

Special meeting of the Home Affairs Panel of the Legislative Council
On Tuesday, 12 October 1999
Response to NGOs' comments on the report of the Hong Kong Special
Administrative Region of the People's Republic of China in the light
of the International Covenant on Civil and Political Rights (ICCPR)

Introduction

This paper responds to points made by Amnesty International Hong Kong Section, the Democratic Party, the Hong Kong Bar Association, and the Hong Kong Human Rights Commission, whose submissions arrived too late for inclusion in the paper presented for the meeting on 23 September. It does not address the very substantial (55 page) submission from the Hong Kong Human Rights Monitor. This is because it reached us on 2 October - well after the other submissions - and we did not have sufficient time to prepare a proper response to it. Should the Panel have questions about issues in the Monitor's submission, we will address them orally at the meeting. And we will address them in our submission to the Human Rights Committee.

2. Many, indeed most, of the views put forward in these submissions are essentially the same as those put forward by the organisations whose views we addressed in the earlier paper. Because the time available for the preparation of the present paper was short, it addresses only points that we consider to be new. Should the Panel - or representatives of the organisations - consider that we should have addressed any of the points that we have omitted, we will respond orally at the meeting on 12 October.

Amnesty International

3. **The "flags" case:** Amnesty expresses the concern that, if BL 39 does not apply to the national laws in Annex III of the Basic Law, this will create dangerous loopholes in the implementation of the ICCPR in Hong Kong. We cannot appropriately discuss the case here as it will be presented to the Court of Final Appeal in October. Suffice to it say that the Government's primary argument is that the relevant local laws relating to

the national and regional flag are consistent with the BL 39 and are therefore valid.

4. **Overall framework for the protection of human rights:** Amnesty says that the Secretary for Justice has changed her position in regard to the extent that Article 39 of the Basic Law protects human rights against the whims of the Executive and the Legislature. This is not the case. Her statement that the rights set out in the Basic Law are "fully justiciable" and are "constitutional rights, which cannot be restricted at the whim of the executive or legislature," remains true. That the rights are fully justiciable is apparent from the facts that litigants are regularly seeking to enforce their rights through the courts, and that court adjudications are valid and binding. Constitutional rights still cannot be restricted by the Executive or the Legislature. The fact that the NPCSC has the power to interpret those rights does not mean that it can restrict them.

5. **Prosecution on the Mainland for crimes committed in Hong Kong and negotiations on rendition arrangements:** Amnesty refers to two high profile cases where the defendants were tried - and executed - on the Mainland for crimes committed in Hong Kong. In both cases, the defendants were arrested in Mainland China. In one case, the defendants - who included Hong Kong residents - had committed crimes in the Mainland as well as in Hong Kong. It was for those crimes that the Mainland authorities tried them. In the other case, the defendant was a Mainland resident who was prosecuted for the murder of five people in Hong Kong, though preparatory acts and the disposal of the proceeds of the crime took place on the Mainland. Mainland residents who commit crimes outside China remain subject to China's Criminal Law (by virtue of Article 7 thereof). Some commentators have questioned whether the Mainland court had jurisdiction to hear the case. That was a question for the Mainland court to determine under Mainland laws. Had the suspects been arrested in Hong Kong, the Hong Kong courts would have had jurisdiction to try them. Concurrent jurisdiction is common throughout the world.

6. The Hong Kong residents were arrested in Mainland China and were charged for - and found guilty of - crimes committed there. As such, they were subject to the penalties of mainland law, just as they would have

been subject to the laws of any other jurisdiction in which they had been convicted of a crime. There was no question of their extradition (which some commentators believe we should have sought) as no extradition arrangements are in place between the Mainland and the HKSAR. Thus, there was no legal basis on which the Secretary for Justice could have sought their return.

7. As regards the Mainland resident, no jurisdiction in the world can prevent other jurisdictions from exercising extra-territorial jurisdiction over events in its territory. Indeed, it is becoming increasingly common for extra-territorial jurisdiction to be asserted by countries around the world. This inevitably means that different laws will apply to people of different nationalities in a particular jurisdiction. This does not breach human rights guarantees.

The Democratic Party

8. **Right to participate in public life:** the Party urges the Government to study the possibility of subsidising election candidates in accordance with the percentage of votes they gain. This, they say, would encourage public participation in public life. The Government already provides substantial subsidies in kind to candidates contesting elections to the Legislative Council and the District Councils. These include two rounds of free mailing services (one round in the case of District Councils elections), free production of a series of election programmes on televisions and radio for candidates to introduce their election platforms and to debate topic issues, and the free production of leaflets to introduce candidates to every registered elector. Against this background, we do not think that further subsidies of this kind would be an appropriate use of public funds.

