Speech by Solicitor General
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Following is a speech by the Solicitor General, Mr Bob Allcock, at a seminar on "Implementing Article 23 of the Basic Law: the Johannesburg Principles" today (December 5):

When formulating its proposals on implementing Article 23 of the Basic Law, the Hong Kong SAR Government has adopted certain guiding principles. One of these is that the proposals must comply with the human rights guarantees in the Basic Law - particularly those in Articles 27 and 39.

ICCPR

Paragraph 1 of Article 39 provides that the International Covenant on Civil and Political Rights shall remain in force and shall be implemented through the laws of the Region. Paragraph 2 of the Article provides that rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law; and such restrictions shall not contravene the provisions of paragraph 1.

The Department of Justice has advised that the proposals contained in the Consultation Document do comply with these human rights obligations. That view has been endorsed by a leading human rights expert from the UK - Mr David Pannick QC.

Johannesburg Principles

Some commentators have suggested that compliance with our human rights obligations is not sufficient; and that we should also comply with the Johannesburg Principles.

As we have heard, the Johannesburg Principles were adopted (in October 1995) by a group of experts in international law, national security and human rights convened by Article 19, the International Centre Against Censorship, and a South African University. The Principles are highly regarded and are very useful reference materials in respect of limitations on freedom of expression and access to information on the grounds of national security.

The Administration has paid attention to these principles in developing its proposals. However, in so far as they are more restrictive than the obligations contained in the Basic Law or the ICCPR, they are not legally binding on the Hong Kong SAR. A renowned human rights commentator (Ms Sandra Coliver) has said that "some of the Principles undoubtedly are more protective of freedom of expression than widely accepted international norms". Ms Coliver, who was a former Law Program Director

for Article 19, added that the Principles reflect the drafters' view of the direction in which international law is, or should be, developing' (Sandra Coliver, Commentary to : The Johannesburg Principles on National Security, Freedom of Expression and Access to Information (1998) 20 Human Rights Quarterly, p.15).

Compliance

There are 25 Johannesburg Principles. Without going through each of these, I would say that, broadly speaking, the Article 23 proposals comply with most of the Principles.

For example, Principle 5 states that no one may be subjected to any sort of restraint, disadvantage or sanction because of his or her opinions or beliefs. That principle is fully respected by the proposals. Opinions or beliefs held on such sensitive subjects as the independence of Taiwan or the future governance of the PRC will be entirely unaffected by the proposed new laws.

Principle 7 enumerates a list of protected expression which should not be considered a threat to national security, including expression that advocates non-violent change of government policy or of the government itself; and criticism of, or insult to, the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation. The Article 23 proposals do not seek to prohibit any such forms of expression.

Perhaps the best way for me to proceed is to summarize each of the proposals and to refer to relevant Principles that may justify them.

Treason

The proposed offence of treason would consist of three limbs. The first limb involves levying war by joining forces with a foreigner to achieve various things, including overturning the PRC Government. Levying war clearly involves serious actions, not merely the exercise of freedom of expression or freedom of information, and so the Johannesburg Principles are not relevant.

The two other proposed limbs could affect freedom of expression or information in that they would make it an offence -

(1) to instigate a foreigner to invade the PRC; or

(2) to assist by any means a public enemy at war with the PRC.

It seems to me that these offences would comply with Principles 1 and 2, in that these restrictions would be prescribed by law and would be necessary in a democratic

society to protect a legitimate national security interest. That legitimate interest would be the need to protect the PRC's existence or territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force.

Whether those offences would comply with Principle 6 is an issue I will return to later.

Secession and subversion

The proposed offences of secession and subversion will both involve acts that amount to levying war, the use or threat of force, or to crimes falling within the definition of "serious unlawful means". None of these elements could be the result of mere words. Again the Johannesburg Principles do not appear to be relevant.

Proscription of organizations

Another proposal in the Consultation Document is to empower the Secretary for Security to proscribe certain organizations if he or she reasonably believes that this is necessary in the interests of national security, public safety or public order. A similar power already exists in the Societies Ordinance, where the expression "national security" means the safeguarding of the territorial integrity and the independence of the PRC.

The proposed new power could only be exercised in a manner that was consistent with the guarantees of freedom of speech contained in the Basic Law and the ICCPR. Moreover, the reference to "national security" in our law would be construed by our courts in accordance with human rights jurisprudence. It is therefore most unlikely that an organization could lawfully be banned in circumstances that contravened the Johannesburg Principles.

