



HONG KONG BAR ASSOCIATION

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2nd February 2013

Ms. Kate Fox Principi
Secretary of the Human Rights Committee
Human Rights Committee Secretariat
8 – 14 Avenue de la Paix
CH 1211 Geneva 10
Switzerland.

Attn: Kate Fox / Sindu Thodiyil

Dear *Kate*,

The Third Report of the Hong Kong Special Administrative Region of the People's Republic of China in the light of the International Covenant on Civil and Political Rights

Please find enclosed the Submission of the Hong Kong Bar Association dated 2nd February 2013 to the United Nations Human Rights Committee for the consideration of the Human Rights Committee Members during the 107th Session to be held in March 2013 in Geneva. The Submission was endorsed at the Bar Council Meeting held on 24th January 2013.

I enclose another **twenty sets** of hardcopies of the Submission for distribution to the Human Rights Committee members.

Yours sincerely,

Paul Shieh SC
Chairman

香港大律師公會

香港金鐘道三十八號高等法院低層二樓

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The Third Report of the Hong Kong Special Administrative Region of the
People's Republic of China in the light of
the International Covenant on Civil and Political Rights

**Hong Kong Bar Association's Submission to
the United Nations Human Rights Committee
(At the 107th Session, 11-28 March 2013, Geneva)**

Part I: General Observations

1. The Hong Kong Bar Association ("HKBA") observes that most of the concerns that the United Nations Human Rights Committee ("the Committee") had raised in its Concluding Observations of 21 April 2006 (CCPR/C/HKG/CO/2) have not been addressed or adequately addressed. Many of those concerns related to earlier observations of the Committee made in 1999 (CCPR/C/79/Add.117).

Part II: Constitutional and legal framework for implementation of ICCPR and conformity of laws with it (ICCPR Art 2)

2. The HKBA considers that the powers reserved to the Central Authorities under the Basic Law of the Hong Kong Special Administrative Region ("HKSAR"), including the power of the Standing Committee of the National People's Congress ("NPCSC") to interpret the Basic Law and the manner of the exercise of those powers have continued to be a matter of serious concern over the maintenance of the Rule of Law and the Independence of the Judiciary 15 years after the establishment of the HKSAR.
3. There have been four occasions since 1997 in which the NPCSC had adopted an interpretation of the Basic Law of the HKSAR. Only one of those four occasions involved a request for interpretation by the Court of Final Appeal pursuant to the express framework of the Basic Law before finally adjudicating a court case. The other three demonstrated that an NPCSC interpretation may be sought and given in the absence of a court case, in the middle of a court case, and subsequent to the

final adjudication of a court case, and with or without a request from the Chief Executive of the HKSAR. The integrity of the established legal system of the HKSAR is therefore subject to an uncertain and dominant source of socialist law-making in respect of which the residents of the HKSAR have little say in shaping its content.

4. The HKBA urges the Committee to express to both the Central People's Government ("CPG") and the HKSAR Government its most serious concern about the state of the Rule of Law in Hong Kong, the commitment of both Governments to honour the guarantee in the Basic Law of a separate legal system for the HKSAR, and the commitment of both Governments to maintain the independence of the judiciary and power of final adjudication.
5. The HKBA urges the Committee to reiterate to the HKSAR Government that the ICCPR prescribes only minimum standards, bearing in mind that while Article 39 of the Basic Law of the HKSAR seeks to secure the continued application of the articles of the ICCPR as applied to Hong Kong, other articles of Chapter 3 of the Basic Law seek to secure not only fundamental rights that overlap with the ICCPR rights but also a potentially broader extent of protection of those rights and other more specific rights.
6. Although the Interception of Communications and Surveillance Ordinance (Chapter 589, Laws of Hong Kong) was enacted in 2006 to regulate the interception of telecommunications and postal packages and the use of means of covert surveillance by law enforcement agencies, the reports of the Commissioner appointed under the Ordinance indicate that there have continued to be occasions in which a law enforcement agency had intercepted or covertly recorded conversations between a suspect or defendant and his lawyer in reasonable anticipation that legal advice would be given during that meeting. However, the Commissioner was handicapped by the Ordinance to investigate the matter further since he was not authorized to listen to the intercepts. The HKBA urges the Committee to express its concern that the law enforcement agencies in Hong Kong should fully respect the fundamental rights to confidential legal advice and to legal representation.

