A Legal Analysis of Hong Kong's New Safeguarding National Security Ordinance and What it Means for Lawyers[1]

Jointly issued by Asian Lawyers Network, The 29 Principles and Lawyers for Lawyers

On March 19, Hong Kong's Legislative Council (LegCo) passed the "Safeguarding National Security Ordinance" (SNSO)[2] popularly known as Article 23 or the Article 23 law, referring to Article 23 of the Basic Law, which calls on the region to pass domestic national security legislation. On March 23, Hong Kong's Chief Executive John Lee signed it into law. This statement provides some legal analysis of the law and surveys possible threats it poses for Hong Kong lawyers.

I. Introducing the SNSO

The SNSO adds to, clarifies, and updates existing national security related laws including the National Security Law (NSL), which was promulgated into Hong Kong law directly by China's National People's Congress (NPC) in June 2020, Hong Kong's colonial-era sedition law, and other laws. It adds additional crimes, mechanisms, clarifications, and amendments to other national security-related laws, often formalizing into law principles already created (abusively) by judges in NSL cases. John Burns, a professor at University of Hong Kong summarized it as making "the National Security regime much more comprehensive. It includes a whole raft of things that were not crimes before or that were colonial crimes, but they have updated the crimes, they have increased the penalty."[3]

More specifically, the SNSO creates 39 offences in five categories: treason, sedition (including insurrection, incitement to mutiny and disaffection, and acts with seditious intent), sabotage, external interference (referring to foreign entities), and theft of state secrets and espionage. The SNSO also increases the severity of penalties over previous laws. For example, charges related to state secrets and sedition, to which lawyers are particularly vulnerable, carry prison sentences up to 10 years.

Hong Kong's LegCo first attempted to pass Article 23 national security legislation in 2003, after which it triggered mass protests by a half-million people in the streets, which prompted the LegCo to table the bill and not seriously attempt to pass it again until this year. Since the NSL's promulgation in 2020, civil and political rights have become significantly more restricted in Hong Kong, creating the conditions that help explain the SNSO's passage.

This shift includes not only the offences and national security mechanisms created under the NSL itself, but other changes that have facilitated attacks on activists, lawyers, journalists, and other independent civil society voices. These changes include designated judges hand-picked for national security cases[4] dismissing traditional common law and civil rights protections in national security cases, new rules

[1] Author: C. Cade Mosley, Asian Lawyers Network. The author wishes to express his great appreciation to the anonymous reviewers which gave insightful corrections, comments, and suggestions. Any mistakes remain his own.
[2] Safeguarding National Security Ordinance, HKSAR, 23 March 2024, https://www.elegislation.gov.hk/hk/A305.
[3] Al Jazeera, "Article 23: Hong Kong legislature passes tough new national security law", 19 March 2024, https://www.aljazeera.com/news/2024/3/19/hong-kong-legislature-passes-tough-new-national-security-law.
[4] Rules for designated judges are covered under Article 44 of the NSL and Art. 100 of the SNSO.

restricting access to lawyers, the resumption of arbitrary arrests under the colonial-era sedition law to target activists (not used since the colonial era), as well as other laws such as those used to criminalize public protests. Additionally, rules requiring legislators to be "patriots" have eliminated anti-authoritarian legislators from the LegCo, and new NSL rules pressure Hong Kong authorities to take pro-Beijing actions, such as rules allowing Chinese agents to operate inside of Hong Kong on national security issues and creating a threat that national security cases may be sent to China for prosecution if Hong Kong authorities fail to adequately address them.

At least 291 people have already been arrested under the NSL as of 22 March 2024,[5] and there has been a virtual total collapse of independent civil society in Hong Kong, in which activist political parties, NGOs, lawyer associations, unions, media outlets, and other civil society organisations have either shut down or moved abroad.[6] Similarly, many of their members or independent actors, including former legislators, rights lawyers, journalists, and rights defenders, have either abandoned or self-censored their activist work or have moved abroad to avoid arrest or harassment. It is in this context that the SNSO passed unanimously by the LegCo, given the expulsion of all pro-democracy members, and without public protests, given the many crackdowns and arrests for public protests.

II. Standards for Lawyers' Rights

With this purpose in mind, it is important to quickly note the international standards and Hong Kong's international obligations for protecting lawyers. While Hong Kong's ratification to the International Covenant on Civil and Political Rights (ICCPR) occurred in 1976 during the colonial era as the United Kingdom's ratification was extended to the then dependent territory, Annex I, Section XIV of the 1984 Sino-British Joint Declaration and Article 39 of Hong Kong's Basic Law legally guarantee that the ICCPR remains in force in Hong Kong since the end of the colonial era on 1 July 1997. Under the ICCPR, the Hong Kong government has international obligations to protect residents' rights to freedom of expression, assembly, and association. In Hong Kong law itself, Basic Law Article 27 and the Hong Kong Bill of Rights Ordinance Articles 16, 17, and 18, respectively, guarantee the rights to freedom of speech, assembly, and association. These rights also apply to lawyers' freedom to practice law, make statements about cases, meet with clients, and be members of law firms and legal associations, as well as for firms and legal associations to not be arbitrarily dissolved.

The standard for justifiable restrictions of these rights—under the ICCPR text and international standards for its interpretation and Hong Kong Common Law—generally requires the elements of necessity and proportionality, which have been arbitrarily rejected in post-NSL national security jurisprudence, as courts have upheld their criminalization in national security cases without credible findings it is necessary or proportionate to stop imminent harm or a vital interest.[7] Underlying this are

[5] Hong Kong Free Press, "Explainer: Hong Kong's national security crackdown – month 45", 1 Apr. 2024, https://hongkongfp.com/2024/04/01/explainer-hong-kongs-national-security-crackdown-month-45/.
[6] HRN, "The Collapse of Civil Society Organisations in Hong Kong", 23 Aug. 2021, https://hrn.or.jp/eng/news/2021/08/23/hrc48-statement-hong-kong/.
[7] Lydia Wong, Thomas Kellogg, "Hong Kong's National Security Law: A Human Rights and Rule of Law Analysis", Georgetown Law Center for Asian Law, Feb. 2021, https://www.law.georgetown.edu/law-asia/wp-content/uploads/sites/31/2021/02/GT-

deeper failures in the independence of judges and the respect of fair trial and due process standards as discussed below in the context of specific cases.

Another important international standard protecting lawyers is the 1990 UN Basic Principles on the Role of Lawyers.[8] Under the principles, governments are called on to: allow lawyers to perform their professional functions without harassment or interference, travel freely in their own country and abroad, and never be threatened with prosecution or sanctions for any professional action (Art. 16); protect lawyers' security (Art. 17); not identify lawyers with their clients causes (Art. 18); recognize lawyers' right to appear before any court if not disqualified in conformity with these principles (i.e., not arbitrarily, Art. 19); give immunity to lawyers' professional statements (Art. 20); allow lawyers access to appropriate government information (Art. 21); respect the confidentiality of all communications between lawyers and clients in professional relationships (Art. 22); respect lawyers' freedom of expression, association, and assembly, including forming and joining national and international organizations and attending their meetings without restriction (Art. 23); respect lawyers' right to form professional associations (Art. 24); ensure that everyone has effective and equal access to legal services, and that lawyers can council clients without improper interference (Art. 25); process complaints fairly, with a fair hearing (Art. 26) and before an impartial and independent authority, with judicial review (Art. 28); and determine disciplinary proceedings under recognized professional standards (Art. 29). As will be clear in the following sections, the actions of authorities under the NSL, SNSO, and related laws and practices threaten or are directly inconsistent with virtually all of these standards.

III. 11 Possible SNSO Threats Against Lawyers

There are 11 possible threats that the SNSO may pose for Hong Kong lawyers discussed below.

