

China (Hong Kong SAR): The Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region

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The following briefing paper provides a preliminary analysis from an international human rights law perspective of the selective provision of the newly enacted national security law in Hong Kong. It is meant to inform ongoing advocacy and policy discussions taking place in the immediate aftermath of the passage of the law. It is not comprehensive and only illustrates some of the many dangerous deficiencies in the law.

On 30 June 2020, China's President Xi Jinping signed a Presidential order, which brought into effect a new national security law adopted by the Standing Committee of the 13th National People's Congress.¹ The law, on its face, stands to arbitrarily interfere with the exercise of the rights to freedom of expression and assembly of the people of Hong Kong, in contravention of international law. It also effectively undermines the independence of the judiciary and threatens the integrity of Hong Kong's system of democratic governance. The very day that the law came into effect, crackdowns against critics and pro-democracy activists began, in violation of China's obligations under international law to respect human rights and in contravention of Hong Kong's Basic Law.

Concerns about China's commitment to protecting human rights and respecting the political autonomy of the Hong Kong Special Administrative Region in China (HKSAR) are not new. In 1992, the International Commission of Jurists (ICJ) sent a mission to Hong Kong to gather evidence and hear the views of Hong Kong's people prior to sovereignty over Hong Kong being transferred from the United Kingdom to the People's Republic of China (PRC). That mission asked two central questions:

- Will the Chinese Government, in fact, allow Hong Kong the high degree of autonomy that it has promised?
- Will the Chinese Government allow the people of Hong Kong to exercise the rights and freedoms which it had denied so far to its own citizens?²

Doubts about China's commitment to answering these questions in the positive remained unanswered after the ICJ visited Hong Kong again in 1996 as part of a follow-up mission. The ICJ at that time advised that monitoring and vigilance would be required from international human rights bodies and the international community to ensure that the territory would be kept safe for democracy, the rule of law, and human rights.³ Recent events, and the passage of the national security law, in particular, now sadly indicate that China is committed to backtracking on its promises to respect the rights of the people of Hong Kong.

In the aftermath of the passage of the "Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (HKSAR)" (National Security Law) by the Standing Committee of the Thirteenth National People's Congress (NPC) on 30 June 2020,⁴ the ICJ is re-visiting the questions it raised in 1992 and 1996 by examining the process and discussion leading up to the enactment of the law and its content. In short, the Chinese government has failed in ensuring its obligations to guarantee the human rights and fundamental freedoms of the people in the HKSAR under international human rights law.

The ICJ in this briefing paper addresses the historical context and background of the national security legislation in the HKSAR. It then sets out the applicable international human rights law and analyzes some of the problematic provisions of the new law in light of international law. The ICJ concludes that the Law is fatally flawed and that the Chinese Government should immediately repeal it.

¹ The English translation of the law used in this paper was provided by Xinhuanet, the official state-run press, 1 July 2020, http://www.xinhuanet.com/english/2020-07/01/c_139178729.htm.

² International Commission of Jurists, "Countdown to 1997: report of a mission to Hong Kong" (1992), <https://www.icj.org/wp-content/uploads/1992/03/Hong-Kong-countdown-to-1997-fact-finding-mission-report-1992-eng.pdf>.

³ International Commission of Jurists, "Hong Kong: the countdown continues" (1996), <https://www.icj.org/wp-content/uploads/2013/05/Hong-Kong-the-countdown-continues-fact-finding-mission-report-1996-eng.pdf>.

⁴ Xinhuanet, "China adopts law on safeguarding national security in Hong Kong", 1 July 2020, http://www.xinhuanet.com/english/2020-07/01/c_139178729.htm.

Q 1. What is the historical context of Hong Kong's special administrative status?

To understand the degree of popular resistance in the HKSAR to the decision of the Chinese central authorities to impose national security laws in the HKSAR, the historical and political context must be considered. When Hong Kong was transferred from the United Kingdom to the PRC in 1997, it was done with a number of conditions.

Among these was the condition that "the current social and economic systems in Hong Kong will remain unchanged, and so will the lifestyle. Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of a strike, of choice of occupation, of academic research and of religious belief will be ensured by law in the Hong Kong Special Administrative Region."⁵

The Sino-British Joint Declaration, a legally binding treaty deposited with United Nations in 1985, states that China's basic policies regarding Hong Kong "will remain unchanged for 50 years", and includes the promise that the city would retain a high degree of autonomy.⁶

The principle of "one country, two systems" was designed, among other things, to guarantee human rights, the rule of law, and the progression towards democracy in Hong Kong.⁷ Article 39 of Hong Kong's Basic Law is clear that the provisions of the International Covenant on Civil and Political Rights (ICCPR) shall remain in force through the legal system of the Special Administrative Region.⁸ Indeed, the Hong Kong Special Administrative Region of the People's Republic of China has continuously reported to the UN Human Rights Committee, most recently with its fourth periodic report in 2019,⁹ and has been subjected to continuous periodic review by that body.

The Declaration also states that Hong Kong's legal and judicial system would remain unchanged for 50 years after 1997.¹⁰ It was in this context that the moves by China's central authorities to enact the security law met with widespread protests and public condemnation in the HKSAR. The moves appeared to threaten the principle of "one country, two systems" principle, and the national security law was widely understood to be in violation of the Basic Law and China's obligations under the Sino-British Joint Declaration.

Q 2. What is the background of the national security legislation in the HKSAR?

In 2003, the HKSAR government first proposed a national security law, as it was obliged to do under Article 23 of the Basic Law. The law aimed to prohibit any act of "treason, secession, sedition or subversion against the Central People's Government."¹¹ The broad, sweeping nature of its provisions, which included a prohibition on foreign political organizations or bodies from conducting political activities within the region, caused a storm of protest on 1 July 2003, when

⁵ JOINT DECLARATION OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA ON THE QUESTION OF HONG KONG, 3. (5), 19 December 1984, <https://treaties.un.org/doc/Publication/UNTS/Volume%201399/v1399.pdf>.