7. The HKBA urges the Committee to continue to express its concern that the HKSAR Government had not to date even proposed to establish a statutory human rights commission with investigatory powers. The HKBA also urges the Committee to express its concern that the Equal Opportunities Commission, which implements anti-discrimination legislation on sex, race, disability and family status, must be allowed to maintain its independence without undue interference from the HKSAR Government.
8. The HKBA urges the Committee to maintain its concern that there is no general legislation in the HKSAR providing effective protection against violations of the rights enshrined under the ICCPR as applied to the HKSAR by non-government actors.
9. The HKBA urges the Committee to maintain its concern that no legislation in detailed terms is in place to cover emergencies and that Article 18 of the Basic Law of the HKSAR on that subject remains in apparent conflict with Article 4 of the ICCPR.

Part III: Principles of gender equality and non-discrimination (ICCPR Arts 3, 26)

10. The HKBA observes that the Race Discrimination Ordinance (Cap 602) has been an inadequate measure for the purpose of outlawing race discrimination in Hong Kong. This is because: Firstly, section 8(2) and (3) of the Ordinance states that an act done on the ground of “the nationality, citizenship or resident status of the person under the law of any country or place concerning nationality, citizenship, resident status or naturalization of or in that country or place” does not constitute an act done on the ground of the race, colour, descent or national or ethnic origin of a person under Ordinance; and Secondly, sections 54, 55 and 56 of the Ordinance exempt laws relating to nationality, citizenship, resident status or naturalization, immigration as well as acts done under the authority of any statute from the Ordinance. The HKBA urges the Committee to question the HKSAR

Government on this matter and call for legislative amendments to remove these exclusions and/or exemptions.

11. The HKBA observes that notwithstanding a number of successful legal challenges on the ground of discrimination based on sexual orientation and the expression of opinion by the Court of Appeal in a case concerning the right to marriage of transgender persons of the hope that the case “would act as a catalyst for the Government to conduct public consultation on gender identity, sexual orientation and the specific problems faced by transsexuals, including the issue of their right to marry”, the HKSAR Government has not even countenanced public consultation on legislative protection for members of the LGBT community from discrimination based on sexual discrimination or gender identity. The Bar urges the Committee maintain its concerns on this matter.

Part IV: Freedom from torture and cruel, inhuman or degrading treatment or punishment; right to be free of arbitrary arrest and detention; security of the person and protection from arbitrary arrest; treatment of prisoners and other detainees (ICCPR 7, 9, 10)

12. There is concern about the living conditions of asylum seekers in Hong Kong. Asylum seekers are not permitted to work and the process of examination of claims takes many months, and even years. The HKBA urges the Committee to express its concern that the policies of the HKSAR Government may expose asylum seekers to degrading treatment.
13. The Immigration Ordinance (Cap 115) was amended in 2012 to introduce a statutory scheme for screening claimants of non-refoulement protection under Article 3 of the Convention Against Torture and Cruel Inhuman or Degrading Treatment or Punishment. This statutory scheme provides for a procedure with strict timetabling towards determination of the claim for protection. Further there are particularly two provisions of concern. Section 37ZC makes provision for medical examination to be conducted by a medical practitioner as arranged by an immigration officer, the Government decision-maker, and the requirement that the claimant must disclose the medical report of the examination so arranged. Section

37ZC thus denies the claimant the opportunity for presenting his or her own medical expert evidence on the occurrence of past torture. Rather the medical investigation remains on the side of the Government. Further, section 37ZD, whereby an immigration officer is permitted to take account of certain behaviour (such as failure to make a claim at certain situations, and failure without reasonable excuse to make full disclosure of material facts in support of the torture claim) of the claimant for the purpose of damaging the claimant's credibility, does not in the opinion of the HKBA, promote fairness in the determination of claims for non-refoulement protection. The HKBA urges the Committee to express its concern over this statutory scheme.

14. The HKBA urges the Committee to question the HKSAR Government whether it accepts that in the light of the Court of Final Appeal's judgment in Ubamaka v Secretary for Security & Anor (FACV 15/2011, 21 December 2012), the HKSAR Government is obliged to protect against non-refoulement a person who can establish the risk that he or she would be subjected to cruel, inhuman or degrading treatment or punishment upon return, such risk involving the violation of a non-derogable right under the ICCPR.