1. The SNSO signals increasing adoption of China's national security policy, which is hostile to lawyers

Considering the restrictive shift following the NSL's promulgation in 2020, which had already led to a total collapse of independent civil society in Hong Kong, it is fair to question what the SNSO will accomplish beyond what the NSL and the associated recent changes have already accomplished, and what motivations underlie the implementation of the SNSO. The answer to this provides an indication of how post-SNSO national security policy should develop.

The Chief Executive has stated that the basic motivations for the SNSO include respecting Article 23 in the Basic Law, bolstering the protection of national security, and filling in gaps in the NSL and related

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HK-Report-Accessible.pdf; UN Human Rights Committee, General Comment No. 34, 12 Sept. 2011, CCPR/C/GC/34, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC %2fGC%2f34.

[8] OHCHR, "Basic Principles on the Role of Lawyers", 7 Sept. 1990, https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-role-lawyers. It has been endorsed by international rights bodies including Human Rights Council Resolution 44/.., "Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers", 17 July 2020, https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F44%2FL.7.

laws.[9] However, there are reasons to question these motivations. It's questionable that the LegCo cares about respecting the Basic Law per se as they tolerate the judiciary's explicit rejection of Basic Law civil and political rights in NSL jurisprudence. It is also questionable that the SNSO will do anything extra to better protect national security itself. The NSL was already wildly disproportionate in exacting draconian measures to punish activities that are not even a threat to national security. The measures of the SNSO are even more draconian. As the activist Hu Ping has stated, "there is really no need" for the new national security legislation in Hong Kong because "opposing voices have already been eradicated."[10] Similarly, former legislator Emily Lau has stated "The [Chinese] central government really does not need to be so heavy-handed in dealing with Hong Kong. We are a small city, who are we to jeopardise national security?"[11] As for gap filling, most of what the SNSO claims to be doing for the NSL has already been well established in case law and practice, as described in the sections below. But to place the claim in context, Hong Kong's colonial era sedition law was originally passed in 1914 and its language has remained largely unchanged until 2024. It is difficult to believe that mere updating and gap filling is suddenly important to the LegCo after 110 years, or 26 years after the colonial era ended.

In contrast to these, several experts have found the primary motivation of the SNSO to be a political signal of Hong Kong's submission to Beijing's vision of a total security state and political control of civil society, as has occurred throughout China.

Alvin Cheung, an assistant law professor at New York University, has stated that "It's clear that the current bill much more closely tracks the mainland's all-embracing concept of national security."[12] Eric Lai, a research fellow at Georgetown Center for Asian Law, found the "political motivation" to be "more important than any practical need."[13] And Emily Lau concluded that the new law is "all part of Beijing's policy towards Hong Kong."[14] The Chief Executive also admitted this point in a statement following the SNSO's passage that "We … have completed a historic mission, lived up to the trust of the country and did not let the Central government down."[15]

The SNSO expresses the Chinese Communist Party's (CCP) deep paranoia of ideological opposition undercutting its legitimacy given the deep unpopularity of the CCP in Hong Kong, as well as its compulsion to control ideas above any practical threat. On the side of Hong Kong's LegCo, the SNSO is a

[9] AP, "Hong Kong's new security law expands scope abroad. What to know about the Article 23 laws", 19 Mar. 2024, https://www.cbc.ca/news/world/hong-kong-security-law-1.7148162.
[10] Kenji Kawase, "Hong Kong passes Article 23 security law with sweeping powers", Nikkei Asia, 19 Mar. 2024, https://asia.nikkei.com/Spotlight/Hong-Kong-security-law/Hong-Kong-passes-Article-23-security-law-with-sweeping-powers.
[11] Kelly Ng, "Article 23: What is Hong Kong's tough new security law?", BBC, 24 Mar. 2024, https://www.bbc.com/news/world-asia-china-68508694. In the same article, Eric Lai stated that "The current Beijing-imposed national security law has already silenced dissent and the voices of civil society. Hong Kong has also not seen any large-scale demonstrations in the past three-and-a-half years."
[12] Emily Feng, "A look at the security legislation that Hong Kong's government is working to pass", NPR, 12 Mar. 2024, https://www.npr.org/2024/03/12/1238130214/a-look-at-the-security-legislation-that-hong-kongs-government-is-working-to-pass.
[13] Ng, *supra*, note 11.
[14] *Id.*
[15] Chris Lau, "Hong Kong passes second national security law, widening crackdown powers and aligning city more closely with mainland China", CNN, 20 Mar. 2024, https://www.cnn.com/2024/03/19/china/hong-kong-second-national-security-law-passed-intl-hnk/index.html.

political signal of its allegiance to the central government line on national security.[16] Practically, national security case law over the last nearly four years had already set this theme by designated judges inflating minor threats to existential threats in convicting defendants. A textbook example is the General Union of the Hong Kong Speech Therapists (General Union) case, where a children's book about cartoon sheep and wolves was found criminally seditious as a serious future threat to Hong Kong's political status.[17] However, the SNSO formalizes this all-encompassing approach towards national security as a political signal and pronouncement of state purpose. And as Sarah Brooks, Amnesty International's China Director, concluded, "The rapid progression of legislation under Article 23 shows the government's eagerness to further dismantle human rights protection and turn its back on its international obligations."[18]

The SNSO's content gives support to this reading. Many measures and definitions directly copy China's NSL, which, its use has shown, has been used by authorities to crack down on independent expression and activities of activists, including lawyers working on politically sensitive cases.

First, the SNSO reaffirms the supremacy of national security in very broad terms at its beginning: "The highest principle of the policy of 'one country; two systems' is to safeguard national sovereignty, security, and development interests." (Art. 2(a)). This copies the same language used in Article 2 of China's own NSL,[19] and has its origins in the policy of national security supremacy developed in China under President Xi Jinping's "comprehensive national security concept" issued in April 2014, further embedded in the Communist Part of China's Constitution in October 2017, and already applied to Hong Kong in a May 2020 National People's Congress decision which became the basis for Hong Kong's NSL.[20]

In effecting this supremacy, SNSO Art. 8 similarly provides that the SNSO has priority over any other law in conflict, and the law should be interpreted in the way most protective of national security, an inversion of the common law principle that rights protections always have priority in cases of conflict, and that laws should always be interpreted in the way most protective of defendants. In line with privileging the central government's law and policy on national security, SNSO Art. 99 also states that the NPC-promulgated NSL has priority over the SNSO if they conflict.

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[16] Economist, "Hong Kong passes a security law that its masters scarcely need", 19 Mar. 2024, https://www.economist.com/china/2024/03/19/hong-kong-passes-a-security-law-that-its-masters-scarcely-need

[17] HKSAR vs. Lai Man-ling, et al ("General Union case"), [2022] HKDC 981, https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=147076; Hong Kong Rule of Law Monitor, "Statement on the Convictions of Speech Therapists Union Leaders for Sedition", 10 Sept. 2022, https://hkrlm.org/2022/09/10/statement-on-the-convictions-of-speech-therapists-union-leaders-for-sedition/.

[18] Amnesty, "Hong Kong: Article 23 legislation takes repression to 'next level' ", 8 Mar. 2024, https://www.amnesty.org/en/latest/news/2024/03/hong-kong-article-23-legislation-takes-repression-to-next-level/.

[19] National Security Law of the People's Republic of China, 1 July 2015, https://www.chinalawtranslate.com/en/2015nsl/.

[20] Merics, " 'Comprehensive National Security' unleashed: How Xi's approach shapes China's policies at home and abroad", 15 Sept. 2022, https://www.merics.org/en/report/comprehensive-national-security-unleashed-how-xis-approach-shapes-chinas-policies-home-and (citing: The concept was added to the amended CCP Constitution in 2017 (2017). [CCP Constitution 2017: https://english.www.gov.cn/news/top_news/2017/10/24/content_281475919837140.htm (in English)]; for background also see: Greitens, Sheena (2021). "Internal Security & Grand Strategy: China's Approach to National Security under Xi Jinping". January 28. https://www.uscc.gov/sites/default/files/2021-01/Sheena_Chestnut_Greitens_Testimony.pdf); the May 2020 NPC decision: http://www.xinhuanet.com/english/2020-05/29/c_139096712.htm.