⁶ Ibid, 3. (2): "The Hong Kong Special Administrative Region will be directly under the authority of the Central People's Government of the People's Republic of China. The Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government."

⁷ Department of Justice in the HKSAR, "Understanding 'One Country, Two Systems' through Hong Kong's Constitutional Development", 29 May 2004, <https://www.doj.gov.hk/eng/archive/pdf/sj20040529e.pdf>.

⁸ Basic law of the HKSAR, "Implementing International Covenants", https://www.basiciaw.gov.hk/en/publications/book/15anniversary_reunification_ch2_5.pdf.

⁹ UN Doc CCPR/C/CHN-HKG/4.

¹⁰ JOINT DECLARATION OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA ON THE QUESTION OF HONG KONG, 3. (12).

¹¹ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Chapter II, Article 23: The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies, https://www.basiciaw.gov.hk/en/basiciawtext/chapter_2.html.

over 500,000 people demonstrated against the proposal.¹² After a standoff, the bill was withdrawn.

In 2019, the HKSAR government, under pressure by the Central Government, introduced a new extradition law. The fear that the bill might result in the forced transfer of people from Hong Kong to face trial in mainland China sparked protests.¹³ Hundreds of thousands of people took to the streets for many consecutive weekends in some of the largest demonstrations since the territory was handed over to China by the United Kingdom in 1997.¹⁴ In confronting the demonstrators, police units allegedly applied unnecessary and disproportionate force, which involved the use of tear gas, pepper spray, water cannons, and rubber bullets.¹⁵

Unwarranted restrictions on the rights to peaceful assembly and free expression, lack of police accountability for unnecessary and excessive force, and the use of legal means to harass protest leaders have been well documented by media and civil society organizations.¹⁶

The protests were later used by the Central authorities to justify the imposition of the national security law. In May 2020, the NPC drafted and passed the national security law and imposed it on the HKSAR without any meaningful public consultation.

Q 3. What are China's human rights obligations in relation to national security legislation?

National security legislation, like any legislation, is subject to the constraints of international law, including human rights law. The HKSAR, though not the rest of the PRC, is legally bound by the International Covenant on Civil and Political Rights (ICCPR).¹⁷ The ICCPR, as applied to the HKSAR, continues to be in force in the HKSAR by virtue of Article 39 of the Basic Law. The Hong Kong Bill of Rights Ordinance (Cap. 383) (HKBORO) implements the ICCPR and therefore has constitutional force pursuant to Article 39 of the Basic Law.¹⁸

The Hong Kong Bill of Rights (HKBOR) also reproduces much of the ICCPR.¹⁹ The ICCPR obliges parties to it to respect and ensures a wide range of human rights and fundamental freedoms, including, among others, the rights to life; the right to liberty; the right to a fair trial; freedom from torture or cruel, inhuman or degrading treatment and punishment; freedom of opinion and expression, freedom of movement; freedom of assembly; freedom of association; the right to privacy and the right to non-discrimination and equal protection of the law.

Some of these rights, like the right to be free from torture and ill-treatment and the right to life, are not generally subject to any limitations and must be absolutely guaranteed in their full scope at all times. Others, such as freedom of expression, assembly, association and movement, may be limited in a narrowly tailored fashion and only for the legitimate purposes set out in the ICCPR. One of those purposes is national security.²⁰ However, even if a State purports to

¹² The Conversation, "Hong Kong: how China's new national security law subverts the territory's cherished rule of law", 30 May 2020, <https://theconversation.com/hong-kong-how-chinas-new-national-security-law-subverts-the-territorys-cherished-rule-of-law-139683>.

¹³ Amnesty International, "Beijing's 'Red Line' in Hong Kong: Restrictions on Rights to Peaceful Assembly and Freedom of Expression and Association", 24 September 2019, <https://www.amnesty.org/en/documents/asa17/0944/2019/en/>.

¹⁴ BBC, "Hong Kong-China extradition plans explained", 13 December 2019, <https://www.bbc.com/news/world-asia-china-47810723>.

¹⁵ Amnesty International, "Beijing's 'Red Line' in Hong Kong: Restrictions on Rights to Peaceful Assembly and Freedom of Expression and Association", 24 September 2019, <https://www.amnesty.org/en/documents/asa17/0944/2019/en/>.

¹⁶ Ibid and see also International Commission of Jurists, "Hong Kong: ensure police do not use excessive force against protesters", 18 November 2020, <https://www.icj.org/hong-kong-ensure-police-do-not-use-excessive-force-against-protesters/>.

¹⁷ International Commission of Jurists, "China (Hong Kong): Authorities must protect right of peaceful assembly and end legal harassment of activists and journalists", 4 March 2020, <https://www.icj.org/china-hong-kong-authorities-must-protect-right-of-peaceful-assembly-and-end-legal-harassment-of-activists-and-journalists/>.

¹⁸ An Introduction to Hong Kong Bill of Rights Ordinance, https://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/the_rights_of_the_individuals/human/BORO-InductoryChapterandBooklet-Eng.pdf.

¹⁹ Hong Kong Bar Association, "Statement of the Hong Kong Bar Association on NPCSC's deliberation of the proposed national security law and reported details", 19 June 2020, <https://www.hkba.org/sites/default/files/20200619%20-%20HKBA%20Statement%20of%20HKBA%20on%20reported%20details%20of%20proposed%20NSI%20%28F%29.pdf>.

