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Panel on Home Affairs

Background brief prepared by Legislative Council Secretariat for the meeting on 10 March 2006

The International Covenant on Civil and Political Rights

Purpose

This paper gives an account of the discussions of the Panel on Home Affairs on the reports submitted by the Hong Kong Special Administrative Region (HKSAR) to the United Nations (UN) under the International Covenant on Civil and Political Rights (ICCPR).

Background

2. The Government of the United Kingdom (UK) extended ICCPR to Hong Kong in 1976. Article 39 of the Basic Law (BL) provides that the provisions of ICCPR as applied to Hong Kong shall remain in force. On 22 November 1997, the Ministry of Foreign Affairs in Beijing announced that in order to fully realise the "one country, two systems" principle, separate reports on the implementation of ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in the HKSAR would be submitted to the United Nations (UN) treaty monitoring bodies. The Government of the People's Republic of China (PRC) ratified ICESCR in 2001. The Government of PRC has signed but has not yet ratified ICCPR.

3. Formerly reports under ICCPR were required every five years but this was changed to a "case by case basis" in 1999. The UN Human Rights Committee (UNHRC) will specify the date for the submission of the next report in its concluding observations issued after examination of the report submitted by the HKSAR . The first report on the HKSAR under ICCPR covering the period from 1 July 1997 to 30 June 1998 was submitted to UN on 11 January 1999 and was heard by UNHRC on 1 and 2 November 1999. UNHRC issued its Concluding Observations on the HKSAR's first report on 15 November 1999.

4. The second report of the HKSAR under ICCPR was submitted to UN in January 2005, and the related hearing will be held on 20 and 21 March 2006.

Panel discussions on the first report of the HKSAR under ICCPR

First report submitted in 1999

5. The Panel on Home Affairs discussed the first report of the HKSAR submitted to UN under ICCPR with the Administration at its meeting on 21 January 1999. Before the UN hearing on the first report, the Panel further discussed the report with deputations and the Administration at its meetings on 23 September and 12 October 1999. The major issues raised by members at these meetings are summarised in paragraphs 6 to 21 below.

Major issues raised by members

Establishment of the Provisional Legislative Council

6. Ms Emily LAU expressed dissatisfaction that the first report of the HKSAR had described the Provisional Legislative Council (PLC) as part of the government system of the HKSAR and had not included details of the controversy over the formation of PLC. The Administration responded that paragraphs 455 to 457 of the report had addressed different opinions regarding the legitimacy of PLC, and the Court of Final Appeal (CFA) had confirmed the constitutional validity of the establishment of PLC.

7. Ms Emily LAU criticised that the first report of the HKSAR had failed to mention that about one to two million people in the HKSAR had lost their right to vote, as a result of the reduction of the electorate for functional constituencies (FCs) in the 1998 Legislative Council (LegCo) election. The Administration explained to the Panel that the FC system in 1998 had ensured the formation of a representative LegCo by allowing different sectors to have a voice in the legislature, and the system was accepted by the community. The Administration also pointed out that the report had made it clear that the FC system was a transitional arrangement, as BL had provided that all LegCo Members would ultimately be returned by universal suffrage.

Interpretation of provisions of BL by the Standing Committee of the National People's Congress

8. In January 1999, CFA heard the right of abode cases of *Ng Ka Ling and Chan Kam Nga*. In delivering its judgment, CFA concluded that it was not required to refer BL22(4) and BL24(2)(3) to the Standing Committee of the National People's Congress (NPCSC) for interpretation. The HKSAR Government was of the view that the CFA's understanding of BL22(4) and BL24(2)(3) might not truly accord with the legislative intent and sought the NPCSC's interpretation of these provisions.

9. In response to members' concern about the impact of the interpretation of BL24(2)(3) by NPCSC on the rule of law, the Administration explained that it had carefully considered all options for resolving the problem, including seeking an amendment of the relevant provisions of BL or seeking an interpretation of those provisions. The Administration considered that both options were lawful and constitutional under BL. The Administration had decided to seek an interpretation because an amendment would change the legislative intent of the relevant provisions.

Removal of claimants of the right of abode

10. Some members expressed concern about a case in which two illegal immigrants who were claimants of the right of abode in the HKSAR had been removed by the Immigration Department (ImmD) notwithstanding that judicial proceedings on an application for injunction against the removal had been in progress. They pointed out that government departments normally would not take action on any criminal or civil case for a period of 42 days, if there were pending court hearings on that case.

11. The Administration explained to the Panel that an application for legal aid made by an illegal immigrant did not constitute sufficient ground for a scheduled repatriation to be suspended. ImmD normally would only suspend a repatriation action when application for legal aid had already been granted to the illegal immigrant concerned.

12. Mr Albert HO pointed out that the Legal Aid Department (LAD) would not request a government department to defer enforcement action against a legal aid applicant unless there was a good chance that legal aid would be granted. In the case concerned, legal aid had subsequently been granted and the court had also granted an injunction order against the removal order. Mr HO was of the view that ImmD should have exercised discretion and deferred repatriation action pending LAD's decision.

Abolition of the Provisional Municipal Councils

13. Mr Albert HO expressed concern about the proposed abolition of the two Provisional Municipal Councils (PMCs) which comprised more elected members than LegCo, possessed policy-making powers in municipal services with financial autonomy and were supported by executive departments to implement their policies. Mr HO considered that the proposed abolition which was a retrograde step in the development of democracy contravened Article 25 of ICCPR. He also considered that it would deprive the public of an important right to participate in elections.

14. The Administration responded that while Article 25 of ICCPR provided that every citizen should have the right to take part in the conduct of public affairs directly or through freely chosen representatives, it had not prescribed the form and powers of institution to be established for the conduct of public affairs. The Administration pointed out that after the abolition of PMCs, the public could participate in the

conduct of public affairs directly or indirectly through LegCo, District Councils, the proposed Food and Environment Bureau, the proposed Culture and Heritage Commission and the proposed Advisory Council on Food and Environmental Hygiene.

