

**HONG KONG
THE COUNTDOWN CONTINUES**

**REPORT OF A VISIT TO HONG KONG
BY THE PRESIDENT OF THE
INTERNATIONAL COMMISSION OF JURISTS
THE HONOURABLE JUSTICE
MICHAEL KIRBY AC CMG**

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International Commission
of Jurists (ICJ)
Geneva, Switzerland

PIL-SUB-5*HON

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PIL-SUB-5*HON

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Foreword

The questions posed in the preface of the 1992 International Commission of Jurists' (ICJ) report of a mission to Hong Kong, *Countdown to 1997*, issued in 1992, remain unanswered even though the future has almost been reached.

The future is 1 July 1997. On that date, sovereignty over Hong Kong will be transferred from the United Kingdom to the Peoples' Republic of China.

The ICJ has continuously been concerned about the maintenance and protection of the Rule of Law, respect for human rights and the independence of the judiciary, after the territory reverts to Chinese control. These concerns were initially broached in *Countdown to 1997*.

At that time, in 1992, the two main questions were: will the Government of the Peoples' Republic of China allow Hong Kong the high degree of autonomy which it has promised? And will the Chinese government allow the people of Hong Kong to continue to benefit from and exercise the universal rights and freedoms which it has so far denied to its own citizens?

The answers to these questions remain, so far, from satisfactory.

As part of an ongoing follow-up, the President of the ICJ, Justice Michael D. Kirby AC CMG, visited the British territory in October 1996. He met with representatives of the Territory's government, the legal profession and members of the Legislative Council and the Executive Council.

This follow-up report of Justice Kirby's visit provides a disturbing account of the uncertainty that remains just a few months away from the transition of sovereignty from the United Kingdom to China.

It is now increasingly evident that strong mobilisation and vigilance will be required from international human rights bodies and the international community to ensure that for the six million inhabitants of Hong Kong, the territory can be kept safe for democracy, the Rule of Law and human rights.

The ICJ, for its part, has committed itself to endeavour to ensure that this transition will not be to the detriments of the people of Hong Kong.

Adama Dieng
Secretary-General

Hong Kong - The Countdown Continues

Background

1. On 1 July 1997, sovereignty over Hong Kong will pass from the United Kingdom of Great Britain and Northern Ireland (United Kingdom) to the Peoples' Republic of China (China). The transfer is now little more than half a year away. Coinciding with a consideration by the Human Rights Committee of the United Nations of the post-transfer application to Hong Kong of the International Covenant on Civil and Political Rights, which presently extends to Hong Kong, the President of the International Commission of Jurists (ICJ), Justice Michael Kirby of Australia (the ICJ President) conducted a one-day visit to Hong Kong on 25 October 1996. The visit was designed to follow up the report of a mission of the ICJ conducted in April 1991. The report of that mission: *Countdown to 1997*¹ outlined the concerns of the ICJ, expressed within its competence established by its statute. Those concerns relate to the defence of the Rule of Law; the protection of fundamental human rights; and the assurance of the independence of the legal profession and of the judiciary.

2. The report of the ICJ Mission was critical of the failure of the United Kingdom Government to ensure that the people of Hong Kong enjoyed the exercise of the right to self-determination which, under international law, belongs to peoples and not to governments or regimes. Specifically, it is a right to be enjoyed in the context of the conclusion of colonial rule. To this time, no opportunity has been afforded to the people of Hong Kong to exercise their right of self-determination. No act of self-determination will take place before the change of sovereignty in Hong Kong. This is so, despite the fact that, for 150 years, Hong Kong has been separately governed by the United Kingdom as a colony. Part, at least, of the territory (including the principal island) was ceded by China to the United Kingdom. The ICJ Mission report was also critical of the Joint Declaration initialed in Beijing on 26 September 1984, by representatives of the British and Chinese Governments (the Joint Declaration) and of the Basic Law which was published in April 1988, and adopted in its final form on 4 April 1990, by the National Peoples Congress of the Peoples' Republic of China (the Basic Law). The report concluded that the Basic Law represented, in many respects, an evasion by China of the terms which it had agreed with the United Kingdom would apply to Hong Kong after the change of sovereignty. The United Kingdom was criticised for having failed, before the termination of colonial rule, to consult the people of Hong Kong before entering negotiations which led to the Joint Declaration.² Since that report was published, the present Governor of Hong Kong (Right Hon Christopher

¹ International Commission of Jurists, Geneva, 1992.