²⁰ International Commission of Jurists, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, April 1985, <https://www.icj.org/siracusa-principles-on-the-limitation-and-derogation-provisions-in-the-international-covenant-on-civil-and-political-rights/>.

limit the exercise of a right on national security grounds, the limiting measures must be prescribed by law and subject to the principle of legality. This means that the law must be stated in a clear, precise manner to enable individuals to adjust their conduct accordingly, and also provide guidance to those charged with executing the laws to ensure they can clearly ascertain which kinds of expression fall under restrictions and which do not.²¹

In addition, any limitations on these rights must comply with the conditions of non-discrimination, necessity and proportionality.²² In the national security context, only those measures strictly necessary to meet the national security purpose are permissible, and those measures must be the least restrictive means available to achieve that purpose. Under no circumstance must the essence of any of these rights be impaired.²³

In sum, any law on national security must be clear in scope and definition. Any permissible limitations on rights must be non-discriminatory, strictly necessary, try and proportionate to achieve a legitimate national security purpose. The analysis below will show that the National Security Law is in blatant violation of the conditions set by international human rights law that could justify limitations on the exercise of certain rights, even if imposed for national security purposes.

In Article 4, the National Security Law provides that "human rights shall be respected and protected in safeguarding national security." The Law commits the State respecting "the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong." Despite these welcome commitments, even a cursory analysis of the law suggests that it is being used to undermine and curtail these rights rather than protect them (as set out in the analysis below).

Q 4. How is the new National Security Law structured?

The National Security Law was passed unanimously at the 20th session of the Standing Committee of the 13th NPC (NPCSC) on 30 June 2020. China's President Xi Jinping signed a presidential order, then Carrie Lam, the Chief Executive of the HKSAR, promulgated the law. On the same day, China unveiled publicly for the first time the full text of the Law. The Law was published just after it went into effect at 11 pm on 30 June, the date of its promulgation.²⁴ Its implementation comes less than 40 days after the NPC openly revealed its plan to impose the law on Hong Kong, bypassing the HKSAR legislature.²⁵

The National Security Law is divided into six chapters with sixty-six articles.

- *Chapter One* provides general principles of the law, including the purpose, legal status of the HKSAR, rights guaranteed, the principle of the rule of law, and responsibilities of the PRC.
- *Chapter Two* addresses the duties of the government bodies of the Hong Kong Special Administrative Region to safeguard national security including the HKSAR's duty to promote national security education in schools and universities.
- *Chapter Three* sets out offences and penalties. It defines four categories of offences -- secession, subversion, terrorist activities, and collusion with a foreign country or external elements to endanger national security -- and their corresponding penalties.
- *Chapter Four* details jurisdiction, applicable law and procedure, and states that the Chief Executive shall designate judges to handle cases concerning offences endangering national security, shall issue a certificate directing a case be tried without a jury, and

²¹ Ibid.

²² UN Human Rights Committee, CCPR/C/GC/34, para. 22, <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

²³ Ibid, para. 34.

²⁴ Promulgation of National Law 2020, 30 June 2020, <https://www.gld.gov.hk/egazette/pdf/20202444e/es20202444136.pdf>. The Law was at first only available in Chinese. Xinhuanet, the official state-run press later released the Law in English. See also http://www.xinhuanet.com/english/2020-07/01/c_139178729.htm.

²⁵ Time, "It Is a Lot More Severe Than People Expected. China Passes National Security Law to Quell Protests in Hong Kong", 1 July 2020, <https://time.com/5860125/hong-kong-national-security-law/>.

that the court should obtain a certificate from the Chief Executive to certify whether an act involves national security or whether the relevant evidence involves State secrets.

- *Chapter Five* establishes an office for safeguarding the national security of the Central People's Government in the HKSAR and defines the mandate of the office. It further stipulates that the office shall exercise jurisdiction over certain national security cases.
- *Chapter Six* includes supplementary provisions, stating that this law will prevail where provisions of the HKSAR laws are inconsistent with the law and that the power of interpretation of the law shall be vested in the Standing Committee of the National People's Congress.

The National Security Law raises numerous matters of grave concern in terms of both its substantive content, and the procedures under which it was conceived, drafted, enacted, and promulgated.

Q 5. What are the key concerns regarding the procedural deficiencies of the new law?

The NPC's decision was implemented by adding it to Annex III of the Basic Law. Under Article 18 of the Basic Law, national legislation is not applicable in the HKSAR unless it is listed in Annex III, which is "confined to those [laws] relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law."²⁶

The Law does not sit comfortably with international human rights standards aimed to strengthen the rule of law and promote democracy.²⁷ Elements of the rule of law include the prescription that "democratic institutions apply democratic processes" and "the right to participate in decision-making and governance."²⁸ As affirmed by States through UN Human Rights Council Resolution 19/36, the rule of law principles includes "inclusive and democratic approaches in the elaboration and revision of fundamental laws and regulations that underpin democracy and the rule of law, human rights and fundamental freedoms," as well as governments "engaging with civil society organizations and institutions and enabling them to participate in the public debate on decisions that would contribute to the promotion and protection of human rights and the rule of law and of any other relevant decisions."²⁹

The process of drafting of the law took place without any meaningful public consultation and through an inaccessible and entirely non-transparent process. The UN High Commissioner for Human Rights Michelle Bachelet pointed out that "public debates and participation in the decision-making process relating to national security measures are crucial, considering the potential such measures have to restrict people's human rights."³⁰

The Hong Kong Bar Association also raised the issue of accessibility of the law.³¹ Ensuring public access to information is also a component of the rule of law.³² The law became available to the

²⁶ The Basic Law of the Hong Kong Special Administrative region of the People's Republic of China, Article 18, https://www.basiclaw.gov.hk/pda/en/basiclawtext/chapter_2.html. Under Article 23 of the Basic Law, the HKSAR "shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the [HKSAR], and to prohibit political organizations or bodies of the [HKSAR] from establishing ties with foreign political organizations or bodies". The NPCSC's decision to add the HK National Security Law under Annex III of the Basic Law via the mechanism provided under Article 18 of the Basic Law is therefore questionable, given that the HKSAR is clearly empowered to enact necessary national security law that would pertain internally to HKSAR under Article 23 of the Basic Law. Annex III, by contrast, appears to cover questions of defence related to the PRC as a whole, vis a vis other States.