Reservations and declarations under ICCPR

15. Ms Emily LAU urged the Administration to review and withdraw the existing reservation with respect to Article 25(b) of ICCPR. Article 25(b) provides that every citizen shall have the right and the opportunity to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors. The Administration informed the Panel that it was reviewing the reservations and declarations in the light of the current constitutional, legal, social and economic situation. The Administration considered it necessary to retain at least some reservations, either in their present or in modified form, and it had no intention of withdrawing the reservation in respect of Article 25(b) which had existed at the time of ratification of ICCPR by UK.

Public meetings and processions

16. Mr LEE Cheuk-yan expressed disagreement with paragraph 380 of the first report of the HKSAR which stated that "the Police have not prohibited or objected to any public meetings or processions since the amendments (to the Public Order Ordinance) came into effect on 1 July 1997". He considered that the cordoning off of certain areas by the Police to prevent demonstration to be held near to the venues of the reunification ceremony and the World Bank meeting were tantamount to prohibiting public processions.

17. The Administration responded that the Police had not prohibited public processions but had only confined them to certain areas. The Administration pointed out that the major change to the Public Order Ordinance (Cap. 245) made in 1997 was the introduction of a "Notice of No Objection" system for the organisation of public processions. Since the introduction of the system, and up to the time of drafting the first report, the Police had not prohibited or objected to any public meeting or procession.

Law Reform Commission's proposal for a Press Council for the protection of privacy

18. Mr Andrew CHENG had enquired whether the Administration had studied the technical issues relating to the establishment of a Press Council as proposed by the Law Reform Commission (LRC) for the protection of privacy. The Administration informed the Panel that it was studying the consultation paper entitled "Regulation of media intrusion" issued by LRC's Privacy Subcommittee, and would need to examine LRC's final recommendations before taking a view.

19. Members may wish to note that after the issuance of the consultation paper, LRC published its report entitled "Privacy and media intrusion" in December 2004 recommending the establishment of an independent and self-regulating commission by statute to deal with complaints of unjustifiable infringements of privacy perpetrated by the print media. The Panel discussed the relevant recommendations at its meeting on 14 January 2005. The Administration was requested to revert to the Panel on its position regarding the LRC's recommendations as soon as possible.

LRC's Report on Arrest

20. Mr James TO had enquired about the progress made by the Administration in implementing the Report on Arrest published by LRC in 1992, which recommended that a number of provisions of the Police and Criminal Evidence Act 1984 in UK be adopted in Hong Kong. The Administration informed the Panel that the LRC's Report contained a number of recommendations, one-third of which had already been implemented. As regards the remaining recommendations, legislative proposals which empowered the Police to take intimate and non-intimate samples from a suspect without the suspect's consent had been introduced into LegCo, while legislative proposals relating to power of arrest were in the drafting stage. The Administration further pointed out that as a result of the LRC's recommendations, legislative amendments had been made in 1993 to restrict the police's powers of search and arrest in order to ensure consistency with the Bill of Rights Ordinance (Cap. 383).

Exemption of the Chief Executive from the Prevention of Bribery Ordinance (Cap. 201)

21. Ms Emily LAU had queried whether giving the Chief Executive (CE) exemption from the provisions of the Prevention of Bribery Ordinance (POBO) contravened Article 26 of ICCPR. Article 26 states that all persons are equal before the law and BL25 states all Hong Kong residents are equal before the law. The Administration responded that exemption of CE from POBO was a legacy of history and not a deliberate act to confer privileges on CE. The Constitutional Affairs Bureau (CAB) was examining the issue.

22. Members may wish to note that in view of the lack of progress on the Administration's review regarding the application of POBO to CE, the Panel on Constitutional Affairs had formed at its meeting on 30 May 2005 a subcommittee to monitor and examine the issue of devising an appropriate statutory framework of bribery prevention applicable to CE, including in particular the Government's review of POBO. The subcommittee had completed its work and presented its report to the Panel. The Administration has undertaken to introduce legislative amendments to subject CE to the control of POBO. According to the Administration, the relevant bill would be introduced into LegCo by May 2006.

<u>Concluding observations issued by UNHRC on the first report</u>

23. The Panel on Home Affairs discussed the Concluding Observations issued by

UNHRC on the first report of the HKSAR with deputations and the Administration at its meeting on 13 March 2000. The major issues raised by members at the meeting are summarised in paragraphs 24 to 34 below.

Major issues raised by members

Establishment of human rights institution in HKSAR

24. Some members pointed out that UNHRC had repeatedly expressed concern about the absence of an independent human rights institution established by law to investigate and monitor human rights violations in the HKSAR, and the implementation of the rights under ICCPR in the HKSAR.

25. The Administration explained that it did not see any obvious advantage in setting up such an institution because the existing framework for the protection and development of human rights had served Hong Kong well. The Administration pointed out that human rights in Hong Kong were founded on the rule of law, an independent judiciary to provide remedies against infringement of human rights, and a sound legal aid system that assured the citizens of their right to seek legal remedy. These foundations had been strengthened by the constitutional entrenchment of ICCPR and ICESCR under BL39. In addition, safeguards were provided by the Ombudsman's Office, the Equal Opportunities Commission, the Privacy Commissioner's Office and the legislature. Also, non-governmental organisations (NGOs) and the media played an active role in the monitoring process. Furthermore, proposals for new legislation had to be vetted by the Human Rights Unit of the Department of Justice (DoJ) to ensure that they complied with the human rights provisions of BL, before they were introduced into LegCo.

Offences of treason and sedition and BL23

26. BL23 provides that 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 organisations or bodies from conducting political activities in the Region, and to prohibit political organisations or bodies of the Region from establishing ties with foreign political organisations or bodies. The Crimes (Amendment) (No.2) Ordinance which was passed in June 1997 dealt with treason and sedition but did not address either secession or subversion as required under BL 23.