² See now United Nations, Committee on the Elimination of Racial Discrimination, 48th Session, 26 February-15 March 1996. General Recommendation XXI (48) adopted at 1147th meeting, 8 March 1996.

Patten) has initiated moves which have increased somewhat the democratic character of the Legislative Council. He is to be commended for these belated efforts, although the Legislative Council still falls short of the requirements of international human rights law.³

3. The purpose of the ICJ's President's visit to Hong Kong was not to re-examine the matters of large significance dealt with in the ICJ Mission report. Instead, it was to have consultations with representatives of the Hong Kong Government, of the legal profession in Hong Kong and of members of the Legislative Council and Executive Council. The ICJ expresses its appreciation to the Governor of Hong Kong (the Rt Hon Christopher Patten) and his officials for organising the meetings requested by the President. He expresses thanks to the persons who made time available for consultations. The Governor was in the United Kingdom at the time of the ICJ President's visit.

Issues of Special Concern

4. As a result of a consideration of matters raised with the ICJ prior to the President's visit, the following are the items which he explored during the visit:

The Legislature

1. Protecting, prior to 30 June 1997, the legitimacy and integrity of the elected Legislative Council, as provided by the Letters Patent to the Governor from the Crown.
2. Preventing the selection in Hong Kong of a purported alternative "Legislative Council," by a process of choice conducted by 400 selected persons not elected by the people of Hong Kong.
3. Management of the transition from the elected Legislative Council to the Legislative Council which will have authority after 1 July 1997.

Law and Courts

4. Steps taken to establish the Final Court of Appeal which is to replace the Judicial Committee of the Privy Council after the transfer of sovereignty to China.
5. Position of the present judges in the period of transition.
6. The need to provide for the modernisation and definition of security offences such as treason, sedition and subversion in order to

³ Cf United Nations, Human Rights Committee, *Draft Annual Report of the Human Rights Committee to the General Assembly under Article 6 of the Optional Protocol*. (Doc CCPR/G/57/CRP.2/Add.2, 17 July 1996):

bring the technical definitions of those offences into line with international human rights norms and with current practice under which they are rarely, if ever, prosecuted in Hong Kong.

Human Rights

7. Protection of dissidents currently believed to be resident in Hong Kong (e.g. Wang Xihai and Liu Ghung).
8. Protection of the right of free expression of the people of Hong Kong in the light of the statement by Qian Qichen (Vice Premier and Foreign Minister of China) on 17 October 1996. foreshadowing limitations on free expression after July 1997.
9. Preservation of the right of peaceful assembly, including the annual procession on 4 June in remembrance of the killings in Tiananmen Square which have been commemorated annually in Hong Kong on the anniversary of those killings.

United Kingdom Action

10. Clarification of the action which the United Kingdom intends to take after July 1997, in response to breaches by China of the terms of the Joint Declaration and of what, specifically, Mr. Major meant by his assurance that the people of Hong Kong would not thereafter "walk alone"?
11. Clarification of the steps that will be taken after July 1997 to ensure that reports continue to be made to the UN Human Rights Committee on Hong Kong's compliance with the International Covenant on Civil and Political Rights?
12. Clarification of the steps which the United Kingdom intends to take to perform its functions as a co-signatory of the Joint Declaration and former responsible power to ensure that the Government of China honours the promises made in the Joint Declaration and specifically those made in pars 3(5) and 3(12), namely:

"3(5) The current social and economic systems in Hong Kong will remain unchanged and so will the life-style. Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law in the Hong Kong Special Administrative Region. Private property, ownership of enterprises, legitimate rights of inheritance and foreign investments will be protected by law and

3(12) The above stated basic policies of the Peoples' Republic of China regarding Hong Kong and the elaboration of them in Annex I to this Joint Declaration will be stipulated in a Basic Law of the Hong Kong

Special Administrative Region of the Peoples' Republic of China, by the National Peoples' Congress of the Peoples' Republic of China and they will remain unchanged for 50 years."

