

REPORT NO. 3 OF THE  
SECTION OF INTERNATIONAL LAW AND PRACTICE

RECOMMENDATION \*

*BE IT RESOLVED*, That the American Bar Association encourages the adoption of a Bill of Rights for Hong Kong which fully guarantees those civil and political rights, after July 1, 1997, which are currently enjoyed by the residents of Hong Kong, as anticipated by the newly enacted Basic Law of the Hong Kong Special Administrative Region.

*BE IT FURTHER RESOLVED*, That the American Bar Association calls upon the Governments of the United Kingdom and the People's Republic of China to give effect in local law, enforceable after July 1, 1997, of provisions of the International Covenant on Civil and Political Rights which now apply to Hong Kong because of their ratification by the United Kingdom, in furtherance of Article 39 of the Basic Law of the Hong Kong Special Administrative Region.

*BE IT FURTHER RESOLVED*, That the American Bar Association calls upon the Government of the People's Republic of China to allow free movement of persons to and from Hong Kong after July 1, 1997, which is guaranteed under the Charter of the United Nations as interpreted by the Universal Declaration of Human Rights.

*BE IT FURTHER RESOLVED*, That the American Bar Association urges the United States Government to use its influence in encouraging the continuance and growth of democratic institutions in Hong Kong.

REPORT

I. Background

By means of a Joint Declaration which came into force on May 27, 1985, the Government of the People's Republic of China and the

Government of the United Kingdom agreed that the territory of Hong Kong, which has been a British Crown Colony since 1841, would revert to the sovereignty of

\*The recommendation was approved. See page 31.

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the People's Republic of China on July 1, 1997. In Annex 1 to this Joint Declaration, the two governments agreed that, "The provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong shall remain in force" when the People's Republic of China assumes sovereignty over Hong Kong.

In April, 1990, the National People's Congress of the People's Republic of China adopted the Basic Law of the Hong Kong Special Administrative Region ("Basic Law"), following a drafting process that had lasted almost three years and produced two drafts of the Basic Law which were revised in response to public comment and the reactions of Chinese and Hong Kong legislators. Under Article 18 of the Basic Law, which functions as a mini-constitution for the territory of Hong Kong, the law of the Hong Kong Special Administrative Region ("HKSAR") will be the Basic Law, laws previously in force in Hong Kong (as stipulated by Article 8 of the Basic Law) and laws enacted by the legislature of the HKSAR.

Pursuant to this provision, the current Hong Kong government has drafted and proposed for enactment a Draft Bill of Rights which would incorporate many of the provisions of the International Covenant on Civil and Political Rights ("ICCPR"). The bill hopes to entrench many elements of the ICCPR which have been extended by the British government to Hong Kong since 1976 but which have never been incorporated into local law. In the minds of many Hong Kong residents, such measures need to be adopted to ensure that freedoms taken for granted under

British administration will not disappear after 1997, when China resumes sovereignty.

## II. The Provisions of the Draft Bill of Rights

Article 39 of the Basic Law promises the continuation of the ICCPR in force after 1997:

"The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

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

Yet nowhere does the Basic Law explain how the Covenants will be implemented into HKSAR law. Unless the People's Republic of China ratifies the Covenants between now and 1997, it is not clear that the HKSAR government would be bound by them after Hong Kong reverts to Chinese sovereignty. Thus, the Draft Bill of Rights has attempted to address this concern.

The provisions of the Draft Bill of Rights are intended to enact as local law the major provisions of the ICCPR. Once enacted, these provisions would join "the laws previously in force" in Hong Kong under Article 18 of the Basic Law.

Whether or not China subsequently ratifies the ICCPR, the Bill of Rights should ensure the effective enforcement of those provisions of the ICCPR which it contains. Although questions remain about the status of the Bill of Rights under the Basic Law (including attempts to give the Bill of Rights authority superior to that of all subsequent legislative enactments), the adoption of the Bill of Rights by the Hong Kong legislative at this time should provide further protection of the civil and political rights of Hong Kong residents after 1997.