27. The HKSAR Government explained to UNHRC in its first report that it was considered prudent to defer the commencement of the Crimes (Amendment) (No. 2) Ordinance until legislative proposals had been formulated to give comprehensive legal effect to BL 23. The pre-existing provisions of the Crimes Ordinance (Cap. 200) on treason and sedition continued to apply in the meantime. UNHRC expressed concern in its concluding observations that the offences of treason and sedition under the Crimes Ordinance were defined in overly broad terms, thus endangering freedom of expression guaranteed under Article 19 of ICCPR. UNHRC also stressed that all

laws enacted under BL23 must be in conformity with ICCPR.

28. Mr Andrew CHENG considered that the Administration had not taken any positive step to address the concern of UNHRC. He also expressed concern about the Administration's plan to enact legislation for the implementation of BL23.

29. The Administration responded that it was studying various issues relating to BL23. The Administration undertook that the legislative proposals for the implementation of BL23 would be subject to extensive public consultation and address the concerns regarding the freedom of expression. Moreover, by virtue of BL39, these proposals would have to be consistent with the provisions of ICCPR as applied to Hong Kong.

30. On 24 September 2002, the Administration issued a Consultation Document on "Proposals to implement BL 23". The National Security (Legislative Provisions) Bill was introduced into LegCo on 26 February 2003. A bills committee which was formed to study the Bill had reported to the House Committee after consideration of the Bill. It was the Administration's proposal to resume the Second Reading debate on the Bill on 9 July 2003. The Chief Executive made an announcement on 5 September 2003 regarding the withdrawal of the Bill and consideration of the Bill lapsed at the end of the second term of LegCo.

Commencement of the Interception of Communications Ordinance (Cap. 532)

31. BL 30 provides that "the freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences".

32. The relevant provisions in existing law regulating interception of communications by law enforcement agencies are those in section 33 of the Telecommunication Ordinance (Cap. 106) and section 13 of the Post Office Ordinance (Cap. 98). UNHRC had expressed concern in its concluding observations on the previous report submitted by UK that "these ordinances can be abused to intrude on the privacy of individuals and that their amendment is urgently required". Mr James TO introduced a Member's bill into LegCo which sought to restrict the power of the authorities to intercept communications. The bill was passed in June 1997 but the Administration had not appointed a commencement date for the Interception of Communications Ordinance (IOCO).

33. Mr Andrew CHENG shared the concern expressed by UNHRC that IOCO had not yet been brought into effect. The Administration responded that it was reviewing the whole issue of regulating interception of communication. The review involved studying overseas practices and experience in regulating interception of communications as well as the technological development in areas concerned. An

inter-departmental working group chaired by the Secretary for Security (S for S) had been set up to examine the technical and policy issues involved. The Administration would take into account comments received from the public consultation on the White Bill on Interception of Communications.

34. Mr Albert HO sought the Administration's views on the concern raised by UNHRC that the remaining in force of section 33 of the Telecommunications Ordinance and section 13 of the Post Office Ordinance had violated the right of privacy under Article 17 of ICCPR. The Administration responded that law enforcement agencies could only intercept communications in strict compliance with the law, and that they were required to obtain authorisation from the highest level of the Government for each interception operation. The Administration conceded that such arrangements were not ideal and was studying ways to make improvements.

35. Members may wish to note that on 22 April 2005, the District Court delivered its ruling on, *inter alia*, the admissibility of recording obtained by covert surveillance into evidence. The judge found that there was no legislative framework in the HKSAR to regulate covert surveillance, and thus the minimum degree of legal protection to which HKSAR citizens would be entitled under BL 30 was lacking. The judge concluded that the system of covertly intercepting private communications as practised by the Independent Commission Against Corruption (ICAC) in the case before the court was not "in accordance with legal procedures", and the recordings were made in breach of BL 30 and so were unlawfully made.

36. On 5 July 2005, the District Court delivered its ruling on, *inter alia*, covert surveillance by ICAC in an application for permanent stay of the proceedings. The judge found that ICAC deliberately and intentionally recorded a conversation knowing that legal advice would almost certainly be given.

37. On 30 July 2005, CE made the Law Enforcement (Covert Surveillance Procedures) Order under BL 48(4) to regulate covert surveillance activities undertaken by law enforcement agencies. The Order was published in the Gazette on 5 August 2005 and came into operation on the following day.

38. On 9 February 2006, the Court of First Instance handed down its judgment on an application for judicial review regarding the existing regime on interception of telecommunication and covert surveillance. In gist, the court dismissed the declaration sought that CE had acted in breach of his duty, and therefore unlawfully, in failing to appoint a day for the commencement of IOCO. The court found that although the Law Enforcement (Covert Surveillance Procedures) Order (the Executive Order) was made lawfully, it could not provide lawful authority for law enforcement agencies to conduct covert surveillance. The court has also declared that insofar as section 33 of the Telecommunications Ordinance authorises or allows access to or disclosure of the content of any message, it is unconstitutional.

39. The Interception of Communications and Surveillance Bill which seeks to provide for the authorisation of interception of communications and covert

surveillance operations by law enforcement agencies will be introduced into LegCo on 8 March 2006. According to the Administration, it has decided against the option of bringing IOCO into operation because, among other things, it covers only interception and not covert surveillance and it is important to have a consistent regime covering both forms of operation.

Panel discussions on the second report of the HKSAR under ICCPR

40. The Panel on Home Affairs discussed the outline of topics to be covered in the second report of the HKSAR for submission to UN under ICCPR with deputations and the Administration at its meetings on 11 April 2003. The major issues raised by members at that meeting are summarised in paragraphs 41 to 43 below.

Development of democracy

41. Ms Emily LAU considered that the Administration should explain in the second report of the HKSAR why constitutional reforms that should be implemented by 2007 had not yet been initiated. She also expressed concern about the recent remarks made by Secretary for Constitutional Affairs (SCA) that the Administration had to examine the interpretation of paragraph 7 of Annex I to BL to see whether the method for selecting CE could be amended by 2007 or after. She opined that the Administration should conduct public consultation if it concluded that constitutional reforms could only be introduced after 2007.