5. The foregoing topics were raised, as appropriate, with each of the persons interviewed by the President.

Elected Legislature

6. The position of the legislature in Hong Kong is of the most pressing concern. It is well summarised in a report prepared for the United Nations Human Rights Committee by the ICJ Section in Hong Kong. The Letters Patent to the Governor provide for a Legislative Council consisting of 60 members. Of those members, 20 are to be returned in respect of geographical constituencies; 30 in respect of functional constituencies; and 10 by an election committee. There are various defects in these arrangements when measured against international human rights norms relevant to the right of the individual to participate in public life. In particular, the election of members through functional constituencies representing particular employment groups, is a clear breach of the requirement of Article 25 of the International Covenant on Civil and Political Rights which provides:

"25. Every citizen shall have the right and opportunity, without any distinctions mentioned in Article 2 and without unreasonable restrictions which provides relevantly:

(a) to take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) to vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;..."

7. The Joint Declaration states that "the legislature of the Hong Kong SAR shall be constituted by elections". This provision is not in itself particularly ambiguous. Against the background of international law and in the context of an international agreement designed to uphold Hong Kong's high levels of individual freedom, the phrase means elections in which permanent residents of Hong Kong took part directly. The promise of the continuation of the rights and lifestyle presently enjoyed by the people of Hong Kong also supports the notion that the words "constituted by elections" were intended to connote a high level of democratic participation, without which those rights and privileges would be at risk. In the past, those rights and privileges have been protected, in part, by the ultimate accountability of the Government of Hong Kong to a fully elected legislature in the United Kingdom. The replacement of the elected Legislative Council by a body chosen by 400 selected persons is not within the language either of the Joint Declaration or of the Basic Law. The validity of the constitution of

such a "Legislative Council" is liable to be challenged in the courts of Hong Kong. However, as the meaning of the phrase "constituted by elections" has been raised by some observers, it is trite to say that regard may be had, in deriving the meaning, to the origins of the phrase and to other relevant facts. The insertion of the phrase "constituted by elections" to describe the constitution of the future Hong Kong legislature was one of the last points to which the United Kingdom and China agreed in the drafting of the Joint Declaration.⁴ What then followed is described:

"The British accepted that 'elections' might include indirect elections and elections through a restricted franchise. In the Chinese political lexicon, 'election' could have meant almost anything; though the Chinese had, in this instance, attempted to make their intentions more transparent by proposing 'election and selection' as the phrase to be used in the Joint Declaration text, before agreeing to the British proposal for 'election' alone".⁵

8. A further relevant factor is to be found in the provision, in the case of Macao, where the phrase agreed between Portugal and China was only that "the majority of [the] members shall be elected".⁶

9. Articles 68 and 69 of the Basic Law provide:

"68. The Legislative Council of the Hong Kong SAR shall be constituted by elections.

69. The term of office of the Legislative Council of the Hong Kong SAR shall be 4 years, except the first term which shall be 2 years."

10. Annex 2 to the Basic Law describes the method for the formation of the Legislative Council. It states that, in each term, the Council shall be composed of 60 elected members. It states that, in its first term, the Council shall be formed in accordance with the Decision of the National Peoples' Congress of 4 April 1990, appended to the annex. That decision provides, *inter alia* that:

"(i) In 1996 the NPC shall establish a Preparatory Committee composed of both Chinese and Hong Kong members (the latter constituting not less than 50% of the membership) which shall prescribe the specific method for forming the first Legislative Council in accordance with that Decision.

⁴ R Cottrell, *The End of Hong Kong - The Secret Diplomacy of Imperial Retreat*, Murray, 1993.

⁵ *Ibid.*

⁶ Yash Ghai, "Hong Kong and Macao in Transition (I): Debating Democracy" (1995) 2 *Democratisation*, No. 3 at 270.

(ii) The first Legislative Council shall be comprised of 60 members, with 20 members returned by geographical constituencies through direct election, 10 members returned by an Election Committee, and 30 members returned by functional constituencies.

(iii) If the composition of the first Legislative Council before the establishment of the Hong Kong SAR is in conformity with the relevant provisions of that Decision and the Basic Law, those of its members who uphold the Basic Law and pledge allegiance to the Hong Kong SAR, and who meet the requirements set forth in the Basic Law may, upon confirmation by the Preparatory Committee, become members of the first Legislative Council.

