

HONG KONG

Safeguards for Human Rights: Amnesty International's Concerns

Introduction

In October 1995, the United Nations Human Rights Committee will examine the Fourth Periodic Report, presented by the United Kingdom (UK) Government on behalf of the Hong Kong Government, on the implementation in Hong Kong of the International Covenant on Civil and Political Rights (ICCPR). For the first time, two members of the Human Rights Committee travelled to Hong Kong at the invitation of the Hong Kong Government before the Committee examined the report.

There has been a high level of public interest and scrutiny in Hong Kong in relation to the preparation of the report to the Human Rights Committee. The Hong Kong Government sought input from Hong Kong non-governmental organizations when preparing its report. Aspects of the report were also debated by the Hong Kong Legislative Council, and a number of seminar on issues related to the report were held in the last year.

A number of important safeguards for human rights were introduced in Hong Kong since the Human Rights Committee examined the Third periodic Report on Hong Kong in 1990. The Bill of Rights Ordinance was adopted in June 1991, incorporating some provisions of the ICCPR into Hong Kong law. The death penalty was abolished in April 1993 (it had hitherto been applicable to murder and other offences, but had not been used for 27 years). In July 1994 legislative amendments widened the mandate of the Commissioner for Administrative Complaints (COMAC) to enable it to deal with certain complaints of human rights violations. Budgets for human rights education were increased and changes were introduced to rules governing the provision of legal aid to citizens who complain that their rights were violated and wish to bring a civil suit against the government. The Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, ratified by the United Kingdom in 1988, was extended to Hong Kong in 1992. The Convention on the Rights of the Child was extended to Hong Kong in 1995.

A number of domestic laws were introduced or amended in line with international human rights standards. In 1993 the Crimes (Torture) Ordinance brought some provisions of the Convention against Torture into effect in Hong Kong law. Several laws were amended to bring them in line with the provisions of the Bill of Rights Ordinance.

Many of these changes were positive. However close consideration of their contents indicates that these provisions fall short of fully implementing Hong Kong's obligations under international human rights standards. In particular:

- ◆ The Bill of Rights does not provide for recognition of international monitoring procedures which are necessary to ensure that the ICCPR remains in force.
- ◆ The Bill of Rights may not adequately protect against the detention of prisoners of conscience for peaceful political activities. Such detention may occur after 1997 under the Basic Law of the Special Administrative Region of Hong Kong, which will govern Hong Kong after its return under the sovereignty of the People's Republic of China in 1997.
- ◆ The Bill of Rights provides for protection against the deprivation of the right to life, but it does not provide safeguards against the future reintroduction of the death penalty.
- ◆ The Bill of Rights includes reservations which may infringe the internationally-recognized rights of prisoners.
- ◆ The Bill of Rights includes reservations which infringe the internationally-recognized rights of asylum-seekers.
- ◆ The detention of Vietnamese asylum-seekers contravenes the ICCPR and other international human rights standards. The detention is in practice automatic and for an indefinite term. There are no legal provisions for the detention to be subjected to judicial control, or for asylum-seekers to challenge the lawfulness of their detention; the only way to challenge the detention is through an application for judicial review which is not an effective remedy. As a result thousands of asylum-seekers are arbitrarily detained in Hong Kong and are, in many cases, held for years in prison-like conditions.
- ◆ The Bill of Rights may not adequately protect Hong Kong residents in a state of emergency after the Basic Law comes into force in 1997, because of the Basic Law's sweeping provisions in that regard.
- ◆ The widening of the mandate of the Commissioner for Administrative Complaints does not amount to establishing remedies that are effective in practice for all victims of human rights violations in Hong Kong, as set out in the ICCPR.
- ◆ Reservations to the ICCPR made by the United Kingdom Government in respect of Hong Kong limit the protection afforded by the ICCPR in Hong Kong, as do the failure of the UK to ratify and extend to Hong Kong the Optional Protocol to the ICCPR, and the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty.

- ◆The UK Government has also failed so far to extend to Hong Kong the United Nations Convention and Protocol relating to the Status of Refugees and the Convention on the Elimination of All forms of Discrimination against Women.
- ◆The UK Government has also so far failed to obtain agreement with the Government of the People's Republic of China, and with the Human Rights Committee, on the method of reporting to the Committee about implementation of the ICCPR after July 1997, if China has not yet ratified the ICCPR at that date.

The present document contains an overview of Amnesty International's concerns in relation to legislation safeguarding human rights in Hong Kong; the detention of Vietnamese asylum-seekers and the continued implementation of the ICCPR in Hong Kong after 1997.

Safeguards for Human Rights

"What do human rights amount to without suitable machinery and structures to ensure their effectiveness...?"

UN Secretary-General Boutros Boutros-Ghali, June 1993

"[M]uch remains to be done, such as developing a human rights culture in Hong Kong, creating human rights consciousness....The Bill [of Rights] is neither a device to oppose China nor just 'a fake Rolex watch'; on the contrary, its proper role should be to strengthen the foundation of the existing legal system and thereby to reassure ordinary people that their rights will be protected....It is only right to hold that 'only if the Bill and the values it stands for are brought into contact with the lives of ordinary people, and are supported by them will the system survive.'"

Beijing University Professor of Comparative Law Gong Xiangrui, June 1991

"[The Complaints against the Police Office has been] lethargic, inefficient and incompetent... The police reputation has been seriously damaged and the ability of CAPO to act as a rigorous, independent and efficient investigator of complaints against the police called into serious question."

