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HONG KONG

Human Rights, Law and Autonomy - The Risks of Transition

Introduction

The return of Hong Kong under the sovereignty of the People's Republic of China (PRC) on 1 July 1997 will be a significant event in the history of decolonization. A colonial power will relinquish its control and China will take over the exercise of sovereignty as a result of a negotiated settlement sealed by an international treaty. More than ten years of negotiations will have contributed to resolve hundreds of political, legal and financial differences related to the handover of sovereignty, underlining in many ways the care taken by the two governments to treat each other as equals, despite diverging political interests and international commitments.

For China, what has widely been seen as one of the marks of its humiliation by colonial powers in the 19th century will be removed by the return of Hong Kong under Chinese rule: as such, it is a momentous event for China. It marks the virtual end of centuries of foreign encroachment.¹ More immediately for the PRC, the handover is made a symbol of the success of the economic reforms and of the policy of "opening" to the world pursued since the late 1970s.

The future of Hong Kong will probably influence the course of events in China in the coming years. It will also be an important factor in many of China's key external relations, and will probably influence the climate of the handover of Macao in 1999. As Hong Kong moves away from its colonial period, it will remain a key to the economic development of the Pearl River Delta. Beyond South China, Hong Kong will continue to play a major worldwide and regional role at the centre of one of the world's fastest-growing regions.

One pillar of Hong Kong's development is the effective protection and promotion of all human rights. The continuation of effective guarantees for human rights will be a critical factor in Hong Kong maintaining its competitive edge against other increasingly dynamic and open metropolises in the Asia-Pacific region, and as the globalization of China's economy progresses.

The protection and promotion of all human rights has assumed growing importance in Hong Kong since the early 1980s: this is consistent with a worldwide trend. Human rights, once a marginal concept in international affairs and business, have become a major focus of debate, to an extent that few would have predicted even in the early 1980s.

¹ The territory of Macao remains the last part of China under foreign administration, until its return on 20 December 1999. However, since 1975 both Portugal and China have agreed to consider Macao as a "Chinese territory under Portuguese administration", thereby removing the formal description of Macao as a colony. Many of the concerns raised in the present document have parallels in Macao.

This document presents a historical and political overview of Hong Kong's transition to Chinese sovereignty. It sets out Amnesty International's human rights concerns related to the transition, and the organization's recommendations to the Hong Kong SAR and the Chinese government, aimed at safeguarding human rights.

Parts of this document, which cover the background to Hong Kong's transition and the evolution of its legislative institutions, deal with issues which are outside Amnesty International's mandate. These are included for clarity, but Amnesty International emphasizes that it takes no position on territorial or constitutional matters. The organization is also aware that some of the points covered in this report are matters of historical debate: their inclusion in this document is intended only to provide context, and does not amount to a position on matters on which Amnesty International is neutral.

Amnesty International and Hong Kong

Amnesty International is a worldwide human rights movement. It is impartial and independent of governments. It takes no position on political systems and territorial issues. Amnesty International has members in more than 20 countries and territories in the Asia-Pacific region. A quarter of the organization's 1.2 million members are from Asia-Pacific Economic Cooperation (APEC) member economies.

Amnesty International has been monitoring human rights issues in Hong Kong since the late 1970s. It has discussed its concerns with successive colonial administrations, including that of Governor Patten, and maintained a dialogue with Hong Kong officials at various levels. It has also consulted with, and received support from, large sections of the community, including professional and legal groups, trade unions, political parties, religious groups and other human rights organizations.

Over the years, on the basis of its research and expertise, Amnesty International has brought to the attention of the Hong Kong authorities a large number of human rights issues - from alleged violations of the human rights of individuals to general concerns over official policy on human rights. These have included concerns over the treatment of asylum-seekers, the treatment of detainees in police custody, procedures for complaints against the police, promotion of human rights and human rights education, etc. The organization has published many reports detailing its findings and recommendations in relation to the above concerns. An overview of these appears in the annex to this document. Amnesty International will continue to monitor human rights issues in Hong Kong and hopes to continue and develop its dialogue with the Hong Kong Special Administrative Region (HKSAR) administration.

Amnesty International has had a section in Hong Kong since 1976, which has been active in promoting human rights awareness and human rights education programs, as well as in campaigning on Amnesty International concerns worldwide.² In accordance with the organization's policies, its Hong Kong Section and members do not provide Amnesty International with information about human rights concerns in Hong Kong, except as regards the situation of refugees; they have no responsibility for action taken or statements issued by the international organization concerning Hong Kong. Since 1989, Amnesty International has also maintained a Regional Office in Hong Kong, serving the needs of its members throughout the Asia-Pacific region.

1. Hong Kong as a Colony: Historical Sketch

"The history of the colony is indissolubly linked with that of China's relations with the West, and the development of the West's attitudes towards China."

Frank Welsh, *A History of Hong Kong*, London, Harper Collins, 1993

Before British colonization, the mouth of the Pearl River (Zhujiang) where Hong Kong is located had long been a prosperous area; its towns and ports had been used by foreign traders for centuries, Burmese and Arab traders among others. The first European trading settlements in the area were established by Portuguese traders in the 1510s, in Tuen Mun and Lantau, now part of the New Territories. The Portuguese abandoned these settlements about ten years later, following defeat at the hands of Chinese armed forces; they returned decades later to eventually settle in Macao.

² Under Amnesty International's statute, Amnesty International members and Sections are not authorized to research, comment or campaign on individual cases of human rights violations in their "own country". However, they are permitted to work on behalf of asylum-seekers who would be at risk of human rights violations if returned to their country of origin. Amnesty International sections and members are also able to campaign for the abolition of the death penalty in their own country. In the case of Hong Kong, this "own country" rule covers the PRC, Taiwan and Macao as well as Hong Kong. As a result, Amnesty International members in Hong Kong cannot comment on the situation of individual victims of human rights violations in any of these territories (except for asylum-seekers at risk of human rights violations if returned, or prisoners sentenced to death or executed). They can, however, carry out work to promote human rights awareness in their own country or territory, and comment on general human rights concerns related to legislation in their own country or territory. Amnesty International, its members and sections take no position on territorial issues, political or social systems. Their concerns and campaigns are limited to the areas defined in the Mandate of the organization.

By the 1830s, Hong Kong was a much-used anchorage and supply harbour for British, American and other ships trading with China. A British naval force and British traders first occupied Hong Kong around 1840, at the start of what is known as the First Opium War. Since the 1820s the traders had used opium in exploitative trading arrangements, prompting retaliation on the part of the Chinese authorities.

The British occupation of Hong Kong Island was sanctioned in 1842 by the Treaty of Nanking (Nanjing), whereby the Chinese Imperial Government ceded Hong Kong Island to Great Britain in perpetuity. The British Government formally declared Hong Kong a colony in 1843. It is estimated that Hong Kong island alone had a population of at least 7,500 in 1841, living off agriculture, fishing and trade.

In 1860, years of armed hostilities between British and other colonial forces, on the one hand, and China on the other, were ended by the first Convention of Peking (Beijing), under which the Kowloon Peninsula, the part of the mainland adjacent to Hong Kong island, was ceded to Britain. In 1898, as China's Qing Dynasty was increasingly weakened by internal factors and further armed forays by foreign powers, another Convention of Peking gave Britain a 99-year lease on islands around Hong Kong, and on a large area of mainland north of Kowloon, now known as the New Territories. This lease increased the area of the British colony almost ten-fold, to just over 1,000 sq. km. It is estimated that the total population of the colonized area probably exceeded 120,000 by 1898. (It is the lease on the New Territories which comes to an end in 1997, although China and Britain agreed before 1984 that the whole of Hong Kong was to be returned to China at the end of the lease.)

In 1899 Britain expelled the Chinese officials who had remained in the old walled city of Kowloon, sandwiched between the Kowloon Peninsula and the New Territories, which was supposed to remain under Chinese sovereignty. China protested against this encroachment, but the area, known as Kowloon City, was progressively merged into the colony.

