

LC: SHA's speech in the motion debate on "Implementing the recommendations of the United Nations Human Rights Committee" (translation)

Following is a translation of the speech by the Secretary for Home Affairs, Dr Patrick Ho, in the motion debate on “Implementing the recommendations of the United Nations Human Rights Committee” at the Legislative Council today (March 1):

Madam President,

I thank the Hon Emily Lau for her motion, and Honourable Members’ trenchant observations which have made for a most fruitful exchange of ideas on this important subject. And I welcome this opportunity to explain the Government's position in regard to its obligations under the international human rights treaties.

In broad terms, that position was explained in Chapter 2 of our second report, which is, of course, the subject of the impending hearing. But, in view of some of the things that we have heard today, I think it worth rehearsing what we said in the report.

As we have stated many times, and doubtless will state again, it must be clearly understood that we hold Treaty Bodies in the highest esteem and accord their concluding observations the utmost respect and the closest attention. But the fact remains that those observations – the expressions of concern and the related recommendations - are not binding as a matter of international law. Our international obligations are defined by the treaties that apply to us, and by any relevant declarations and reservations. Our position, which we believe is shared by many, if not most, governments, derives - inter alia but primarily - from a section of the United Nations Manual on Human Rights Reporting on “The essence of dialogue”. Let me quote this verbatim –

"At this point, one must stress that the Committees are neither courts nor quasi-judicial bodies. The nature of their activity may be of a different quality with regard to the competence of some treaty bodies to receive and to examine individual complaints or communications. However, it has never been claimed that the treaty bodies may perform judicial or quasi-judicial functions in the consideration of States Parties' reports. The Committees, as a result of the dialogue, do not issue a judgement regarding the degree of implementation of the provisions contained in the relevant instrument in the reporting State.

“The purpose of the dialogue is rather to assist the reporting State in the implementation of its treaty obligations. The dialogue should clarify the scope and the meaning of the treaty obligations and should highlight those aspects that may have been neglected by the authorities of the reporting State. It is in this spirit that the members of the Committees raise issues of concern to them, ask their questions, and formulate their comments accordingly at the end of the consideration of a report. And it is in the same spirit that the written comments of the Committee as a whole are formulated at the conclusion of the consideration of a report.”

As non-judicial entities, the Treaty Bodies have greater flexibility than do courts in the conduct of their business. For example, the hearings – unlike those held by the courts - are not constrained by the need to confine conclusions to matters actually addressed in the course of proceedings. Thus, it is increasingly common for the concluding observations to include expressions of concern and/or recommendations about matters that were not raised during the hearing, or even in the preceding list of issues.

Thus, the Treaty Bodies enjoy considerably more latitude than do judicially constituted courts. This has clearly has many advantages but also serves to demonstrate that, as the United Nations Manual affirms, the Treaty Bodies are not courts, they do not behave as courts, and their observations, concerns, and recommendations – while always attended to with seriousness and respect - do not and cannot carry the authority of a court ruling. In essence, therefore, they are of an exhortatory nature and, while parties to the treaties will normally endeavour to implement them to the extent they judge to be practicable, they are not bound by them.

Hong Kong, while not a state party, is no exception to that generality. As we made clear in the report, we do seek to implement Treaty Body recommendations, either wholly or in part, where we consider that doing so would be consistent with the principles I have just outlined. Essentially, we will implement a recommendation when we judge that to do so is required as a matter of international law. Where this is not the case, we will do so where this is –

- * feasible in practical terms, which may include legal and constitutional considerations, as well as the more obvious question of physical, political, or economic constraints;
- * affordable, either immediately or within a given timeframe; and
- * necessary to achieve the objectives that the recommendation seeks to attain.

The approach I have just outlined reflects the varying nature of the recommendations of treaty-monitoring bodies. In some cases, a recommendation does no more than reflect a

specific obligation in the particular treaty. In that case, the relevant jurisdiction will be obliged to take action, not because the committee has recommended it, but because the treaty requires this. However, in many cases, recommendations go beyond what the treaty specifically requires, for example by suggesting how a particular obligation may best be implemented. In that case, the jurisdiction may properly decide to implement the obligation in another way. And, in some cases, the recommendations are to the effect that a jurisdiction should withdraw a reservation or declaration that was entered into when the treaty was acceded to. In that case, there is clearly no obligation, either under the treaty or as a result of the recommendation, to do this.

But let there be no misunderstanding: we have acted on past recommendations of the Human Rights Committee and will act on any future ones to the extent that we judge feasible and desirable. Examples of past endeavours include bringing the sex discrimination law into effect, closing the former detention camps, and making police charge sheets and charge forms available in Chinese as well as English. Those things required time and we were not in a position to implement them at the time the Committee originally asked us to. But when we, as the responsible authorities on the spot, judged the timing to be right, we acted without further delay. An example of a long-standing recommendation that has yet to be put into effect is the establishment of a human rights commission. We have not, as some have asserted, ignored the Committee. We have kept the matter in view, testing its implications against the criteria I have rehearsed and ready to move forward when the conditions are met. Tentative steps have already been taken in that direction with the establishment of new public forums for regular and formal exchange of views between Government and non-governmental organisations. Options for further development are under exploration, though we are not – as yet ready to commit to a timetable.

