestablish the basic system of the PRC, or overthrow or intimidate the CPG "by using force or serious criminal means that seriously endangers the stability of the People's Republic of China or by engaging in war."

The Johannesburg Principles

Most submissions have drawn attention to the fact that the concept "disestablish" is not known in Hong Kong law, and the absence of definition underscores the extent to

which this provision falls afoul of Principle 1.1.of the Johannesburg Principles, requiring that the "law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful." Freedom of expression and information are most seriously implicated in this section by the stipulation that subversion is committed by "serious criminal means that seriously endangers the stability of the PRC." Included in "serious criminal means" is any act which "seriously interferes with or disrupts an electronic system or an essential service facility or system (whether public or private)." As the Hong Kong Bar Association has observed, a protest in the form of sending e-mails en masse to the Government or a large mass rally which unintentionally interferes with the transport system or traffic facility might fall within this definition of subversion.

The Offense of Secession

Unwarranted restrictions to freedom of expression potentially brought about by the overbroad definition of "serious criminal means", employed in respect of sedition, are similarly raised in the proposed provisions criminalizing the offense of secession. Secession, like sedition, may be committed through serious criminal means, including any act which "seriously interferes with or disrupts an electronic system or an essential service, facility or system (whether public or private)"

The Offense of Sedition

The proposed provisions relating to sedition criminalize inciting others to commit treason, subversion or secession or inciting "others to engage, in Hong Kong or

elsewhere, in violent public disorder that would seriously endanger the stability of the People's Republic of China." Further, any individual who "(a) publishes, sells, offers for sale, distributes or displays any seditious publication; (b) prints or reproduces any seditious publication; or (c) imports or exports any seditious publication, with intent to incite others, by means of the publication" to commit treason, subversion or secession is also liable to conviction and punishment.

The Johannesburg Principles

Principle 6 of the Johannesburg Principles requiring that expression only be proscribed if it incite imminent violence, be likely to incite such violence and if there is a direct and immediate nexus between the expression and the likelihood or occurrence of such violence, is clearly breached by these provisions. Section 9D, expressly stipulating types of expression that do not constitute incitement for the purposes of sedition, is not sufficient to bring these provisions into conformity with the Johannesburg Principles. Expression, notwithstanding section 9D, may be considered seditious incitement even in circumstances where it is not intended to incite imminent violence, or is unlikely to incite such violence, or where no nexus exists between the expression and the likelihood or occurrence of such violence.

Moreover, the imprecise, ambiguous phrasing of section 9C, particularly the phrase "likely to induce a person to commit an offense" makes it likely that publication will be considered seditious in circumstances where it "transmits information issued by or about an organization that a government has declared threatens national security or a related interest" – in direct violation of Principle 8 of the Johannesburg principles.

ICCPR

Like the offence of treason itself, the proposed offense of sedition is so imprecisely defined, it might criminalize expression even in the absence of a convincing connection between the incitement and the likelihood of the incitement resulting in the specified prohibited acts. It is quite possible that expression might be criminalized simply because it coincides with views held by "an enemy entity" or which might be considered to create sympathy for that entity – in violation of Article 19 of the ICCPR. *See* Republic of Korea, ICCPR, A/55/40 vol. I (2000) 29.

Furthermore, in the absence of any clear definition of what would constitute "seriously endangering the stability of the people's Republic of China", individuals might be convicted without any clear determination of the nature and extent of the risk, if any, that they pose – again in violation of the ICCPR.

See Park v. Republic of Korea (628/1995), ICCPR, A/54/40 vol II (20 October 1998) 85 (CCPR/C/64/D/628/1995) and *Kim v. Republic of Korea* (594/1994), ICCPR, A/54/40 vol II (3 November 1998) 1 (CCPR/C/64/D/574/1994).

Offenses Relating to the Official Secrets Act

Section 16A makes it an offense for a person who has been a public servant or government contractor to make, without lawful authority, a damaging disclosure of any information, document or other article that relates to the affairs concerning the HKSAR that are the responsibility of the Central Authorities; and that have come into his possession by virtue of his position. The provision specifies that disclosure is damaging if the disclosure endangers national security or is likely to endanger national security.

The Johannesburg Principles

Again, the imprecise, ambiguous nature of the drafting makes it impossible to ascertain with clarity what information could be considered an endangerment or likely endangerment to national security – breaching Principle 1.1.of the Johannesburg Principles. Moreover, Principles 13, 15 and 16 are also negatively implicated by this section. Principle 13 requires that in all decisions concerning the right to information, the public interest in knowing the information shall be a primary consideration. Principle 15 stipulates that individuals shall not be punished on national security grounds for disclosure of information where the disclosure does not actually harm and is not likely to harm national security and the public interest in knowing the information outweighs the harm from disclosure. Principle 16, recognizing circumstances exactly of the order which section 16A addresses, provides: "No Person may be subjected to any detriment on national security grounds for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweighs the harm fro

m disclosure." Clearly, no provision is made in section 16A for the balancing of the public interest against the harm resulting from disclosure.

The Proscription of Organizations

The proposed Article 23 legislation grants the Secretary of Security the power to proscribe any local organization if he "reasonably believes that the proscription is necessary in the interests of national security and is proportionate for such purpose." Local organizations liable to proscription are those which have as their objective

engagement in treason, subversion, secession or sedition or commit an offense of spying; or have committed or are attempting to commit such offenses, or "which is subordinate to a mainland organization the operation of which has been prohibited on the ground of protecting the security of the People's Republic of China, as officially proclaimed by means of an open decree, by the Central Authorities under the law of the People's Republic of China." Before making such a determination the Secretary must afford the organization an opportunity "to be heard" or "to make representations in writing" – the choice of which is at his or her discretion. In circumstances where the Secretary of Security "reasonably believes" that affording the organization an opportunity of this type "would not be practicable", he or she can forego the procedure altogether. An appeal to the Court of First Instance is granted within 30 days of the proscription taking effect, although these proceedings may be closed and even exclude the defendant's chosen counsel. Moreover, the Secretary of Security is granted the power to make the rules for such appeals.