Similarly, the definition of "national security" in Art. 4 mirror's China's NSL Art. 2, blurring the distinction between Hong Kong and Chinese national security governance and bringing Hong Kong national security policy in line with China's policy as if it were part of a unified whole.[21] It is very broad, covering "economic and social development", being "free from … threats", and a "capability to maintain" that status.[22] The first element allows for virtually any domain of human activity to be targeted, and the last two ensure that targeted actions do not need to pose an actual risk to national security, as long as they affect the capability to maintain it, which particularly targets expression and civil society action.

Also similar to China's authoritarian *modus operandi* towards national security, a leading role is also given in the SNSO to the Chief Executive, beginning with certifying whether an issue involves national security and giving the executive broad discretionary powers to directly control civil society under the guise of national security. The Chief Executive is also given powers to direct and bolster many aspects of the SNSO and national security, such as designated judges, making subsidiary legislation, administrative instructions, and so on. Other elements of the SNSO also mirror China's law, such as the definition of state secrets which mirror's China's 2023 updates to greatly broaden its own definition in its state secrets and espionage, which will be discussed further below.

This explicit alignment of the SNSO with China's NSL and its vision of a total security state is the basic context which informs all of the other elements that follow. It suggests that the future direction of national security policy in Hong Kong is pointed towards China's existing policy, for which the targeting of lawyers for arbitrary arrest and harassment is a central element as discussed in the next section.

2. The SNSO makes arbitrarily prosecutions easier and more abusive, which may also target lawyers

The first and most basic threat that rights lawyers face under the SNSO are measures that criminalize typical activities of human rights defenders generally, of which rights lawyers are one category, either in defending rights defenders or working on political sensitive cases.

This threat already began with post-NSL national security prosecutions, in which activists and lawyers critical of the increasing authoritarianism in Hong Kong have been arbitrarily arrested and convicted, such as the General Union activists mentioned above and lawyers such as Chow Hang Tung.[23]

The alignment of the SNSO with China's NSL language and policy, as discussed above, signals that Hong Kong may begin mirroring China's policy more closely, which includes the targeting of rights lawyers. The current period of serious crackdowns on lawyers in China began in earnest with the 709 crackdown in July 2015, in which China authorities rounded up and interrogated over 300 lawyers and legal staff,

[21] 29 Principles and Hong Kong lawyers, direct communication.
[22] The full definition is: "the status in which the state's political regime, sovereignty, unity and territorial integrity, the welfare of the people, sustainable economic and social development, and other major interests of the state are relatively free from danger and internal or external threats, and the capability to maintain a sustained status of security."
[23] James Pomfret & Jessie Pang, "A jailed Hong Kong lawyer defies Beijing's campaign to subjugate the city", Reuters, 10 Nov. 2022, https://www.reuters.com/investigates/special-report/china-lawyers-crackdown-hongkong/.

with many later serving prison sentences.[24] Since then, rights lawyers in China have continued to this day to be subjected to arbitrary arrests, torture, and harassment.[25] It is important to note that the crackdown on rights lawyers is a central element of Xi Jinping's "rule by law" authoritarian turn, where rhetoric of respecting law is turned against civil society, and rights lawyers are the principal agents of resistance, making them targets for criminal prosecution.[26]

Several SNSO rules facilitate further crackdowns on activists and lawyers by further undermining fair trial standards well established in Hong Kong law before the NSL, including restrictions on the right to access a lawyer (which also applies to lawyers as defendants), unreasonable bail restrictions, and extensions of pre-charge detention periods.

It is important to reiterate the relevance of the expanded definition of national security threats under the SNSO to the kinds of lawyers that may be targeted. In Hong Kong, so far it has only been lawyers speaking on political issues, such as Chow Hang Tung, Kevin Yam, and Dennis Kwok that have been targeted with national security offences. However, inside China, lawyers have been arbitrarily arrested for defending clients in ostensibly non-political cases such as involving gender and LGBT rights, religious rights, health service denials, environmental rights, housing and land rights and arbitrary evictions, and so on. Despite their non-political content, the Chinese government views these cases, and the lawyers that work on them, as threats to their national security and harass, arrest, and torture them accordingly. The new definition of national security and a supremacy clause for it in the SNSO is a signal that Hong Kong authorities may move in this direction and similarly target a much broader range of rights lawyers systematically.

The recent 612 Fund case is one indication that Hong Kong is already moving in this direction.[27] In that case, authorities filed complaints to the Hong Kong Bar Association and Law Society of Hong Kong for several lawyers who assisted protestors arrested during the 2019 protests to subject the lawyers to disciplinary procedures for possible fine or suspension. The complaint was that they allegedly wrongly accepted payments from the 612 Humanitarian Relief fund supporting arrested protestors. The fund was forced closed and its trustees and secretary found guilty and forced to pay a fine because it was not properly registered, an action which the UN special rapporteur on freedom of assembly and association

[24] John Sudworth, "Wang Quanzhang: The lawyer who simply vanished", BBC News, 22 May 2017, https://www.bbc.com/news/blogs-china-blog-39974953.
[25] William Nee, "8 Years After '709,' Persecution of Chinese Human Rights Lawyers Continues", 9 Jul. 2023, https://thediplomat.com/2023/07/8-years-after-709-persecution-of-chinese-human-rights-lawyers-continues/
[26] Jordan Link, Nina Palmer, & Laura Edwards, "Beijing's Strategy for Asserting Its 'Party Rule by Law'Abroad", US Institute of Peace, 29 Sept. 2022, https://www.usip.org/publications/2022/09/beijings-strategy-asserting-its-party-rule-law-abroad; Taisu Zhang, "Xi's Law-and-Order Strategy", Foreign Affairs, 27 Feb. 2023, https://www.foreignaffairs.com/china/xis-law-and-order-strategy.
[27] Kahon Chan, "Complaints upheld against some Hong Kong solicitors linked to protest defence fund, Law Society says", HKFP, 20 Jan. 2024, https://www.scmp.com/news/hong-kong/law-and-crime/article/3249191/complaints-upheld-against-some-hong-kong-solicitors-linked-protest-defence-fund-law-society-says; Hillary Leung, "Some Hong Kong lawyers linked to 2019 protest humanitarian fund could see suspensions after police complaints", HKFP, 22 Jan. 2024, https://hongkongfp.com/2024/01/22/some-hong-kong-lawyers-linked-to-2019-protest-fund-could-see-suspensions-following-nat-sec-police-complaints/.

has found generally disproportionate and inconsistent with the right to freedom of association.[28] While the Bar Association cleared 38 accused lawyers of any wrongdoing, the Law Society substantiated some complaints, with the president stating that "For the substantiated cases, there will be different levels of penalty."[29] The important element to note is that the lawyers were targeted by authorities for arbitrary sanction specifically for their defence of protestors, which suggests the possibility that lawyers may be further and more seriously targeted specifically for their legal work in the future.

Many of the offences listed below, such as sedition and harassment of national security workers, may become ways to target lawyers' speech and actions in their role associated with rights defense.

3. The SNSO restricts defendants' access to lawyers in ways that may negatively impact lawyers

The second potential threat against lawyers involves rules that specifically address them.

SNSO Article 79 allows authorities to restrict individual lawyers and law firms from representing clients in national security cases, due to their threat to national security or police investigation. This extends the restriction on lawyers already implemented in a December 2022 NPC ruling that Hong Kong courts must get approval by the Chief Executive to admit a foreign lawyer for national security cases, which was formalized into law by an amendment to Hong Kong law in May 2023.