If an organization were banned, Principle 8 would come into play. This states that "Expression may not be prevented or punished merely because it transmits information issued by or about an organization that a government has declared threatens national security or a related interest". There is no proposal to prevent or punish expression on such grounds. Offences would only be committed by those who organize or support the activities of an organization proscribed in Hong Kong, or who manage or are an office bearer of a proscribed organization.

The two areas where the Johannesburg Principles are particularly relevant, in that they directly affect freedom of expression and freedom of information, are sedition and the theft of state secrets. Let me turn to sedition first.

Sedition

The proposed new offence of sedition will be considerably narrower than the existing offence, which is to be repealed. The new offence would be committed only if someone -

(1) incites others to commit treason, secession or subversion; or

(2) incites others to violence or public disorder that seriously endangers the stability of the state or the HKSAR.

An offence of inciting others to violence or public disorder that seriously endangers the stability of the state would seem to be justified by Principles 1 and 2. Its genuine purpose and demonstrable effect would be to protect the PRC's existence or its territorial integrity against the use of or threat of force, or its capacity to respond to the use or threat of force. Moreover, that offence, and the proposed offence to protect the stability of the HKSAR from being seriously endangered by violence or public disorder are justifiable restrictions on freedom of expression on the grounds of public order, or on the grounds of respect of the rights of others. The Johannesburg Principles do not purport to deal with restrictions based on these grounds. They only deal with restrictions based on the grounds of national security. I would therefore submit that the second limb of the proposed offence of sedition is not inconsistent with the Principles.

What about the first limb : inciting others to commit treason, secession or subversion? That limb clearly relates to national security. Some commentators have suggested that the proposed offence would not comply with Principle 6. A similar comment might be made in respect of those aspects of treason that touch upon freedom of expression or information.

Principle 6

Principle 6 states that expression may be punished as a threat to national security only if a government can demonstrate that :

(1) the expression is intended to incite imminent violence;

(2) it is likely to incite such violence; and

(3) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

I hope that Dr D'Souza and other supporters of the Johannesburg Principles will not object if I subject Principle 6 to a rigorous analysis. With regard to the status of the Principle, Ms Coliver has commented that "Principle 6 is not yet an accepted

norm of international law". As to the content of the Principle, Ms Coliver has commented as follows.

"It may indeed be that Principle 6 protects a small range of speech that legitimately could be prohibited under even the most liberal interpretations of international free speech law. Arguably, the Principle could adequately protect freedom of expression and yet prohibit incitement to actions, though non-violent, that violate legitimate national security interests as defined in Principle 2. Such acts might, for instance, involve disobedience of lawful military orders necessary for the protection of legitimate interests."

In other words, Principle 6 appears to be unnecessarily restrictive.

Let me explore these comments further. Firstly, can the incitement of non-violent actions never be prohibited in order to protect legitimate national security interests? I would respectfully submit that there may be many situations where it would be consistent with international human rights standards, and also appropriate, to prohibit the incitement of non-violent acts. For example, the UN Human Rights Committee and the European Court and Commission have all authorized restrictions on fundamental rights, including freedom of expression, in the interests of protecting a state's authority to raise an army. No incitement to violence was involved in those restrictions.

Let me give some other examples of non-violent acts that have the potential of threatening a legitimate national security interest.

(1) Disobedience of lawful military orders necessary for the protection of national security.

(2) The disabling of a national defence computer system.

(3) The use of biological or chemical weapons.

(4) Broadcasting propaganda for the enemy during a state of war.

It seems to me that it should be possible to criminalise not only these, and similar, acts but also the incitement of such acts. However, it would seem that Principle 6 would prevent the punishment of someone who incited these acts.

Secondly, Principle 6 provides that incitement to violence cannot be punished as a threat to national security unless the intention is to incite imminent violence. The closest precedent for Principle 6 is the US Supreme Court's judgment in the case of Brandenburg v Ohio 395 U.S. 444 (1969), which developed the "clear and present danger test".

The background to both tests is a desire to distinguish between statements that reflect what a person believes in, and statements that urge others to do something, now or in the future. That distinction is entirely reasonable, and the proposals in respect of Article 23 would certainly not interfere with a person's beliefs.

However, where a person intentionally urges another to commit a crime of violence, is there any reason to distinguish between imminent violence and violence at a later date? Our general law of incitement makes no such distinction. If I incite someone to murder another person, it is an offence regardless of whether I urge an immediate murder, or one in a few weeks' time.

My concern about the imminent violence test is threefold -

(1) it is contrary to general principles of our criminal law;

(2) it introduces great uncertainty into a serious offence, since "imminent" is a vague concept; and

(3) most importantly, it appears to be illogical.