²⁷ UN Human rights Council, A/HRC/RES/19/36, Human Rights, Democracy and the Rule of law, 19 April 2012, para. 16, <https://digitallibrary.un.org/record/725358>.

²⁸ International Commission of Jurists, Tunis Declaration on Reinforcing the Rule of Law and Human Rights, March 2019, paras. 9. b) and c), <https://www.icj.org/wp-content/uploads/2019/04/Universal-ICJ-The-Tunis-Declaration-Advocacy-2019-ENG.pdf>.

²⁹ UN Human rights Council, A/HRC/RES/19/36, Human Rights, Democracy and the Rule of law, 19 April 2012, paras. 16 (J)(ix) and 16(E), <https://digitallibrary.un.org/record/725358>.

³⁰ UN OHCHR, "China/Hong Kong SAR: Security law must meet human rights obligations, says Bachelet", 19 June 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25978&LangID=E>.

³¹ Hong Kong Bar Association, "Letter to Chief Executive regarding timely publication of proposed national security law", 19 June 2020, <https://www.hkba.org/sites/default/files/Chairman%27s%20letter%20to%20Chief%20Executive%20-%20Timely%20Publication%20of%20Proposed%20National%20Security%20Law.pdf>.

³² UN Human rights Council, A/HRC/RES/19/36, Human Rights, Democracy and the Rule of law, 19 April 2012, para. 16 (F).

public only moments after it took effect. This both prevented the people of Hong Kong from meaningfully participating in the legislative process and limited the ability of legal experts to review the compatibility of the law with Hong Kong's legal and constitutional framework and China's international legal obligations.³³

Furthermore, the law includes provisions that explicitly prohibit judicial review of the decisions made by the Committee established to enforce the law. According to Article 14 of the law, the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region has very broadly defined functions and duties including (1) analysing and assessing developments in relation to safeguarding national security in the Hong Kong Special Administrative Region, making work plans, and formulating policies for safeguarding national security in the Region; (2) advancing the development of the legal system and enforcement mechanisms of the Region for safeguarding national security; and (3) coordinating major work and significant operations for safeguarding national security in the Region.

Most troubling, the law explicitly states that "[n]o institution, organisation or individual in the Region shall interfere with the work of the Committee. Information relating to the work of the Committee shall not be subject to disclosure. *Decisions made by the Committee shall not be amenable to judicial review*" (emphasis added).

"The principle of judicial review is indispensable to the effective operation of the rule of law. Judges must retain the authority within the scope of their jurisdiction as final arbiters to state what the law provides."³⁴ According to the Beijing Statement on Principles of the Independence of the Judiciary in the LAWASIA region, signed by the top judiciary authorities in Hong Kong SAR and the PRC as a whole,³⁵ "the independence of the judiciary requires that the judiciary has jurisdiction, directly or by way of judicial review, overall issues of a justiciable nature." The removal of the competency of the judiciary in the HKSAR to review the constitutionality of this law clearly undermines the judicial function, the separation of the powers, and the independence of the judiciary.

Q 6. What are the crimes and penalties under the new law, and what are the key concerns?

The National Security Law is overbroad both as to the definition of the crimes as well as its scope. The law also applies to Hong Kong SAR permanent residents as well as non-residents, as well as those outside Hong Kong SAR who violate the law,³⁶ irrespective of whether or not such persons are otherwise in the jurisdiction of Hong Kong SAR. In particular, definitions of the offences of secession, subversion, terrorist activities, and collusion with foreign forces are vague and overbroad. In a 1 July statement, the Hong Kong Bar Association raised similar concerns and stressed that the law does not provide clear or transparent guidelines as to how it will be enforced. The HKBA called upon the government to apply the law "in a manner that is fully consistent with the Basic Law and Hong Kong Bill of Rights."³⁷

The law's definitions of both '**secession**' and '**subversion**' are extremely broad in scope and appear to be designed to capture the actions of pro-democracy demonstrators. In the case of 'subversion,' it includes "interfering in, disrupting, or undermining the performance of duties and functions" of the Central or HKSAR governments.³⁸ This formulation could potentially lead

³³ Law Council of Australia, "Law Council President, Pauline Wright, statement on China imposing security laws in Hong Kong", 30 June 2020, <https://www.lawcouncil.asn.au/media/media-releases/statement-on-china-imposing-security-laws-in-hong-kong>.

³⁴ International Commission of Jurists, Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis, Principle one. Principles and Legal Commentary, particularly pages. 1-15, available at <https://www.icj.org/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf>.

³⁵ Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region (7th Conference of the Chief Justices of Asia and the Pacific, 1997), August 1997, <https://www.icj.org/wp-content/uploads/2014/10/Beijing-Statement.pdf>.

³⁶ Article 38 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region.

³⁷ Hong Kong Bar Association, "Statement of the Hong Kong Bar Association on the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region", 1 July 2020, <https://www.hkba.org/sites/default/files/20200701%20HKBA%20statement%20on%20Safeguarding%20National%20Security%20in%20HKSAR.pdf>.

³⁸ Article 22 on 'subversion' reads as follows: "A person who organises, plans, commits or participates in any of the following acts by force or threat of force or other unlawful means with a view to subverting the State power shall be guilty of an offence:

to the prosecution and imposition of extreme penalties (up to life in prison) for many of the acts of non-violent protest that have been part of the pro-democracy demonstrations, such as blocking the entrance to buildings. The authorities have already indicated that they consider some of the common chants and slogans calling for the HKSAR independence to be illegal under the National Security Law. This pronouncement has already had a chilling effect on freedom of expression in the HKSAR, and people have gone so far as to delete their social media accounts entirely.³⁹

The provisions on '**terrorist acts**' and '**colluding with foreign forces**' are also deeply problematic. Article 24 includes activities committed "with a view to coercing the Central People's Government, the Government of the Hong Kong Special Administrative Region or an international organization or intimidating the public in order *to pursue a political agenda*."⁴⁰ The term "political agenda" is vague, ambiguous, overbroad, and, in the absence of a more precise definition, would contravene the principle of legality. Taken on its face, the term "political agenda" would seem very much to apply to conduct that is specifically protected and promoted under human rights law, particularly the ICCPR, which protects the right to political participation in article 25 and freedoms of expression, association and assembly in articles 19, 21 and 22. These provisions also seem tailored to catch many of the activities engaged in by individuals who participated in Hong Kong's mass pro-democracy protests over recent years.