42. Ms Cyd HO considered that the abolition of PMCs and the Government's proposals to enact legislation for the implementation of BL23 indicated that there was a retrogression in the development of democracy in Hong Kong. Ms HO considered that the second report of the HKSAR should cover these issues in detail. The Administration responded that it did not consider that there was a retrogression in the development of democracy in Hong Kong. The Government of the HKSAR had a constitutional duty to enact legislation to give effect to the provisions of BL23. Human rights in the HKSAR would not be affected by introduction of the National Security (Legislative Provisions) Bill because it was specifically provided that the interpretation, application and enforcement of its provisions must comply with the various international human rights treaties applicable to Hong Kong. The Administration would explain the issue in its second report to be prepared.

Monitoring of the implementation of ICCPR

43. Some members expressed dissatisfaction about the lack of monitoring over the implementation of ICCPR in the HKSAR and the Administration's failure to implement the UNHRC's recommendation of establishing an independent human rights commission in the HKSAR for such a purpose. The Administration responded that it would need to review relevant past discussions and consider the issue in the light of the availability of resources, the public administration system, and appropriateness of setting up such an institution at the present stage. Ms Cyd HO expressed concern that DoJ had said that ICCPR and the concluding observations of

UNHRC were not legally binding. She considered that if Government of the HKSAR was not legally required to implement ICCPR and the recommendations made by UNHRC in its concluding observations, it would be meaningless to discuss the progress of the Administration's work in this respect. The Administration assured the Panel that the HKSAR Government would respond to the concerns of UNHRC in its concluding observations made in 1999 in the second report to be prepared. Mr Albert HO was of the view that to facilitate the monitoring over the implementation of ICCPR, the Administration should report the progress of its work in promoting human rights to LegCo on an annual basis.

44. Members may wish to note that the Panel discussed the monitoring mechanisms for the implementation of international human rights treaties in the HKSAR at its meeting on 9 May 2003. At the Panel's request, the Administration has been providing annual overviews of developments relating to the six treaties applicable to Hong Kong which entail an obligation to submit periodic reports to the UN treaty monitoring bodies since the 2003-04 session. Members also reiterated their view at that meeting about the need for setting up an independent human rights commission in the HKSAR. However, it was the Administration's view that the existing measures, i.e. laws, policies, and practices were consistent with the requirements of the international treaties applicable to the HKSAR and none of these treaties contained provisions that required governments to establish a central monitoring body for human rights.

Relevant motion and questions moved/raised at Council meetings

45. A motion was moved by Ms Emily LAU at the Council meeting on 1 March 2006 urging the Government to implement the recommendations of UNHRC. The speeches given by the Secretary for Home Affairs, SCA and S for S during the motion debate were in **Appendices I to III** respectively. The motion was negatived.

46. Details of the questions relating to ICCPR raised at Council meetings since the first term of LegCo are in **Appendix IV**.

Council Business Division 2
Legislative Council Secretariat
8 March 2006

Appendix I

Press Release

LC: SHA's speech in the motion debate on "Implementing the recommendations of the United Nations Human Rights Committee" (translation)

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Following is a translation of the speech by the Secretary for Home Affairs, Dr Patrick Ho, in the motion debate on "Implementing the recommendations of the United Nations Human Rights Committee" at the Legislative Council today (March 1):

Madam President,

I thank the Hon Emily Lau for her motion, and Honourable Members' trenchant observations which have made for a most fruitful exchange of ideas on this important subject. And I welcome this opportunity to explain the Government's position in regard to its obligations under the international human rights treaties.

In broad terms, that position was explained in Chapter 2 of our second report, which is, of course, the subject of the impending hearing. But, in view of some of the things that we have heard today, I think it worth rehearsing what we said in the report.

As we have stated many times, and doubtless will state again, it must be clearly understood that we hold Treaty Bodies in the highest esteem and accord their concluding observations the utmost respect and the closest attention. But the fact remains that those observations – the expressions of concern and the related recommendations - are not binding as a matter of international law. Our international obligations are defined by the treaties that apply to us, and by any relevant declarations and reservations. Our position, which we believe is shared by many, if not most, governments, derives - inter alia but primarily - from a section of the United Nations Manual on Human Rights Reporting on "The essence of dialogue". Let me quote this verbatim –

"At this point, one must stress that the Committees are neither courts nor quasi-judicial bodies. The nature of their activity may be of a different quality with regard to the competence of some treaty bodies to receive and to examine individual complaints or communications. However, it has never been claimed that the treaty bodies may perform judicial or quasi-judicial functions in the consideration of States Parties' reports. The Committees, as a result of the dialogue, do not issue a judgement regarding the degree of implementation of the provisions contained in the relevant instrument in the reporting State.

"The purpose of the dialogue is rather to assist the reporting State in the implementation of its treaty obligations. The dialogue should clarify the scope and the meaning of the treaty obligations and should highlight those aspects that may have been neglected by the authorities of the reporting State. It is in this spirit that the members of the Committees raise issues of concern to them, ask their questions, and formulate their comments accordingly at the end of the consideration of a report. And it is in the same spirit that the written comments of the Committee as a whole are formulated at the conclusion of the consideration of a report."

As non-judicial entities, the Treaty Bodies have greater flexibility than do courts in the conduct of their business. For example, the hearings – unlike those held by the courts - are not constrained by the need to confine conclusions to matters actually addressed in the course of proceedings. Thus, it is increasingly common for the concluding observations to include expressions of concern and/or recommendations about matters that were not raised during the hearing, or even in the preceding list of issues.

Thus, the Treaty Bodies enjoy considerably more latitude than do judicially constituted courts. This has clearly has many advantages but also serves to demonstrate that, as the United Nations Manual affirms, the Treaty Bodies are not courts, they do not behave as courts, and their observations, concerns, and recommendations – while always attended to with seriousness and respect - do not and cannot carry the authority of a court ruling. In essence, therefore, they are of an exhortatory nature and, while parties to the treaties will normally endeavour to implement them to the extent they judge to be practicable, they are not bound by them.