Successive Chinese governments have respected the terms of the 1842, 1860 and 1898 treaties, despite expressing opposition to them as "unequal treaties", an expression used since the 1930s. The Government of the Republic of China (ROC), which succeeded the Qing Dynasty in 1911, expressed opposition to the existence of colonies and areas under foreign jurisdiction in China, but was unable to challenge foreign encroachments. The PRC, which succeeded the ROC in 1949 throughout mainland China, reiterated its predecessor's opposition to the original treaties.

After it joined the United Nations in 1971, the Government of the PRC requested that the UN remove Hong Kong and Macao from the list of colonial territories covered by the Declaration on the Granting of Independence to Colonial Countries and Peoples (aimed at monitoring colonial territories' evolution towards self-rule). In a March 1972 communication to

the Special Committee overseeing the implementation of that Declaration, the Chinese Government stated that Hong Kong and Macao were parts of Chinese territory occupied by the British and Portuguese authorities and that the settlement of the questions involved was entirely within China's sovereign right. In November 1972, the UN General Assembly approved the Special Committee's recommendation to exclude Hong Kong and Macao from the above list. As a result, the United Kingdom (UK) ceased to report on Hong Kong to the Special Committee.

In 1984 the PRC and the UK signed the Joint Declaration on the Question of Hong Kong. In that document the two governments agreed the date and modalities of the return of Hong Kong to China. The Joint Declaration provided that China would establish the HKSAR upon the handover; and that the HKSAR would "enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government". The chief executive of the HKSAR would be appointed by the PRC "on the basis of the results of elections or consultations" to be held in Hong Kong. The laws in force in Hong Kong at the time of the Joint Declaration were to "remain basically unchanged". An annex to the Joint Declaration elaborated on many of the basic principles which China would apply to the HKSAR. The annex stipulated *inter alia*:

- that the "legislature of the HKSAR shall be constituted by elections";
- that the laws previously in force in Hong Kong "shall be maintained, save for any that contravene the Basic Law and subject to any amendment" by the HKSAR legislature;
- that "the provisions of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) as applied to Hong Kong shall remain in force".

In April 1988, the Chinese Government published the first draft of the Basic Law, which was to provide the legal basis for the HKSAR government. A Drafting Committee, comprised in part of Hong Kong people, contributed to the development of the text. In Amnesty International's view the draft law offered insufficient protection against torture and arbitrary arrest and did not adequately guarantee the right to life and other fundamental rights, including freedom of expression, freedom of association and religious freedom. It also failed to spell out how the ICCPR would continue to apply in Hong Kong after the handover to China.

A second draft of the Basic Law, published in February 1989 responded to many of the human rights concerns raised by the first draft. However that draft still lacked an adequate guarantee of the right to life, and failed to include a provision specifying that no law applied in the HKSAR, particularly during a state of emergency, could contravene the provisions of the ICCPR as applied to Hong Kong.

The final text of the Basic Law, adopted by China's National People's Congress in April 1990, met some of these concerns by adding new provisions in Article 39 (see page 13). However the human rights safeguards of the Basic Law fell short of those contained in the ICCPR and other international human rights instruments in force in Hong Kong.³

The principle that Hong Kong laws should remain "basically unchanged" in the run-up to the handover appears to have meant in practice that major legal changes since 1984 have been discussed by China and the UK through the Joint Liaison Group (JLG, a body set up under the Joint Declaration to negotiate issues related to the handover). Most of them were agreed by the JLG, but some - including the Bill of Rights, electoral legislation introduced since 1992 and legal amendments made in pursuance of the Bill of Rights - have been criticized by China, either at the JLG or independently.

Thirteen years after the signing of the Joint Declaration, the handover of Hong Kong will mark the implementation of the "one country, two systems" principle set down in the Basic Law. This principle will probably make China the only country in the world with two different legal systems and traditions in force in different parts of its territory.

The "one country two systems" principle presents China with the continuing challenge of dispelling uncertainties - in particular as to which matters are within Hong Kong's "autonomy". These uncertainties are highlighted in the continuing debate about political structures. They also affect the future of mechanisms for international reporting on the implementation of human rights safeguards.

2. Hong Kong's Colonial Institutions

For decades, the British and Hong Kong authorities failed to fulfill all their international obligations under the ICCPR as applied to Hong Kong. From 1946 to the present, Hong Kong's colonial institutions, while improving safeguards against human rights violations and developing some accountability to the community, have failed fully to comply with international commitments for protection and promotion of human rights and for prevention of human rights violations.

³ Amnesty International published studies of the first and second drafts of the Basic Law. See *Hong Kong: Memorandum on the Draft Basic Law of the Hong Kong Special Administrative Region* (AI Index: ASA 19/02/88), published in July 1988, and *Hong Kong: Summary of Comments on the Basic Law of the Hong Kong Special Administrative Region (Draft) Issued in February 1989* (AI Index: ASA 19/04/89), published in November 1989.

Political reforms

Hong Kong's colonial government was re-established in 1946, after an interim military administration which had taken over from the defeated Japanese authorities. The post-war government followed the pre-war colonial pattern: plans to establish political institutions more representative of the Hong Kong people were proposed in 1949 but abandoned in 1952. Reforms proposed in the 1960s made little headway. From 1950 to the 1980s, two main changes occurred in the institutional set-up: a gradual increase in the number of "unofficial" (non-civil servant) members of the Legislative Council, and the introduction of direct elections for members of the Urban Council. The number of unofficial members of the Legislative Council was increased from 8 in 1951 to 24 in 1977, all appointed by the Governor. Under a 1973 reform, 12 of the 24 seats on the Urban Council became filled through elections, although the right to vote was limited to taxpayers with a secondary education or higher (voting rights were later extended to all permanent residents over 21 years old). In 1982, elections were organized for the first time for members of the District Boards, which advise local government organs.

During the early 1980s, public consultations were carried out about proposals to widen the proportion of directly elected representatives on municipal bodies and the Legislative Council. Despite an important measure of popular support for these proposals, the Hong Kong Government did not carry them out.

In 1995, further reforms were implemented, following proposals by Governor Patten in 1992, increasing the representativeness of the various bodies. All 60 seats on the Legislative Council were filled by elections, including 20 by direct election with voting rights to all residents over 18 who had been residing in Hong Kong for seven years or more (the 40 other seats being filled by indirect election). Similarly all members of the Urban Council and the Regional Council were elected, directly or indirectly. Finally, starting in 1994, all District Board members were directly elected.

These changes were belated, and many international observers have complained that they came too slowly. The Human Rights Committee, a body of independent experts which oversees the implementation of the ICCPR by state parties, has repeatedly criticized the UK and Hong Kong Governments for failing to develop adequate and equal participation by Hong Kong citizens in the political process.

The Bill of Rights

In March 1990, the Hong Kong Government published a draft Bill of Rights Ordinance, partly in response to recommendations by the legal community that the ICCPR be "enshrined" in Hong Kong domestic legislation. The Bill of Rights came into force in June 1991, incorporating most provisions of the ICCPR. The Bill of Rights improved on the human rights protections hitherto available, as well as on those provided under the Basic Law, for example by prohibiting not only

torture but also other forms of cruel, inhuman or degrading treatment or punishment.⁴ Under the Bill of Rights, all other Hong Kong laws were to be repealed if they contradicted the Bill of Rights, which therefore gained a degree of pre-eminence over other laws.

However, Part III of the Bill of Rights provides that the Bill's human rights safeguards do not always apply to prisoners and juvenile detainees. The Reservations section of the Bill also leaves open the possibility that aliens could be arbitrarily expelled from Hong Kong, or detained without access to judicial review of their detention. These provisions do not provide adequate safeguards against *refoulement* of asylum-seekers in Hong Kong.

Despite its limitations, and the fact that the implementation of the Bill of Rights, contrary to that of the ICCPR, is not subject to international monitoring by a statutory independent body, the Bill of Rights has contributed to improving legal safeguards for human rights in Hong Kong.