Article 29 on 'Collusion with a Foreign Country or with External Elements to Endanger National Security' contains similarly broad definitions, apparently aimed at deterring and criminalizing engagement with or support from international organizations and the diplomatic community. Among other things, it criminalizes "directly or indirectly receiv[ing] instructions, control, funding or other kinds of support from a foreign country or an institution" to commit acts including:

- (1) waging war against the People's Republic of China, or using or threatening to use force to seriously undermine the sovereignty, unification and territorial integrity of the People's Republic of China;
- (2) seriously disrupting the formulation and implementation of laws or policies by the Government of the Hong Kong Special Administrative Region or by the Central People's Government, which is likely to cause serious consequences;
- (3) rigging or undermining an election in the Hong Kong Special Administrative Region, which is likely to cause serious consequences;
- (4) imposing sanctions or blockade, or engaging in other hostile activities against the Hong Kong Special Administrative Region of the People's Republic of China; or
- (5) provoking by unlawful means hatred among Hong Kong residents towards the Central People's Government or the Government of the Region, which is likely to cause serious consequences.

Given the unaccountable discretion given to the Committee to interpret the law, language such as "disrupting the formulation and implementation of the law," "rigging or undermining an election in the HKSAR," and "engaging in other hostile activities" may readily be invoked to

(1) overthrowing or undermining the basic system of the People's Republic of China established by the Constitution of the People's Republic of China; (2) overthrowing the body of central power of the People's Republic of China or the body of power of the Hong Kong Special Administrative Region; (3) seriously interfering in, disrupting, or undermining the performance of duties and functions in accordance with the law by the body of central power of the People's Republic of China or the body of power of the Hong Kong Special Administrative Region; or (4) attacking or damaging the premises and facilities used by the body of power of the Hong Kong Special Administrative Region to perform its duties and functions, rendering it incapable of performing its normal duties and functions."

³⁹ Time, "Hong Kong Says Common Protest Slogan Calling for 'Revolution' Is Now Illegal Under National Security Law", 3 July 2020, <https://time.com/5862683/hong-kong-revolution-protest-chant-security-law/>.

⁴⁰ The full text of Article 24 reads as follows: "A person who organizes, plans, commits, participates in or threatens to commit any of the following terrorist activities causing or intended to cause grave harm to the society with a view to coercing the Central People's Government, the Government of the Hong Kong Special Administrative Region or an international organization or intimidating the public in order to pursue political agenda shall be guilty of an offence: (1) serious violence against a person or persons; (2) explosion, arson, or dissemination of poisonous or radioactive substances, pathogens of infectious diseases or other substances; (3) sabotage of means of transport, transport facilities, electric power or gas facilities, or other combustible or explosible facilities; (4) serious interruption or sabotage of electronic control systems for providing and managing public services such as water, electric power, gas, transport, telecommunications and the internet; or (5) other dangerous activities which seriously jeopardize public health, safety or security."

suppress freedom of expression without any recourse for appeal. Under these terms, any individual or organizations with international ties or associations with international bodies is left vulnerable to prosecution. This gives rise to considerable concern and confusion as to whether certain existing activities of academics, NGOs, and media organizations that had been treated as lawful in the past might now be construed criminal activities by these provisions.

In addition to the problems of definition and lack of accountability, the penalties set out in the Law, including penalties of up to life imprisonment, are disproportionately severe, especially considering the breadth of activity that the Law could be used to punish. Under the new provisions, a principal offender could be sentenced up to life imprisonment or a fixed term of not less than ten years, which are almost certainly disproportionate even too many of the types of conduct that might be appropriately criminalized. Notably, violations of the Law also disqualify a person from standing in elections or holding public office (Article 35).

The severity of penalties imposed for offences that are not adequately defined, and which allow for wide discretion by implementing authorities deepen concerns that these provisions will result in abusive implementation. This is intensified by concerns that the judiciary tasked with oversight of the Law may not be fully independent or impartial in the national security context – as detailed below.

Q 7. Are the rights to a fair trial by an independent judiciary safeguarded in the new law?

No. The National Security Law contains deeply problematic provisions regarding the appointment, tenure, and removal of judges, jurisdiction over national security cases, and establishment of a national security agency. These provisions threaten the independence of the judiciary and undermine the rule of law in the HKSAR. They are in conflict with the commitment in Article 5 of the National Security Law to the principle of the rule of law, the presumption of innocence, and the right to defend oneself before a judicial body.

The new law undermines the right to a fair trial by a competent, independent and impartial tribunal established by law, guaranteed under Article 14 of the ICCPR. It is also inconsistent with the Sino-British Joint Declaration, which stated that "[t]he Hong Kong Special Administrative Region will be vested with executive, legislative and independent judicial power, including that of final adjudication. The laws currently in force in Hong Kong will remain basically unchanged."⁴¹

The establishment of special courts for national security purposes is generally problematic, especially when they are constituted and operate in a manner that does not comport with principles of an independent judiciary, including the UN Basic Principles on the Independence of the Judiciary. Basic Principle 5 expressly provides: "Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals." The provisions above appear, *prima facie*, to fall afoul of this principle.