Hong Kong, while not a state party, is no exception to that generality. As we made clear in the report, we do seek to implement Treaty Body recommendations, either wholly or in part, where we consider that doing so would be consistent with the principles I have just outlined. Essentially, we will implement a recommendation when we judge that to do so is required as a matter of international law. Where this is not the case, we will do so where this is –

* feasible in practical terms, which may include legal and constitutional considerations, as well as the more obvious question of physical, political, or economic constraints;

* affordable, either immediately or within a given timeframe; and

* necessary to achieve the objectives that the recommendation seeks to attain.

The approach I have just outlined reflects the varying nature of the recommendations of treaty-monitoring bodies. In some cases, a recommendation does no more than reflect a specific obligation in the particular treaty. In that case, the relevant jurisdiction will be obliged to take action, not because the committee has recommended it, but because the treaty requires this. However, in many cases, recommendations go beyond what the treaty specifically requires, for example by suggesting how a particular obligation may best be implemented. In that case, the jurisdiction may properly decide to implement the obligation in another way. And, in some cases, the recommendations are to the effect that a jurisdiction should withdraw a reservation or declaration that was entered into when the treaty was acceded to. In that case, there is clearly no obligation, either under the treaty or as a result of the recommendation, to do this.

But let there be no misunderstanding: we have acted on past recommendations of the Human Rights Committee and will act on any future ones to the extent that we judge feasible and desirable. Examples of past endeavours include bringing the sex discrimination law into effect, closing the former detention camps, and making police charge sheets and charge forms available in Chinese as well as English. Those things required time and we were not in a position to implement them at the time the Committee originally asked us to. But when we, as the

responsible authorities on the spot, judged the timing to be right, we acted without further delay. An example of a long-standing recommendation that has yet to be put into effect is the establishment of a human rights commission. We have not, as some have asserted, ignored the Committee. We have kept the matter in view, testing its implications against the criteria I have rehearsed and ready to move forward when the conditions are met. Tentative steps have already been taken in that direction with the establishment of new public forums for regular and formal exchange of views between Government and non-governmental organizations. Options for further development are under exploration, though we are not – as yet ready to commit to a timetable.

When dealing with large issues – and most of the issues addressed in the concluding observations are, very large – caution is simple prudence. Unless we are required to act as a matter of international law, we will not, for the sake of a few brief kudos, jeopardize the interests of Hong Kong by precipitously giving effect to the recommendations of bodies that, with the best will in the world, are familiar with our circumstances only at a distance and whose members live far away in places whose circumstances and concerns may be very different from those prevailing here. We will act on our best judgment for the well-being of Hong Kong's people.

At the same time, however, I must point out that - while the recommendations in the concluding observations and the decisions of the treaty bodies are not directly binding on the courts in Hong Kong - the courts have often used them in the construction of statutes and cases. For example, in the case of Shum Kwok Sher v HKSAR, the Court of Final Appeal held that -

"In interpreting the provisions of Chapter III of the Basic Law and the provisions of the Bill, the Court may consider it appropriate to take account of the established principles of international jurisprudence as well as the decisions of international and national courts and tribunals on like or substantially similar provisions in the International Covenant on Civil and Political Rights (ICCPR), other international instruments and national constitutions."

Action on concluding observations is not, of course, the only way in which governments give effect to their treaty obligations. It is also important that they ensure that their laws, policies, and administrative measures are consistent with those obligations. Thus, in Hong Kong, when legislation is being prepared, or when Government policies are formulated, the Department of Justice advises the responsible bureau or department on the compatibility of those proposals with the ICCPR provisions as applied to Hong Kong. When providing such advice, the Department draws substantially on the relevant concluding observations and general comments of the treaty bodies.

In summary, therefore, we act in good faith in deciding how and when to act on the Treaty Bodies' concluding observations. That is, we most firmly assert, the prerogative of governments that have the ultimate responsibility for the governance and well being of their people. In implementing their international obligations, they must exercise their best judgement as to what is or is not conducive to the common weal and act upon that judgement even when that may entail deferring action on a particular Treaty Body recommendation. In this regard, our position is entirely consistent with the view expressed in the Committee's General Comment 3 of 1981, where it noted that -

"…article 2 of the Covenant generally leaves it to the States parties concerned to choose their method of implementation in their territories within the framework set out in that article."

Our approach to the hearing process and the conclusions that flow from that process affirms the General Comment. We have consistently acted in accordance with it and will continue to do so. That is the spirit in which we will approach the impending hearing in New York.

The Hon Emily Lau criticised the relevant principal officials for not leading the HKSARG delegation to the UN Human Rights Committee's hearing of Hong Kong's report, saying that it was a disrespect to the Committee. As far as we understand, most other State Parties have their representatives to the United Nations or officers responsible for human rights policy, rather than political-appointed officials, head their delegations. We think that it is more appropriate for the officer responsible for human rights policy to lead the delegations to those hearings. The Solicitor General as well as representatives from the Constitutional Affairs Bureau and the Security Bureau will also attend the upcoming hearing and answer questions from the Committee. I would like to reiterate that, in terms of ranking and size, the Hong Kong delegation compares favourably to those of other State Parties. The United Nations' relevant Committees have also acknowledged that the HKSARG has respect for the hearings.

Freedom of expression and freedom of the press are fundamental rights enjoyed by all people in Hong Kong. They are enshrined in Article 27 of the Basic Law, and Article 16 of the Hong Kong Bill of Rights. The Government is firmly committed to protecting those freedoms and to maintaining an environment in which a free and active press can operate under minimum regulation that does not fetter either freedom of expression or editorial independence.

Some Members have raised queries on the existing anti-discrimination laws and the proposed race discrimination legislation. The Government does not agree with any kind of discrimination. The Hong Kong Bill of Rights Ordinance prohibits all forms of discrimination in the Government and the public sector. Currently we have three pieces of anti-discrimination laws in place, namely the Sex Discrimination Ordinance, Family Status Discrimination Ordinance and Disability Discrimination Ordinance. We are now working on the fourth anti-discrimination legislation to prohibit racial discrimination in the private sector. We understand the public expectations for this legislation, and are now trying to iron out the legal and technical issues involved and proceed with the relevant legislative work. We are now in the final stage of the drafting work and we hope to introduce the Bill to the Legislative Council soon.