The Courts

The Hong Kong Bill of Rights guarantees an independent judiciary. The Joint Declaration and Basic Law also state that there shall be an independent judiciary, though some articles of the Basic Law (such as Article 158 which confers upon the Standing Committee of China's National People's Congress the power to decide whether any existing law in Hong Kong contravenes the Basic Law) have been criticized as compromising the authority and independence of the Hong Kong courts after 1997.

Despite the existence of legal safeguards for the independence of the judiciary in Hong Kong, there has been concern about the extent to which judicial independence can be reinforced. In 1994 Amnesty International called on the government to commission an independent review aimed at identifying any further measures which may be needed to guarantee the future independence of the judiciary in Hong Kong. The organization recommended that the review also consider means of ensuring the recruitment of judges with the highest standards of competence, integrity and independence.

Amnesty International also recommended that the review should consider the extent to which the United Nations (UN) Basic Principles on the Independence of the Judiciary have been integrated into law, practice and training in Hong Kong, and should propose any further measures which may be needed for fuller integration. The Basic Principles on the Independence of the Judiciary *inter alia* at securing and promoting the independence of the Judiciary; at ensuring that members of the Judiciary enjoy the rights to freedom of expression and association,

⁴ Amnesty International published a study of some aspects of the Bill of Rights following the publication of the Draft Bill of Rights in March 1990. See *Hong Kong: the Draft Bill of Rights Ordinance 1990 - Memorandum from Amnesty International* (AI Index ASA 19/04/90) published in June 1990.

belief and assembly while preserving the dignity and impartiality of their office; and at securing conditions of service and tenure consistent with judicial independence.

Amnesty International recommended that special note be taken of the requirements in the UN "Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary," which include:

i) "All States shall adopt and implement in their justice systems the Basic Principles on the Independence of the Judiciary in accordance with their constitutional process and domestic practice" (Procedure 1).

ii) "Judges, lawyers, members of the executive, the legislature, and the public in general, shall be informed in the most appropriate manner of the content and the importance of the Basic Principles so that they may promote their application within the framework of the justice system" (Procedure 4).

iii) "Member States shall inform the [UN] Secretary-General every five years, beginning in 1988, of the progress achieved in the implementation of the Basic Principles, including their dissemination, their incorporation into national legislation, the problems faced and difficulties or obstacles encountered in their implementation at the national level and the assistance that might be needed from the international community" (Procedure 7).

To Amnesty International's knowledge, no extensive review of the safeguards for judicial independence have been carried out by the Hong Kong Government in recent years. Amnesty International is concerned that this failure to review safeguards for judicial independence may lead to some uncertainty in relation to the situation of judges during the transition (see page 13).

Failure to establish a Human Rights Commission

In April 1994, Amnesty International made a detailed study of the then existing flaws in the safeguards for human rights in Hong Kong. The organization concluded that Hong Kong lacked a sufficiently accessible, affordable, speedy and effective mechanism under which individuals could seek redress and reparations for alleged violations of their human rights, and that as a result, some victims of human rights violations were left without an effective remedy, in contravention of the ICCPR.⁵

Amnesty International's study emphasized that, to implement the ICCPR, any government had to ensure that all people understand their rights and that they all have access

⁵ See *Hong Kong and Human Rights: Flaws in the System - A Call for Institutional Reform to Protect Human Rights* (AI Index: ASA 19/01/94), published by Amnesty International in April 1994.

to affordable, effective remedies if their rights are violated. These are obligations which the Hong Kong Government has not yet fully discharged, and which the HKSAR Government is also bound to carry out under the terms of the ICCPR as applied to Hong Kong.

Since 1976 the governments of the UK and Hong Kong have been bound by the ICCPR to establish remedies that are **effective in practice** for **all** victims of human rights violations in Hong Kong. This is an international treaty obligation - a legal imperative of the present, not an aspirational goal for the future. The Hong Kong government had a duty to set up adequate human rights awareness, education and training programs in Hong Kong - which will be transferred to the HKSAR Government.

Until such steps are taken, the Hong Kong authorities will not be fulfilling those international obligations, nor will the Hong Kong Bill of Rights be properly implemented. Since its April 1994 report, Amnesty International has been calling on the Government of Hong Kong to establish an independent agency with a mandate to develop:

- , an accessible, affordable, speedy and effective human rights complaints system, to complement the judicial system;
- , a more proactive, forward-looking and effective approach to human rights implementation; and
- , effective human rights awareness, education and training programs.

An independent human rights commission (if properly constituted, adequately resourced, and genuinely independent) is the sort of institution which could play a major role in accomplishing all three of these essential goals. The commission should reflect the principles established for such bodies by the United Nations. It should be independent from government and organized so that the terms of appointment and tenure of the commission members afford the strongest possible guarantees of competence, impartiality and independence.

Despite renewed calls, no action was taken by the Hong Kong Government since 1994 to establish a human rights commission. Some minor adjustments to administrative procedures were made, such as the broadening of the mandate of the Commissioner for Administrative Complaints. However, these do not appear to have brought substantial improvements in human rights safeguards since they were introduced.

Amnesty International calls on the Chief Executive Designate and on the HKSAR legislature to ensure that such an independent human rights commission is established as a matter of priority.

3. The Hong Kong Special Administrative Region Institutions

The Chief Executive and the Provisional Legislature

The first Chief Executive of the HKSAR, Tung Chee-hwa, was formally designated by the Chinese Government in December 1996, following his nomination on 11 December by a 400-member Selection Committee, made up of Hong Kong people, established in 1996 under rules set out in 1990 when the Basic Law was adopted.

The Selection Committee's other main task was to nominate the members of the Provisional Legislature, the first legislative organ of the HKSAR. The nominations took place in December 1996, shortly after the nomination of Tung Chee-hwa. Nominees to the Provisional Legislature included 33 members of the current Legislative Council, as well as former members of the Legislative Council who had either stepped down in recent years, or lost their seats in elections to challengers. The Democratic Party, which in 1995 won most of the directly-elected seats on the Legislative Council, is not represented in the Provisional Legislature - it had opposed the Provisional Legislature's creation and refrained from nominating its members to stand for a seat in it.

In September 1994 China had announced that its National People's Congress (NPC) had resolved to abolish the existing Legislative Council and other elected bodies. Chinese officials had earlier stated that electoral reforms introduced in 1993, which led to a widening of the electorate, made the composition of the Legislative Council elected in 1995 incompatible with the Basic Law. To Amnesty International's knowledge, the reasons for the alleged incompatibility between the current electoral arrangements and the Basic Law have never been spelled out formally by the Standing Committee of the NPC, which under the Basic Law has authority to interpret the Basic Law.

The NPC Standing Committee, in a decision passed on 31 August 1994, stated, following consideration of the issue by its own Law Committee:

“The [Standing Committee] Meeting considers that the last Legislative Council of British Hong Kong, the Urban Council, Regional Council and District Boards will terminate on 30 June 1997. The electoral arrangements decided unilaterally by the British Government in relation to the last Legislative Council of British Hong Kong, the Urban Council, Regional Council and District Boards are in breach of the Joint Declaration, do not accord with the Basic Law of the HKSAR of the PRC and with the Decision of the NPC on the Method for the Formation of the First Government and the First Legislative Council of the HKSAR.”

The decision went on to entrust the Preparatory Committee with making appropriate arrangements to decide on the method for the establishment of the first legislature of the

HKSAR and to establish that first legislature. It further entrusted the HKSAR with deciding on the powers and method of formation of other local councils.

When the 1995 Legislative Council elections were held, Chinese officials reiterated the view that the “unilateral” character of the changes to electoral arrangements had been a factor in China’s conclusion that the Legislative Council and other local elections were not compatible with the Basic Law, the Joint Declaration and “related agreements”, apparently referring to correspondence on these matters between the British and Chinese authorities. Chinese official commentaries stated that the last elections were “unfair and unreasonable” and did “not truly reflect the will of the Hong Kong people”.

