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19 February 2004

Clerk to Subcommittee on  
United Nations Sanctions (Liberia) Regulation 2003  
Legislative Council  
Legislative Council Building  
8 Jackson Road  
Hong Kong  
(Attn : Mr Raymond Lam)

Dear Mr Lam,

**Subcommittee on  
United Nations Sanctions (Liberia) Regulation 2003**

I refer to your letter of 16 February 2004 referring to us a submission from Mr Simon N M Young of the University of Hong Kong.

Please find attached a note setting out the Administration's response to the points raised relating to separation of powers and the Basic Law.

As regards the instruction from the Ministry of Foreign Affairs (MFA), we have pointed out previously that correspondence between the Central People's Government (CPG) and the Government of the Hong Kong Special Administrative Region (HKSARG), including instructions from the MFA concerning the implementation of United Nations Security Council Resolutions, is intended for internal use only. We consider it inappropriate to release internal correspondence to persons outside the Administration. This is an established practice governing the handling of HKSARG's correspondence with CPG and all other governments. In response to the Subcommittee's request, the Chief Secretary for Administration has already

issued a letter to the Subcommittee Chairman confirming the specific instruction we received.

Yours sincerely,

( Mrs Philomena Leung )  
for Secretary for Commerce, Industry and Technology

c.c.  
DoJ (Attn : Mr John Hunter)

Encl.

**Separation of powers under the Basic Law**  
**- with reference to CE's power to make delegated legislation**  
**under the United Nations Sanctions Ordinance (Cap 537)**

In *Yau Kwong Man v Secretary for Security* [2002] 3 HKC 457, Hartmann J, at para 38, made the observation that the powers of the legislature, the executive and the judiciary were separate. In terms of BL 80, judicial power is vested in those appointed to hold judicial office. That being so, he held that what the legislature could not do, consistent with the separation of powers, was to place judicial power in the hands of the executive. However, his judgment in the case can be viewed as concerning the narrow issue of the constitutionality of the Chief Executive's determination of the minimum term of detainees serving discretionary life sentences or detained at the executive's discretion prior to the commencement of section 67C of the Criminal Procedure Ordinance (Cap 221). In any event, the issue could fairly be narrowed down to one concerning separation of powers in the field of punishment of criminal offences, which has traditionally been held to fall within the purview of the judiciary. It is an area which, as a matter of principle, should not be left in the hands of the executive.

2. In *Lau Kwok Fai Bernard v Secretary for Justice*, Nos. 177 of 2002 and 180 of 2002, Hartmann J further considered the principle of separation of powers in the Basic Law. He, at para 20, expressed agreement to Professor Wade's observation in his work *Administrative Law* (7<sup>th</sup> ed, 1994), at p 860 that **there was an infinite series of graduations, with a large area of overlap, between what was plainly legislation and what was plainly administration**. He considered that the same must apply when looking to the relationship between what was plainly the function of the judiciary contrasted with the function of the legislature and the administration. At para 23, he said:

“While ... I accept that the Basic Law incorporates the principle of separation of powers (subject of course to the meaning and purpose of specific articles which may act to modify that principle), it is apparent that whether the [Public Officers Pay Adjustment] Ordinance, in respect of any individual article or in respect of the Basic Law generally, offends that Law is a matter which may only be determined by looking at the Ordinance ‘in context’. As the Privy Council said in ... [*Liyange v R* [1967] 1 AC 259]: each case must be decided in the light of its own facts and circumstances, including the *true purpose of the legislation and the situation to which it is directed*.”  
(emphasis original)

3. In the case of the United Nations Sanctions Ordinance (Cap 537), the legislation was made to provide for the imposition of sanctions against places outside the People's Republic of China arising from Chapter 7 of the Charter of the United Nations, and to provide for matters incidental thereto or connected therewith. Under section 3(1), the Chief Executive is empowered and required to ("shall") make regulations for a specific purpose, namely giving effect to a relevant instruction given by the Ministry of Foreign Affairs (MFA) to him to implement, cease implementing, modify etc certain mandatory sanctions decided by the Security Council of the United Nations. Under section 3(5), these regulations are excluded from the Legislative Council's scrutiny of subsidiary legislation provided for in sections 34 and 35 of the Interpretation and General Clauses Ordinance (Cap 1). In understanding the above exclusion, it would be appropriate to have regard to the following context:

- (a) the relevant instructions given by the MFA fall within the scope of "directives issued by the Central People's Government" under BL 48(8), which the Chief Executive has a power and function to implement;
- (b) the above instructions clearly concern foreign affairs relating to the HKSAR, for which the Central People's Government is responsible under BL 13(1);
- (c) section 28(1)(b) of Cap 1 provides that no subsidiary legislation shall be inconsistent with the provisions of any Ordinance;
- (d) the provisions in Cap 1, including sections 34 and 35, apply unless a contrary intention is discerned in an Ordinance (section 2(1)). In other words, the Legislative Council may, if it sees fit, exclude certain delegated legislation from its scrutiny under sections 34 and 35. This exclusionary power predated 1 July 1997,<sup>1</sup> and its continuation or exercise of it after that date is unlikely to be inconsistent with the constitutional order provided for in the Basic Law, a central feature of which is the theme of continuity.

4. Given the above context, we are of the view that section 3(5) of Cap 537 does not offend the principle of separation of powers implicit in the Basic Law.

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<sup>1</sup> As noted by Professor Simon Young in his submission to the Legislative Council dated 16 Feb 2004, section 3(15) of the Fugitive Offenders Ordinance (Cap 503) has an exclusionary provision similar to section 3(5) of Cap 537. The above provision predated the reunification.