In addition to protections already provided under the Basic Law, the Draft Bill of Rights would also limit or eliminate such abuses as torture or other cruel, inhuman or degrading punishment; detention of political prisoners; laws regarding treason, secession or sedition or theft of state secrets; and excessive use of the death penalty. In a positive vein, the Draft Bill of Rights provides, in Part I, Clause 2(5), that "There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in Hong Kong pursuant to law, conventions, regulations or custom on the pretext that the Bill of Rights does not recognize such rights or that it recognizes them to a lesser extent." Part I, Clause 5 names certain rights as non-derogable and limits the restriction of all other rights during states of emergency. Non-derogable rights include the right to life, the prohibition on torture and ill-treatment, the prohibition on slavery, the prohibition on *ex post facto* laws, the right to be recognized as a person with legal rights and the freedoms of thought, conscience and religion.

### III. Civil and Political Rights Concerns with Respect to Hong Kong

#### A. In General

Although residents of Hong Kong, at least since 1976, have widely enjoyed civil and political rights guaranteed under the ICCPR, those rights have never been incorporated into local Hong Kong law. Without enactment into local law, the transfer of sovereignty over Hong Kong from the United Kingdom to the People's Republic of China endangers the continued enjoyment of those rights after July 1, 1997. Most members of the Hong Kong Legislative Council, Hong Kong's legislature, support the Draft Bill of Rights, as do the majority of Hong Kong's residents.

#### B. Current Threats to Civil and Political Rights

The urgency of the Hong Kong civil rights situation has been underscored by recent events. Political activists involved in pro-democracy activities, some of them attacking the People's Republic of China, have been harassed in their activities by the Hong Kong government. Charges against these individuals include the "illegal" use of megaphones without a permit, solicitation of political donations without government approvals and failure to provide identity card information to arresting police. Such acts on the part of the Hong Kong government violate fundamental political rights to assemble, to speak freely and to advocate social and political change.

Hong Kong's media have undertaken self-censorship, choosing not to air material that might be offensive to the People's Republic of

China or the local government. The banning of a Taiwanese documentary by government officials under a film censorship ordinance last year has heightened sensitivities of television producers and publishers. The implications for freedom of expression are obvious and ominous.

Despite the support the Draft Bill of Rights has received from the Hong Kong Bar Association, the Hong Kong Law Society and many other social groups that want to see the bill enacted as soon as possible, Chinese officials in Hong Kong and Beijing have criticized the bill severely—even warning that it could be repealed by the Chinese government after 1997. Many have argued that this reaction only further underscores the need for a bill of rights.

#### **C. Independence of the Judiciary and Attorneys**

Among the considerations addressed by provisions of the Draft Bill of Rights are several that reinforce the status of judges and attorneys in the HKSAR after 1997. In the light of the lack of judicial independence and the employment of all lawyers in the People's Republic of China by state-run legal advisory offices, any guarantees are welcome. Most important are the recurring assurances that actions on the part of executive officials in the HKSAR government will be reviewable by judges, especially to ensure their compliance with the provisions of the Basic Law and Bill of Rights. The rights to an impartial hearing, with provisions for appeal, access to independent counsel and tort remedies for violations of other basic rights, are fundamental to the rule of law.

#### **D. Nationality, Entry to and Exit from the Territory**

Hong Kong has, since the founding of the People's Republic of

China in 1949, served as a refuge for many fleeing China. Surplus population and individual malcontents were allowed to cross China's border with Hong Kong; almost two million refugees entered Hong Kong from 1949 until the late 1960s. Hong Kong proved very resilient; resources were mobilized to house and to maintain at a subsistence level the colony's swelling population. Successive temporary waves of immigrants from the mainland recurred, but they were easily absorbed by Hong Kong's growing economy.

By the early 1980s, attention began to focus on the 1997 deadline for the return of the leased New Territories, which account for over 90 per cent of Hong Kong's total land area, to China under the terms of an 1898 treaty with the United Kingdom. China made it clear that it would not countenance any continuation of British control. As a practical matter, the rest of Hong Kong had to revert to China along with the New Territories, since the entire colony had become significantly interdependent.