In February 1997, Chief Executive Designate Tung Chee-hwa stated that the electoral arrangements criticised by China appeared to breach Article 3 of the Joint Declaration and Article 8 of the Basic Law. The reference to a breach of Article 8 was also made by the PRC’s Vice-Premier Qian Qichen. Article 8 of the Basic Law states that “the laws previously in force in Hong Kong” are to be maintained. Article 3(3) of the Joint Declaration specifies that “the law currently in force in Hong Kong will remain basically unchanged”. Observers have argued, however, that Article 8 of the Basic Law refers to the laws in force in Hong Kong before the Basic Law is put into effect on 1 July 1997. In any case, the statements by Chinese and other officials have not specified how these articles have been breached by the new electoral amendments.

The 1994 NPC Standing Committee decision, while in practice amounting to an interpretation of the Basic Law, was apparently not reached in full accordance with Article 158 of the Basic Law, which confers on the Standing Committee the power to interpret the Basic Law. Article 158 provides that the Standing Committee must “consult its Committee for the Basic Law of the HKSAR before giving an interpretation”. However, the NPC decision does not refer to a consultation of that committee, but to that of another committee, the Law Committee.

Article 158 also provides that the Standing Committee “shall authorize the courts of the HKSAR to interpret on their own, in adjudicating cases, the provisions of [the Basic Law] which are within the limits of the autonomy of the Region”. Under the Joint Declaration, the areas that are excluded from the HKSAR’s autonomy are “foreign and defence affairs which are the responsibility of the Central People’s Government”. It is unclear how electoral arrangements such as those used to elect the Legislative Council could be seen as falling under one of the categories in which autonomy is restricted. It would therefore appear that the courts

of the HKSAR could be empowered to decide on the legality of the electoral arrangements, once the HKSAR is set up.

It is unclear in what ways the powers and functions of the Provisional Legislature will differ, if at all, from those of the partly-elected legislature called for under the Basic Law. Members of the Provisional Legislature have stated that its term of office will be only one year, as against two years for the first legislature under Basic Law provisions. Elections under the provisions of the Basic Law would therefore be held during the first half of 1998. But to Amnesty International's knowledge there has been no indication of other differences.

It is also unclear whether the process which led to the decision to dissolve the Legislative Council and other bodies, and to set up the Provisional Legislature, was fully consistent with that outlined in the Basic Law. Amnesty International is concerned that this process may be seen to amount to a weakening of the rule of law in Hong Kong - which may indirectly result in a weakening of the effectiveness of human rights safeguards. This concern is deepened in view of the possibility that the Provisional Legislature may be called upon to vote on proposals to amend or repeal existing human rights safeguards.

The Courts

The Court of Final Appeal (CFA) will play a major role in the maintenance of the rule of law in Hong Kong. In June 1995, the PRC and the UK agreed that the Court would start operating on 1 July 1997 - suggestions made earlier that it should start operating before that date to ease the transition were abandoned. The Chief Executive Designate will play a major role in the nomination of CFA Judges, and in ensuring that the CFA is provided with all the administrative support it needs to fulfil its duties effectively.

It is essential that the CFA be, and be seen to be, a highly competent, independent and professional body, commanding the respect and confidence of the Hong Kong people. It is also essential that the independence of the judiciary be as complete as possible, in the run-up to and beyond the handover. The Chief Executive's role in that respect will be crucial, as he will appoint three of the nine members of the Judicial Services Commission, charged with nominating candidates for positions throughout the Judiciary.

To that end, Amnesty International urges the Chief Executive Designate to ensure that preparations for establishing the CFA are carried out in an open manner, and to ensure that the Court has all the necessary administrative support from the day it starts operating.

Further, the Chief Executive will be involved in reappointing judges currently in office to serve under the HKSAR. Amnesty International is concerned that the process under which the reappointments will be conducted should be fully consistent with the UN Basic Principles on the Independence of the Judiciary.

Amnesty International urges the Chief Executive Designate to commit himself to nominating to the Judicial Services Commission people who command strong respect among the Hong Kong Judiciary and legal circles, and will inspire the confidence of the Hong Kong public.

4. The Implementation of International Standards

The Human Rights Committee, a body of independent experts to whom signatories to the ICCPR must regularly report on their implementation of the treaty, has clearly stated its view that the ICCPR, as applied to Hong Kong, will continue to apply after July 1997. In October 1995, in a statement by its Chairperson, the Human Rights Committee solemnly stated that the ICCPR will continue to protect the rights of the people of Hong Kong after the territory's reversion to Chinese sovereignty. The Committee based this view on jurisprudence establishing that human rights treaties devolve with territories and that successor states continue to be bound by the obligations under the ICCPR entered into by the predecessor state in respect to the territory being transferred. It added that this view was consistent with the 1984 Sino-British Joint Declaration on the Question of Hong Kong.

Both the PRC and the UK are bound to ensure that international human rights standards in force in Hong Kong prior to the handover are maintained under the HKSAR government: this obligation is enshrined in the Joint Declaration and in the Basic Law. Article 39 of the Basic Law is crucial in that respect; it states that:

“The provisions of the ICCPR, the ICESCR, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the of the HKSAR.

“The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.”

The Basic Law, in the HKSAR, in effect has constitutional value. As a result, Article 39 should be considered as giving constitutional strength to the requirement, which is part of the ICCPR, that all legislation and administrative practices in Hong Kong guarantee and protect the rights safeguarded by the ICCPR. Current legislation in Hong Kong which implements the guarantees required under the ICCPR should therefore be upheld under Article 39.

Amnesty International believes that Article 39 obliges the Government of the HKSAR to ensure that all laws in the Regions are consistent with the ICCPR are applied in Hong Kong.

The Future of the Bill of Rights

The Bill of Rights enshrined the provisions of the ICCPR in domestic Hong Kong law. Since the UK became a party to the ICCPR and extended its application to Hong Kong, the Hong Kong Government has been bound by this international treaty to ensure that all Hong Kong laws are consistent with the ICCPR as applied to Hong Kong.

The Bill of Rights in its current form implements that requirement by specifying that other Hong Kong laws are deemed invalid if they contradict the Bill of Rights' provisions. The Legal sub-committee of the Preparatory Committee for the HKSAR proposed *inter alia* in January 1997 that the Bill of Rights be amended by deletion of Articles 3(2) and 4, which state that:

Article 3(2): "All pre-existing legislation that does not admit of a construction consistent with this Ordinance [the Bill of Rights] is, to the extent of the inconsistency, repealed."

Article 4: "All legislation enacted on or after the commencement date [of the Bill of Rights] shall, to the extent that it admits of such a construction, be construed so as to be consistent with the ICCPR as applied to Hong Kong."

Commentaries by members of the Preparatory Committee have indicated that these deletions were proposed mainly because the provisions in question amounted to confer on the Bill of Rights a quasi-constitutional status, different to that of other ordinances. These commentaries maintain that only the Basic Law can have constitutional pre-eminence over other Hong Kong laws. However, the Preparatory Committee did not suggest that other provisions of the Bill of Rights presented any inconsistency with the Basic Law.

If the proposed amendments to the Bill of rights are adopted, the Bill of Rights would lose its “pre-eminence”. This could apparently make it more difficult to challenge in courts legal provisions which contradict the Bill of Rights, or government actions taken in contradiction with the Bill of Rights. However, Article 39 of the Basic Law appears to provide a safeguard similar to that of the contested Bill of Rights clauses, insofar as it ensures that no Hong Kong law can infringe on the provisions of the ICCPR.

In December 1996, Amnesty International urged Chief Executive Designate Tung Chee-hwa to confirm unequivocally that the Bill of Rights, because it enshrines in Hong Kong law most provisions of the ICCPR as applied to Hong Kong, is consistent with Hong Kong’s international obligations and with the Basic Law, and to confirm that he will ensure that the Bill of Rights will remain in force during his administration, and will not be amended in any way which reduces its scope and effectiveness.