Concerning new arrivals from the Mainland, we agree that they occasionally suffer from discrimination by the local Chinese in Hong Kong. However, since the majority of them are of the same ethnicity as the local Chinese, i.e. Han Chinese, the discrimination they suffer is not based on race, but rather it is a kind of social discrimination. Therefore it is not included in the proposed legislation against racial discrimination.

As regards sexual orientation discrimination, it impinges on deeply ingrained values and notions of morality. The proposal of legislating against this form of discrimination

requires public consensus for effective implementation. Our considered view is that, at this stage when the issue is still being debated, we should address discriminatory attitudes through public education, with a view to fostering in the community a culture of greater objectivity, tolerance and mutual respect.

The Hon Alan Leong asked about children's right and also the possibility of setting up an independent children committee. As we explained in both HKSAR's report under the Convention of the Rights of the Child as well as its hearing last September, the best interests of the child are necessary considerations in all relevant decision-making in Hong Kong, including legislative proposals and policies, and are taken into account as a matter of course. We have specific laws dealing with different aspects of the Convention. The impact of legislation and the execution of policies are monitored by the Legislative Council, the Ombudsman and the press, and are reviewed by the bureaux concerned.

Madam President, thank you.

Ends/Wednesday, March 1, 2006
Issued at HKT 21:02

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附錄 II
Appendix II

新聞公報

立法會：政制事務局局長就議員動議議案「實施聯合國人權事務委員會的建議」的致辭全文（只有中文）

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以下是政制事務局局長林瑞麟今日（三月一日）下午在立法會會議上就劉慧卿議員動議議案「實施聯合國人權事務委員會的建議」的致辭全文（只有中文）：

主席女士：

引言

民政事務局局長剛才已解釋了特區政府對落實《公民權利和政治權利國際公約》（下稱《公約》）的立場，我會就議員提出與政制事務有關的部分，作進一步的回應。

《公約》在香港特區的施行情況

剛才有議員表示，香港在政制方面的發展不符合《公約》的規定。正如何局長在發言時指出，香港特區在實施《公約》的規定時是可以因應本港的實際情況，例如法律和憲法上的考慮，決定以何種方式實施《公約》的規定。

對於有意見認爲香港特區的政治體制須顧及《公約》第25條（b）段的規定，我須重申，香港特區的政治體制是根據《基本法》而定的。英國政府在1976年將《公約》引申至香港時加入了保留條文，保留香港毋須遵守第25條（b）段，即第25條（b）段有關選舉的規定不適用於行政局和立法局，這是當年的安排。根據中央人民政府於1996年6月向聯合國秘書長發出的照會和《基本法》第39條，這項保留條文繼續適用於香港特區。

政制發展

雖然《公約》第25條（b）段的規定不適用於行政會議和立法會，但是我們並沒有將香港的政制發展擱在一旁。特區政府非常重視香港的政制發展，並且一直根據《基本法》加以推動。《基本法》第45條及第68條訂明，行政長官和立法會的產生辦法須根據香港的實際情況並按照循序漸進的原則而規定。最終的目標是，行政長官由一個有廣泛代表性的提名委員會按照民主程序提名之後由普選產生，而關於立法會的選舉，最終的目標也是全部議員由普選產生。

普選是《基本法》對香港民主發展訂下的最終目標，特區政府一直致力逐步發展民主。2004年成立的政制發展專責小組，研究了如何令2007/08年的行政長官和立法會選舉辦法可以進一步開放，並且朝着最終普選的目標而邁進。

在《基本法》以及2004年4月26日全國人大常委會的《決定》的框架下，我們去年10月提出了有關2007/08年兩個選舉辦法的建議方案。本來這

建議方案如果獲得立法會通過，是會有超過四分一的選舉委員會委員，以及接近六成的所有立法會議席，基本上都是由三百多萬名選民經地區直選或間接選舉所產生的，這是在《基本法》及人大常委會有關《決定》的框架之下，最能夠增加民主成分及擴闊選民基礎的方案。但是很可惜，雖然方案獲得大多數社會人士和超過半數的立法會議員的支持，但最終未能按照《基本法》的規定而獲得立法會全體議員三分之二大多數通過。根據全國人大常委會2004年4月6日所作出的《解釋》，如果兩個選舉辦法未能夠作出修訂，附件一和附件二有關兩個辦法的相關條文將會繼續適用。在此情況下，2007年行政長官和2008年立法會的選舉將按照現行的安排進行。

主席女士，或許在此我想回應幾位議員的發言。

劉慧卿議員再提「原地踏步」的問題。但是其實劉議員與其他反對派議員非常清楚知道，當時他們妄顧有六成市民希望這2007/08年兩個選舉方案可以通過，仍否決了我們所提出能促進民主進程的選舉方案，在過去一段日子，幾個月裏，反對派議員聲稱寧願「原地踏步」，都要做出這個否決。凡事要有始有終，既然當時明顯決定寧願選擇「原地踏步」，便要面對「原地踏步」現有的實況。

郭家麒議員發言時說，他原則上接受按實際情況辦事，但他不會支持自由黨張宇人議員所提的修訂。他在發言期間說，去年12月初有二十萬人出來遊行。但是大家都記得大部分學術機構做的調查是七萬至九萬多人不等，所以如要講實際情況，便要講事實，不要誇大。