Can a state not legitimately prohibit a terrorist group from inciting others to prepare for a secessionist war sometime in the future by arming themselves with missiles and other weapons?

Can it not legitimately prohibit agents from inciting others to betray their country by joining enemy troops that are to invade sometime in the future?

The "imminent violence" test would seem to leave the state powerless to deal with such threats.

Thirdly, Principle 6 states that incitement to violence can only be punished if it is likely to succeed. If a person intentionally incites violence, whether against an individual or the State, he or she has demonstrated behaviour that is unacceptable. It seems to me that the law can legitimately punish such behaviour, irrespective of its chances of success, in the same way that it punishes attempted crimes which may have had no chance of success.

Fourthly, Principle 6 requires there to be a direct and immediate connection between what is expressed and the likelihood or occurrence of violence. I take the view that if a person intentionally incites violence, his or her culpability is not diminished by the fact that violence may not result directly or immediately from his incitement. For example, a person may post on the internet a terrorist message that incites acts of violence and gives instructions as to how certain weapons may be made

or acquired. That message may be forwarded many times, each time to a wider audience, and eventually result in terrorist outrages. Can the state not punish the inciter of those outrages, simply because there was no direct and immediate connection between him and the perpetrators?

With the greatest respect to the drafters of Principle 6, I would suggest that its well-intentioned attempt to limit restrictions on freedom of expression does not produce appropriate results in all cases. I would suggest that the more open-ended tests applied by the courts in respect of the International Covenant on Civil and Political Rights and the European Convention on Human Rights have more to commend them. As the distinguished American judge, Mr Justice Frankfurter commented (in Dennis v US, 341 U.S. 494 (1951)) in respect of the "clear and present danger test", the demands of national security are better served -

"by candid and informed weighing of the competing interests within the confines of the judicial process than by announcing dogmas too inflexible for the non-Euclidean problems to be solved."

Let me return to the proposed offences of treason and sedition, where there are competing interests of national security and freedom of speech and information. If one weighs the competing interests in a candid and informed manner, can one justify the proposals?

I would suggest that the proposed offences of

(1) instigating a foreigner to invade the PRC;

(2) assisting by any means a public enemy at war with the PRC;

(3) inciting others to commit the offences of treason, secession or subversion; and

(4) inciting others to violence or public disorder that seriously endangers the stability of the state,

are justifiable restrictions on the grounds of national security. The fact that Principle 6 may not in all cases be satisfied would not, in my opinion, prevent a court from upholding these offences as being consistent with the Basic Law or ICCPR. Nor should it be a valid ground for not enacting the proposed offences.

Seditious publications

Before I leave sedition, I would briefly mention the proposals in respect of seditious publications. There are current offences relating to such publications, and it is proposed that these be replaced by a much narrower offence.

It is proposed that a publication should be regarded as seditious only if it would incite persons to commit the offences of treason, secession or subversion. The proposal is that it would be an offence for a person, who knowing or having reasonable grounds to suspect that a publication is seditious, deals with, or possesses, that publication. A defence of "reasonable excuse" is suggested as a means to cater for legitimate circumstances, such as academic research or news reporting.

Although this proposal was made with the good intention of creating a very narrow and defensible offence, concerns have been raised, particularly in relation to the proposed offence of possessing a seditious publication. Librarians and others have asked why the possession of such a publication should be an offence if there is no intention to incite relevant offences. The Administration notes these concerns and has undertaken to review the proposed offences.

Theft of state secrets

The last category of offences I need to discuss is that of the theft of state secrets.

Principle 12

Principle 12 of the Johannesburg Principles states that "A state may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest".

We consider that our proposals in respect of the unauthorized disclosure of state secrets are consistent with this principle. The categories of information to be protected are specifically set out and are narrow.

The two categories that are particularly relevant to national security are information relating to security and information relating to defence. That information is already protected by existing law from unauthorized disclosure, and it is not proposed to extend the protection to cover, for example, economic information.

Principle 15(1)

The first part of Principle 15 states that no person may be punished on national security grounds for disclosure of information if the disclosure does not actually harm, and is not likely to harm, a legitimate national security interest.

With regard to the unauthorized disclosure of protected information, with one

exception that I will explain, our proposed laws will fully comply with the first part of Principle 15. That is, an offence will only be committed if the disclosure was damaging, or was likely to be damaging, in the manner specified in the current law.

The exception relates to unauthorized disclosures of security or intelligence information by members of the security and intelligence services. It is considered that the integrity of these services deserves the highest protection. As a result it is proposed to retain the current law, which prohibits such disclosures irrespective of whether they are damaging. I accept that this is not consistent with the first part of Principle 15, but note that the British House of Lords has recently decided that such a restriction is consistent with the UK's Human Rights Act.