In order to remove any ambiguity as to the applicability of the ICCPR in Hong Kong, Amnesty International recommends that the Chief Executive Designate confirm that, in accordance with Article 39 of the Basic Law, all Hong Kong laws must be consistent with the provisions of the ICCPR as applied in Hong Kong.

Amnesty International recommends that the Provisional Legislature abstain from amending or repealing existing legislation concerning human rights safeguards, such as the Bill of Rights and a number of Ordinances.

5. The Reporting Obligation to the Human Rights Committee

The Human Rights Committee held that the reporting obligation under Article 40 of the ICCPR would continue to apply to Hong Kong. It has repeatedly expressed its intention to cooperate with the Governments of the People’s Republic of China and of the UK to work out the modalities to implement the reporting obligation.

Article 40 of the ICCPR requires all State Parties to the Covenant "to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights." These reports to the Human Rights Committee are an absolute and integral requirement of the ICCPR. The International Covenant on Economic, Social and Cultural Rights also has a reporting requirement, as do the

Convention against Torture and the Convention on the Rights of the Child, which all apply to Hong Kong.

The Joint Declaration and the Basic Law both guarantee that the ICCPR (and other international standards currently in force in Hong Kong) shall remain in force in Hong Kong after July 1997. The international reporting obligation, being an integral part of these instruments, also remains in force. The next report on Hong Kong to the Human Rights Committee is due in 1999.

The People's Republic of China has not yet ratified all the international standards which apply to Hong Kong. It is therefore necessary to establish an effective procedure to ensure that the reporting obligations in relation to Hong Kong can be carried out effectively. The International Rights and Obligations Sub-Group of the Joint Liaison Group, a body set up by the British and Chinese governments to discuss matters relating to the return of Hong Kong to Chinese sovereignty, is reportedly considering this issue. However, there does not appear to have been progress on this matter since it came on the Sub-Group's agenda, at least three years ago.

Pending ratification of the ICCPR by the People's Republic of China, it is indispensable for the credibility of the safeguards it provides in Hong Kong that an effective method of reporting to the Human Rights Committee be agreed upon by the British and Chinese governments. The Human Rights Committee should be satisfied that the reporting procedures will be effective.

In its December 1996 Open Letter to the Chief Executive Designate, Amnesty International urged him to seek the development, by the Government of the PRC, of a procedure for reporting to the Human Rights Committee on the implementation of the ICCPR in Hong Kong. Amnesty International also urged him publicly to commit his administration to cooperate with all efforts to ensure that reporting is carried out.

Amnesty International also urged the Chief Executive Designate to seek consultations with the Government of the PRC on the method for reporting to relevant UN bodies on the implementation in Hong Kong of other international human rights standards, such as the ICCPR, Convention against Torture and the Convention on the Rights of the Child, which apply to Hong Kong and have been ratified by the PRC. In particular, Amnesty International recommends that the Hong Kong SAR Government be entrusted by the PRC Government with the consultations and drafting necessary to prepare the sections of these reports which

concern the implementation of these standards in Hong Kong, and with their presentation before relevant UN bodies.

6. Freedom of Expression, Association and Other Fundamental Rights

In January 1997, the Preparatory Committee for the HKSAR proposed the repeal of 16 laws and amendments to 8 others (and to the Bill of Rights, as described above). Some of these proposed changes, if implemented, would risk diluting human rights safeguards for the people of Hong Kong, by restoring legislation which has earlier been found by the Hong Kong Government to be inconsistent with the ICCPR as applied to Hong Kong - and therefore also with Article 39 of the Basic Law.⁶ Indirectly, some of the proposed changes would reduce the accountability of the HKSAR institutions to Hong Kong citizens.

The Preparatory Committee's recommendations included the amendment of ordinances on registration of societies, media licencing, broadcast authority, and police control of public meetings and processions. These long-standing ordinances had been brought into conformity with the Bill of Rights through amendments made in 1991. The Preparatory Committee proposed that the ordinances be restored to their pre-1991 form. Amnesty International is particularly concerned at two of the proposals to amend the Public Order Ordinance and the Societies Ordinance.

If the current Public Order and Societies Ordinances were repealed and replaced with legislation similar to that in force in Hong Kong until the early 1990s, the HKSAR executive would apparently have more leeway to ban peaceful demonstrations, such as the commemoration of the Tiananmen pro-democracy movement in China held every year in Hong Kong. Similarly, the authorities of the HKSAR would have greater leeway to ban non-governmental organizations that they deem to be undesirable.

⁶ According to the current Hong Kong Government, the legal amendments made since the 1990s have been made as a result of an overall review of Hong Kong legislation, aiming at bringing all Hong Kong laws in conformity with the Bill of Rights (and hence with the ICCPR). This argument used to be dismissed by the British authorities themselves. In 1978 the UK authorities had told the Human Rights Committee that legal changes were not needed in Hong Kong to implement the ICCPR - however the Committee was never satisfied with this view and its members have repeatedly called for incorporation of the ICCPR into Hong Kong law.

By restoring pre-1991 legislation, the HKSAR would likely be in breach of the ICCPR as applied to Hong Kong - whose provisions, transposed in the Bill of Rights, were found by the Hong Kong Government to be incompatible with the ordinances in their original version. In 1990, Amnesty International had expressed concern that charges brought against demonstrators under public order legislation in force at the time constituted undue restrictions on the exercise of fundamental rights, and could lead to the imprisonment of these demonstrators as prisoners of conscience (see Annex). The organization is concerned that, if restored to their pre-1991 form, the ordinances named by the Preparatory Committee could similarly be used to restrict the legitimate exercise of human rights.

Article 23 of the Basic Law

Article 23 of the Basic Law also contains provisions which appear to make possible limitations to the exercise of fundamental rights. Article 23 states:

“The 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 organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.”

The broad wording of Article 23 of the Basic Law of the Hong Kong SAR raises the concern that the peaceful exercise of fundamental rights could be curtailed. These rights include the right to freedom of thought, conscience and religion protected under Article 18 of the ICCPR; the right to freedom of expression (Article 19 of the ICCPR); and the rights to peaceful assembly and to freedom of association (Articles 21 and 22 of the ICCPR).

This concern is deepened by Amnesty International’s experience of a pattern of human rights violations in China under which legislation protecting state secrets has been used to imprison people for the disclosure of information on matters of legitimate public debate.⁷ Legislation limiting the exercise of religious activities and articles of the Criminal Law punishing “counter-revolutionary” offences, have also been used in China to imprison prisoners of conscience.

⁷ See *People’s Republic of China: States Secrets - A Pretext for Repression*, AI Index ASA 17/42/96, published in May 1996.

Amnesty International is also concerned that laws passed to prohibit “foreign political organization or bodies from conducting political activities in the Region” may be used to imprison people, whether or not they are residents of the HKSAR, for the exercise of rights safeguarded under the ICCPR as applied to Hong Kong. The same concern exists in relation to laws passed to prohibit HKSAR “political organizations or bodies from establishing links with foreign political organizations or bodies”. This sweeping prohibition may if transposed in HKSAR law lead to severe restrictions on fundamental rights. For example, links established between members of the HKSAR legislature and other legislature or parliamentary groups could be restricted. Similarly, membership of political parties affiliated to international political groups could apparently be punishable under laws implementing Article 23.

Amnesty International is concerned that any legislation passed in the HKSAR to prohibit “any act of treason, secession, sedition” or “subversion against the Central People’s Government” should not restrict the exercise of fundamental rights, such as the freedom of association and peaceful assembly. Similarly, the organization urges the HKSAR authorities to ensure that no legislation on political organizations limits the exercise of fundamental rights as safeguarded under international standards.