15. The HKBA urges the Committee to question the CPG and the HKSAR Government closely of cases of rendition of persons from Hong Kong to Mainland China or a foreign country, where the person(s) concerned faced torture or other cruel, inhuman or degrading treatment or punishment or were likely to be punished for their political views. This request is made in the light of the case of Sami al-Saadi who was forced to board a plane in Hong Kong along with his wife and children bound for Libya in 2004. The United Kingdom Government which took part in the related operation agreed to settle Mr al-Saadi's claim for compensation in December 2012.

16. The conditions of detention in police cells are not conducive to long periods of detention. Yet there have been cases persons being held in police cells for days and even weeks. The HKBA urges the Committee to question the HKSAR Government on this matter and to express its concern that such conditions should be improved.

Part V: Right to privacy, right to freedom of thought, conscience and religion; right to freedom of opinion and expression, peaceful assembly and association (ICCPR Arts 17, 18, 19, 21 and 22)

17. The HKBA observes that the Public Order Ordinance (Cap 245) remains capable to be applied to restrict unduly the enjoyment of the rights guaranteed in Article 21 of the ICCPR. The HKBA urges the Committee to express the view that “national security” should be deleted from the provisions of the Ordinance setting out the grounds for refusing permission to hold public meetings and public processions.

18. The HKBA urges the Committee to question the HKSAR Government over the justifications for a separate licensing system of incidents of a public meeting or public procession, such as dancing and display or exhibition of objects, as “a place of public entertainment”, on top of the “no objection” system for the holding that public meeting or public procession.

19. The HKBA also urges the Committee to continue to express its concern that the Societies Ordinance (Cap 151) remains a threat to the full enjoyment of rights under Article 22 of the ICCPR and that “national security” should be deleted from the provisions of the Ordinance regarding the criteria for refusal of registration, cancellation of registration or prohibition of operation of societies.

20. The HKBA observes that the HKSAR Government has not conducted a review of the Official Secrets Ordinance (Cap 521) to bring it fully in line with Article 19 of the ICCPR. The HKBA urges the Committee to express a similar view.

21. The HKBA urges the Committee to question the HKSAR Government the justifications for sanctioning the installation and use of CCTV cameras in public streets and places, including rooftops. The HKBA also urges the Committee to ask for the guidelines of the HKSAR Governments on the use, retention and destruction of captured images.
22. The HKBA urges the Committee to question the HKSAR Government on the considerations of the Hong Kong Police Force for sanctioning the use of monitoring cameras as part of the equipment of police officers on patrol, including police vehicles installed with multiple cameras. The HKBA also urges the Committee to ask for the guidelines of the HKSAR Governments on the use, retention and destruction of captured images.
23. The HKBA urges the Committee to question the HKSAR Governments on occurrences of incidents of assault, damaging of property and vandalism against politicians, NGOs and independent media groups, their offices, and their banners and other promotional materials at street level. The HKBA also urges the Committee to question the HKSAR Government on whether these incidents have been investigated by the police, and if so, what the rate of detection has been.

Part VI: Expulsion of aliens; rights to enter one's own country; protection of the family and children (ICCPR Arts 12, 13, 23, 24)

24. The People's Republic of China adopted the reservation entered by the United Kingdom in 1976 for Hong Kong over immigration legislation governing the entry, stay and departure of persons not having the right to reside in Hong Kong and the application thereof. The Court of Final Appeal in Hong Kong recently considered the terms and effect of the said immigration reservation, as well as its domestic adoption in section 11 of the Hong Kong Bill of Rights Ordinance (Cap 383) in *Ubamaka* (above).

25. In *Ubamaka* (above), the Court of Final Appeal construed section 11 of the Hong Kong Bill of Rights Ordinance to “exclude the application of HKBORO and BOR in relation to the exercise of powers and the enforcement of duties under immigration legislation regarding persons not having the right to enter and remain in Hong Kong except insofar as the non-derogable and absolute rights protected by BOR Art 3 [prohibition of torture] are engaged”.
26. The judgment of the Court of Final Appeal in *Ubamaka* (above) discussed the terms and effect of the said immigration reservation entered into by the United Kingdom in 1976 when the ICCPR was extended by the United Kingdom to Hong Kong. The Court of Final Appeal interpreted the said immigration reservation as not founded on and limited to the United Kingdom’s immigration policy in 1976 aiming at preventing influxes of immigrants having a connection to the United Kingdom and Colonies into the United Kingdom metropolitan territories and other dependent territories, including Hong Kong, but that the application of the ICCPR in Hong Kong, which included the said immigration reservation, had evolved in accordance with local circumstances. The HKBA urges the Committee to consider this holding as a matter of public international law and in the context of the topic of reservations to human rights treaties. In particular, as to whether the holding ignores the nature and function of a reservation to a multilateral international treaty, which is to set out once and for all the position taken by a State Party at the point of entry as to the rights and obligations in the treaty, and providing an opportunity at that point for other State Parties to object. The HKBA also urges the Committee to question the HKSAR Government on this matter.
27. The *Ubamaka* judgment also passed on the question of whether the said immigration reservation was incompatible with the object and purpose of the ICCPR. The HKBA urges the Committee to consider this question and make its views known.