9. **Rural elections:** the Party says that the elections of village representative are not subject to the Corrupt and Illegal Practices Ordinance (Cap. 288). This, they say, encourages illegal or corrupt practices. As we said in the earlier paper, our aim is to bring these elections within the framework of the law. Once that legislation is in place

(and as we informed the Panel in May this year), our intention is that these elections should be subject to either the Corrupt and Illegal Practices Ordinance or to the future Elections (Corrupt and Illegal Conduct) Ordinance.

10. The Party also considers that the Chairmen of the Rural Committees are insufficiently representative. However, the fact is that they are returned by elections. In most Rural Committees, the Chairmen are elected by full general assemblies that are mainly comprised of village representatives of the relevant rural area. In other cases, the full general assemblies elect the executive committees. The latter, in turn, elect the Chairmen.

11. **Complaints against the Police:** the Party says that the IPCC does not have any actual powers under the existing Police complaints system. To illustrate the point, it cites the complaint against Police handling of demonstration at the 30 June 1997 reunification ceremony. But - as we point out in paragraph 382 of our Report - the IPCC disputed CAPO's findings in this case and the Commissioner of Police readily accepted the Council's recommendations. This clearly demonstrates that the Council is both independent and impartial and that its role in the complaints system is significant.

12. The Party also cites the low participation rate of IPCC Members under the IPCC Observers Scheme. But the Observers Scheme is only one of the means whereby IPCC Members monitor CAPO investigations. For example, when examining investigation reports, they can ask CAPO to clarify areas of doubt. In discharging their duties, they can interview witnesses. And - with effect from 1 September 1999 - we have expanded the Observers Scheme by appointing 29 retired IPCC Members and other community leaders - such as the District Fight Crime Committee Chairmen - as Lay Observers of CAPO investigations.

13. **Legal Aid:** the Party urges the Administration to make the Legal Aid Department independent of the Government. They say that the Department takes an inordinately long time to process applications relating to personal injuries, divorce, and compensation claims in labour cases.

They also consider that legal aid should be provided for cases before the Coroner.

14. Taking these points seriatim -

- (a) **independence:** our view is that the legal aid system is fair and independent. The Legal Aid Ordinance provides that the Director of Legal Aid must consider every case independently. Any persons whose applications have been refused or who feel aggrieved for any reasons can appeal to the Judiciary under the existing mechanism;
- (b) **processing times:** recent statistics show that 97% of applications relating to divorce and 87% of those relating to labour compensation claims were processed in three months. This exceeds the Department's pledge to process 80% of applications in that time frame. Applications relating to personal injuries take longer because the Department must obtain medical records and documentation on the degree of injury. Currently, the Department can only process 65% of the applications within three months. It is working towards improving on this.
- (c) **legal aid for cases before the Coroner's court:** in October, we will introduce a Bill to implement the proposals of the 1997 Review of the Legal Aid Policies. Among other things, the Bill seeks to empower the Director of Legal Aid to grant legal aid to the next of kin of a deceased person in cases that involve significant public concern, irrespective of whether the case involves compensation claims. It will also empower the Duty Lawyer Service to provide legal aid to persons who are likely to face a reasonable chance of criminal prosecution that would lead to a jail sentence or loss of livelihood as a result of giving evidence at Coroner's inquests. This will pay for a lawyer to attend the whole inquest to protect the interests of such persons and to cross-examine witnesses.

15. **Freedom of association:** the Party says that an application under

the Societies Ordinance to register an association - to be known as "Never Forget June-Fourth" - has been unduly delayed. They have called for an explanation. The application is being processed by the Societies Officer (the Commissioner of Police) in accordance with the Societies Ordinance (Cap.151). The process has taken some months because the Societies Officer has had to ask for additional information (which has also required some clarification) to assist him in the consideration of the application.¹ Each application must be examined carefully and the time taken to do so varies from case to case.

The Hong Kong Bar Association

16. **Rule of law:** the Association asks whether the application of the NPCSC interpretation can be squared with the rule of law. At the risk of repeating what we said in the earlier paper and at the meeting on 23 September, there is no conflict. An NPCSC interpretation of the Basic Law is constitutionally valid, and is the highest authority on the meaning of the Basic Law. The application of that meaning is therefore the application of the law and is entirely consistent with the rule of law.

17. **Ouster clauses:** such clauses sometimes provide that particular administrative decisions shall be final and cannot be challenged in the courts. These clauses are themselves subject to challenge in the courts, and the law relating to them is complex. However, the right to a fair and public hearing by a competent, independent and impartial tribunal, guaranteed in Article 14 of the ICCPR is fully protected in domestic law by Article 10 of the Bill of Rights Ordinance.