Relatedly, under article 80, police may apply for permission from a court to remove the right of suspects to consult a lawyer while in pre-arrest detention, while also being able to extend such detention to an additional 14 days under Article 76 over the previous period of 48 hours. Another set of rules affecting lawyers' work is Articles 83-86, which permit movement restriction orders as part of the bail conditions of accused persons, which will restrict accused persons' ability to meet or communicate with legal counsel even while out on bail.

Hong Kong's Secretary for Justice justified these rules by stating that "the guiding thought is that some lawyers are not sincerely providing legal services, but instead they may take the opportunity to destroy evidence or notify [an accomplice]."[30] This justification is disingenuous, however, as there are already rules in place prohibiting such actions and mechanisms to enforce them. Needless to say, detained persons are more vulnerable to rights abuses while in lengthened pre-arrest detention without access to a lawyer and cut off from the public, which will also apply to detained lawyers themselves. Abuses are most likely in pre-arrest detention in every country, but particularly in China where widespread pre-arrest disappearances, torture, and forced confessions occur in special centers cut off from the public

[28] Maina Kiai, "First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association", UN Human Rights Council, Doc. A/HRC/20/27, 21 May 2012, para. 56, https://digitallibrary.un.org/record/730881 ("The right to freedom of association equally protects associations that are not registered", and individuals "involved in unregistered associations should indeed be free to carry out any activities, including the right to hold and participate in peaceful assemblies, and should not be subject to criminal sanctions.")

[29] Leung, *supra*, note 27.

[30] International Bar Association, "Hong Kong: the IBAHRI is profoundly concerned about the Safeguarding National Security Law and the implications for the legal profession", 25 Mar. 2024, https://www.ibanet.org/Hong-Kong-the-IBAHRI-is-profoundly-concerned-about-the-Safeguarding-National-Security-Law-and-the-implications-for-the-legal-profession.

under the Residential Surveillance at a Designated Location (RSDL) system.[31] These rules may be viewed as a step for Hong Kong in this direction.

All of these provisions are inconsistent with Article 35 of the Basic Law, which guarantees suspects' "right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in courts, and to judicial remedies."

Hong Kong legal experts have reasoned that these provisions may be used to dismiss attorney-client privilege since an attorney being restricted from consulting for any national security case or an accused person being restricted from meeting with counsel (if they find a way), means that communication could only be in a personal capacity which is not privileged.[32] Below in Part 7, this statement will consider a particular vulnerability of lawyers to the crime of misprision of treason if their communications with defendants is not privileged.

More generally, these rules will have lasting negative impacts on the legal profession by chilling lawyers' statements and actions to avoid having their work restricted. It also essentially eliminates important legal voices from the community, and it provides a basis for further administrative restrictions and control of lawyers as discussed in Part 11 below.

4. The SNSO punishes absconders and criminalizes extraterritorial conduct in ways that may negatively impact Hong Kong lawyers living or working abroad

Article 89 of the SNSO allows the Secretary for Security to apply listed measures against "absconders" within a certain time period according to a given process. An absconder is defined as any Hongkonger charged with an offence endangering national security found outside Hong Kong.[33] Note that the offence does not have to be under the SNSO, but any national security-related offence. Thus, rights lawyers who left Hong Kong following the NSL promulgation are vulnerable to the measures for actions taken before or after their departure. The next section will further address the extraterritorial vulnerability for lawyers living abroad; however, it is worth noting that charging activists and lawyers living abroad for NSL crimes then sanctioning with new extraterritorial measures evince a "retroactive applicability" that the high representative for the European Union found "deeply worrying".[34]

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[31] Eryk Bagshaw, "'Psychological torture': The brutal system China uses to make people disappear", SMH, 15 Oct. 2023, https://www.smh.com.au/world/asia/psychological-torture-the-brutal-system-china-uses-to-make-people-disappear-20231013-p5ec16.html; Amnesty, "China: Torture and forced confessions rampant amid systematic trampling of lawyers' rights", 12 Nov. 2015, https://www.amnesty.org/en/latest/press-release/2015/11/china-torture-forced-confession/; ISHR, "Briefing Paper: UN experts' documentation of Residential Surveillance at a Designated Location (RSDL) in China", 13 Dec. 2023, https://ishr.ch/defenders-toolbox/resources/briefing-paper-un-experts-documentation-of-residential-surveillance-at-a-designated-location-rsdl-in-china/.

[32] 29 Principles and Hong Kong lawyers, direct communication.

[33] SNSO, Art. 89(2)(a).

[34] "Hong Kong: Statement by the High Representative on behalf of the European Union on the adoption of new national security legislation", European Council, 19 Mar. 2024, https://www.consilium.europa.eu/en/press/press-releases/2024/03/19/hong-kong-statement-by-the-high-representative-on-behalf-of-the-european-union-on-the-adoption-of-new-national-security-legislation/.

These measures against absconders include summary suspension of Hong Kong professional qualifications under any ordinance (Article 93). This particularly affects lawyers because it prevents those charged with national security offences that have left Hong Kong from practicing overseas without due process as required by the Legal Practioners Ordinance, and without the involvement of the independent bodies charged with regulating the legal profession.[35] Similarly, authorities may apply financial sanctions to those fleeing abroad, possibly preventing them from being hired, leasing property, or starting or conducting business.

The power may also allow Hong Kong authorities to facilitate their non-consensual return to Hong Kong, consistent with the authorities' practice of issuing bounties against absconders, which they have already issued for 13 activists living abroad.[36] Article 96 allows the cancellation of HKSAR passports without appeal, which prevents rights lawyers and activists from travelling. It also raises the possibility of Hong Kong authorities abusing the Interpol Red Notice System or Stolen and Lost Travel Documents system to harass lawyers and activists charged with national security offences that move abroad and to have the suspects deported back to Hong Kong for trial without needing to invoke the extradition process.

The UN Basic Principles on Lawyers Article 16(b) states that lawyers are entitled to freedom of travel both within their own country and abroad to carry out their work.

To give an indication of the possible scale of application of these measures, at least hundreds of lawyers, if not many more, have been reported to have left Hong Kong following the NSL's promulgation,[37] and arrest warrants have already been issued to 13 activists living abroad, including the lawyer Kevin Yam and barrister Dennis Kwok.[38] For each one of these persons, authorities' offered a bounty of 1 million HK dollars, encouraging their abduction and return to Hong Kong.

Several experts have already identified in all of these measures the Hong Kong government's attempts to target and sanction organisations and activists living in exile. Thomas Kellogg, executive director of the Center for Asian Law at Georgetown University has stated that "It seems that they want to use this new law to also tackle these overseas activists", which may include rights lawyers.[39]

[35] 29 Principles and Hong Kong lawyers, direct communication.
[36] The Guardian, "Hong Kong puts arrest bounties on five overseas activists including US citizen", 14 Dec. 2023, https://www.theguardian.com/world/2023/dec/14/hong-kong-puts-arrest-bounties-on-five-overseas-activists-including-us-citizen.
[37] James Pomfret, Greg Torode, Anne Marie Roantree, David Lague, "Lawyers exit Hong Kong as they face campaign of intimidation", Reuters, 29 Dec. 2022, https://www.reuters.com/investigates/special-report/china-lawyers-crackdown-exodus/.
[38] Kirsty Needham, "Lawyer wanted by Hong Kong says he was exercising his rights in Australia", Reuters, 6 Jul. 2023, https://www.reuters.com/world/china/lawyer-wanted-by-hong-kong-says-he-was-exercising-his-rights-australia-2023-07-06/.
[39] Steve Inskeep, "There are renewed efforts in Hong Kong to push for tighter national security laws", NPR, 31 Jan. 2024, https://www.npr.org/2024/01/31/1228067657/there-are-renewed-efforts-in-hong-kong-to-push-for-tighter-national-security-law.

5. The charge of "external interference" may put lawyers working with overseas partners at risk

The SNSO criminalizes "external interference" under Articles 52 and following. Included in its definition is a Hongkonger cooperating with or receiving financial support from an "external force" to influence a government office or agent to make any decision.