Under Article 88 of the Basic Law, judges are appointed by the Chief Executive of the HKSAR on the recommendation of the Judicial Officers Recommendation Commission. This is an independent statutory body, constituted under the Judicial Officers Recommendation Commission Ordinance (Cap. 92),⁴² which is composed of local judges, persons from the legal profession, and reputable persons from other sections. However, Article 44 of the new law stipulates that the Chief Executive shall designate judges who specifically hear cases regarding national security.

⁴¹ JOINT DECLARATION OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA ON THE QUESTION OF HONG KONG, 3(3), 19 December 1984.

⁴² CAP 92 Judicial Officers Recommendation Commission Ordinance in Hong Kong, <https://www.hkllii.hk/eng/hk/legis/ord/92/>.

There are very well defined international human rights law standards regarding the assignment of cases and judicial appointments.⁴³ For instance, the UN Basic Principles on the Independence of the Judiciary provides that "judges, whether appointed or elected, shall have guaranteed tenure until mandatory retirement age or the expiry of their term of office, where such exists." The Basic Law also provides that "a judge of a court of the Hong Kong Special Administrative Region may only be removed for inability to discharge his or her duties, or for misbehavior, by the Chief Executive on the recommendation of a tribunal appointed by the Chief Justice of the Court of Final Appeal and consisting of not fewer than three local judges."⁴⁴

The Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region 1997 provides:

35. The assignment of cases to judges is a matter of judicial administration over which ultimate control must belong to the chief judicial officer of the relevant court.

36. The principal responsibility for court administration, including appointment, supervision and disciplinary control of administrative personnel and support staff must vest in the judiciary, or in a body in which the judiciary is represented and has an effective role.

It is already the normal (and problematic) practice in Hong Kong for judges who hear cases regarding national security to be appointed on a yearly basis by the Chief Executive, and they can be removed if their "words or deeds endanger national security."⁴⁵

Principle 2 of the UN Basic Principles on the Independence of the Judiciary provides that: "The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason." The Basic Law (Article 85) also stipulates that "the courts of the HKSAR shall exercise judicial power independently, free from any interference."

In practice, political influence and other forms of intimidation or interference by government officials or other powerful actors, the manipulation of assignment of cases, and other concerns about internal independence, have raised doubts about the capacity of Hong Kong's judiciary to impartially enforce the existing law. The National Security Law removes even the pretense of an independent judiciary by referring these decisions to a committee over which the judiciary has no oversight and to which no appeal can be made.

Under Article 65 of the Law, the power of interpretation is vested in the Standing Committee of the National People's Congress. As discussed in Q. 5, "the principle of judicial review is indispensable to the effective operation of the rule of law. Judges must retain the authority within the scope of their jurisdiction as final arbiters to state what the law provides."⁴⁶ This is also inconsistent with the Basic Principles, which provide that "the judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law."⁴⁷

⁴³ International Commission of Jurists, International principles on the independence and accountability of judges, lawyers and prosecutors – Practitioners' Guide, No. 1, 3 April 2005, <https://www.icj.org/no-1-international-principles-on-the-independence-and-accountability-of-judges-lawyers-and-prosecutors/>.

⁴⁴ Article 89 of the Basic Law, https://www.basiclaw.gov.hk/en/basiclawtext/chapter_4.html#section_4.

⁴⁵ Article 44 of the law reads as follows: "The Chief Executive shall designate a number of judges from the magistrates, the judges of the District Court, the judges of the Court of First Instance and the Court of Appeal of the High Court, and the judges of the Court of Final Appeal, and may also designate a number of judges from deputy judges or recorders, to handle cases concerning offence endangering national security. Before making such designation, the Chief Executive may consult the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region and the Chief Justice of the Court of Final Appeal. The term of office of the aforementioned designated judges shall be one year. A person shall not be designated as a judge to adjudicate a case concerning offence endangering national security if he or she has made any statement or behaved in any manner endangering national security. A designated judge shall be removed from the designation list if he or she makes any statement or behaves in any manner endangering national security during the term of office."

⁴⁶ International Commission of Jurists, Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis, Principle one. Principles and Legal Commentary, particularly pages. 1-15, available at <https://www.icj.org/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf>.

⁴⁷ UN Basic Principles on the Independence of the Judiciary, 3 and The Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region 1997, para. 33.

Irreparable damage will be done to the rule of law if such crucial decisions in the HKSAR are made by judges who lack independence, appointed by the executive and operating with no oversight from the judicial system of appeals. Indeed, according to Article 44 of the Law, the Chief Executive shall designate a number of judges to handle cases concerning national security-related offences. Before making such a designation, the Chief Executive may consult the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region and the Chief Justice of the Court of Final Appeal. This further weakens an already flawed appointment process for judges adjudicating cases involving national security interests, by potentially removing them from the Hong Kong judicial structure entirely. The Hong Kong Bar Association emphasized in its statement that judges making these determinations must be free from any actual or perceived influence or interference from other branches of the government.⁴⁸

The Law also creates the potential for confusion about the appropriate jurisdiction for criminal cases prosecuted pursuant to it. Article 55 states that the Office for Safeguarding National Security of the Central People's Government will take jurisdiction over any alleged violations of the Law if the case is "complex due to the involvement of a foreign country or external elements," the Hong Kong government "is unable to effectively enforce" the Law or if it involves "a major and imminent threat to national security." Such broad provisions stand to be interpreted to apply to a wide range of activities by human rights defenders, political activists, academics, and the broader public. It leaves open the possibility that individuals may be sent to the Mainland of the PRC for trial and serve any terms of imprisonment in Mainland prisons.⁴⁹

These provisions undermine the judiciary's crucial role as an independent check on the arbitrary use of power by the executive and legislative branches of government, as an impartial arbiter of disputes between private persons, and as a guarantor of the fair administration of justice and fair trial rights.⁵⁰

Q 8. What is the mandate of newly established security agencies?

The provisions establishing a new national security committee and a new national security policy structure in the HKSAR raise serious concerns about the powers and the lack of accountability of these institutions.