The Johannesburg Principles

Proscription, criminalizing those who are members or attend meetings of the organization or give money or any form of aid to the organization, essentially limits the rights of expression and information of these members in a form that amounts to prior censorship. However, prior censorship may only be invoked in the interest of protecting national security in times of public emergency which threatens the life of the country – as provided in Principle 23 of the Johannesburg Principles. In circumstances of national emergency which has been officially and lawfully proclaimed, limitations are valid only to the extent strictly required by the exigencies of the situation and only when and for so

long as they are not inconsistent with the government's obligations under international law. Clearly no national emergency obtains in Hong Kong and nor have the authorities claimed as such.

UDHR & ICCPR

The UDHR enshrines the right of everyone "in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." Importantly the right is not limited only to circumstances in which an individual has been charged with a criminal offence. The ICCPR elaborates on this right, requiring that: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

In various submission before the U.N. Human Rights Commission, the Commission has indicated that the concept "suit at law" is to be understood broadly, and is based "on the nature of the right in question rather than on the status of one of the parties (governmental, parastatal or autonomous statutory entities), or else on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated upon, especially in common law systems where there is no inherent difference between public law and private law and where the courts normally exercise control over the proceedings either at first instance or on appeal specifically provided by statute or else by way of judicial review." *See Y.L. v. Canada* (112/1981), ICCPR,

A/41/40 (8 April 1986)[3] [in which the claim for a pension was held to be subject to Article 14 specifications]

Clearly the procedures outlined in the proposed legislation allowing for the proscription of certain organizations by the Secretary of Security might validly be weighed against the protections guaranteed in Article 14 of the ICCPR. The proposed legislation does not require of the Secretary of Security when ordering proscription to provide reasons for proscription, only that s/he serve a copy of the order on the organization and that the order be published. This failure to require that substantive reasons be given for the proscription substantially compromises the rights of these organizations and their members to an initial fair and public hearing. The failure also impairs the right to independent review of the decision by the Court of First Instance: a serious impairment only compounded by the power given the Secretary of Security to make regulations for the handling of appeals, and the express provision for regulations which would permit the court to exclude both the appellant and the legal representative appointed by him from the proceedings.

The power afforded the Executive to determine the procedures by which an appeal against an order of proscription might be brought, the potential exclusion of both the appellant and his/her choice of legal counsel cast doubt on the competence,

[3] *See* also *Morael v. France* (207/1986), ICCPR, A/44/40 (28 July 1989): "The Committee notes . . . that the paragraph in question applies not only to criminal matters but also to litigation concerning rights and obligations of a civil nature. Although Article 14 does not explain what is meant by a "fair hearing" in a suit at law (unlike paragraph 3 of the same article dealing with the determination of criminal charges), the concept of a fair hearing in the context of article 14(1) of the Covenant should be interpreted as requiring a number of conditions, such as equality of arms, respect for the principle of adversary proceedings, preclusion of *ex officio reformatio in pejus* (*ex officio* correction worsening an earlier verdict, and expeditious procedure." See also *Vargas-Machuca v. Peru* (906/2000) ICCPR, CCPR/C/75/D/906/2000 (22 July 2002).

independence and impartiality of this review process, suggesting that it is unlikely to meet the robust standards required by the ICCPR.

Finally in respect of the proscription powers, it must be noted that the provisions grant the Secretary of Security wide discretion in effecting proscriptions. The U.N. Human Rights Committee has shown itself to be particularly concerned with insufficiently substantiated penalizations of this sort. In the case of *Pietraroia v. Uruguay* (44/1979) (R.10/44), ICCPR, A/36/40 (27 March 1981), the Committee held: "[t]he Government of Uruguay has submitted no evidence regarding the nature of the activities in which Rosario Pietraroia was alleged to have been engaged and which led to his arrest, detention and committal for trial. Bare information form the State party that he was charged with subversive association and conspiracy to violate the Constitution, followed by preparatory acts thereto, is not in itself sufficient . . ." Again, in the case of *Mukong v. Cameroon*(458/1991),ICCPR.A/49/40volii(21 July 1994) 171 (CCPR/C/51/D/458/1991), the Committee demonstrated its unwillingness to countenance bald reliance on national security: "The State party has indirectly justified its actions on grounds of national security and/or public order, by arguing that the author's right to freedom of expression was exercised without regard to the country's political context and continued struggle for unity. While the state party has indicated that the restrictions on the author's freedom of expression were provided for by law, it must still be determined whether the measures taken against the author were necessary for the safeguard of national security and/or public order . . .the legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights; in this

regard, the question of deciding which measures might meet the 'necessity' test in such situations does not arise."

See also Sohn v. Republic of Korea (518/1992), ICCPR, A/50/40 vol. II (19 July 1995) 98 (CCPR/C/54/D/518/1992)[4] and *Laptsevich v. Belarus* (780/1997), ICCPR, A/55/40 vol II (20 March 2000) 178.

[4] "The Committee notes that the state party has invoked national security and public order by reference to the general nature of the labour movement and by alleging that the statement issued by the author in collaboration with others was a disguise for the incitement to a national strike. The Committee considers that the State party has failed to specify the precise nature of the threat which it contends that the author's freedom of expression posed and finds that none of the arguments advanced by the State party suffice to render the restriction of the author's right to freedom of expression compatible with paragraph 3 of article 19.