

**EU-CHINA DIALOGUE SEMINAR ON HUMAN RIGHTS**  
**London, 12 – 13 December 2005**

**EU RECOMMENDATIONS**

Based on the open and frank discussions that took place on ICCPR article 14, article 9 and article 6(2) during the dialogue seminar on human rights that took place in London on December 12 and 13, 2005, participants from the European Union would like to recommend that the following steps need to be taken by China to bring its legislation into alignment with these articles.

In submitting these recommendations, EU participants would like to underline that no country is expected to be in conformity with all ICCPR provisions before ratification can take place and that ICCPR ratification by China would have a positive impact on the on-going reform process.

**Recommendations on ICCPR Article 14**

1. On equality before the courts

It is recommended to ensure that trials are public and that the concept of “state secret” is more strictly defined and is not broadly construed so as to derogate from this principle.

2. On judicial independence

It is recommended to establish safe-guards preventing the selection of judges on grounds of political considerations or local concerns and to exclude disciplinary measures caused by specific applications of the law in sentencing.

It is recommended to abolish or modify the different formal mechanisms by which outside forces, including the legal-political committees and the adjudication committees, are able to influence the judicial process.

3. On presumption of innocence

The Criminal Procedural Law should include an explicit right to remain silent.

4. On right to defense

It is recommended to ensure the equality of arms between the prosecutor and the defense lawyer. This includes protecting the following rights of the defense: the right to meet with the defendant in private, the right to see the file and the right to have access to evidence. The lawyer should be entitled to examine all the material of the prosecution and to cross-examine the suspect and the witnesses in court. The defendant should not be forced to accept a lawyer appointed by the government.

It is furthermore recommended to abolish or restrict application of article 306 of Criminal Law and article 38 of Criminal Procedural Law, and other provisions making it possible to identify lawyers with their clients or their client’s cause and to prosecute lawyers for fulfilling their professional obligations

#### 5. On role of witnesses

Measures should be taken to ensure that witnesses as a rule appear in court and are cross-examined in person by the prosecutor and the defense lawyer.

While any measures aiming at increasing the efficiency of justice are legitimate and welcome, it is recommended, so far as fast-track proceedings are concerned, that these should be confined to cases where the defendant has chosen to plead guilty or has indicated that he/she does not require any prosecution witnesses to be called. Before doing so, he/she should be advised of their rights.

#### 6. On forced confessions

There should be explicit and clear rules that coerced confessions should not be admitted in court and used as evidence. In alleged cases of torture and ill-treatment the burden of proof should rest with the prosecution and the public security organs. Any detained person should have effective and immediate access to a doctor.

### **Recommendations on ICCPR Article 9**

The two sets of recommendations submitted by the UN Working Group on Arbitrary Detention following the visits it undertook to China in 1996 and 2004 inspired most of the discussions that took place on article 9. EU participants endorse those recommendations. In addition, they would like to make the following specific recommendations.

#### Art. 9 (1) – Security and liberty of person.

It was encouraging to hear that Chinese law has already incorporated certain provisions guaranteeing security and liberty of person. EU participants recommend that no one can be detained on account of his/her political, ideological, or religious views, opinion, conviction or non-violent activity.

They recommend the definition of necessary safeguards against arbitrariness and abuse with respect to the Chinese system of confinement of mentally ill persons in mental health facilities, which they are not allowed to leave.

#### Art. 9 (2) – Right to be informed

According to Chinese information this requirement is fulfilled in practice, especially by way of warrants. It is recommended, however, that China consider a more formalized system of information. In particular, legally-binding provisions in the law should be established.

#### Art. 9 (3) – Obligation to bring detained person before a judge.

It is necessary to prohibit all forms of detention without approval by a judge. Furthermore, the judiciary needs to meet the criteria of independence and impartiality. In this respect the role of the procuratorate needs to be reconsidered.

Pre-trial detention should remain exceptional; the ongoing efforts in that respect are encouraged.

#### Art. 9 (4) – Right to remedy

Chinese law apparently does not effectively offer the right to challenge before a court the lawfulness of all kinds of detention, such as re-education through labour (RTL). On-going reform-

efforts should progress speedily on the basis of the relevant recommendations of the WG on Arbitrary detention as expressed in E/CN.4/2005/6/Add.4.

#### Art. 9 (5) – Right to compensation

It is sufficient for the claim that detention was unlawful: culpable conduct is not required. Chinese law needs to cover this.

### **Recommendations on ICCPR article 6(2)**

In light of the full and frank discussion on China's efforts to reduce the scope and implementation of the death penalty in line with the requirements and spirit of Article 6 of the ICCPR, the EU representatives respectfully submit the following recommendations:

1. It is important to interpret the concept of 'most serious offences' for which the death penalty may be appointed, pending its complete abolition, in the light of the development of norms and practices as regards the scope and implementation of capital punishment in the international context. In particular: the very substantial and rapid growth in the number of countries that have completely abolished the death penalty in peacetime or wartime or for all ordinary crimes under criminal law in peacetime, as well as the substantial number who have not carried out any executions for at least 10 years or have announced a moratorium on executions – between them accounting for 7 out of 10 of all member states of the United Nations; furthermore, the number of retentionist countries that have in recent years greatly reduced the number of crimes subject to capital punishment and the now very small number of countries that regularly carry out a substantial number of executions (20 or more) each year.
2. In the light of this, and in order to comply with the spirit of Article 6(2) of the ICCPR, it is recommended that there should be a very substantial reduction in the range of offences for which the death penalty may be imposed in China. This would be in line with United Nations policy (Resolution 2857/1971) to "progressively restrict the number of offences for which the death penalty might be imposed, with a view to its abolition" and with the statement of the UN Human Rights Committee that the wording of Article 6(2) should be read to mean that the death penalty can be applied, pending abolition, only as "a quite exceptional measure".
3. That in line with developing international norms and case law, it is recommended that all articles of the Criminal Law of the PRC that appoint the possibility of a mandatory sentence to death should be repealed, especially because five of these articles appear to appoint a mandatory death sentence in circumstances where there may be no death of an individual (Articles 121, 240, 317, 392 and 395) and two of which relate to economic crimes (Articles 392 and 395).
4. That Article 6(2) must be read in conjunction with Article 6(6), namely that "Nothing in the Article [Art. 6] should be invoked to delay or prevent the abolition of capital punishment by any State party to the present Covenant".
5. In order fully to inform the Chinese people, its academics, lawyers and policy makers, of the use of capital punishment and of the progress being made in restricting its scope and implementation, and in line with Resolution 1989/64 of the UN Economic and Social Council, it is recommended

that the PRC should publish, if possible on an annual basis, for each category of offence for which the death penalty may be imposed, the following data: the number of persons sentenced to death at the trial of first instance, whether immediately or suspended; the number of death sentences reversed or commuted at the trial of second instance; the number of death sentences approved by the People's Supreme Court; the number of instances in which clemency had been granted; the number of persons under sentence of death at the end of the year; and the annual number of executions carried out. The EU participants believe that it would be an advance in making China's practice more transparent if the PRC would respond positively to the UN Secretary-General's next quinquennial survey on *Capital Punishment and the Implementation of the Safeguards Guaranteeing the Rights of those facing the Death Penalty*.