As set out above (in Q.2), the Law establishes an Office for Safeguarding National Security of the Central People's Government in the Hong Kong Special Administrative Region with a broad mandate "for safeguarding national security," including "overseeing... the Region in the performance of its duties for safeguarding national security" (Article 49) and handling cases of violation of the National Security Law (Article 55, see Q 2., above). Article 56 leaves no doubt that the Office has full jurisdiction and authority to investigate and prosecute violations of the Law with the "Supreme People's Procuratorate" responsible for designating a body to prosecute violations, and the "Supreme People's Court" for designating a court to adjudicate them.

Article 14 eliminates all of the avenues for accountability for such a body, including that "No institution, organisation or individual in the Region shall interfere with the work of the Committee. Information relating to the work of the Committee shall not be subject to disclosure. Decisions made by the Committee shall not be amenable to judicial review."

⁴⁸ Hong Kong Bar Association, "Statement of the Hong Kong Bar Association on the Proposed Designation of Judges by the Chief Executive in National Security Cases", 23 June 2020, <https://www.hkba.org/sites/default/files/20200623%20-%20HKBA%20Statement%20on%20the%20Proposed%20Designation%20of%20Judges%20by%20the%20Chief%20Executive%20in%20National%20Security%20Cases%20%28E%29.pdf>.

⁴⁹ Article 55 reads in full as follows: The Office for Safeguarding National Security of the Central People's Government in the Hong Kong Special Administrative Region shall, upon approval by the Central People's Government of a request made by the Government of the Hong Kong Special Administrative Region or by the Office itself, exercise jurisdiction over a case concerning offence endangering national security under this Law, if:

(1) the case is complex due to the involvement of a foreign country or external elements, thus making it difficult for the Region to exercise jurisdiction over the case;

(2) a serious situation occurs where the Government of the Region is unable to effectively enforce this Law; or

(3) a major and imminent threat to national security has occurred.

⁵⁰ International Commission of Jurists, Tunis Declaration on Reinforcing the Rule of Law and Human Rights, March 2019, para. 13, <https://www.icj.org/wp-content/uploads/2019/04/Universal-ICJ-The-Tunis-Declaration-Advocacy-2019-FNG.pdf>

In addition to creating the national security committee accountable only to the Central People's Government, Article 43 would essentially create a parallel law enforcement system not subject to the usual legal scrutiny and accountability that is in place for the law enforcement agencies in the HKSAR.⁵¹ This includes new policing and prosecutorial bodies within the Hong Kong Police Force and the Department of Justice, with sweeping intelligence and surveillance powers, and the heads of which will be appointed directly by the Chief Executive (Articles 16-18), discussed further below.

Article 60 of the Law explicitly exempts the new national security apparatus from any kind of oversight and removes it from HKSAR jurisdiction, including from HKSAR law enforcement officials. It states that:

The acts performed in the course of duty by the Office for Safeguarding National Security of the Central People's Government in the Hong Kong Special Administrative Region and its staff in accordance with this Law shall not be subject to the jurisdiction of the Hong Kong Special Administrative Region.

In the course of performing duty, a holder of an identification document or a document of certification issued by the Office and the articles including vehicles used by the holder shall not be subject to inspection, search or detention by law enforcement officers of the Region.

The Office and its staff shall enjoy other rights and immunities provided by the laws of the Region.

It is fundamental to the rule of law that no individual or public or private institution is above the law, and all Government agents, irrespective of their position, should be promptly held fully accountable for any violation of the law that they commit.⁵² Articles 14 and 60 create national security and law enforcement bodies that are unaccountable to any of the judicial or democratic structures in place in the HKSAR to prevent human rights abuses by security personnel. There is no national mechanism to guarantee accountability and access to justice when human rights violations committed by the Office and its personnel. This is especially problematic given the expansive powers of a new national security police department, discussed below.

Q 9. How does the new law threaten to undermine freedom of expression in the HKSAR and abroad?

The Law will drastically shrink civic space and curtail the exercise of the fundamental freedoms in Hong Kong, and directly impact upon their freedom to continue activities in the exercise of protected human rights in the context of their democracy movement. It provides that "the Office for Safeguarding National Security of the Central People's Government in the HKSAR will take necessary measures to strengthen the management of and services for organs of foreign countries and international organizations in the Region, as well as non-governmental organizations and news agencies of foreign countries and from outside the mainland, Hong Kong, and Macao of the People's Republic of China in the Region."⁵³

The potential of this law to have a chilling effect on the exercise of freedom of expression, association, and assembly became immediately obvious following the passage of the Law. Journalists, politicians, civil society activists, and non-governmental organizations began to self-censor following its promulgation, amidst a context where rights to freedom of expression, association, and assembly had been already eroding in the HKSAR.⁵⁴ International

⁵¹ Hong Kong Bar Association, "Statement of the Hong Kong Bar Association on NPCSC's deliberation of the proposed national security law and reported details", 19 June 2020, <https://www.hkba.org/sites/default/files/20200619%20-%20HKBA%20Statement%20of%20HKBA%20on%20reported%20details%20of%20proposed%20NSL%20%28F%29.pdf>.

⁵² UN Human rights Council, A/HRC/RES/19/36, Human Rights, Democracy and the Rule of law, 19 April 2012, para. 16(j)(iii), <https://digitallibrary.un.org/record/725358>.

⁵³ Article 54 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region.

⁵⁴ Hong Kong Free Press, "Every person on the planet affected: Hong Kong security law more draconian than feared, say analysts", 2 July 2020, <https://hongkongfp.com/2020/07/02/every-person-on-the-planet-affected-hong-kong-security-law-more-draconian-than-feared-say-analysts/>.

organizations are evaluating their future in the city and are scrutinizing their digital footprint for anything that may now seem "subversive."⁵⁵

Of particular concern is the way in which the Law seeks to assert jurisdiction over speech and actions well beyond the borders of the HKSAR. Article 38 of the Law states:

This Law shall apply to offences under this Law committed against the Hong Kong Special Administrative Region from outside the Region by a person who is not a permanent resident of the Region.