(iv) The term of office of members of the first Legislative Council shall be 2 years."

11. By an evolutionary process, beginning in 1985, the United Kingdom Government moved towards increasing the electoral participation in the "functional constituencies" which had previously represented, substantially, small and elitist organisations. In 1991, the concept of "geographical constituencies" was introduced. The Democratic Party secured the largest number of seats. Many of its members had taken part in public demonstrations in Hong Kong in 1989 in support of the student protesters then demonstrating in Tiananmen Square. The Legislative Council elected on 17 September 1995, was elected to hold office for a four year term expiring in 1999.

12. The Chinese Government opposed the electoral reforms introduced by the Hong Kong Government designed to ensure increased popular participation in the election of the Legislative Council. Nevertheless, the Electoral Reform Bill was passed by the Legislative Council in July 1994. The result was that the Standing Committee of the National Peoples' Congress thereafter opposed the "through train" option by which the last Legislative Council, established under the Letters Patent, would have constituted the first Legislative Council of the Hong Kong SAR. In a nutshell, China was concerned about the heightened popular participation in the Legislative Council and the election to it of strong and vocal proponents of the Rule of Law, human rights and the independence of the judiciary and of the legal profession. Untroubled by a tradition, or the reality and legal assurance, of these elements of modern government in China itself, China abandoned the "through train" aspiration. Instead it announced that there would be established a provisional legislature whose members would be "elected" by a 400 member Selection Committee to be appointed by the Preparatory Committee. The Preparatory Committee decided on 6 October 1996, to elect the provisional body in mid-December 1996. It has asked the Government of Hong Kong to provide funding. The establishment of an appointed legislature is a clear violation of the Joint Declaration which clearly contemplated that the Legislative Council would serve its full elected term.

13. During the course of his visit, the ICJ President expressed concern at the suggested illegality of the constitution of an alternative Legislative Council for Hong Kong. He expressed the view that this would be in clear breach of the Basic Law which contemplates that there is but one Legislative Council in Hong Kong. He expressed the view that any attempt in Hong Kong to establish a parallel, or alternative, "Legislative Council", including by the purported "election" of an alternative "Legislative Council", would probably be unlawful and almost certainly attract challenge in the courts of Hong Kong. The view was expressed to the ICJ President that any such alternative "Legislative Council" was likely to be "elected" (more accurately selected) outside Hong Kong. Any such body would not purport to exercise the powers of the Legislative Council in Hong Kong prior to 1 July 1997. In defence of the establishment of a procedure for the election/selection of a "Legislative Council", it was suggested that there would be an immediate need for a Legislative Council after 1 July 1997, so that responsibility and necessity required that China should put steps in train to provide for one prior to that date.

14. The clear implication of the Basic Law was that the "through train" procedure should be adopted. China is in breach of that implication. There is no foundation either in the Joint Declaration or the Basic Law for the procedure which China has now adopted. Its excuses for doing so are completely unconvincing. This is so given that, even after the electoral reform of July 1994, the Hong Kong Legislative Council fell far short of a modern democratically elected legislature conforming to the International Covenant on Civil and Political Rights. China's refusal to accept the Legislative Council, elected even in its present form, is in clear breach of its accepted obligation and of international human rights law. The choice of an alternative "Legislative Council" by 400 selected persons cannot amount to a Legislative Council "constituted by elections". It is in contravention of that undertaking in the Joint Declaration and of the requirement in Article 68 of the Basic Law. It is a serious breach of faith with the commitment given by China in terms of the Joint Declaration. The United Kingdom and the international community should say so in plain terms.

Law and Courts

15. The ICJ President was assured that those judges presently serving in Hong Kong, who were prepared to continue in office after 1 July 1997, would remain in office. It was probable that new oaths would be administered, given that at present the judges of Hong Kong are subject to the oath of allegiance to the Queen which they would have taken on entering into office. There is nothing unusual in this proposed requirement. It is usual, for example, upon the replacement of the Queen, as Head of State, by a republican constitution for the judges to be re-sworn. However, the form of the new judicial oath should be settled and known in advance so that those who are expected to accept its obligations are aware of their proposed new commitment. Given the continuing involvement of judges of several nationalities, it would be appropriate to confine the form of oath to one to

uphold the laws of the Hong Kong SAR "without fear or favour, affection or ill will". It would also be highly desirable that laws be enacted to protect and defend the independence of the legal profession in Hong Kong. Until now this has been assured by history, convention and the independent status of the judiciary.