To put this offence into context, "collusion with foreign forces" was already an offence under the NSL, and the SNSO's "external interference" is defined even more broadly so that it will have even wider and more arbitrary coverage. Several cases and case studies under the NSL offence give an indication of the direction the "external interference" offence may be heading. The NSL "foreign collusion" threat particularly targeted Hong Kong organisations that had foreign financial sources, and journalists that advocated for sanctions in foreign media sources, such as in newspapers. In one case, Hong Kong authorities listed a joint petition to the UN High Commissioner for Human Rights as evidence supporting a foreign collusion charge.[40] The SNSO "external interference" offence can be expected to extend even further into activities with overseas links, even with no conceivable connection to national security. Note that the definition covers acts or statements to merely "influence" authorities, which on its face may cover any kind of recommendation to a Hong Kong agency or agent involving an "external source".

Not only is the new offence of "external influence" defined over broadly, Article 56 further states that it is sufficient to show communication with the external force on the matter with knowledge that the decision would benefit it for a court to presume the suspect was acting on behalf of the organisation. Article 57 states that the offence may also be applied extraterritorially. Thus, virtually any documented contact between a Hongkonger living abroad and a vocal foreign critic of Hong Kong or Chinese authorities may be charged under this offence, allowing for absconder sanctions to be applied.

An "external force" is defined to include foreign governments, political organisations, and "any other organisation in an external place that pursues political ends", which could include even a company advocating for policies that favor its industry. There are further descriptions of how companies may fall under the rule if the directors act under another external force. Members of any such organisation are also included in the definition.

As one corporate consultant asked fairly, given that the definition of "international organisation" under the offence is so broad ("the members of which include 2 or more countries, regions, places, or entities entrusted with functions by any country, region or place", Article 166(5)), "Aren't foreign investment banks and businesses international organisations?"[41] Several experts have expressed concern that the offence may target transnational business operations attempting to work in Hong Kong or with Hong Kong partners. In such cases, in-house corporate lawyers may be in the front lines of vulnerability to the offence.

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[40] Kelly Ho, "Organiser of Hong Kong's mass pro-democracy demos faces police probe, as force demands financial records", Hong Kong Free Press, 27 Apr. 2021, https://hongkongfp.com/2021/04/27/organiser-of-hong-kongs-mass-pro-democracy-demos-faces-police-probe-as-force-demands-financial-records/; HRN, *supra*, note 6.

[41] Kelly Ng, "Article 23: Hong Kong passes tough security law fought by protesters for years", BBC, 19 Mar. 2024, https://www.bbc.com/news/world-asia-china-68594448.

In the context of this statement, there is also a concern that virtually any association with an activist, rights lawyer, or foreign rights groups or their staff, including exiled Hong Kong activists, may trigger the offence. Sarah Brooks, Amnesty International's China Director, expressed concern over "the prosecution of activists who interacted with overseas individuals or organisations … framed as 'endangering national security.' "[42] Considering that Hong Kong authorities have already cited engagement with a UN human rights process as evidence of foreign collusion, it is also conceivable that "external interference" may also apply to recommendations made by even UN bodies and similar non-political international organisations.

6. Charges related to secrets threaten lawyers working with any government information

As with the other offences listed in this statement, the SNSO's criminalization of the "unlawful acquisition", "possession", and "disclosure of state secrets" raises concerns due to the offences' over broad and vague definition of "state secrets". Under SNSO Article 29, secrets are defined to include any information on (a) "major policy decisions", (c) Hong Kong's "external affairs", (d) "economic or social development in China or the HKSAR", (e) "technological development or scientific technology" and (g) involving the relationship between the China and Hong Kong governments, among other things. Notably, the SNSO's wording of its state secret offence is almost identical to China's state secrets law, which gives some indication of how it may be applied, with one example given below that demonstrates the particular vulnerability of lawyers.

These categories may be read to include information on virtually any human activity, as long as it can be defined as "secret". Hung Ho Fung, a sociology professor at John Hopkins University, stated that when social and economic affairs are treated as state secrets, "it can include anything."[43] He added "With these draconian and not clearly defined clauses, even apolitical business persons can get into trouble and will face the risk of their office being raided and themselves being detained, arrested or placed under exit ban as in many cases in mainland China."[44]

Possession of a secret is punishable by up to 3 years imprisonment (Article 33(1)), illegal acquisition for up to 5 years (Article 33(3)); and unlawful disclosure up to 10 years (Article 35(1)). The offences require an intent to endanger (or in some cases reckless disregard for) national security, which NSL jurisprudence demonstrates may always be found when a designated judge wants to find it.[45]

Article 37 further defines an offence carrying a 5-year sentence for disclosing a "confidential matter", which is defined as "a matter the disclosure, without lawful authority, of which would prejudice the

[42] Kanis Leung, "How will a new national security law affect different walks of life in Hong Kong?", AP, 19 Mar. 2024, https://apnews.com/article/hong-kong-new-security-law-explainer-633e91d7d3aef09381b349282a7dec1f.
[43] Lau, *supra*, note 15.
[44] *Id.*
[45] The very first NSL case, Tong Ying Kit, established the defendant's intent to cause grave harm to society based on a traffic violation: "the Defendant's act in charging through the various checklines resulting in the said collision clearly illustrates his intention to disrupt the maintenance of law and order, thereby rendering law-abiding citizens to fear for their own safety and to worry about the public security of Hong Kong." HKSAR vs. Tong Ying Kit, [2021] HKCFI 2200, para. 163, https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=137456. Many subsequent NSL judgments have followed a similar practice in arbitrarily finding such intent.

interest of the Central Authorities or the Government." "Prejudice the interests" is such a broad phrase that it allows authorities to criminalize the release of virtually any internal information in an authority's discretion.

Some experts have expressed concern that the law may target research into military, social, and economic developments inside China and due diligence investigations into individuals and companies on the Chinese mainland, which have often been carried out by Hong Kong-based academics and consulting and advisory firms.[46] As one expert speculated in a similar vein, "Let's say a group of colleagues go out to lunch and discuss how to handle some work matters. Will it constitute leaking a state secret? Will we be arrested if someone eavesdrops and spreads the information? I am very afraid that we can be accused [of the offence] easily."[47] AP reported that "Financial professionals who often deal with sensitive corporate information are worried about some provisions related to the protection of state secrets because they echo the broad definition of secrets used in mainland China, which covers economic, social and technological developments beyond traditional security fields."[48]

An example of such an application of China's near-identical state secret law was the raid by China's state security authorities on the international advisory firm Capvision, part of a wider crackdown on consulting agencies by Beijing to dissuade investigations into information sensitive to the central government.[49]

Eric Lai has linked this with the broader motivation of authorities to control information, and through it opinion and civil society action as discussed at the start of this statement, stating that "Hong Kong authorities are eager to further tighten information control in the city as a corollary of stricter security legislation."[50] He further stated that he expects a "chilling effect" across society, adding that "The business community would be particularly affected by the new 'theft of state secrets' and 'espionage' offenses."[51]

As with many of the offences described in this statement, on the front lines of vulnerability to the criminalization of research involving government documents are lawyers, such as in-house lawyers in compliance departments and in firms conducting auditing, consulting and advising, and due diligence work.