進一步回應梁國雄議員的發言。梁議員喜歡引經據典，今日也有引述國際人權公約和《基本法》，但他有一個疏漏，他提到行政長官向立法會負責是根據《基本法》第48條，我需要更正一下，第48條是講述行政長官的職權，而特區政府要向立法會負責，是根據《基本法》第64條，我相信這只是「百密一疏」。但是梁議員有一個論點，是更加有偏差。他提到香港現有立法會是承接殖民地期間立法機構的身分，這個我不敢苟同。因爲自九七回歸以後，香港是有民主進程的，我們現在的立法議會是有半數由地區直選議員作代表；而回歸以前最多是有三分之一有直選成分。而且現在根據《基本法》第73條，立法會行使實質的職權，例如要通過特區政府提出的立法草案和預算案，政府才可以接着做要做的工作。

主席女士，儘管這個2007/08年的方案不獲通過，特區政府仍然會致力按照《基本法》的規定推動香港的民主發展。一直以來，特區政府和行政長官都非常明白，香港市民希望早日見到普選的落實，而且《基本法》也規定普選是我們香港最終的目標。因此我們須要探討的是如何、以及應該用甚麼方式達至普選的目標。

民主體制有不同的形式，環顧很多已經實行民主體制的地方，所實施的政治制度和選舉辦法是取決於該地方或地區的民情歷史、傳統文化、經濟型態、種族狀況和固有信念等實際情況。要推動香港的政制發展，我們必須認真研究在《基本法》所定下的政制發展藍圖之下，用甚麼模式是最適合香港特區，並且符合《基本法》的有關規定。例如要有利資本主義經濟的發展，包括《基本法》所訂明有關維持特區政府基本上收支平衡、維持低稅制等的規定。同時也要顧及能夠有效地確保兼顧各階層的利益、維持社會均衡參與等原則。

策略發展委員會

其實，行政長官已經率先在去年11月透過策略發展委員會展開有關普選路線圖的討論，而經過三個多月的工作，委員會的討論取得了一定的進展。例如，委員大體上同意普選的概念應該包括平等和普及的原則；整體而言，普選的制度基本上應該是一人一票，並可以透過直接或間接的選舉方法來產生所選出的代表。所以我相信，就這兩方面的原則，我和李卓人議員隔空也好，不隔空也好，大家也有一個共同的理解。

策略發展委員會將會繼續研究行政長官和立法會普選的安排，並且提出一些可以供大家參考和討論的具體建議，讓公眾可以進一步理解這個課題。我們的目標是要在2006年年中總結有關普選的原則和概念的討論，以及2007年年初總結有關行政長官和立法會普選制度設計的討論。我們希望可以這些總結爲基礎，展開下一步的工作。

結語

主席女士，特區政府完全理解公眾對普選的訴求。策略發展委員會會繼續跟進這個議題和推動整個香港社會對普選的討論。我們認爲透過廣泛討論，增進對這個議題的了解，這對將來落實普選是十分重要的。同時我們相信透過與社會各界多一點接觸、多一點討論，對這個問題作出溝通，必定有助於將來對有關議題作出結論，和對達成整體共識有幫助。

主席女士，我謹此陳詞。

完

２００６年3月1日（星期三）
香港時間１９時５８分

附錄 III
Appendix III

新聞公報

立法會：保安局局長就劉慧卿議員動議議案「實施聯合國人權事務委員會的建議」的致辭全文（只有中文）

＊＊＊＊＊＊＊＊＊＊＊＊＊＊＊＊＊＊＊＊＊＊＊＊＊＊＊＊＊＊

以下爲今日（三月一日）在立法會會議上保安局局長李少光就劉慧卿議員動議議案「實施聯合國人權事務委員會的建議」的致辭全文：

主席女士：

剛才民政事務局局長及政制事務局局長已經就他們的政策範圍的事項解釋了政府的立場，在餘下的時間我希望向各位議員簡述保安局對人權委員會中提及的一些建議的回應。

基本上，政府已經在較早前向聯合國人權委員會提交的第二次報告中詳細交代有關事項，但今天我會扼要地重申幾個重點之外，亦會就個別項目的最新發展簡單說明特區政府如何跟進工作，以確保我們符合《公民權利和政治權利國際公約》的規定。

投訴警方獨立監察委員會

聯合國人權事務委員會認爲投訴警方獨立監察委員會（警監會）並沒有權力，確保投訴警方個案的調查工作，得以妥善和有效地進行。另外，委員會仍然關注到投訴警方行爲不當的個案繼續由警方負責調查，會影響調查結果的公信力。

就委員提出的意見，我們希望強調，負責調查涉及警務人員不當行爲的投訴警察課，是完全獨立於警方其他行動和支援單位的，並且受警監會緊密監察和覆檢該課所處理的投訴個案。警監會屬於獨立的非紀律部隊組織，由社會各界的非官方人士組成，成員包括各界專業人士、立法會議員、申訴專員或其代表等。警監會設有由全職人員運作的秘書處，負責協助警監會執行各項工作。

我們已制定有效的制衡措施，以確保投訴獲得徹底、公平、公正的處理。投訴警察課須就每宗投訴擬備詳細調查報告，並把報告提交警監會詳細審核。如果警監會成員對任何調查有疑問，可以會見投訴人、被投訴人和證人。警監會也可以要求投訴警察課提交有關投訴個案的任何文件或資料。警監會成員可進行突擊或預先安排的視察，以監察投訴警察課的調查工作。警監會若不滿調查結果，可以要求投訴警察課解釋有疑點的地方，或重新調查投訴個案。此外，警監會可就任何投訴個案向行政長官提交報告，並提出認爲適當的建議。由此可見，警監會顯然有足夠的能力，以確保調查工作妥善和有效地進行。

我們在這些年來更採取多項措施，以提高現行制度的公信力和透明度。具體來說，我們推行了「觀察員計劃」，委派已卸任的警監會成員和一些社區領袖擔任觀察員，進行預先安排或突擊的視察，以監察投訴警察課的調查工作。警監會亦成立了特別小組，負責監察嚴重的投訴個案，投訴警察課須就小組選定的個案，每月提交進度報告。小組也可在投訴警察課就調查個案作出總結前，要求該課澄清進度報告中的有關事項。

爲了進一步改善現行的制度，我們正擬備法律草案，把警監會改爲法定組織。我們正徵詢警監會對草案內容的意見。之後，我們會諮詢立法會保安事務委員會，並盡快正式向立法會提交條例草案。