16. The Chief Secretary assured the ICJ President that the Hong Kong Government understood the importance of defining, in terms conforming to current practice, public order and security offences such as treason, sedition, subversion etc. Discussions were being had to endeavour to achieve this re-definition by agreement with China if possible. Whilst this discussion is welcomed by the ICJ, and agreement would obviously be desirable for the survival of any definitions of the offences adopted, it remains the responsibility of the Hong Kong Government to ensure that this potential source of human rights difficulty should be removed by bringing the text of the law into harmony with international human rights norms and current practice. The necessity to do so has assumed an added urgency by reason of recent statements of representatives of the Government of China and actions by Chinese officials. The Chinese Government has refused to have dealings with the elected members of the Hong Kong Democratic Party. It refused to issue visas to a number of them to visit Beijing, ostensibly to lobby against the establishment of a competing provisional legislature. Two of the leaders of the Democratic Party have been publicly accused of "subversion" following their support for the 1989 student protest movement in Tiananmen Square. Its members have been excluded from the Preparatory Committee. It appears extremely unlikely that any of them, or of those elected independent members of the Legislative Council constituting the movement known as "The Frontier", will be appointed to the provisional "Legislative Council" which China is purporting to constitute.

17. The ICJ President was given an assurance that dissidents and refugees from China, presently resident in Hong Kong, who may be at risk because of previous human rights involvement, will be assisted, where that is their wish, to depart or where necessary to obtain refugee status outside Hong Kong before 30 June 1997. Whilst confidence was expressed that, after 1 July 1997, the annual remembrance of the Tiananmen Square killings would continue to be observed in Hong Kong, this must be a matter of serious doubt. Shortly before the ICJ President's visit, Lu Ping warned the Hong Kong media that they would not be allowed to advocate secession of Hong Kong from China after 1 July 1997. In a meeting with the delegation of local journalists, the Director of the Hong Kong and Macao Affairs Office said that, after 1997, the media would be prohibited from publishing articles which supported secession:

"I don't have to give you any dream that after 1997 Hong Kong will be allowed to be engaged in [promotion of] Taiwan independence or two Chinas. Independence for Hong Kong is absolutely impossible. No matter if it is advocacy of 'two Chinas' or one China and one

Taiwan or advocacy of independence of Hong Kong, Taiwan and Tibet, this is a different issue from press freedom."

18. Statements such as the foregoing underline the dangers to the observance of human rights after 1 July 1997. They also emphasise the vital importance of ensuring, so far as still possible, the preservation of the Rule of Law and of an independent judiciary and legal profession which will uphold the Bill of Rights Ordinance and secure protection of basic human rights from the courts.

Observance of Human Rights

19. The Governor of Hong Kong has rejected the proposal contained in the ICJ Mission report (Recommendation 42) that the United Kingdom should, on behalf of Hong Kong, prior to 30 June 1997, subscribe to the First Optional Protocol so as to give individuals in Hong Kong a right of direct access to the United Nations Human Rights Committee. This course was proposed to provide an effective external monitor of human rights in Hong Kong which could be invoked by individual petition. In defence of his refusal (which presumably reflects the decision of the United Kingdom Government), the Governor has pointed out that the last paragraph of Chapter XIII of Annex 1 of the Joint Declaration (reflected in Article 39 of the Basic Law) provides that the provisions of the two International Covenants (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), as applied to Hong Kong, shall remain in force after 1 July 1997. According to the Governor, notwithstanding the failure to ratify the First Optional Protocol in respect of Hong Kong, the obligations imposed by the two Covenants, which are thereby assumed in respect of the Hong Kong SAR by China, include the obligations to make submissions on Hong Kong to the respective United Nations treaty monitoring bodies pursuant to the requirements respectively of Articles 40 (ICCPR) and 16 (ICESCR). The Governor stated that the United Kingdom Government continues to "urge the Chinese Government at the highest levels to accede to the two International Covenants and to make clear how China will fulfil the requirements to report in respect of" the Hong Kong SAR.⁷