Aside from these types of cases, however, most directly the law targets whistleblowers disclosing internal documentation of government corruption, serious mismanagement, criminal activities, or other serious malfeasance in government agencies or government-linked organisations, or simply activities

[46] Greg Torode, Jessie Pang, "Article 23: what you need to know about Hong Kong's new national security laws", Reuters, 19 Mar. 2024, https://www.reuters.com/world/asia-pacific/article-23-what-you-need-know-about-hong-kongs-new-national-security-laws-2024-03-19/.
[47] Ng, *supra*, note 41.
[48] Leung, *supra*, note 42, citing Kanis Leung, "Hong Kong's plan for a new national security law deepens fears over eroding civil liberties", AP, 28 Feb. 2024, https://apnews.com/article/hong-kong-national-security-law-china-7be1fcea908ddb1b2537ec41f6fd4220.
[49] Lau, *supra*, note 15.
[50] *Id.*
[51] *Id.*

that portray the government in a bad light. As the former Hong Kong-based attorney Kevin Yam stated, "It will basically shut down all whistleblowers. And even if someone is going to blow the whistle and tell the media about it, which media organisations will risk publishing the scoop?"[52]

Beyond publicizing a whistleblower's findings in media, which makes journalists vulnerable to this offence, the most common use for whistleblower-disclosed information is to provide the evidentiary foundation for litigation by lawyers against the offending corruption or criminal activities uncovered. Note that mere acquisition and possession of the "secret" is sufficient to trigger the offence, which will seriously chill any lawyer from even contacting or attempting to obtain information from potential whistleblowers, which would be a criminal offence in itself, even if the information is not disclosed or used. This in turn makes it significantly more difficult for government corruption and maleficence to be identified or checked by any legal means, which will drive a culture of impunity and increasing violations.

Because the definition of secrets is so broad, the law may also target almost any purported use of government information, even if it does not involve whistleblowing bad behavior, simply to shut down any investigation into government-liked activities for any reason or to shut down or harass any organisations conducting such research. Again, lawyers would be among the actors vulnerable to such applications of the offence.

It is important to consider the public interest exception to the offence. An exemption for unlawful disclosure is made for "specified disclosures" where "the public interest served by making the disclosure manifestly outweighs the public interest served by not making the disclosure" (Article 30(1)(c)).

While ostensibly this exemption should apply to lawyers using internal information for legal work in the public interest, such as litigating against government malfeasance, there are good reasons to doubt its efficacy in actually protecting public interest uses. First, the standard for the defence, that the public interest in disclosure "manifestly outweighs" the interest in keeping it secret, is a high burden and entirely open to arbitrary discretion in its interpretation. Looking at the national security jurisprudence developed in post-NSL cases, it is clear that judges routinely vastly overstate the national security threats of typically innocuous acts and objects (traffic violations, crowding, children's books, flags, slogans, music, the color yellow, and the like) while being blind to claimed public interests of statements critical of government policy. However, even more concretely, we need to only observe the above case that China criminalized the investigations of advisory firms under its state secrets law, which should inform how narrow the scope the public interest defence may apply.

In addition to the offence of disclosure of secrets itself, the Crimes Ordinance Article 159A provides for the offence of conspiracy connected to any other offence.[53] This will be discussed in further detail in the next section on sedition, where jurisprudence regarding conspiracy has been more fully developed. However, it is enough to state here that if an individual is charged with acquiring, disclosing, or

[52] Cindy Sui, "Explainer: What Is in Hong Kong's New National Security Law?", VOA, 5 Feb. 2024, https://www.voanews.com/a/explainer-what-is-in-hong-kong-s-new-national-security-law-/7472256.html.

[53] SNSO article 109(a) states that, despite any other Ordinance, the penalty for conspiracy to violate a NSL offence will be the same as the underlying offence.

possessing a secret or, as relevant, confidential material, the entire organisation or its members may also be vulnerable to conspiracy charges linked to the underlying offence by being involved with the acts, even if it is in the normal course of their business. In Part 11 below, this statement will consider administrative measures such as dissolving organisations, where conspiracy charges will become relevant.

Finally, some observers have noted that the SNSO, particularly with its disclosure-related offences including on secrets, confidential matter, and misprision of treason (discussed below), will fortify what has already become an "informant culture" in Hong Kong after the NSL's passage, in which colleagues do not want to talk about work and may even move overseas to avoid the threat of prosecution.[54]

Even aside from actual prosecution, this may severely chill communications and consultations in the legal community for fear of even inadvertently bringing up issues that might be targeted by the law.

7. The SNSO's sedition-related charges may restrict lawyers' statements, work, and research

A related offence to the disclosure or mere possession of secrets is the disclosure or mere possession of purported seditious material.

Notably, the SNSO's version of the sedition charge replaces Hong Kong's colonial-era sedition law, which had already been revived following the passage of the NSL and the jurisprudential transformation that it triggered. The SNSO increases the severity of the colonial sedition law in several ways, including by explicitly covering possession and increasing the penalty for sedition from a 2-year to a 7-to-10-year prison sentence. SNSO Article 25 also provides that an intention to incite public disorder or violence is not necessary to the offence, formalizing a judge-made principle already created in post-NSL sedition jurisprudence, such as in the General Union case.

Similar to other SNSO offences the definition of sedition is overly broad and undefined. Article 23(1) defines it as any act or stating of a word with seditious intention, and Article 23(2), which mirrors the colonial-era's definition, defines seditious intent as "an intention to bring a Chinese citizen, Hong Kong permanent resident or a person in the HKSAR into hatred, contempt or disaffection against" the political system, government agencies and officers, or any Hong Kong law. To give a sense of how arbitrarily this definition is applied, in the General Union case, the designated judge interpreted "hatred", "contempt", and "disaffection" in this definition by analogy to a school bully, making any conceivable connection to national security ridiculous.[55]

This can include any act or statement that portrays the Hong Kong or central government in a negative light in the authorities' and designated judges' discretion. As mentioned in the previous part, several NSL cases have already built a jurisprudence that recognizes a very broad array of statements or actions

[54] Ng, *supra*, note 41.

[55] General Union case, *supra*, note 17, para. 94. It is worth noting that, if one actually follows the analogy, he means people getting arbitrarily arrested and subjected to police violence in demonstrations, and those writing a children's book about them, are the bullies, and the police and authorities are their victims being subjected to the bullies' hatred, as if the Hong Kong and China central governments are like bullied children.

portraying the Hong Kong or China governments in a negative light as seditious that would not normally raise any concern about a real threat to the government, including the General Union case (a children's book), Tam Tak Chi and Ma Chun Man (chanting slogans), Jimmy Lai (writing articles and editorials in newspapers), and so on.

Article 28 states that the offence of seditious acts or statements applies extraterritorially. Article 24(3) goes further to criminalize the mere possession of a publication that has a seditious intention, punishable up to 3 years imprisonment. Article 22 similarly criminalizes the mere possession of material that may incite a public officer to be disaffected towards the government with intent to do so. It was in the context of this offence that Maya Wang, acting China director at Human Rights Watch, stated that "The new security law will usher Hong Kong into a new era of authoritarianism. Now even possessing a book critical of the Chinese government can violate national security and mean years in prison in Hong Kong."[56]

As before, the major concern is that seditious material is so broadly defined that it allows authorities the discretion to arbitrarily arrest persons possessing virtually any media critical of the Hong Kong or central government. These offences mark some of the most overbroad ways that Hong Kong authorities can in their discretion criminalize critical civil society voices inside Hong Kong, including rights lawyers. For the same reason, lawyers and activists living abroad are probably most vulnerable to sedition charges as it can target acts or statements critical of the government even when made overseas or online.

Also similarly to other offences described in this statement, there are reasons why lawyers may be particularly targeted under the SNSO's sedition offence. It is in the nature of many legal cases to make statements during cases that may portray government officials or acts negatively, in a way authorities perceive as bringing the government into hatred, contempt, and disaffection.

There is a stated exception for sedition if the act or statement is done to give an opinion with a "view to improving or alteration in accordance with law" (Article 23(4)(a)). However, this exception is in the discretion of designated judges who openly use politicized and emotional language to find seditious acts and speech directly in terms of their political content.[57] It is reasonable to expect a "view to improve" exception will not apply to any statements or acts conveying political sentiments viewed as seditious per se in practice, no matter how constructive.

While sedition charges in themselves may be broadly applied, as several NSL cases have demonstrated, when a conspiracy charge is linked to seditious acts, the offence can operate even more broadly to target an entire organisation based on a violation of an individual member.