Freedom of opinion and information

In China since 1989, dozens of people, including prisoners of conscience, have been detained on charges related to “state secrets”. At least 14 people, whose cases were of concern to Amnesty International, were imprisoned on such charges as of early 1996. The nature of some of these cases raises concerns that the legislation on state secrets is being used in China to repress fundamental freedoms.

The meaning given to the term “state secrets” in China is very broad. It encompasses matters which would be the subject of public scrutiny in other countries and goes far beyond what is needed to protect national security. Among the issues which are classified as state secrets, for example, are the national statistics on the number of people sentenced to death and executed every year. Virtually anything can be classified as a state secret if the authorities so decide.

Legislation on state secrets is being used in China to prevent public debate on a wide range of issues which have little to do with national security and to imprison people for the peaceful exercise of their right to freedom of expression and association. Legislation on state secrets and national security appears to form the background to government-imposed restrictions over freedom of information and expression, including freedom of the press. In

early January 1996 for example, the official newspaper *Liberation Army Daily* quoted PRC President Jiang Zemin as giving the following message to newspapers in China: “The most important thing in running newspapers is to uphold the party and political line.”

Amnesty International is concerned that any legislation on state secrets passed in the HKSAR in pursuance of Article 23 of the Basic Law should protect the exercise of freedom of expression and information as safeguarded under international standards, in particular Article 19 of the ICCPR. The organization urges Chief Executive Designate Tung Chee-hwa to commit himself publicly to ensuring that no law passed by the Hong Kong Special Administrative Region, whether or not in pursuance of the Basic Law, infringes upon or undermines the rights and freedoms safeguarded under the ICCPR and other international human rights standards. In particular, it urges him to ensure that no legislation passed in Hong Kong in pursuance of Article 23 of the Basic Law restricts freedom of association, information and expression as safeguarded under international standards.

7. Laws Governing the Military Garrison in Hong Kong

A garrison of the People’s Liberation Army is due to be established in Hong Kong at the time of the handover. The establishment of a garrison was envisioned in the Joint Declaration. The Basic Law does not describe precisely the role of any armed forces stationed in Hong Kong. However it says in Article 14 that:

“The Government of the HKSAR shall be responsible for the maintenance of public order in the Region.

“Military forces stationed by the Central People’s Government in the HKSAR for defence shall not interfere in the local affairs of the Region. The Government of the HKSAR may, when necessary, ask the Central People’s Government for assistance from the garrison in the maintenance of public order and in disaster relief.”

The same article provides that “in addition to abiding by national laws, members of the garrison shall abide by the laws of the HKSAR.”

Annex III of the Basic Law, which lists the national laws of the PRC which apply in the HKSAR, does not include laws on the military. However, Article 18 of the Basic Law specifies that:

“In the event that the Standing Committee of the National People’s Congress decides to declare a state of war or, by reason of turmoil within the HKSAR which endangers

national unity or security and is beyond the control of the government of the Region, decides that the region is in a state of emergency, the Central People's Government may issue an order applying the relevant national laws in the Region."

Article 18 of the Basic Law therefore allows for laws such as the PRC's Martial Law to be in force in Hong Kong by decision of the central authorities. Article 14 indicates that both PRC and HKSAR legislation are to apply to military forces in Hong Kong, but does not specify which law prevails if there is a conflict between the requirements of Hong Kong law and the applicable PRC law. In particular, the Basic Law does not indicate which law is to apply to members of the Hong Kong garrison when they are called upon to assist in the maintenance of public order in the HKSAR.

Amnesty International believes that all security forces that carry out law enforcement functions, including "maintenance of public order", are bound by international criminal justice and law enforcement standards, such as the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the Code of Conduct for Law Enforcement Officials. These standards provide guidelines limiting the use of force by law enforcement personnel. All law enforcement forces, including the military, are bound by the same standards when they carry out such functions.

The ambiguity of the legal framework applicable to the PLA's garrison in Hong Kong has been exacerbated by the adoption by China in December 1996 of the PRC Garrison Law for the HKSAR (hereafter the Garrison Law). The Garrison Law includes a series of provisions which may in practice make members of the garrison virtually immune from HKSAR law and courts, if they carry out actions that may constitute crimes under Hong Kong law, or infringe upon the civil rights of Hong Kong residents. The apparent ambiguity over which laws apply to the military adds to uncertainty about the limits of the powers the military will exercise in Hong Kong.

In order to help ensure certainty and ensure that all security forces are bound by the same standards in line with UN guidelines, Amnesty International calls on the Government of the PRC to clarify that the Hong Kong Garrison will be bound by HKSAR law if asked to maintain public order or carry out other police functions.

Article 6 of the Garrison Law states that, when a state of war or emergency is declared by the central authorities in Hong Kong, "the Hong Kong Garrison shall, in the light of the decisions of the Central People's government, perform their duties in the HKSAR in accordance with the provisions of national laws." Nowhere in the Garrison Law is it stated that members of the Hong Kong Garrison must also abide by the law of the HKSAR, as provided under the Basic Law.

Article 7 of the Garrison Law states that military materials and “on-duty personnel” of the Garrison “shall not be subject to inspection, search or detention by the law enforcement personnel of the HKSAR”. Article 8 adds that “in the light of the relevant laws of the HKSAR, the garrisoned troops may adopt measures to stop practices that hinder their duties.” The scope of these “measures” is not specified.

Article 20 states that “criminal cases involving Hong Kong Garrison personnel shall be handled by the military judiciary”. Since there is no military judiciary in Hong Kong, and no provision in the Basic Law for the establishment of such a judiciary authority in the HKSAR, the military judiciary referred to is necessarily that of the PRC. Amnesty International is concerned that military personnel should be tried by civilian courts if accused of committing crimes against the person (human rights violations) against civilians.

Article 20 adds that “crimes committed by off-duty personnel in which HKSAR laws are violated, or in which the person or the property of Hong Kong residents, with the exception of stationed military personnel, are infringed upon, shall be handled by the courts of the HKSAR and relevant law-enforcement organs.” This provision, however, is weakened by Articles 21, which indicates that Garrison members involved in a criminal cases may be detained in PLA rather than HKSAR custody pending investigation.

Martial Law provisions

Should a state of emergency or war be declared in the HKSAR by the PRC authorities, the Garrison Law indicates that the PLA troops in Hong Kong will be required to act in accordance with relevant “national laws”. The main law in that regard is the Martial Law of the PRC, which came into force on 1 March 1996.

That law specifies the procedures under which martial law is to be declared. It allows “martial law enforcement institutions” to ban or restrict public meetings, ban strikes, impose press censorship, control correspondence, or “ban any activities against martial law”. It allows “martial law enforcement personnel” to detain and search, in effect, anyone they suspect of opposing martial law, to disperse, including by force, “illegal” gatherings or situations “where there is disruption of traffic order”, among others. Arrests and detention carried out under martial law are not subject to the time limitations provided under the PRC’s Criminal Procedure Law, although the prosecution authorities must still approve arrests, within an undefined time frame.

The use of fire-arms is authorised in a range of situations where violence occurs or is threatened, “if police instruments prove to be of no avail”. However no limits are set on the nature of the arms used, and there is no indication that the amount of force used needs to be proportionate to the threat of violence.

The ICCPR, as applied in Hong Kong, specifies in Article 4 that certain rights are non-derogable, and limits the restriction of all other rights during a state of emergency. The non-derogable rights include the right to life, the prohibition on torture and ill-treatment, the freedom of thought, conscience and religion and other basic rights. It further specifies that restrictions on other rights may only occur “in time of a public emergency which threatens the life of the nation and the existence of which is officially proclaimed”, and such restrictions are only permitted “to the extent strictly permitted by the exigencies of the situation”.

Amnesty International is concerned that martial law regulations which would apply in Hong Kong during a state of emergency permit restrictions to the exercise of basic rights which go beyond those envisioned under the ICCPR. Declaration of a state of emergency is an expression of the rule of law, not the abrogation of it. International standards set strict limits on the scope of restrictions which may be enforced under a state of emergency.