20. The meeting of the United Nations Human Rights Committee at its 58th Session in Geneva in October 1996, considered the report by the United Kingdom in respect of Hong Kong. The ICJ, on 1 July 1996, called on China to acknowledge its obligation under the International Covenant on Civil and Political Rights to ensure that periodic reports continue to be submitted to the United Nations after 1 July 1997. It also urged the Government of China to cooperate with the Human Rights Committee and the United Kingdom in working out the mechanism by which such reports would be

⁷ Letter from the Governor of Hong Kong dated 2 July 1996, reproduced in the report of *Justice, Hong Kong*.

submitted. The Committee had before it the report of *Justice, Hong Kong*, the Hong Kong Section of the ICJ.⁸ In the Committee's report, published after the ICJ President's visit to Hong Kong, it noted⁹ :

"In dealing with cases of dismemberment of States parties to the International Covenant on Civil and Political Rights, such protection cannot be denied to them merely by virtue of dismemberment of that territory or its coming under the sovereignty of another state or one or more other states".

The Committee takes comfort from the terms of the Joint Declaration agreed by the Governments of the United Kingdom and China:

"In this regard the Committee pointed out that the parties to the Joint Declaration have agreed that all provisions of the Covenant as applied to Hong Kong shall remain in force after 1 July 1997. These provisions include reporting procedures under Article 40 since the reporting requirements under Article 40 will thus continue to apply, the Human Rights Committee expects that it will continue to receive and review reports submitted in relation to Hong Kong."

21. It will remain an important obligation of the ICJ and of other international human rights bodies to monitor the conduct of China in conforming to Article 40 of the Covenant as promised in the terms of the Joint Declaration upon which both the United Kingdom and the United Nations Human Rights Committee have expressed their reliance. It will be specially important for human rights groups, both inside and outside Hong Kong, to remain vigilant and to ensure that the reporting is genuine and not nominal and perfunctory. A source of particular concern is a statement made concerning the Hong Kong Bill of Rights Ordinance (CAP 383) by the former Chief Justice of Hong Kong, Sir Ti Liang Yang, in support of his "candidature" for appointment as Chief Executive of the Hong Kong SAR. His attitude to the Bill of Rights Ordinance is less than encouraging. His chief complaint is that it gives the judicial organ "legislative power". This represents a complete misunderstanding both of the Ordinance and of the function of the courts in upholding the human rights promised in it.

22. The role of the United Kingdom in the 50 years referred to in the Joint Declaration is still unclear, including its own conception.¹⁰ It is highly desirable that this uncertainty should be clarified as quickly as possible. The

⁸ Hong Kong Section of the International Commission of Jurists (*Justice*), *Human Rights in Hong Kong*, Submission to the Human Rights Committee at its 58th Session, Geneva, October 1996 (Dr. Nihal Jayawickrama).

⁹ United Nations, Human Rights Committee, Consideration of Report Submitted by States Parties Under Article 40 of the Covenant - *Concluding Observations of the Human Rights Committee - United Kingdom of Great Britain and Northern Ireland (Hong Kong)*, CCPR/79/Add.69 (8 November 1996) at 2.

¹⁰ See *Hansard, Parliamentary Debates*, House of Lords, 24 April 1996 per Lord Skidelsky.

Joint Declaration, which contained the promises of China was made between China and the United Kingdom. The United Kingdom is the only other party to that compact. It is therefore the State with a principal interest and authority to ensure that the compact is kept.¹¹ The Government of the United Kingdom should clarify precisely what it intends to do to ensure that the promises, pursuant to which it proceeded to surrender sovereignty over Hong Kong (and with it the future of 6 million subjects of the Crown), will be observed by China. Resort to catchy expressions such as "they will not walk alone" is no substitute whatever for a detailed statement by the United Kingdom Government on the steps which it will put in place to monitor compliance by China with its promises, where necessary, to bring pressure to bear to ensure that those promises are kept and to respond in an appropriate and lawful way, conforming to international law, where the promises are broken.