28. The *Ubamaka* ruling suggests that HKSAR permanent resident family members of a person who is subject to immigration control (including his or her child) may be prevented by section 11 of the Hong Kong Bill of Rights Ordinance from challenging the decision of the immigration official over that person on the ground that it will split the family and/or go against the best interests of the child. The HKBA urges the Committee to question the HKSAR Government on whether such a reading of the ruling and of the reservation is contrary to the objects and purposes of the ICCPR and express its concern over the matter.

Part VII: Right to take part in the conduct of public affairs; right to vote (ICCPR Art 25)

29. The current electoral system for the Chief Executive of the HKSAR returns a candidate for appointment by the CPG in an election by a committee of 1,200 persons, which is itself constituted by representatives of different sectors of the community returned by various routes of unequal weighting. The HKBA urges the Committee to question closely the CPG and the HKSAR government closely on the justifications for the current electoral method.

30. Both the Central Authorities and the HKSAR Government have indicated that the electoral systems for the return of a candidate of the Chief Executive of the HKSAR for appointment and for the formation of the Legislative Council of the HKSAR may each be reformed to a system based on universal suffrage in 2017 and 2020 respectively. Consultation is expected in the coming years on how universal suffrage is to be implemented. The HKBA urges the Committee to question closely the CPG and the HKSAR Governments on their current understanding of “genuine periodic elections” and of “universal and equal suffrage” in Article 25 of the ICCPR.

31. A reservation was entered into by the United Kingdom in 1976 when the ICCPR was extended to Hong Kong so as to reserve against Article 25(b) of the ICCPR, “the right not to apply article 25(b) in so far as it may require the establishment of an elected Executive or Legislative Council in Hong Kong.” The CPG and the HKSAR Government have continued to rely on this reservation, notwithstanding that the Legislative Council had since 1995 been fully elected, to deny the relevance of Article 25(b) of the ICCPR to the development of the electoral system of the Legislative Council of the HKSAR. The HKBA expresses concern about the two Governments’ continual reliance on the reservation in light of the fact that the Legislative Council is now fully elected and the implementation of universal suffrage in Hong Kong in the near future. The HKBA urges the Committee to question the CPG and the HKSAR government closely on their understanding of the reservation to Article 25(b), its continual validity in light of the fact that the Legislative Council is fully elected, and whether they had or would embark on a review of the continued maintenance of the reservation with a view for its withdrawal.
32. After the District Councils elections in November 2011, it was discovered and widely reported in the media that voters registrations were made using false addresses, entitling people to vote in constituencies they were not residents of. A number of people were prosecuted for “corrupt conduct with respect to voting at elections” and were sentenced to terms of imprisonment. The HKSAR Government had proposed various measures to improve the election system, including requiring newly registered voters to provide proof of residential address and criminalising the failure to register new residential address within a prescribed period. However, no concrete measures have been taken by the HKSAR Government so far to deal with the problem of electoral malpractices. The HKBA urges the Committee to question the HKSAR government on the timetable for introducing measures to counter electoral malpractices before the next election in 2015.

33. The Legislative Council (Amendment) Ordinance 2012 was enacted to prohibit a legislator who resigns from participating in a by-election held within 6 months of his or her resignation. The HKBA earlier issued statement in response to the legislative bill on the consistency of the bill with Articles 25 and 26 of the ICCPR. The justification of the HKSAR Government is that it is an abuse and a waste of public resources for a member of the Legislative Council to resign in order to seek a by-election and then re-election. The HKBA doubts that such a course of action constitutes an abuse, as well as the effectiveness of the prohibition. Additionally, the prohibition does not distinguish between different causes of resignation. The HKBA urges the Committee to express concern as to whether the prohibition imposes an unreasonable restriction of the right guaranteed in Article 25(a), including the right to elect and the free choice of representatives.

HONG KONG BAR ASSOCIATION

Dated 2nd February 2013.