Principles 15(2) and 16

The second part of Principle 15 provides that no person may be punished on national security grounds for disclosure of information if the public interest in knowing the information outweighs the harm from disclosure. Principle 16 contains a similar principle in respect of disclosures by public servants.

Neither our current law, nor the proposals in the Consultation Document, incorporate such a principle. Should they do so?

Our law is based on the UK's Official Secrets Act 1989. When that legislation was being prepared, the British Government considered creating a public interest defence, but rejected it for two reasons. First, a central objective of its reforms was to achieve maximum clarity in the law and in its application. A general public interest defence would make it impossible to achieve such clarity. Secondly, the intention was to apply criminal sanctions only where this was clearly required in the public interest. It was considered that no one should be allowed to disclose information which he knows may, for example, lead to loss of life, simply because he has a general reason of a public character for doing so.

The enactment of the UK's Human Rights Act in 1998 enabled defendants in the UK (as in Hong Kong) to challenge criminal offences as contravening the guaranteed rights. Questions were raised as to whether offences relating to unauthorized disclosure could be reconciled with the guarantee of freedom of expression. The concern was focused, in particular, on the restrictions that applied to security personnel, who can commit an offence of unauthorized disclosure even if the disclosure is not damaging. It was also focused on the perceived need to allow "whistleblowers" to reveal public wrongdoing, on the grounds that this would be in the public interest.

Those concerns were answered by the House of Lords in its recent decision in Shayler. The relevant offence was held to be consistent with the Human Rights Act.

A very detailed account of the need to balance freedom of expression and national security is set out in the judgment. The court considered that the law provides sufficient protection for a "whistleblower" to reveal wrongdoings in appropriate cases.

This historical background helps to explain why the Consultation Document did not propose to follow Articles 15 and 16. However, a number of commentators have called for some form of public interest defence. This is something that the Administration will need to seriously consider. In doing so, I have no doubt that due consideration will be given to Principles 15 and 16 of the Johannesburg Principles.

Principle 17

Principle 17 states that once information has been made "generally available", any justification for trying to stop further publication will be overridden by the public's right to know.

Our current legislation relating to the crime of unauthorized disclosure does not provide any defence of prior disclosure, and the Consultation Document does not propose to introduce one. Again, our law is based on the UK's Official Secrets Act, and the British Government had rejected such a defence. It argued that a second disclosure could, in some circumstances, be more damaging that the first disclosure. For example, an initial story concerning protected information might carry little weight and cause no damage. However, an unauthorized confirmation of that story by a senior official could be very damaging. Although our law does not provide a defence of prior publication, the effect of such publication may be that a subsequent disclosure is not damaging and does not therefore amount to an offence.

The position in respect of civil proceedings to restrain the disclosure of information that is already in the public domain may well be different. According to the celebrated British litigation concerning the "Spycatcher" publications, it may not be possible to restrain the publication of official secrets on the basis of a breach of confidentiality if the information has already been published elsewhere. The decisions in those English and European Court cases would be of at least of persuasive authority in Hong Kong. It is therefore likely that, so far as civil proceedings are concerned, Principle 17 would be complied with.

Conclusion

By way of conclusion, I would like to emphasize the following points.

(1) The proposals contained in the Consultation Document are put forward with a view to obtaining the views of members of the community. This is a genuine consultation

exercise and all views are most welcome.

(2) Any suggestions based on the Johannesburg Principles will be given serious consideration, even though the Hong Kong SAR is not legally obliged to comply with them.

(3) The views I have expressed today are an attempt to explain the extent to which the current proposals do or do not satisfy the Johannesburg Principles. However, some of the proposals may well be further developed as a result of the comments received on them.

(4) I consider that most of the Principles are satisfied by the current proposals.

(5) Some proposals in respect of treason and sedition may not comply with Principle 6. But I would respectfully query whether only those expressions that are intended, and likely, to incite imminent violence can properly be prohibited on the grounds of national security.

(6) The proposals in respect of official secrets may not fully comply with the statements in Principles 15 and 16 concerning situations where the public interest in knowing the information outweighs the harm from disclosure; and they may not fully comply with Principle 17 concerning information that is already in the public domain.

The Johannesburg Principles clearly provide a useful benchmark against which the proposals may be judged. I would nevertheless suggest that those Principles are not the only criteria we should be applying. Provided that the proposed new laws are consistent with the Basic Law and the ICCPR, in the final analysis it is for the people of Hong Kong, and their legislature, to decide where to strike the balance between the protection of national security and freedom of expression and freedom of information.

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