At the same time, in a series of cases involving Hong Kong residents, China sought to impress upon both Hong Kong and Britain its claims to control Hong Kong residents as citizens of the People's Republic of China. Several Hong Kong residents were arrested and tried in China for acts in Hong Kong and elsewhere outside of China which displeased Chinese officials. No heed was given to inquiries from foreign governments about the status of these individuals after their arrest in China, since the Chinese government argued that they were Chinese nationals and that such inquiries were interference in China's internal affairs.

1949, served as a refuge fleeing China. Surplus and individual malcontent allowed to cross China's border with Hong Kong; almost a million refugees entered Hong Kong from 1949 until the late 1950s. Hong Kong proved very resourceful in maintaining at a subterranean level the colony's swelling population. Successive temporary immigration controls were imposed, but they were overruled by Hong Kong's economic dynamism.

In the early 1980s, attention shifted to the 1997 deadline for the return of the leased territories, which account for 95 percent of Hong Kong's real estate, to China under the 1898 treaty with the United Kingdom. China made it clear that it would not countenance the continuation of British control. On a local matter, the rest of the world had to revert to China. In the New Territories, the entire colony had become economically interdependent.

At the same time, in a series of decisions involving Hong Kong residents, the United States sought to impress upon Hong Kong and Britain the need to control Hong Kong citizens of the People's Republic of China. Several Hong Kong residents were arrested and detained for acts in Hong Kong. Elsewhere outside of Hong Kong, displeased Chinese officials were given to interfere with foreign governments' interests in Hong Kong, since the United States government argued that Chinese nationals and their activities were interfering with Hong Kong's internal affairs.

Since June, 1989, the mainland government has shown renewed enthusiasm for asserting its will in Hong Kong even before the hand-over of power in 1997. The British government has shown little interest in standing up to such pressures. A handful of senior officials of Chinese ethnicity have been promised full British passports and residency in Britain, but the rights of the rest of Hong Kong's people to leave the territory and to re-enter it have been left to the determination of Hong Kong's future Chinese rulers. Provisions of the Basic Law and the Draft Bill of Rights should reinforce the promise of the Sino-U.K. Joint Declaration that Hong Kong residents will enjoy freedom to travel and to leave and to return to Hong Kong.

In addition, the Draft Bill of Rights should make it clear that aliens who arrive in Hong Kong seeking asylum, and who are at risk of imprisonment or execution, be protected against *refoulement*. Such protections are recognized in international human rights conventions and are consonant with legitimate immigration control measures which countries around the world have adopted. Any expulsion from Hong Kong must allow for proper process and judicial review of any decision to expel a person lawfully present in the territory.

#### IV. The Role of the United States

As the largest foreign investor and an important political presence in Hong Kong, which is home to the largest United States Consulate in the world, the United States can play a useful role in encouraging the democratic development of Hong Kong. The common values of freedom and individual rights re-

flected in both the United States Bill of Rights and the Hong Kong Draft Bill of Rights argue strongly for such support. In recent debates over the extension of Most Favored Nation status to China, an important consideration has been the effects of extension or denial on the residents of Hong Kong. Thus, the identity of commercial, political and strategic interests with respect to Hong Kong mandates expression of United States government concern and approval for the adoption of legal protections of basic rights in Hong Kong.

#### V. Conclusion

This resolution arises at an important juncture in Hong Kong's history, as its future relationship with the People's Republic of China is to be determined. The direction of these developments may be significantly influenced by the stance of the American Bar Association and other friendly observers of the evolution of democratic institutions in Hong Kong. The rule of law throughout the world is an established and worthy goal of the Association; it is a purpose that the Association recognizes as its own Goal VIII. The enactment of the Draft Bill of Rights in Hong Kong will advance this goal. The Section of International Law and Practice, therefore, urges that the American Bar Association adopt the proposed resolution.

Respectfully submitted,

HOMER E. MOYER, JR.,  
*Chairman*  
 Section of International Law  
 and Practice

February, 1991