Judge Henry Brazier, Hong Kong, January 1995

The third of the above statements was reportedly made by Judge Henry Brazier, presiding over a trial in January 1995 in which dentist Leung Shu-keung claimed he had been beaten by police officers. The officers were acquitted. The Complaints against the Police Office (CAPO) had received Dr Leung's complaint in April 1993, but took so long to act that the case only reached court in January 1995.

The case of Dr Leung is one of an apparently growing number of complaints of human rights violations allegedly perpetrated by police in Hong Kong. The authorities point out that very few of the thousands of complaints received by CAPO against the police result in successful prosecutions. While this may be in large part due to the professionalism of the Hong Kong Police, it appears also to be related to the ineffectiveness of many CAPO investigations. Amnesty International believes that a growing number of complaints of human rights violations have not been pursued by the victims because of the lack in Hong Kong of an affordable and accessible complaints system.

In 1994, Amnesty made a detailed study of the flaws in the safeguards for human rights in Hong Kong.¹ The organization concluded that Hong Kong lacked a sufficiently accessible, affordable, speedy and effective complaints mechanism, and that as a result, some victims of human rights violations were left without an effective remedy, in contravention of the ICCPR.

The quotations of Dr Boutros Boutros-Ghali and Prof. Gong Xiangrui above emphasize two important obligations of any government in implementing the ICCPR: to ensure that all people in a society understand their rights, and to ensure that they all have access to affordable, effective remedies if their rights are violated. These are obligations which the Hong Kong Government has not yet fully discharged, as explained in Amnesty International's April 1994 report.

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 a **minimum** international treaty obligation - a legal imperative of the present, not an aspirational goal for the future. The UK and Hong Kong governments also have a duty to set up adequate human rights awareness, education and training programs in Hong Kong.

Until such steps are taken, the UK and Hong Kong governments will not be fulfilling those international obligations, nor will the Hong Kong Bill of Rights (which incorporates most of the ICCPR) be properly implemented. In its April 1994 report, Amnesty International called on the Government of Hong Kong (or, in respect of recommendations 5 the Government of the UK) to take the following steps, without further delay, toward effective implementation of the ICCPR:

1. The government should establish an independent human rights commission, with a mandate to develop:

¹ 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 in April 1994.

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

The commission should reflect the principles adopted for such bodies by the United Nations.

2. The agency and staff determining which cases qualify for legal aid should be made independent of the government, to ensure that their decision-making is impartial and seen to be impartial.

3. The government should 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 and to ensure recruitment of judges with the highest standards of competence, integrity and independence. This review should examine 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 measures which may be needed for fuller integration.

4. The government should ensure that people who bring a Bill of Rights court case against the government should not have to pay the government's costs if they lose the case (assuming the court does not deem the case to be abusive or frivolous).

5. The UK should extend to Hong Kong the following international human rights conventions: UN Convention and Protocol relating to the Status of Refugees and the Convention on the Elimination of All Forms of Discrimination against Women. The UK should ratify and extend to Hong Kong the Optional Protocol to the ICCPR, and the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty. The UK should declare under Article 22 of the UN Convention against Torture (with extension to Hong Kong) that it recognizes the competence of the Committee against Torture to consider individual complaints of violations. Reservations made to fundamental rights of individuals in the ICCPR by the UK in respect of Hong Kong should be withdrawn.

Safeguards for asylum-seekers

As at early 1995, there over 22,000 Vietnamese asylum-seekers remained in detention camps. Almost all have been denied refugee status and face forcible return to Viet Nam if

they do not opt for "voluntary repatriation". Most of them have spent several years in detention without effective access to judicial review of their detention.

The majority of the Vietnamese currently detained have been "screened out" in the refugee determination procedure set up by the government, and thus are in the government's view "illegal immigrants" and not refugees or asylum-seekers. However, all of them were seeking asylum and many of those "screened out" continue to claim a fear of returning to Viet Nam.

The Hong Kong authorities' policy of detaining Vietnamese asylum-seekers is in contravention of a number of international human rights standards. The reasons for detaining the asylum-seekers are not recognized as legitimate by international standards: these allow only for the detention of asylum-seekers charged with a recognizably criminal offence, or if the authorities can demonstrate in each individual case that the detention is necessary, that it is on grounds prescribed by law and for one of the specified reasons which international standards recognize may be legitimate grounds for detaining asylum-seekers. Moreover, Hong Kong law makes no provision for the detention of the Vietnamese to be subject to judicial control, nor does it provide for a procedure whereby asylum-seekers can challenge the lawfulness of their detention other than through an application for judicial review, which is not an effective remedy.

The judicial review is a long, drawn-out and expensive process. It is not carried out as of right but requires leave from the court to proceed. There is also a time limit for judicial review applications, which requires that any challenge to the detention be made within three months of the decision to detain (ie, three months from the arrival of the asylum-seeker in Hong Kong). In practice, it is impossible for asylum-seekers to challenge the legality of their detention in Hong Kong.²

² See a detailed study of the procedure for detaining Vietnamese asylum-seekers in *Hong Kong: Arbitrary Detention of Vietnamese Asylum-seekers*, AI Index ASA19/04/94, issued in April 1994.

Reporting to the Human Rights Committee after 1997

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 1984 Sino-British Joint Declaration on the Future of Hong Kong and the Basic Law of the Hong Kong Special Administrative Region (which will come into force in Hong Kong on 1 July 1997) 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 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 two 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.