The ICCPR and other international standards, as well as customary law, establish that some rights cannot be suspended (see above). In Amnesty International’s experience, violations of the non-derogable rights to life and freedom from torture occur most frequently during an emergency when security forces are given licence to maintain public order with no effective executive, legislative or judicial control. In China, Amnesty International has documented numerous reports of human rights violations, including arbitrary arrests, torture and summary executions, during periods of martial law in Lhasa and parts of Beijing in 1988 and 1989. Amnesty International is concerned that the provisions of the Martial Law of the PRC may lead to violations of non-derogable rights, including the right to be protected from torture and ill-treatment.

Further, Amnesty International is concerned that the exercise of rights other than the non-derogable rights can be suspended by a state only to the extent strictly necessitated by the situation, and as a temporary measure. The organization believes that the provisions of the Martial Law of the PRC are so vague that they would permit the arbitrary suspension of rights, such as the right not to be arbitrarily detained, the right to fair trial, and the rights to freedom of expression, association and peaceful assembly.

Amnesty International is also concerned that, under both the Garrison Law and the Martial Law, PLA troops enforcing martial law in Hong Kong would be effectively immune from prosecution in Hong Kong courts, and that Hong Kong residents would be subject to national laws of the PRC other than those which apply to the HKSAR by virtue of their inclusion in Annex III of the Basic Law.

8. The Death Penalty

The death penalty has been abolished in Hong Kong since 1992; prior to abolition it had not been used since 1966, as death sentences were systematically commuted to life imprisonment. Amnesty International has noted with great interest that Chief Executive Designate Tung Chee-hwa in 1996 took the view that reinstating the death penalty would not be beneficial to Hong Kong. Amnesty International, which seeks abolition of the death penalty worldwide, believes that there is no evidence that the death penalty is more effective than other forms of punishment as a deterrent against crime. None of the many studies carried out in many countries over the last decades has ever demonstrated a link between the use of the death penalty and a drop in crime.

Amnesty International opposes the death penalty unconditionally, on the grounds that it constitutes a denial of the right to life and is the ultimate form of torture and cruel, inhuman or degrading punishment. Mindful of the views often attributed to victims, the organization believes that justice is best served by open and fair trials, rather than by executions.

Amnesty International urges the Chief Executive Designate to ensure that, in accordance with his earlier statement, the abolition of the death penalty in Hong Kong is not overturned.

Recommendations

In order to maintain and reinforce safeguards for human rights in Hong Kong during and beyond the transition to Chinese sovereignty, Amnesty International makes the following recommendations to the HKSAR Government:

Establish an independent human rights commission

An independent Human Rights Commission would make an important contribution to the reinforcement of respect for, and awareness of, human rights in Hong Kong. It would also contribute to the maintenance of public confidence in the commitment to human rights of the Hong Kong SAR Government.

Amnesty International urges the HKSAR government to initiate the establishment by the Hong Kong SAR of an independent Human Rights Commission, to help contribute to safeguarding human rights for the people of Hong Kong. It urges you to propose legislation setting up that commission, in accordance with the standards for such commissions set out by the UN and by Amnesty International.

Review and reinforce safeguards for judicial independence

Amnesty International urges the HKSAR Government to commission an independent review aimed at identifying any further measures which may be needed to guarantee the future independence of the judiciary in Hong Kong. Amnesty International also recommends that the

review should consider the extent to which the UN Basic Principles on the Independence of the Judiciary have been integrated into law, practice and training in Hong Kong, and should propose any further measures which may be needed for fuller integration

Amnesty International recommends that the process under which currently serving judges are reappointed to serve under the HKSAR Government be conducted in full accordance with the UN Basic Principles on the Independence of the Judiciary.

Maintain the Bill of Rights

Amnesty International urges Chief Executive Designate Tung Chee-hwa to confirm unequivocally that the Bill of Rights, because it enshrines in Hong Kong law most provisions of the ICCPR as applied to Hong Kong, is consistent with Hong Kong's international obligations and with the Basic Law, and to confirm that he will ensure that the Bill of Rights will remain in force during his administration and will not be amended in any way which reduces its scope and effectiveness.

Amnesty International recommends that the Chief Executive Designate confirm that, in accordance with Article 39 of the Basic Law, all Hong Kong laws must be consistent with the provisions of the ICCPR as applied in Hong Kong.

Amnesty International further recommends that the Provisional Legislature abstain from amending or repealing existing legislation concerning human rights safeguards, such as the Bill of Rights and a number of ordinances.

Seek development of international reporting procedures

Amnesty International urges the HKSAR Government to seek the development, by the Government of the PRC, of a procedure for reporting to the Human Rights Committee on the implementation of the ICCPR in Hong Kong. Amnesty International also urges the HKSAR to cooperate with all efforts to ensure that reporting is carried out.

Amnesty International also urges the Chief Executive Designate to seek consultations with the Government of the PRC on the method for reporting to relevant UN bodies on the implementation in Hong Kong of other international human rights standards, such as the ICCPR, Convention against Torture and the Convention on the Rights of the Child, which apply to Hong Kong and have been ratified by the PRC. In particular, Amnesty International recommends that the Hong Kong SAR Government be entrusted by the PRC Government with the consultations and drafting necessary to prepare the sections of these reports which concern the implementation of these standards in Hong Kong, and with their presentation before relevant UN bodies.

Maintain safeguards for freedom of association, peaceful assembly and other rights

Amnesty International urges the HKSAR to ensure that any legislation passed to prohibit “any act of treason, secession, sedition” or “subversion against the Central People’s Government” should not restrict the exercise of fundamental rights, such as the freedom of association and peaceful assembly. Similarly, the organization urges the HKSAR authorities to ensure that no legislation on political organizations limits the exercise of fundamental rights as safeguarded under international standards.

Amnesty International urges the HKSAR Government to ensure that any legislation on state secrets passed in the HKSAR in pursuance of Article 23 of the Basic Law protects the exercise of freedom of expression and information as safeguarded under international standards. The organization urges Chief Executive Designate Tung Chee-hwa to commit himself publicly to ensuring that no legislation passed in Hong Kong in pursuance of Article 23 of the Basic Law restricts freedom of association, information and expression as safeguarded under international standards.

Maintain the accountability of all security forces

In order to help ensure certainty and ensure that all security forces are bound by the same standards in line with UN guidelines, Amnesty International calls on the Government of the PRC to clarify that the Hong Kong Garrison will be bound by HKSAR law if asked to maintain public order or carry out other police functions.

Amnesty International urges that military personnel should be tried by civilian courts if accused of committing crimes against the person (human rights violations) against civilians.

Ensure protection of rights during a state of emergency

Amnesty International is concerned that martial law regulations which would apply in Hong Kong during a state of emergency permit restrictions to the exercise of basic rights which go beyond those envisioned under the ICCPR. Amnesty International urges the HKSAR Government to ensure that no legislation applicable in Hong Kong during a state of emergency can lead to violations of non-derogable rights, including the right to life and the right to be protected from torture and ill-treatment.

Amnesty International urges the HKSAR Government to ensure that the exercise of rights other than the non-derogable rights can be suspended only to the extent strictly necessitated by the situation, and as a temporary measure.

Amnesty International also urges the HKSAR Government to ensure that Hong Kong residents are not subject to national laws of the PRC other than those which apply to the HKSAR by virtue of their inclusion in Annex III of the Basic Law, including during a state of emergency.

Do not restore the death penalty

Amnesty International urges the Chief Executive Designate to ensure that, in accordance with his earlier statement, the abolition of the death penalty in Hong Kong is not overturned.

Annex: Amnesty International's Concerns about Hong Kong, 1973 - 1996

Amnesty International has been monitoring human rights in Hong Kong since the early 1970s - in 1973 the organization undertook research in the situation of then South Vietnamese nationals who had fled to Hong Kong to evade being drafted into the then South Vietnamese army.

In step with the development of the worldwide work of the organization, Amnesty International's monitoring of human rights issues in Hong Kong grew in scope during the 1980s.