截取通訊條例

眾所周知，截取通訊是不可或缺的執法工具，而我們已於二〇〇六年二月初發表我們規管執法機關進行截取通訊和秘密監察的立法建議的要點，並就此與立法會保安事務委員會進行了三次會議，也和其他相關人士和團體交流意見。正如我較早前所指出，我們將於三月八日向立法會提交《截取通訊及監察條例草案》。就截取通訊而言，我們的建議與一九九六年法改會有關截取通訊的報告書及一九九七年有關該題目的白紙條例草案的建議大致相符。此外，我們亦加入了額外的保障措施。

我們這套建議提供一個全面的架構，規管執法機關在截取通訊及秘密監察兩方面的行動。當中也參考了包括公約和其他有關的國際條文和法例，引進了多項重要的保障措施，在保障個人通訊私隱的權利，及保障公眾安全的需要兩者之間，達至平衡。與我們現行的機制，以至立法會及公眾曾討論的機制相比，都是一項很大的進步。

在擬備這些建議時，我們已考慮立法會及各相關團體的意見。我們會與立法會議員充份配合，以儘快審議這項條例草案。希望在各方的共同合作下，有關草案可在本立法年度內得以通過，令執法機關能有效履行其保護公共安全和維持治安的職責。

至於《截取通訊條例》方面，其所訂的程序及準則在許多情況下會令執法機關無法有效運作，而且該條例並未有提供如獨立監察機構的保障。此外，《截取通訊條例》的適用範圍並不包括秘密監察，而秘密監察是非常重要的執法工具。由於該條例存在許多缺點，我們認爲現時的立法建議遠爲優勝。我們希望大家能集中討論我們提出的條例草案，提供穩固的法律基礎，讓執法機關繼續有效地保護市民，也能更好地保障市民的通訊私隱。

和平集會的權利

法律要求公眾人士在使用公共地方時，要合理地互讓互諒。而在梁國雄及其他人對香港特別行政區一案中，終審法院亦指出，和平集會的權利同時亦意味着政府有明確的責任，須採取合理和適當措施，以確保合法舉行的集會能和平進行。終審法院亦接納通知制度是有需要和是合乎憲法的。終審法院裁定上訴人在公眾遊行舉行前未有遵照法例的規定通知警務處處長，又不理會警方已發出的警告的罪行是成立的。至於法院在判詞中就其他有關事宜的意見，執法人員在其日常職務中亦已予充份參考。

當局一貫的政策目的，是要在保障個人言論自由與和平集會的權利，以及維護社會整體利益之間，保持一個合適的平衡。其實，示威遊行已成爲香港人生活的一部份。在一九九七年七月至二〇〇六年一月期間，共有18 628次公眾集會和遊行在本港舉行。其中警方只就二十一宗提出反對或作出禁止，而當中九項集會或遊行活動經更改路線、地點或規模後，最終仍能舉行。

總結

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我必須強調，《基本法》第三章是本港保障各種基本公民權利和自由的憲制根本。《基本法》第二十七條特別規定，香港居民享有言論及表達等自由。《香港人權法案條例》（香港法律第383章）更把《公民權利和政治權利國際公約》適用於本港的規定，以成文法訂立法律依據。

特區政府完全瞭解到，這些自由和權利是現今社會不可或缺的原素。我們會嚴格依法施政、維護香港居民的人權和自由。我們過往的成績，我相信市民是有目共睹的。

主席女士，特區政府非常重視聯合國人權委員會的意見，如果日後的建議是切實可行及合適本港社會整體利益，我們一定會採取行動予以落實。劉慧卿議員的動議原意我們是充份理解的，但其中提及聯合國人權委員會在將來可能提出的意見，我們認爲並不是謹慎的做法。

本人謹此陳詞。

完

２００６年3月1日（星期三）
香港時間１９時０７分

Questions relating to the International Covenant on Civil and Political Rights raised by Members at Council meetings since the first term of the Legislative Council

Meeting Date	Question
2 December 1998	Hon LEUNG Yiu-chung raised an oral question on the submission of reports by the Government of the Hong Kong Special Administrative Region (HKSAR) under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).
9 June 1999	Hon Ambrose CHEUNG raised an oral question on potential breach of the Basic Law (BL) and relevant International Covenant as a result of dissolution of the Provisional Municipal Councils.
24 November 1999	Dr Hon YEUNG Sum raised an oral question on the Government's follow-up action on the Concluding Observations of the United Nations Human Rights Committee.
8 December 1999	Hon Emily LAU raised an oral question on the need to modify the electoral systems to achieve full compliance with ICCPR.
29 March 2000	Hon Cyd HO raised a written question on the detention of ex-prisoners pending deportation or removal.
21 February 2001	Hon Cyd HO raised a written question on the deportation and removal of persons and the reservation with respect to relevant provision of ICCPR.
12 December 2001	Hon James TO raised an oral question on the Falun Gong followers in Hong Kong and the protection of the freedom of assembly and of speech under BL and ICCPR.
18 December 2002	Hon LEE Cheuk-yan raised a written question on the operation of the Appeal Board on Public Meetings and Processions and measures to ensure that its board members had full understanding of, among others, ICCPR.
9 April 2003	Hon Cyd HO raised a written question on legal aid applications in respect of litigations relating to breaches of the Hong Kong Bills of Rights Ordinance and/or inconsistency with ICCPR.
20 October 2004	Hon Fred LI raised a written question on the accessibility of polling stations by the mobility-handicapped persons to protect their right to vote at elections.

Meeting Date	Question
1 March 2006	Hon Emily LAU raised an oral question on the Administration's plan to enact a new legislation subsequent to the ruling of the Court that the Law Enforcement (Covert Surveillance Procedures) Order was inconsistent with BL30 Law and that section 33 of the Telecommunications Ordinance was also inconsistent with relevant provisions of BL and ICCPR.

Council Business Division 2
Legislative Council Secretariat
8 March 2006