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In the last meeting, the Chairman suggested that we provide some information relating to the question of establishing an independent human rights commission (IHRC) in Hong Kong. In addition to the documents that were submitted earlier, I would like to state the following:

a. Deficiencies in the existing human rights protection mechanisms in Hong Kong

The fundamental deficiency in the existing human rights protection mechanism is that Hong Kong does not have exclusive institutional machinery that is entirely devoted for the protection of the rights and freedoms of the people of Hong Kong. I believe that Hong Kong's existing human rights framework is not in compliance with the Paris Principles. Although Hong Kong has a few institutions in the form of the Equal Opportunities Commission, the Ombudsman and the Office of the Privacy Commissioner for Personal Data that are engaged in the task of protecting and promoting some aspects of human rights, these institutions are not best suited to provide a holistic approach to the protection and promotion of human rights, as envisaged in the Paris Principles. Unfortunately, our historical experience with the working of existing institutions in Hong Kong demonstrates that functional autonomy and operational independence are neither protected through the legal structure nor in practice. While establishing some of these institutions in Hong Kong, there was an opportunity to emphasise the basic philosophy underlying the establishment of such institutions worldwide, which is to ensure the protection and promotion of human rights and fundamental freedoms of people through the development of national institutions. However, this was not done and our institutions have been subject to different types of criticism. This is of particular concern when other institutions, including the judiciary and, to a certain extent, the administrative methods of grievance redress within the government departments may not always be able to afford "guarantees of independence and pluralism," as such guarantees are specifically mentioned in the sub-heading of the Paris Principles. The working of the existing institutions in Hong Kong does not demonstrate that these Principles have been duly followed.

b. Feasible options to enhance the existing mechanisms

I believe that an independent human rights commission should be established in Hong Kong as soon as possible. The institutional approach to

[♦] *This paper is a shorter version of the views that were submitted earlier.*

handling human rights issues has proven to be one of most commonly developed strategies to facilitate domestic protection and promotion of human rights. The experience of many societies worldwide have demonstrated the fact the national human rights institutions have been successful in empowering the people and to ensure a certain degree ensure accountability of the government. Hong Kong needs an independent human rights commission (IHRC) that should specifically be mandated to investigate allegations of human rights violations that come before it or those cases in which it decides to take *suo motu* jurisdiction.

The judiciary in Hong Kong, by their nature, cannot pass any opinion on the legality or otherwise of a future legislation. The proposed independent human rights commission of Hong Kong can perform a variety of functions, including investigating alleged human rights violations, conducting public inquiries, exercising advisory jurisdiction, enforcement of human rights in prisons and other custodial institutions, providing advice and assistance to governments, promoting human rights education and awareness, promoting interaction, exchange, and better coordination among other human rights commissions in the region and worldwide, promoting interaction and exchange with NGOs, and publication of annual reports.

To this list may be added a few more specific functions for the IHRC of Hong Kong: the IHRC should engage and collaborate with NGOs in Hong Kong to tackle human rights problems and to promote and develop a vibrant civil society culture in Hong Kong; the IHRC of Hong Kong should also collaborate, share information with other HRCs in the Asia-Pacific region and other parts of the world and be willing to learn from best practices and experiences of HRCs that have been successful in handling human rights issues in other jurisdictions; the IHRC should involve itself in the task of prioritising the promotion of human rights education in Hong Kong that respects human dignity and cherishes human values like equality, non-discrimination, and tolerance.

There are other societies in which HRCs are functioning effectively and they have started to take capacity-building initiative and training programs to promote the establishment of HRCs worldwide. The proposed IHRC of Hong Kong could very well use these experiences and indeed engage and interact with other countries where HRCs have been successfully protecting and promoting human rights. The proposed IHRC should also be empowered to handle violations of economic, social and cultural rights, besides civil and political rights. The experience of HRCs that have been established in other parts of the world also demonstrate that even the successful HRCs have not been effective in the area of economic and social rights and have been subject to criticism on this account. In this context, it is important to recognise that the mandate of the IHRC in Hong Kong should specifically include powers to investigate allegations of violations of ESC rights and provide remedies for the victims. Since the ICCPR and ICESCR are both entrenched in the HKSAR, the proposed IHRC will have a legal and constitutional framework to ensure the proper protection and promotion of all human rights.