[56] Maya Wang, Tweet, 19 Mar. 2024, https://twitter.com/wang_maya/status/1770076717597548843.
[57] For some egregious examples see, e.g., General Union case, *supra*, note 17, para. 35 ff. ("36. Defendants, you are going to leave custody soon, but my question to you is: when are you going to leave the prison of your mind?"); Tam Tak Chi, [2022] HKDC 208, para. 93, https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=142703 (Translated from Chinese: "It is not difficult for anyone who heard and saw the defendant's 'outstanding' performance that day to see the cunning and vicious heart of the defendant.").

The idea is that, once an act or statement is arbitrarily declared seditious, normal activities of the organisation, such as publishing articles in the case of media organisations or analogous support for the work of members among companies and law firms, may be criminalized as part of a seditious conspiracy to advance the seditious act or statement.

There are two examples. In the General Union case, acts of distributing the children's books at issue were considered part of a seditious conspiracy due to the content of the books.[58] Similarly in the Jimmy Lai sedition case, a recent ruling on a motion built on the same General Union holding to clarify that the duration of a conspiracy for a media company includes normal media operations, such as distributing newspapers.[59] In other words, if a single article is found to be seditious, the normal operations of the entire media company may be charged with criminal conspiracy for those normal operations. It does not take much stretch of imagination to see how this understanding of criminal conspiracy may target any organisation handling information the government may deem as seditious. In the context of legal work, this may prevent law firms from employing lawyers with a history of legal rights work. As mentioned in the previous section, in Part 11 below, this statement will consider this issue in terms of possible administrative measures to dissolve organisations, where conspiracy sedition charges may be relevant.

As a quick addition to this section, an offence to which lawyers are vulnerable which is related to sedition is "harassment of workers handling cases or work concerning national security", which includes the criminalization of "offensive words" by any means to "cause alarm or distress" among national security workers (Article 119(1)(a)(i)). It is easy to envision statements that rights lawyers might make in a typical defense for defendants charged under the SNSO that could by perceived as offensive to national security workers. The crime is punishable by up to 10 years imprisonment.

8. The charge of failing to disclose the commission of treason may threaten lawyers if legal privilege is denied

A similar offence involving possession of information to note is under SNSO Article 12, traditionally known as misprision or the intentional concealment of knowledge of treason, in which a person gains knowledge of an act of treason and does not report it, an offence punishable by up to 14 years in prison. Notably, Article 12(3) reserves the entitlements of "legal professional privilege" for communications with legal professionals, ostensibly exempting lawyers that gain such information in the course of their legal work from the offence. However, recalling Part 3 above, it was mentioned that there is concern that police may refer to rules for restricting national security clients' ability to meet with council to ignore attorney-client privilege. If that happens, misprision of treason may become a viable charge for lawyers for information obtained during what authorities take to be non-privileged consultations in their private capacity.

[58] HKSAR vs. Lai Man-ling, *supra*, note 17, para. 148.
[59] HKSAR vs. Lai Chee Ying, et al, [2023] HKCFI 3337, paras. 32-36, https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=157099.

There are some indications that Hong Kong authorities may act in this direction. An advisor to the Chief Executive, Ronny Tong, has stated that religious professionals are not exempt, even if they heard about the acts during confession.[60] Statements such as this may indicate a motivation among authorities to read the legal professional privilege narrowly and find ways to ignore it altogether to target lawyers working on national security cases. The uncertainty surrounding this possibility may deter lawyers from working on cases that may involve treason altogether, even despite the law giving privilege for legal communications.

9. Practical consequences of the law will make Hong Kong lawyers' work more difficult

As the above two subsections suggest, beyond being specifically targeted for prosecution under the law, the law will also have practical consequences that may hamper lawyers' ability to do legal work. This includes restrictions on their ability to work with transnational companies and international associations, not only because of a risk of prosecution, but because the companies and associations will withdraw from engagement in Hong Kong due to the risk. Similarly, Hong Kong will be subject to further economic sanctions and restrictions by other governments, including business and travel advisories against Hong Kong, the removal of diplomatic privileges from Hong Kong trade offices, and so on.

In the context of the above threats to lawyers of arrest or judicial or administrative harassment, a number of rules may be applied to undermine or eliminate traditional protections of lawyers. The next two subsections give two examples.

10. The law legally and practically restricts lawyers' ability to communicate with closed-door trial and reporting restriction rules

The SNSO provides for closed-door trials for national security cases in general (Article 87) which should be regularly applied. Article 108 further ends the long-standing right of the defence to lift restrictions on reporting of committal proceedings so that information on the proceedings reaches the public. These rules allow proceedings to occur without transparency and public scrutiny, allowing for manifest abuses to occur and a culture of impunity to harden.

To place these rules in context, in China, there has been a trend of increasingly restricting lawyers' ability to communicate details about a national security case or their clients to the public extending from closed door trial rules, including the reported requirement for lawyers to sign non-disclosure agreements restricting them from any communications about national security related trials.[61] The closed door trial language in the SNSO raises the possibility that Hong Kong may be progressing on a similar track over time. The practice of restricting lawyers' ability to communicate to the public about their clients or trials makes both lawyers and their clients more vulnerable to abusive court decisions and judicial actions.

[60] Leung, *supra*, note 42.
[61] ALN, "Eight Ways that Rights Lawyers in China and Hong Kong Continue to Face Arbitrary Detention, Harassment, and Repression", 29 Dec. 2023, https://www.asianlawyers.net/statements/2023-12-29-eight-ways-rights-lawyers-in-china-and-hong-kong-face-repression, Part 6.

It is worth explaining the Article 108 rule in more detail. In basic terms, it allows magistrates (civil officers that handle preliminary or committal proceedings for cases) to ignore the existing rules on reports on committal proceedings, which say that if a defendant requests the default restriction on committal proceeding reports to be lifted, the magistrate has no discretion to deny the defendant's request; the restriction must be lifted. By overriding this rule as a default, Article 108 ensures that magistrates will almost always deny the defendant's request and that the default restriction on the committal proceeding being publicly reported remains in place, with the only exception being if the magistrate is personally "satisfied that doing so is necessary in the interests of justice and would not be contrary to the interests of national security"; in which case the magistrate "may" accept the defendant's request. As mentioned several times above, designated judges and magistrates can always arbitrarily find the interests of justice and threats to national security to favor their position against a defendant's interest based on political considerations.

To explain SNSO Article 108 more explicitly, the Magistracy Ordinance, Article 87A(1) begins with the default rule that, aside from a few basic facts, committal stage proceedings shall not be reported to the public.[62] While not made explicit, the implicit purpose of this rule is to protect a defendant from the reporting creating bias against him or her, such as biasing possible future jury members. However, the ordinance provides an explicit exception in Article 87A(2): If the accused person him or herself applies to lift the reporting restriction, since the purpose of the rule is to protect the defendant, then the magistrate has no discretion to deny his or her request. An example would be if a defendant thinks that the magistrate or committal process itself may be biased against him or her and that public reporting would subject them to public scrutiny, deterring abuses against the defendant. SNSO Article 108(1) then says that it replaces MO Article 87A with its own rules. Article 108(2) then says that a magistrate may, on application by the prosecution or the accused, lift the default reporting restriction (or more explicitly, order that MO Article 87A(1) does not apply to a report, which removes the restriction). Then Article 108(3) gives the narrow conditions under which a magistrate can lift the restriction, "only … on being satisfied that doing so is necessary in the interests of justice and would not be contrary to the interests of national security", which we can expect will generally not be satisfied.

