

Outline of Amnesty International Concerns on the Implementation of the ICCPR in Hong Kong

(Submitted to LEGCO Home Affairs Panel, 23 September 1999)

The following is a summary outline of Amnesty International's concerns regarding the implementation of the ICCPR in Hong Kong. This is a work in progress and is subject to amendment. Most of the issues will be submitted to the UN Human Rights Committee in October in the form of concerns or recommendations.

Many of Amnesty International's concerns in Hong Kong are long-standing and have been addressed by the UN Human Rights Committee in their previous concluding observations, and recommendations.¹ Outstanding areas of concern include the need for:

- Independent participation in the investigation of complaints against the police;
- Legislation and remedies against violation of Covenant rights by non-government actors, including comprehensive anti-discrimination legislation;
- Clarification of military accountability and the protection of rights during a state of emergency;
- A comprehensive Human Rights Commission.

The rationale for such suggestions is familiar to the Panel and will not be repeated here. Amnesty International only reiterates its firm belief that such measures would greatly enhance the framework for human rights protection in Hong Kong.

Many of the additional concerns outlined below have been detailed in the organization's previous reports on Hong Kong, in particular: "HK SAR: Human Rights One Year On: No Room for Complacency" (June 1998, AI Index ASA 19/0/98).² Since then a key focus has become how far the new constitutional order protects the exercise basic rights enshrined in the ICCPR against encroachment for administrative expediency. As experience with the One Country Two Systems model develops, controversy has frequently revolved around the understanding of autonomy and the difficult interface between two systems governed by radically different approaches to the nature and purpose of law. Here issues of concern inevitably involve the actions of both the HK SAR government and the central government, so both will need to present detailed rationale for their actions if the committee's scrutiny is to be effective.

FREEDOM OF EXPRESSION, ASSOCIATION AND ASSEMBLY

RELEVANT INTERNATIONAL STANDARDS:

ICCPR Articles: 19, 21, 22, 5

1. Amendments to the Public Order and Societies Ordinances

CONCERNS

- The amendments expanded the grounds for intervention in legitimate peaceful association and assembly, reversing changes made by the previous administration to comply with the Bill of Rights and thereby the ICCPR.
- The HK SAR government failed to demonstrate the objective necessity for introducing registration, a "notice of no objection" and further restrictions in the name of "national security".
- The definition of "national security" grounds for restrictions on fundamental freedoms, in particular as detailed in administrative guidelines to the police, is too broad and vague. It is not limited to "the most serious cases of a direct political or military threat to the entire nation" as established in international law and jurisprudence.
- The National Peoples Congress Standing Committee in announcing that relevant sections of the ordinances could not be adopted as HK SAR laws, failed to provide reasoning for their determination that they contravened the Basic Law (BL). This was the only legitimate grounds set out in BL 160 for this one-off determination on matters which otherwise, under the BL, fall within the HK SAR's autonomy. Transparency might have allayed suspicions, instead the scope of BL Article 39 was called into question.

IN PRACTICE

No demonstration has been prohibited, but protestors have complained of the enforcement of "demonstration areas" far from the target of their protests, and of police operating beyond their duty and interfering in peaceful protest (such as playing loud music to drown out protestors), particularly during visits by senior representatives of the central government. Other protestors have claimed that chances for appeal are undermined by the police practice of communicating restrictions only verbally at the last minute. No societies have been refused registration, but at least one group has complained of unwarranted delays and objected to the requirement to provide the names of all members.

2. New Flags Ordinances

CONCERNS

- The legislation provides for punishment, including imprisonment, for actions which could include the peaceful exercise of the right to freedom of expression as enshrined in the ICCPR.
- In passing the laws, the Provisional Legislative Council does not appear to have examined whether they were in compliance with the ICCPR.

IN PRACTICE

The first prosecution under the ordinances, for an incident which posed no threat to public order, is currently under appeal. Reported government arguments that BL article 39 does not apply to BL Annex III national laws locally applied raises concerns about dangerous loopholes in the implementation of the ICCPR in Hong Kong.

3. Amendments to Trade Union Ordinance, Employment and Labour Relations Ordinance

The ILO found some of these amendments to be contrary to principles of freedom of association of trade unionists as established in ILO conventions 87 & 98.