18. **Presentation of the report:** the Association asks how the report will be presented to the Human Rights Committee. The Hong Kong delegation will be led by the Secretary for Home Affairs (SHA). Its other members will include the acting Solicitor General, the Deputy Solicitor General, and representatives of the Constitutional Affairs Bureau, the

¹ These requests were made in accordance with section 15(1) of the Ordinance which provides that the Societies Officer may, at any time, require a society to furnish him in writing such information as he may reasonably require for the performance of his functions under the Ordinance.

Security Bureau, the Home Affairs Bureau and the Labour Department. The procedure will be the same as that followed when Hong Kong was under British administration. That is, the Chinese Ambassador to the United Nations, as representative of the sovereign, will introduce the delegation. SHA will then make an introductory statement, updating the Human Rights Committee on key developments since 30 June 1998. SHA and members of the delegation will answer such questions as the Committee puts to them.

19. **Complaints involving disciplined services other than the Police:** the Association has said that paragraph 46 of the report is not wholly accurate in view of "the limited role of the visiting justices" and the lack of an independent prison inspectorate. We do not accept that the role of the visiting justices is limited. Each year, on average, the justices receive over 200 complaints from inmate of penal institutions: a figure that suggests that prisoners regard the system as effective and have confidence in it. But important though their role is, the justices comprise just one part of the overall system for handling prisoners' complaints. Other avenues of appeal include the Chief Executive, members of the Legislative Council, the Ombudsman and the Correctional Service Department's Complaints Investigation Unit.

20. **Deaths in Police custody:** the Association has said that the information in paragraphs 98 to 102 of the report needs updating. We do so in the following paragraphs.

21. Between 1 July 1998 and 31 August 1999, there were five deaths in Police custody: one in 1998, the other four in 1999. In one case, the person concerned was found to have died by suicide. In another, the jury returned an open verdict, with heroin intoxication being the cause of death. In one of the three remaining cases, the Coroner has ordered a death inquest to be held in early November. Investigations into the two other cases are in progress.

22. In paragraph 100 of the report, we said that four investigations into such deaths had yet to be concluded. In one case the person concerned was found to have died of unlawful killing. A police officer was convicted

of manslaughter and committed to a Psychiatric Centre for an unspecified period. In two of the cases the deceased were found to have died by suicide. In the remaining case, there was a verdict of death by accident.

23. **Torture (records of alleged ill treatment by the Police):** referring to paragraph 112 of the report, the Association says that the Police and the Department of Justice should be able to keep a record of cases where the courts rule on claims of ill treatment of prisoners in trials within trials (*voire dices*). Technically, it would be possible to record the number of times courts are asked to make such rulings and the rulings they subsequently make. But - for the reasons below - the statistics so obtained would be misleading in that they could give a false, and exaggerated, impression of the extent to which the courts viewed Police actions as incidents of impropriety.

24. When courts rule on the admissibility of confessional statements after *voire dire* proceedings, they are not required in law to give their reasons for either admitting the statements into evidence or for excluding them. In the event of exclusion, most courts confine themselves to observing that the statement will not be admitted because the prosecution has not proved voluntariness beyond reasonable doubt. Detailed reasons for a ruling are the exception and not the rule. On the rare occasions when detailed reasons are given, it is not usual for a court to indicate that it accepts the allegations of Police impropriety. Most commonly, it will simply indicate that it has doubts about the veracity of the police version and/or that - as there may be some truth in the allegations of the accused - it would not be safe to admit the confessional statement.

25. On the (also rare) occasions when a court indicates that it either accepts an allegation of impropriety, or believes that it may be true, the judge, the prosecutor, or the defence counsel will routinely ask police to pursue the matter. Normally, however, CAPO will already be aware of the matter in view of pre-trial complaints lodged with it by the accused or his lawyers. CAPO keeps a record of both the pre-trial complaints and the referrals from the courts but does not distinguish them for statistical purposes. The numbers are -

<u>Year</u>	<u>No. of assault complaints</u>
1996	72
1997	58
1998	81
1999	138

(to 30 June)

26. **Prison Rules:** referring to paragraph 180 of the report, the Association considers that the Secretary for Security cannot be regarded as an "independent appellate body" for prisoners aggrieved by decisions of the Commissioner of Correctional Services. The background is that, before the Rules were changed in 1996, an aggrieved prisoner could only appeal to the Commissioner of Correctional Services. The 1996 Rules provide the prisoner with a further appeal channel, namely the Secretary for Security who must consider each case impartially. The Secretary is 'independent' in the sense that the Correctional Services Department and its staff are her subordinates and she is not beholden to them either on a personal level or as a matter of institutional culture.