23. A most unfortunate suggestion that the United Kingdom would regard its responsibility in respect of the undertakings accepted in the Joint Declaration as terminated on 1 July 1997, appears in a comment, during the meeting of the United Nations Human Rights Committee in October 1996, publicly attributed to a legal adviser of the British Foreign Office, Mr Henry Steel. He was reported as saying "There was considerable difficulty in the proposition that a state retain legal responsibility for a territory when it no longer had sovereignty". The United Kingdom's legal responsibility after 1 July 1997, derives from its international agreement with China and its historical role in Hong Kong, not from its sovereignty over Hong Kong. This distinction should be acknowledged, and fully accepted, by the United Kingdom Government.

Conclusions and Recommendations

24. As a result of the ICJ President's report, the following conclusions and recommendations are adopted by the ICJ:

24.1 The ICJ will continue to monitor closely the developments leading up to, and after, the transfer of sovereignty over Hong Kong.

24.2 The ICJ will continue to press for the exercise by the people of Hong Kong of the right to self-determination guaranteed to them by international law and will remind China, the United Kingdom and the people of Hong Kong of the significance of that provision of international law and of the apparent breach of it to this time.

24.3 The ICJ condemns any attempt to establish an alternative "Legislative Council" in place of the Legislative Council established by law in Hong Kong. The elected Council alone has the power and

¹¹ Resolution of the Senate of the United States, 104th Congress, Second Session, adopted by unanimous consent 27 June 1996.

authority to discharge the functions of the legislature in Hong Kong at least until 30 June 1997. The Basic Law clearly contemplated that it would continue in office after 1 July 1997. The ICJ continues to stress the importance of providing for the democratic legitimacy of the Government in the Hong Kong SAR, the accountability of that government to the people of Hong Kong and, in particular, the answerability of that government for any abuses of human rights, infractions of the Rule of Law and the acceptability of the levying of taxes and imposts upon the people of Hong Kong. The present arrangements do not provide for any of these basic rights - a remarkable commentary both on the Governments of the United Kingdom and China - as this vital and economically important territory passes to a new system of government without a freely chosen decision on the part of its people. That such an event could occur on the brink of the 21st Century is as astonishing as it is reprehensible.

24.4 The ICJ urges China to desist from proposals to select a future Legislative Council of Hong Kong on the basis of the selection of candidates by 400 appointed persons. This procedure is in clear breach both of the Joint Declaration and of the Basic Law which promised respectively the participating states, the international community and the people of Hong Kong that the Legislative Council of the Hong Kong SAR would be "constituted by elections". Those words, particularly understood in the context of the promise, render the purported constitution of a "Legislative Council" by a decision of 400 appointed persons a breach of the requirement that there be a Council "constituted by elections".

24.5 The ICJ presses the Government of Hong Kong, without delay, to propose and secure the enactment of safeguards in the definition of treason, sedition, subversion and other such public order offences to ensure that, before the transfer of sovereignty, such offences conform, in the letter of the law, to international human rights law and to the current practice in Hong Kong whereby they are rarely, if ever, prosecuted.

24.6 The ICJ urges that the Government of Hong Kong make appropriate arrangements so that refugee status is accorded to dissidents and other persons living in Hong Kong who wish to depart from Hong Kong before 30 June 1997, where their position thereafter may be at risk because of their previous criticism of China or support, whether in China or Hong Kong, for democracy and human rights.

24.7 The ICJ urges the United Kingdom Government to clarify its intended actions after 1 July 1997, to monitor the compliance by China and the Hong Kong SAR with the requirements of the Joint Declaration and Basic Law. Specifically, the ICJ urges the United Kingdom the establishment of a high level committee of eminent persons, chosen from United Kingdom and other Commonwealth

countries, to monitor developments in Hong Kong and to report regularly to the United Kingdom Parliament, Commonwealth Heads of Government meetings and the international community on the compliance by China and the Hong Kong SAR with the letter and spirit of the Joint Declaration and the Basic Law.