Hong Kong lawyers have expressed particular dismay at Article 108, as committal stage reporting has proven to be a vital protection against manifest injustice to defendants in national security cases. With the above framing in mind, one can see how Article 108 flips the goal of the reporting restriction on its head, making it not about protecting the defendant above all but about protecting national security above all at the cost of the defendant. This is part of a pattern in post-NSL national security jurisprudence. A related example is the holding of designated judges that defendants in national security cases should normally be denied the common law right to a jury trial in order to prevent the "injustice" of politicized public opinion (which finds the NSL deeply unpopular in Hong Kong), which would prevent designated judges getting the arbitrary convictions that they seek, even though the main purpose of

[62] Magistrates Ordinance, Cap. 227, art. 87A(2), "Restrictions on reports of committal proceedings", https://www.elegislation.gov.hk/hk/cap227!en.

juries is to protect defendants principally from judge bias, not to protect national security.[63] This example is also relevant to the rules on committal stage reporting restrictions because, again, one of the main justifications of the default committal stage reporting restriction is to protect defendants from future jury bias. The fact that designated judges in national security cases do not even allow jury trials as a default eliminates one of the major justifications to have the restriction at all.

In exactly the same vein, magistrates in national security cases commonly view the committal stage reporting restriction as facilitating their goal of making decisions at the committal stage that would be deeply unpopular and trigger public outcries—e.g., such as arbitrarily rejecting legal rights or long-held common law jurisprudence—by eliminating public scrutiny which they view as unjustifiably "pressuring" the proceedings and leading to "injustice". As one commentator has explained, in denying a defendant's request to lift the restriction, the magistrate mistakenly replaces the restriction's goal of "justice for the defendant" with "justice for the state", such as relieving prosecutors from public pressure or protecting prosecution witnesses; however the purpose of the rule is not to protect the state but to protect the defendant from the state, and it must be interpreted in that light.[64]

Two past national security cases, "Hong Kong 47" and "Hong Kong Alliance", demonstrated how magistrates in national security cases wrongly rejected the rules on committal stage reporting to abusive ends. In both cases, the defendants requested a lifting of the restriction on committal stage reporting to discourage abuses of process. The respective magistrates arbitrarily rejected the requests, each stating incorrectly that magistrates have the discretion to reject defendant requests on the matter under the Magistracy Ordinance. To frame the decision, the lengthy committal proceedings for both cases were reportedly full of manifest abuses and irregularities, and the reporting restriction relieved the decisions from public scrutiny. Later, in the subversion case for the lawyer Chow Hang Tung, the defendant appealed the same decision in her case to judicial review in the High Court, where the denial of her request for lifting the restriction was overturned due to the clear text of Magistracy Ordinance Article 87A(2), which leaves no ambiguity to the exception for defendant requests, leaving magistrates with no discretion to deny them.[65]

It is in this context that SNSO Article 108 can be understood as creating a new baseline situation where magistrates regularly reject defendants' requests to lift reporting restrictions to keep the proceedings shielded from public scrutiny, since it is unlikely they will ever find the lifting in the interest of "justice", in their view, or national security. Due to the magistrates' practice before the High Court overturned the practice in the Chow Hang Tung case, it is virtually certain that magistrates in national security cases will follow this new baseline and continue to deny defendants' requests to lift the restrictions on committal stage reporting which will facilitate further abuses against defendants, including lawyers, moving Hong

[63] Tong Ying Kit vs. Secretary of Justice, [2021] HKCFI 1397, https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=135853.

[64] Tim Hamlett, "Why a Hong Kong judge was right to rule on reporting restrictions for committal proceedings", HKFP, 13 Aug. 2022, https://hongkongfp.com/2022/08/13/why-a-hong-kong-magistrates-ruling-on-reporting-restrictions-for-committal-proceedings-was-wrong/.

[65] Candace Chau, "Hong Kong court quashes decision to enforce reporting ban on activist's national security case in landmark ruling", HKFP, 2 Aug. 2022, https://hongkongfp.com/2022/08/02/hong-kong-court-quashes-decision-to-enforce-reporting-ban-on-activists-national-security-case-in-landmark-ruling/.

Kong ever closer towards China's practice of unrestrained abuses against defendants without public scrutiny.

11. The SNSO may open the door to further administrative restrictions on and control of lawyers

Another trend that has been reported in the legal community in China has been the increasing use of administrative restrictions on and control of lawyers, typically based on political motivations. This includes the practice of suspending or revoking lawyers' license to practice after defending politically sensitive defendants, as well as the implementation of an "annual inspection" process for both lawyers and law firms through which information is gathered and government control over lawyers is asserted.[66]

These developments may occur through chief executive or national security committee decisions, which are given broad powers and discretion to make certain decisions and measures for national security as described in SNSO Article 111 and following.

a. Measures towards lawyers

A basis for administrative control is already constructed in several parts of the SNSO. Part 4 above discussed rules to revoke "absconder" lawyers' professional qualifications if they are charged with a national-security related offence. There may also be reasons to expect qualifications of domestic lawyers may be targeted; however, rules simply restricting listed lawyers from working on national security cases at all may be sufficient. The inability for lawyers specialized in criminal defense from working on a large category of criminal defense cases may also be enough to practically squeeze them out of the profession. Simply the threat of administrative sanction or pressure, which is a lower burden process and subject to less scrutiny than prosecution, may thus deter lawyers from working on politically sensitive cases or issues. Threats of prosecution, sanction, and harassment, including the threat of disqualification, may also practically compromise the independence of lawyers altogether, which will have negative effects on the rule of law and protection of rights across the board.

b. Measures towards law firms

The SNSO amends rules to facilitate the dissolution of companies and organisations for national security violations, which may apply to law firms. Note again, as discussed in Part 7 above, that NSL jurisprudence has already given authorities grounds to dissolve organisations for contributing to seditious conspiracy if members are charged with seditious acts. In this vein, Articles 60 and following prohibit organisations from taking acts endangering national security. This includes, per Articles 60 and 61, local organisations that receive funds from an external place, or are otherwise associated, affiliated, or participating with them in decisions, even indirectly. Article 68 further provides almost unrestricted power for authorities to investigate any organisation, including by compelling the disclosure of their internal materials in writing. This rule in particular will have a severely chilling effect on organisations, which may not even be able to safely keep records involving sensitive matters. On their face these rules

[66] *Id.*, Part 4.

may apply to transnational law firms or local law firms working with overseas partners. Part 5 above has already discussed how overseas partnerships may threaten lawyers and law firms.

To the extent law firms may be targeted by these rules, we may expect firms employing lawyers working on politically sensitive cases or defending clients in national security cases, those that have not already been sufficiently excluded from national security legal work because they do not follow a pro-Beijing line, may be at risk of dissolution. Whether any firm is actually dissolved, uncertainty in the law creating the threat of such dissolution may deter law firms from employing activist lawyers, an effect already present in China law firms.

In this context, it is also worth noting that already in several post-NSL national security related cases, authorities have investigated organisations' financial records to find either external funding sources or arguable irregularities, as a basis for dissolving the organisation.[67]

One reason to watch out for such measures towards lawyers and law firms is because such practices are already being practiced towards lawyers and law firms in China, and, aside from discrete political pressure, China agents work directly with Hong Kong national security bodies, raising the possibility that over time practices in China in national security-related cases may become part of the practice in Hong Kong.

IV. Conclusion

Stepping back and considering the broad theme of these points, the SNSO demonstrates a major landmark in the progression of Hong Kong towards a more authoritarian system in the image of China, including in its treatment of lawyers such as its attacks on lawyers defending rights defenders and working on politically sensitive cases over which the central government has an irrational fear. At every turn, we should pay attention to how different national security regulations might affect lawyers, and how they may create the possibility for abusive practices against lawyers in China to become practiced in Hong Kong.

We recommend that the international community of states continue to pressure Hong Kong and Chinese authorities to protect lawyers by continuing to make statements about their vulnerability, and by applying sanctions and other appropriate measures. We call on China and Hong Kong authorities to repeal the NSL, SNSO, and other abusive national security related laws, release those arbitrarily arrested under them, and end any harassment of lawyers, journalists, activists, and other targeted groups.

[67] HRN, *supra*, note 6.