This extension of the jurisdiction of the authorities beyond the borders of the HKSAR creates the risk that the Law may not only be abused to violate the rights of the people of Hong Kong, but individuals who are not HKSAR citizens, residents, or even in the physical jurisdiction of the HKSAR. International media outlets and non-governmental organizations, in particular, will come under increased scrutiny. Journalists immediately raised a red flag that the Law could be applied to any journalists writing on Hong Kong, whether or not they are based in the territory.⁵⁶

Q 10. What kind of powers do the police have under the new law?

The National Security Law sets out a broad array of police powers to enforce the Law. In addition, the Law actually establishes a new police institution that is (as set out above) free from accountability and oversight. Articles 16 and 17 calls for the establishment of a new department within the HKSAR police force. This department enjoys a range of powers that go beyond those available under the existing law, the Police Force Ordinance (Cap. 232).⁵⁷ Importantly, judicial supervision of covert surveillance is removed under Article 43 of the Law. The new police body appears to be more of an intelligence agency with special investigative power, than a law enforcement body, and, as described above, is not subject to strong accountability mechanisms.

It is crucial that State intelligence agencies are accountable for their actions pursuant to a specific and comprehensive legislative framework that defines the mandate of any intelligence agency and clarifies its special powers in a way that is compliant human rights obligations.⁵⁸ Without such a framework, the PRC is likely not to meet its obligations under human rights law to respect and ensure the effective enjoyment of human rights.

States may make use of certain preventive measures like covert surveillance or the interception and monitoring of communications, provided that these are case-specific interferences. They should be made on the basis of a warrant issued by a judge on showing of a probable cause or reasonable grounds, and there must be some factual basis, related to the behaviors of an individual, which justifies the suspicion that he may be engaged in an activity that threatens national security.⁵⁹ In this case, surveillance activities will not be subject to any judicial review or accountability measures, which, as noted above, is not compliant with international human rights law and standards.

Article 43 sets out an expansive set of powers for the new police division. In addition to the ordinary police powers already granted to the HKSAR police force under the law, the department for safeguarding national security of the Hong Kong Police Force is also empowered under the Law to take the following measures:

⁵⁵ New York Times, "In Hong Kong, Arrests and Fear Mark First Day of New Security Law", 1 July 2020, <https://www.nytimes.com/2020/07/01/world/asia/hong-kong-security-law-china.html>.

⁵⁶ Reporters Without Borders, "Hong Kong: Under the National Security Law, no journalist in the world is free from China's violent retribution", 2 July 2020, <https://rsf.org/en/news/hong-kong-under-national-security-law-no-journalist-world-free-chinas-violent-retribution>.

⁵⁷ Cap. 232 Police Force Ordinance, https://www.elegislation.gov.hk/hk/cap232?pmc=0&m=0&pm=1&xpid=ID_1438402864313_001.

⁵⁸ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/HRC/10/3, 4 February 2009, para. 27.

⁵⁹ Ibid, para. 30.

- (1) a search of premises, vehicles, vessels, aircraft and other relevant places and electronic devices that may contain evidence of an offence;
- (2) ordering any person suspected of having committed an offence endangering national security to surrender travel documents, or prohibiting the person concerned from leaving the Region;
- (3) freezing of, applying for a restraint order, charging order and confiscation order in respect of, and forfeiture of property used or intended to be used for the commission of the offence, proceeds of crime, or other property relating to the commission of the offence;
- (4) requiring a person who published information or the relevant service provider to delete the information or provide assistance;
- (5) requiring a political organisation of a foreign country or outside the mainland, Hong Kong and Macao of the People's Republic of China, or an agent of authorities or a political organisation of a foreign country or outside the mainland, Hong Kong and Macao of the People's Republic of China, to provide information;
- (6) upon approval of the Chief Executive, carrying out interception of communications and conducting covert surveillance on a person who is suspected, on reasonable grounds, of having involved in the commission of an offence endangering national security; and
- (7) requiring a person, who is suspected, on reasonable grounds, of having in possession information or material relevant to the investigation, to answer questions and furnish such information or produce such material.

Needless to say, this expansive palette of expanded powers coupled with the lack of accountability mechanisms described above – is a recipe for disaster. Given the recent history of police abuse in the HKSAR, there is good reason to believe that these provisions will be used to target human rights defenders and other activists, particularly those involved in the democracy protests.

The powers include an expanded set of tools to surveil private online communications, including ordering service providers to turn over information. International social media companies also face difficulties under this law. Technically, companies like Facebook have to comply with the request from the police in the HKSAR to take down certain posts or to assist in their investigations under Article 43.

Many of these provisions and would interfere with upon rights to freedom of opinion and expression online, and the right to privacy protected respectively under article 19 and 17 of the ICCPR. For example, vague laws and regulations violate the legality requirement, and internet service providers should only be compelled to release user data when ordered by judicial authorities certifying necessity and proportionality to achieve a legitimate objective.⁶⁰

Provisions under Article 17 and 48 such as "collecting and analysing intelligence and information concerning national security," "requiring a person who published information or the relevant service provider to delete the information or provide assistance" or "carrying out interception of communications and conducting covert surveillance on a person who is suspected, on reasonable grounds, of having involved in the commission of an offence endangering national security" fail to comport with the elements of legality, necessity, and proportionality, as outlined above.

Q 11. What does the International Commission of Jurists recommend?

In light of the above analysis, and the immediate concern that the implementation of the National Security Law as it stands will violate human rights and undermine democratic governance and the rule of law in the HKSAR, the ICJ calls on the Chinese Government to repeal the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, as it is not compliant with international human rights law and standards.

⁶⁰ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/35/22, 30 March 2020, para. 19.