24.8 The ICJ commits itself to continue to support *Justice, Hong Kong* and other human rights groups and organisations based in Hong Kong. It will ensure that reports are provided to the United Nations Human Rights Committee, to the media and the international community on the situation of the Rule of Law, human rights and the independence of the judiciary and the legal profession in Hong Kong after 1 July 1997. The ICJ will continue to urge the United Nations Human Rights Committee to retain a vigilant interest in Hong Kong and to ensure that the Government of the Peoples' Republic of China, after 1 July 1997, honours the obligation, effectively undertaken in the Joint Declaration, to conform to the reporting procedures under Article 40.

24.9 The ICJ, after 1 July 1997, in cooperation with the Hong Kong Bar, with *Justice, Hong Kong* and other human rights groups and individuals will organise an international conference in Hong Kong designed to focus attention on the protection of human rights in the Hong Kong SAR. Vigilant attention by the international community is the best assurance that the Rule of Law, respect for human rights and maintenance of the independence of the judiciary and the legal profession will continue after sovereignty of Hong Kong passes to China on 1 July 1997. Human rights bodies, such as the ICJ, must establish networks of contact in Hong Kong to monitor and report widely any matters of concern.

25. Copy of this report and the foregoing conclusions and recommendations will be distributed to the Governor of Hong Kong, the Legislative Council of Hong Kong, the Governments of the United Kingdom and the Peoples' Republic of China, human rights groups and interested individuals in Hong Kong.

26. Because of the urgency, and in advance of this report, the ICJ President sent a letter of principal recommendations to the Governor of Hong Kong. Copy of that letter is the annex to this report.

Geneva
1 December 1996

Annex
Copy of Letter from the President
of ICJ to the Governor
of Hong Kong, The Rt. Hon Christopher Patten,
Dated 14 November 1996

Your Excellency

Hong Kong and the Rule of Law

[Omitting formal parts]

May I repeat the principal points which I made to the Chief Secretary, Mrs Anson Chan CBE?

- 1. The purported election of an alternative Legislative Council is clearly invalid and contrary to the Basic Law. The Government of Hong Kong should, to the full extent of its power, uphold the legitimacy and authority of the Legislative Council, elected and discharging its functions according to law.
- 2. The selection of members of the Legislative Council by 400 persons appointed, effectively, by the Government of China is a clear breach of the agreement in the Joint Declaration and the provisions of the Basic Law to the effect that the Legislative Council of the Hong Kong SAR shall be "constituted by elections".

In the context and having regard to the background materials, the selection in this way is not an "election". It is also a breach of international human rights law. The Hong Kong Government should continue to endeavour to persuade China to the obvious correctness of this position.

- 3. The position of appointed judges during the transition should, to the fullest extent possible, be clarified, in advance of 30 June 1997, so that their rights, duties and obligations during the transition are known to all.
- 4. The Government of Hong Kong should, without delay, proceed to propose amendments to the Criminal Law of Hong Kong to redefine the offences of treason, sedition and subversion etc. so that the verbal definitions are in conformity with international human rights law and with current practice in Hong Kong.
- 5. The position of dissidents presently resident in Hong Kong should be protected and, should it be their wish, their departure before 30 June 1997 should be facilitated.

- 6. The United Kingdom should indicate publicly, to the people of Hong Kong and to the international community, precisely what it intends to do to uphold the letter and spirit of the Joint Declaration after 1 July 1997, and in particular during the period of 50 years in which, in accordance with the Joint Declaration, the rights of the people of Hong Kong and their lifestyle "will remain unchanged" and "be protected by law". A group of eminent persons should be established, chosen from the United Kingdom and Commonwealth countries, to monitor the situation in Hong Kong and to report on any departures by China from the Joint Declaration.
- 7. The United Kingdom should do all in its power to ensure that reports in respect of Hong Kong and in accordance with Article 40 of the International Covenant on Civil and Political Rights continue to be made to the Human Rights Committee of the United Nations after 1 July 1997.
- 8. The International Commission of Jurists and other human rights bodies should continue vigilantly to monitor the situation in Hong Kong. The ICJ should organise an international conference on human rights and the Rule of Law in Hong Kong at an appropriate time after the change of sovereignty.

In due course I should be grateful for any comments which you may consider it appropriate to make on the above principal recommendations.

At this stage the above are provisional. They represent my own views and have not yet been submitted for approval to the Commission.

Sincerely

M D KIRBY
President of the International Commission of Jurists