27. **Rehabilitation of offenders:** the Association has queried whether the provisions of the Rehabilitation of Offenders Ordinance (Cap. 297) discriminate against affluent offenders as the amount of a fine is a relevant factor in considering whether a person can get the benefit under the Ordinance. The level of fine is not the only consideration: the provisions also cover offenders who have been sentenced to an imprisonment for three months or less as well as those who have been subject to a fine of \$10,000 or below. And, in practice, the system of rehabilitation of offenders under the Ordinance has worked well for the 13 years since its enactment. The upper limits (length of imprisonment and level of fines) were endorsed by the Legislative Council after thorough discussion. They are not intended to discriminate against affluent offenders, nor are they arbitrary. While it is true that the Courts *may* take account of an offender's means when setting the level of fines, they also take into account other - more important - factors such as the severity of the offence involved; the degree of damage inflicted on the victim or the extent of deterrence that the Courts intend to reflect in the sentences they impose. The situation envisaged by the Association is theoretically possible but - to the best of our knowledge - it has not proven so in practice. Having said that, we will

carefully consider the Association's concerns.

28. **The JP system:** the Association has asked for statistics relating to action taken and information on whether prisoners are able to see JP's out of the hearing of CSD staff. It is, in fact, an established practice that JPs may speak to prisoners in private if they so wish. Venues suitable for the purpose (that is, rooms in sight - but not in the hearing - of prison staff), are available in all CSD institutions.

29. The Association says that paragraph 203 of our report (respecting the work of Justices of the Peace) would be more credible if we had supplied statistics relating to action taken. The point is well taken. Between 1 April 1998 and 31 March 1999, visiting justices have initiated investigation action into 90 cases (about 35% of the total number of complaints). They did so on their own initiative and without referring the complaints for follow-up by the institutions concerned. The Justices personally inquired into each complaint. This entailed such things as seeking background information from prison staff and examining relevant records and documents.

30. **Prison (Amendment) Rules 1997:** the Association has asked whether CSD staff may read letters addressed to prisoner's legal advisers. In normal circumstances, they may not. Rule 47B(2) specifically prohibits this except where staff have reasonable grounds for believing that a letter is not a bona fide communication for the purpose of seeking or giving legal advice.

31. **Freedom of religion:** the Association has asked why the Government denied Roman Catholics the opportunity of a visit by their religious leader when he posed no threat to public order. As we explained at the time, the Pope is a head of state (the Vatican) that does not recognise the People's Republic of China, our sovereign. Since he holds that position ex officio, as head of the Roman Catholic Church, no distinction can be made (in the context of foreign affairs) between his political and religious persona. The fact that he was unable to visit Hong Kong in no way restricted the religious freedom of Roman Catholics living here. They remain free to worship, preach, and proselytise. And they can follow the

Pope's progress through publications, television, the Internet and the numerous other means that modern technology has made available.

32. **Freedom of information:** the Association has asked whether the statutory remit of the Ombudsman enabled her to regard an unreasonable refusal to provide information as "maladministration". The Ombudsman deals with complaints about non-compliance with the Code on Access to Information in the same way as any other complaints alleging maladministration. The Association has also asked whether persons refused access to a document are informed that they may lodge a complaint with the Ombudsman. They are. Paragraph 1.26 of the Code makes it clear that a person who believes that a department has failed to apply the Code properly may complain to the Ombudsman. The guidelines issued to departments also provide that - when replying to requests for review of a decision to refuse an application - departments should advise the applicants that they have the right to lodge complaints with the Ombudsman.

The Hong Kong Human Rights Commission

33. **Public consultation on the Report:** the Commission says that our practice of consulting the public on the basis of outline reports (as opposed to draft reports), violates UN reporting requirements. In fact, our practices are almost identical to those of the Canadian Government that are cited in the UN Manual on Human Rights Reporting as "instructive". Like the Canadians, we invite NGO's contributions to our reports. But we go further by extending that invitation to the general public. Like them, we undertake to consider all comments that are submitted and to relay them to the relevant bureaux and departments for comment. And, like them, we do not undertake to address each specific comment in the reports. Nevertheless, we generally address over 90%, albeit usually in summary form. In 1995, Canada's invitations attracted four responses in relation to the ICCPR and 10 in relation to the ICESCR. We attracted 11 in both cases. When the current edition of U N Manual on Human Rights Reporting was published, the Canadian authorities were considering using the Internet to solicit information from a wider audience. We already do that.

34. But the Canadian example *is* instructive and, in future, we will adopt their practice of forwarding the complete texts of all submissions received to the relevant UN Committee under separate cover. However, the fact remains that these reports are the Government's reports, not those of the NGOs. As we have said many times, the UN Manual positively encourages NGOs to submit their own reports and to attend the hearings. Hong Kong NGOs are well aware of this and have not been slow to respond. This ensures that the treaty monitoring bodies have access to information from all perspectives, not just those of the Government.

**Home Affairs Bureau
October 1999**