In 1988 the organization expressed concern over the continuing use of caning as a criminal punishment - which Amnesty International considered was cruel, inhuman and degrading. Two boys, aged 14 and 15, had each received four strokes of the cane after they were convicted of robbery and assault - these were the first instances of caning for such offences since 1985, although caning had been imposed on people convicted under Section 33 of the Public Order Ordinance for carrying an "offensive weapon" in a public place. Also in 1988, Amnesty International expressed concern about the beating of about 100 Vietnamese asylum-seekers after a disturbance at the Hei Ling Chau detention centre. An official inquiry in August 1988 concluded that "excessive force" had been used in the incident by Correctional Services Department personnel.

In July 1988 Amnesty International published its first document analysing human rights concerns related to the then draft Basic Law of the HKSAR. The organization expressed concern that the draft law offered insufficient protection against torture and arbitrary arrest and did not adequately guarantee the right to life and other fundamental rights, including freedom of expression, freedom of association and religious freedom. The organization also expressed concern that neither the UK nor the PRC governments had spelled out how the ICCPR would continue to apply in Hong Kong after the handover to China. Requests by Amnesty International to meet representatives of China on the Basic Law Drafting Committee were not answered.

In 1989, Amnesty International published a study of the second draft of the Basic Law, in which it called for further changes to ensure human rights protection, including guarantees that Hong Kong would remain bound by the provisions of the ICCPR and other international instruments in force in the territory before 1997. It also renewed its call for explicit guarantees in the Basic Law for the right to life and protection from torture and ill-treatment, and recommended that the Basic Law include a provision banning the application in Hong Kong of any legislation which may contravene the provisions of the ICCPR.

Amnesty International also expressed concern about the prosecution of protesters for unlawful assembly and about the alleged ill-treatment of some of them. This concern arose after the arrest in September 1989 of four members of a group formed to support the pro-democracy

movement in China. Along with four other members of the group, arrested later, they had been charged with unlawful assembly under the Public Order Ordinance in connection with a protest before the offices of the New China News Agency.

In July 1989 over 100 Vietnamese asylum-seekers, including children, had been beaten by police at the Shek Kong Detention Centre, one man later died. There were reports of disturbances and ill-treatment in other detention centres. The screening procedure instituted in 1988 to evaluate individual claims for refugee status was found by Amnesty International to be seriously flawed. However the policy of forcible return of those “screened out” under the process was started in December 1989, when the first group of 51 Vietnamese people were returned to Viet Nam.

In July and September 1990, Amnesty International expressed concern about the prosecution under the Summary Offences Ordinance of five pro-democracy activists who had been briefly detained in February 1990 following a week-long sit-in to protest against alleged flaws in the (then) Draft Basic Law. They were accused of having illegally used megaphones to address the public, and of having collected money without permission.

In 1991 Amnesty International called for a review of the detention policy for Vietnamese asylum-seekers, whose numbers continued to rise. The screening process continued to present many flaws, despite improvements introduced in 1990: legal advice and assistance remained inadequate, and the written records of the crucial first screening interview, used as the basis for the decision on the asylum claim, was not read back in Vietnamese to the claimant. Amnesty International has reiterated its concerns over the treatment of the Vietnamese asylum-seekers every year since its 1991 call for review.

Amnesty International renewed its long-standing call on the Hong Kong Government to abolish the death penalty, after the Legislative Council in June 1991 passed a motion urging abolition of the death penalty. Legislation tabled before the Legislative Council in November 1992 to abolish the death penalty was eventually adopted in April 1993.

Uncertainty over the future course of China’s policies towards Hong Kong grew during 1992, in the aftermath of the publication of proposals for political reform, presented by incoming Governor Chris Patten in October 1992. Concern had arisen earlier (March 1992) in Hong Kong over the status of civil liberties in Hong Kong, when the PRC’s Minister of Public Security confirmed press reports that his ministry had collected information about Hong Kong residents, including political activists, suspected of opposing the Chinese Government. The Minister, Tao Siju, reportedly described as “inaccurate” reports that these people would risk arrest after 1997.

In July 1993, the Legislative Council approved without dissent a motion to establish an independent Human Rights Commission - a proposal which the Governor did not approve. In

April 1994, following discussions in Hong Kong with government officials, Legislative Council members, legal scholars, human rights activists and members of the HKSAR Preliminary Working Committee, Amnesty International urged the Hong Kong Government to establish such an independent commission, to ensure that those who complain of human rights violations have access to an effective and affordable procedure to seek remedy, and to develop training for officials on human rights law and education programs. The organization also called for a review of the safeguards for the independence of the Judiciary to be carried out.

In April 1994, the Legislative Council renewed its 1993 call for a human rights commission to be set up. In July 1994 the Hong Kong Government tabled before the Council a number of proposals aimed at improving existing safeguards, but falling short of establishing a commission. The proposals included a widening of the mandate of the Commissioner for Administrative Complaints, increased budgets for human rights education and changes in rules governing the provision of legal aid to citizens who wish to bring a civil suit against the government to seek redress against alleged human rights violations.

In September 1994 the Standing Committee of China's National People's Congress adopted a resolution providing for the dissolution of the Legislative Council, and other elected municipal bodies, at the time of the handover of sovereignty, on the grounds that they had been constituted under rules which were not consistent with the Basic Law. The areas of inconsistency were not described. In subsequent statements, Chinese officials blamed the "need" to dissolve these institution on the "unilateral" character of the political reforms carried out since 1993 in Hong Kong.

In October 1994, Chinese officials were reported as taking the view that China was under no obligation to report to the United Nations Human Rights Committee on the implementation of the ICCPR in Hong Kong. However such reporting is mandatory under the provisions of the ICCPR as applied to Hong Kong. In April 1994, Amnesty International had renewed its call on both the British and Chinese Governments to agree with the Human Rights Committee, and other relevant committee overseeing the implementation of other international instruments in force in Hong Kong, on methods to fulfil international reporting obligations.

In October 1995, Amnesty International submitted to the Human Rights Committee a briefing summarizing its concerns in Hong Kong. These included concerns about the future of the Bill of Rights, which the Preliminary Working Committee had declared in September 1995 to be partly inconsistent with the Basic Law. Amnesty International was also concerned about judicial independence in Hong Kong, following the June 1995 agreement in principle between China and the UK to establish the Court of Final Appeal in Hong Kong on 1 July 1997. Earlier suggestions that the Court would start operating earlier, in order to ease the transition of sovereignty, were abandoned. The number of judges from other common law jurisdictions sitting on the CFA bench was reduced from two to one in the final agreement.

Amnesty International's concerns also covered procedures for complaints against the police by citizens alleging human rights violations. In January 1995, two policemen who had been charged with assault were acquitted at a trial where the judge highlighted the "inefficient" character of the investigation by the Complaints Against the Police Office, into allegations that the policemen had ill-treated a man in custody.

In October 1996 the Human Rights Committee considered the supplementary report on implementation of the ICCPR it had requested in 1995 from the United Kingdom Government. The Committee called on the UK to prepare a further report by May 1997, summarizing changes in human rights safeguards and practices in the final months of the British administration.

In September 1996, five labour activists who in January had carried out an unauthorized demonstration demanding better safety conditions for workers in toy factories set up in China and other countries by Hong Kong companies, were convicted of disturbing the peace and ordered to pay fines. They appealed their convictions, arguing that their activities had been legal under the Bill of Rights

The conditions of detention for some of the Vietnamese asylum-seekers were made more difficult by the withdrawal of some social services. Conditions at Victoria Prison, part of which was used as a holding centre for Vietnamese awaiting imminent return, were reported in September 1996 to have seriously worsened, with severe overcrowding and insufficient hygiene. Also in September, lawyers applied for the judicial review of the legality of the detention of some Vietnamese; legal proceedings were still under way in January 1997. The forcible return of Vietnamese was speeded up towards the end of 1996.