When dealing with large issues – and most of the issues addressed in the concluding observations are, very large – caution is simple prudence. Unless we are required to act as a matter of international law, we will not, for the sake of a few brief kudos, jeopardize the interests of Hong Kong by precipitously giving effect to the recommendations of bodies that, with the best will in the world, are familiar with our circumstances only at a distance and whose members live far away in places whose circumstances and concerns may be very different from those prevailing here. We will act on our best judgment for the well-being of Hong Kong's people.

At the same time, however, I must point out that - while the recommendations in the concluding observations and the decisions of the treaty bodies are not directly binding on the courts in Hong Kong - the courts have often used them in the construction of statutes and cases.

For example, in the case of *Shum Kwok Sher v HKSAR*, the Court of Final Appeal held that -

“In interpreting the provisions of Chapter III of the Basic Law and the provisions of the Bill, the Court may consider it appropriate to take account of the established principles of international jurisprudence as well as the decisions of international and national courts and tribunals on like or substantially similar provisions in the International Covenant on Civil and Political Rights (ICCPR), other international instruments and national constitutions.”

Action on concluding observations is not, of course, the only way in which governments give effect to their treaty obligations. It is also important that they ensure that their laws, policies, and administrative measures are consistent with those obligations. Thus, in Hong Kong, when legislation is being prepared, or when Government policies are formulated, the Department of Justice advises the responsible bureau or department on the compatibility of those proposals with the ICCPR provisions as applied to Hong Kong. When providing such advice, the Department draws substantially on the relevant concluding observations and general comments of the treaty bodies.

In summary, therefore, we act in good faith in deciding how and when to act on the Treaty Bodies' concluding observations. That is, we most firmly assert, the prerogative of governments that have the ultimate responsibility for the governance and well being of their people. In implementing their international obligations, they must exercise their best judgement as to what is or is not conducive to the common weal and act upon that judgement even when that may entail deferring action on a particular Treaty Body recommendation. In this regard, our position is entirely consistent with the view expressed in the Committee's General Comment 3 of 1981, where it noted that –

"...article 2 of the Covenant generally leaves it to the States parties concerned to choose their method of implementation in their territories within the framework set out in that article.”

Our approach to the hearing process and the conclusions that flow from that process affirms the General Comment. We have consistently acted in accordance with it and will continue to do so. That is the spirit in which we will approach the impending hearing in New York.

The Hon Emily Lau criticised the relevant principal officials for not leading the HKSARG delegation to the UN Human Rights Committee's hearing of Hong Kong's report, saying that it was a disrespect to the Committee. As far as we understand, most other State Parties have their representatives to the United Nations or officers responsible for human rights policy, rather

than political-appointed officials, head their delegations. We think that it is more appropriate for the officer responsible for human rights policy to lead the delegations to those hearings. The Solicitor General as well as representatives from the Constitutional Affairs Bureau and the Security Bureau will also attend the upcoming hearing and answer questions from the Committee. I would like to reiterate that, in terms of ranking and size, the Hong Kong delegation compares favourably to those of other State Parties. The United Nations' relevant Committees have also acknowledged that the HKSARG has respect for the hearings.

Freedom of expression and freedom of the press are fundamental rights enjoyed by all people in Hong Kong. They are enshrined in Article 27 of the Basic Law, and Article 16 of the Hong Kong Bill of Rights. The Government is firmly committed to protecting those freedoms and to maintaining an environment in which a free and active press can operate under minimum regulation that does not fetter either freedom of expression or editorial independence.

Some Members have raised queries on the existing anti-discrimination laws and the proposed race discrimination legislation. The Government does not agree with any kind of discrimination. The Hong Kong Bill of Rights Ordinance prohibits all forms of discrimination in the Government and the public sector. Currently we have three pieces of anti-discrimination laws in place, namely the Sex Discrimination Ordinance, Family Status Discrimination Ordinance and Disability Discrimination Ordinance. We are now working on the fourth anti-discrimination legislation to prohibit racial discrimination in the private sector. We understand the public expectations for this legislation, and are now trying to iron out the legal and technical issues involved and proceed with the relevant legislative work. We are now in the final stage of the drafting work and we hope to introduce the Bill to the Legislative Council soon.

Concerning new arrivals from the Mainland, we agree that they occasionally suffer from discrimination by the local Chinese in Hong Kong. However, since the majority of them are of the same ethnicity as the local Chinese, i.e. Han Chinese, the discrimination they suffer is not based on race, but rather it is a kind of social discrimination. Therefore it is not included in the proposed legislation against racial discrimination.

As regards sexual orientation discrimination, it impinges on deeply ingrained values and notions of morality. The proposal of legislating against this form of discrimination requires public consensus for effective implementation. Our considered view is that, at this stage when the issue is still being debated, we should address discriminatory attitudes through public education, with a view to fostering in the community a culture of greater objectivity, tolerance

and mutual respect.

The Hon Alan Leong asked about children's right and also the possibility of setting up an independent children committee. As we explained in both HKSAR's report under the Convention of the Rights of the Child as well as its hearing last September, the best interests of the child are necessary considerations in all relevant decision-making in Hong Kong, including legislative proposals and policies, and are taken into account as a matter of course. We have specific laws dealing with different aspects of the Convention. The impact of legislation and the execution of policies are monitored by the Legislative Council, the Ombudsman and the press, and are reviewed by the bureaux concerned.

Madam President, thank you.

Ends/Wednesday, March 1, 2006