4. Legislation in accordance with BL article 23

Deferred, but developments so far on "national security" do not allay concerns that legislation under BL article 23 may limit and undermine the exercise of fundamental rights in Hong Kong. Concerns relevant to the upcoming debate include:

- The HK SAR government's failure to demonstrate the objective necessity for measures introduced so far.
- Definition of "national security" grounds introduced so far overly loose, in particular "advocating separation from the PRC, including advocacy of the independence of Taiwan or Tibet" in the absence of propagating or inciting the use of violence etc.
- Continuing criticism from Beijing, and Hong Kong NPC members including calls for intervention over Hong Kong media coverage of Taiwan government positions, and other "advocacy" fuels uncertainty.
- HK SAR government's interpretation of jurisdiction issues, and reported position on the inapplicability of BL 39 to national legislation applied to Hong Kong via local laws etc. generates continuing uncertainty as to whether stipulations in BL Article 23 that Hong Kong shall enact national security legislation on its own are sufficient to safeguard the fundamental rights of all in Hong Kong, in normal and emergency situations, from serious encroachment based on mainland China's definitions of national security crimes which the UN Working Group on Arbitrary Detention has found seriously problematic.

OVERALL FRAMEWORK FOR PROTECTION OF HUMAN RIGHTS

RELEVANT INTERNATIONAL STANDARDS:

ICCPR Articles 2,5,12,14,17,23,24,26

The ongoing "right of abode" controversy, has serious implications for the long term protection of fundamental human rights in Hong Kong.

Key legal bulwarks of human rights protection in Hong Kong provided for in the Basic Law and Joint Declaration include the rights set out directly in the Basic Law or established via Article 39, and the continuation of the rule of law as previously practiced in Hong Kong via a separate legal system based on the common law with an independent judiciary holding final adjudication power. Any actions which undermine these elements carry long term costs to confidence in the constitutional model and special status of Hong Kong.

In opting for expedience in attempting to resolve these issues, the HK SAR Government has challenged the standing and final adjudication power of the Court of Final Appeal. By opting for a request for reinterpretation, for which there is no explicit provision in the Basic Law, the government bypassed checks and balances set out in the Basic Law which had always been presented as key institutional safeguards of the autonomy model. The option was the least transparent currently available, and opportunities for genuine open participation by all parties and representatives of the full range of opinion in Hong Kong were severely curtailed. Far from bringing a “resolute, prompt and conclusive” solution to the issues raised, the expedients have expanded controversy which the Court of Final Appeal will be burdened with for some time to come.

Article 24 at the heart of the controversy is part of Chapter III of the Basic Law which enshrines “fundamental rights and duties of residents” which include many of the rights set out in international covenants applicable in Hong Kong as well as article 39 affirming that the ICCPR and ICESCE and ILO Conventions shall remain in force.

On these, the Secretary for Justice has said: “the fact that these rights are set out in the Basic Law is significant for two reasons. First, the rights become fully justiciable and not simply moral aspirations or international norms, secondly, by being in the Basic Law, the rights are elevated to constitutional rights which cannot be restricted at the whim of the executive or legislature”³. The implications of the controversy are starkly illustrated by the change in her position now. She concedes that “it is correct as a matter of law” that the executive seeking an interpretation with no restrictions, sets a precedent which could be used in future to erode human rights. Now the safeguard is reduced to; “we must distinguish between those things which are legally possible and the political reality”.

OTHER INTERFACE BETWEEN TWO SYSTEMS AND IMPACT ON PROTECTION OF COVENANT RIGHTS

RELEVANT INTERNATIONAL STANDARDS:

ICCPR articles 2, 6, 7 (and General Comment 20, Para 9), 14, 26

UN Model Treaty on Extradition - the basic international standard

UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (no.5)

Prosecution on the Mainland for crimes committed in Hong Kong and negotiations on rendition arrangements

In two high profile cases, defendants were tried on the mainland for crimes committed in Hong Kong after the HK SAR government failed to assert jurisdiction.

- The defendants were charged under the Chinese Criminal Law which, according the One Country Two Systems policy and specific provisions in the Basic Law, should not apply in Hong Kong.
- They were prosecuted under procedures that do not conform with international standards for fair trial.
- Several defendants were executed for crimes exclusively or mainly committed in Hong Kong even though the death penalty has been abolished in Hong Kong, and the government in its report to the Human Rights Committee states that it has "no intention of reinstating the death penalty".

The government justified their inaction through: the existence of concurrent jurisdiction; widely disputed interpretations of the Basic Law and the Chinese Criminal Law; and the lack of a formal rendition arrangement between the Mainland and the HKSAR.