Under these circumstances, the creation of an IHRC would send the right signals to all concerned people that the government is ready and willing to handle the human rights implications of all legislation. Moreover, the creation of an IHRC would only underscore the government's pre-existing commitments to international human rights obligations to which Hong Kong is a party. The mandate of the IHRC ought to be wider so as to include both civil and political rights and economic, social and cultural rights. Unlike the courts of Hong Kong, the IHRC need not be restricted by domestic legislation and should be able to handle issues relating to human rights in a much more creative manner. In this regard, it is useful to refer to the objection that there may be a case of functional duplication prevailing in the concept of a human rights commission in Hong Kong due to the fact that the HKSAR already has an EOC.

c. Review of the options before deciding on the way forward

It is important to note that that the formation of EOC in Hong Kong was preceded by initial efforts to create a human rights commission. These efforts did not come to fruition and what ultimately came about was not an IHRC but an EOC. Equality and non-discrimination, albeit a very important human rights issue, is only one of the various human rights issues that need an institutional response. EOC has jurisdictional limitations to pursue matters that are violations of the anti-discrimination law. This means that many of the other human rights violations that take place in Hong Kong will have to be dealt with by the courts of the HKSAR or some other administrative tribunal with little relief to the survivors.

The proposed IHRC will not supplant the EOC. The EOC will function on the same lines in which it is presently functioning. However, there are arguments for its reform, and the need for guarantees of its greater transparency and independence is significant. The IHRC will be an independent stand-alone institution that will be broadly mandated and will have jurisdiction to investigate allegations of human rights violations. The functions of the IHRC will be determined based upon numerous factors, including the needs and human rights aspirations of the people of Hong Kong, the structure of human rights law in the BL and the BORO, the Paris Principles and other international human rights principles that are relevant for the establishment of human rights commissions. The IHRC will also draw upon comparative experiences in terms of the functions of the HRCs that have been established and functioning in other countries in the South East Asian region and other parts of the world.

Further, the enabling legislation that establishes the IHRC will have to ensure that there is no functional duplication in terms of the role of the EOC and hence, those matters that come before the IHRC, which are directly or indirectly related to equality and non-discrimination, need to be handed over to the EOC. This will ensure that both the IHRC and the EOC do not function in opposing directions or enter into a turf war, but rather complement each other's unique roles.

The governance discourse in Hong Kong can be significantly transformed if the IHRC remains the focal point for good governance. Close interaction and engagement of the IHRC with the EOC and the ICAC would benefit these institutions in evolving suitable policies and practices that, in totality, ensure good governance. Human rights support good governance, and any system of administration that does not respect human rights cannot promote good governance. Hong Kong has the potential to take the lead in this area, as there are numerous possible linkages between the human rights discourse of the IHRC, which could be supported by the good governance discourse of the ICAC and the anti-discrimination discourse of the EOC. All these aspects are indeed human rights issues and it is in the best interests of the HKSAR's growth and development that the IHRC is established so that rule of law, protection of rights and freedoms, and promotion of good governance and achievement of sustainable social and economic development becomes a true reality.

For meeting the gap in human rights protection that Hong Kong is facing, establishment of an Independent Human Rights Commission (IHRC) is essential. The word "independent" is so important in the political context of Hong Kong that it was considered appropriate to add it to the acronym "IHRC". An autonomous human rights institution in the form of an IHRC will be capable of meeting the expectations of Hong Kong society and promoting a culture of human rights. It is important to recognise that there will be no duplication or clash of jurisdiction of the IHRC with other entities that deal with particular human rights issues, which are covered by the EOC and the ICAC. The arguments for an IHRC outweigh those against it. A model IHRC that can accommodate various concerns and still be effective has been proposed for consideration of the legal community and political authorities. This framework can go a long way in bringing Hong Kong closer to the liberal rights-respecting paradise that it has always aspired to be.

Concluding Remarks

I recognise that there may be a need for further examination of these issues, particularly the need for the establishment of an independent human rights commission in Hong Kong. My humble submission is that the Subcommittee on Human Rights Protection Mechanisms of the Panel on Home Affairs should consider commissioning an independent study with a view to understanding the law, institutional practice and effectiveness of the human rights commissions in the Asia Pacific region. This study and the resultant report may be a useful document on the basis of which future discussions relating to the establishment of the IHRC can be conducted. Of course, the study should be commissioned in all earnestness and not with a view to delay the process of creating an institutional machinery for protecting human rights in Hong Kong. But before the study is commissioned, there is an urgent need for the recognition that the existing machinery to protect human rights in Hong Kong is not adequate. There is no doubt that the absence of an independent human rights commission in Hong Kong continues to create serious obstacles for protecting and promoting human rights in Hong Kong.