Mainland resident Li Yuhui, was executed in Guangdong Province in April 1999 for the alleged murder by poison of five women in a geomancy based ritual in Hong Kong. In this case the HK SAR government argued that an interpretation of Article 7 of the Chinese Criminal Law confirmed its application to Mainland residents in Hong Kong.

If this is a correct interpretation, then there are far reaching implications for Hong Kong in terms of ensuring equal enjoyment of covenant rights and equal protection of the law for all without distinction (articles 2,26). For example, there is nothing currently to prevent Mainland residents in Hong Kong being prosecuted by the Mainland courts, under draconian National Security provisions, for exercising freedom of expression and association in Hong Kong through activities which are not criminal in Hong Kong, but which attract the heaviest penalties in the Chinese

Criminal Law. Such a possibility undermines the value of reassurances given in BL article 23 that the Hong Kong SAR shall enact laws on its own to prohibit offences against national security.

The cases and interpretations demonstrate the pressing need for a watertight and comprehensive agreement on rendition of fugitive offenders. However statements by the HK SAR government officials on their position in negotiations currently underway are not reassuring. The HK SAR government has stated that previous practice and existing legislation concerning the Surrender of Fugitive Offenders and Mutual Legal Assistance, which follow the UN Model Treaty on Extradition, are not appropriate in this case.

CONCERNS

- As yet no firm guarantees that the basic international standard (the UN Model Treaty on Extradition), even the mandatory parts, will be followed, only that they will be “of useful reference”.
- On no rendition for political crimes : the Secretary for Security has said only that the government would “make reference to international practice” stating at the same time that on the mainland “political offences had already been repealed under the amended Criminal Law of the PRC which came into force in 1997”. This replacement of “Counter Revolutionary” crimes by “Crimes against National Security” does not mark the end of political offences in China. On the contrary, as determined by the UN Working Group on Arbitrary Detention, these revisions have significantly expanded the potential for imprisoning those simply exercising fundamental rights. Political prosecutions, under these and other offences, and politically motivated detention without trial under the Re-education through Labour system have continued since the Central government’s own signing of the ICCPR in October 1998.
- On no double criminality “international practice would be taken into consideration” but the Criminal Law of the PRC specifically allows for it.
- On no rendition in cases where the death penalty will be carried out (a discretionary part of the UN Model Treaty, but common practice amongst abolitionist territories), the Secretary for Security has said: “it might not be appropriate for the HK SAR government to be too inflexible over the question of the death penalty.” Amnesty International totally disagrees. Under ICCPR article 6, the HK SAR government has the duty to protect the right to life of all people within its jurisdiction. Death penalty procedures on the mainland fall short of the minimum safeguards set out ICCPR article 6. Mainland trial procedures do not yet conform to international standards for fair trial set out in ICCPR article 14 and other international standards. As such executions on the Mainland constitute summary executions, on which the UN **Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 5)** states “**No one shall be involuntarily returned or extradited to a country where there are substantial grounds for believing that he or she may become a victim of extra-legal, arbitrary or summary execution in that country**”.
- The Secretary for Security, responding to legislators concerns has also stated that “offenders who had committed economic offences were not punishable by death under the Criminal Law of the PRC. In the event of bribery, only mainland officials who had received graft would be liable to the death penalty”. This is not correct in law or in practice, as indicated by the capital offences stipulated in over 20 articles of mainland China’s Criminal Law, and executions carried out as part of the anti-corruption campaign this year.

Amnesty International believes that international standards and the common practice of abolitionist territories must prevail as the basis for this important agreement. That “flexibility” which glosses over the true scope of the death penalty, unfair trials, and inadequate procedural safeguards on the mainland risks undermining the HK SAR government’s obligations under the ICCPR.

1. See in particular UN Human Rights Committee document: CCPR/C/79/Add.57, 9 November 1995.

2. Other relevant reports by Amnesty International include: "HONG KONG: Human Rights, Law and Autonomy: The Risks of Transition", February 1997 (AI Index: ASA 19/04/97). "HONG KONG: Basic Rights at Risk: Comments on the HKSAR Consultation Document of April 1997" (AI Index 19/06/97).

3. Speaking at the American Chamber of Commerce Business Ethics Conference, 20 November 1997.

4. Quoted in South China Morning Post, 19 May 1999.