

For Discussion

Legislative Council Panel on Security

**Fourth and Fifth Reports of the People's Republic of China (PRC)
under the Convention Against Torture and Other Cruel,
Inhuman or Degrading Treatment or Punishment**

Part Two: Hong Kong Special Administrative Region

INTRODUCTION

Members asked to discuss the "Fourth and Fifth Reports of the People's Republic of China under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - Part Two: Hong Kong Special Administrative Region", which was published in June 2006. This paper briefs Members on areas under the purview of the Security Bureau.

BACKGROUND

2. The People's Republic of China is a State Party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Convention"). Article 19.1 of the Convention requires State Parties to submit periodic reports on the measures they have taken to give effect to their undertakings under the Convention. The first report of the HKSAR under the Convention (the "initial report") was submitted in May 1999, together with the third periodic report of China, to the United Nations Committee Against Torture ("the UN Committee"). In Hong Kong, the Legislative Council Panel on Home Affairs (HA Panel) discussed the initial report on 13 March 2000. The UN Committee heard the initial report on 4 and 5 May 2000 and issued its conclusions and recommendations on 9 May 2000 (copy at **Annex**). The UN Committee welcomed a number of measures taken by the HKSAR, such as the release of all Vietnamese refugees/migrants; increase in the maximum sentence for certain sexual crimes; and introduction of training courses targeting law enforcement personnel.

3. Pre-drafting consultation on the second report on the HKSAR ("the second report") was conducted from 7 May to 18 June 2004. The HA Panel discussed the outline of the topics of the second report, which included the Government's preliminary response to the 2000 conclusions and recommendations of the UN Committee, as well as received views from various deputations, on 11 June 2004.

4. The second report was submitted to the United Nations in June 2006 as part of China's Fourth and Fifth reports on the Convention. It was circulated to Members of the Legislative Council in early August 2006, and is also available for public access on the web site of the Home Affairs Bureau ("www.hab.gov.hk"). The UN Committee has not fixed a hearing date yet.

THE SECOND REPORT

5. Other than responding to the 2000 recommendations of the UN Committee, the second report also sets out, among other things, developments since the submission of the initial report. The salient points are summarized in paragraphs 6 to 19 below.

Article 1: Defining "torture"

6. The UN Committee expressed the concern that the reference to "lawful authority, justification or excuse" as a defence for a person charged with torture, as well as the definition of a public official in the Crimes (Torture) Ordinance, (Chapter 427), "are not in full conformity with Article 1 of the Convention". The UN Committee recommended that "the necessary steps be taken to ensure that torture, as defined in Article 1 of the Convention, is effectively prosecuted and appropriately sanctioned".

7. The Government had explained the position of HKSAR to the UN Committee. For the purpose of the said Ordinance (section 3(5)), "lawful authority, justification or excuse" means –

- (a) in relation to pain or suffering inflicted in Hong Kong, lawful authority, justification or excuse under the law of Hong Kong;
- (b) in relation to pain or suffering inflicted outside Hong Kong –
 - (i) if it was inflicted by a public official acting under the law of Hong Kong or by a person acting in an official capacity under

that law, lawful authority, justification or excuse under that law;

- (ii) in any other case an authority, justification or excuse which is lawful under the law of the place where it is inflicted.

8. The defence is intended, and is also necessary, to cover matters such as the reasonable use of force to restrain a violent suspect/prisoner. It is not intended, nor would the courts be asked to interpret it, as authorising conduct intrinsically equivalent to torture as defined in Article 1 of the Convention.

Article 2: Legislative, administrative, judicial or other measures to prevent acts of torture

9. The UN Committee also expressed the concern that there were as yet no prosecutions under the Crimes (Torture) Ordinance, despite "circumstances brought to the attention of the Committee justifying such prosecutions".

10. The Government does not condone or tolerate the use of any excessive force by law enforcement officers, who are trained to treat all persons, including detainees and arrested persons as individuals, with humanity and respect. Torture is a particularly serious offence that carries a maximum sentence of life imprisonment. For an act to qualify as torture, there must be evidence that severe pain and suffering were intentionally inflicted by the authorities acting in their official capacities. No cases have met those criteria on the strength of the evidence so far. This may indeed reflect the deterrent effect of the relevant legislation and the success of the education programme against torture (see paragraphs 14 and 15 below). Should there be cases meeting the requisite evidential requirement, prosecutions would be initiated.

Article 3: Torture as a ground for refusal to expel, return or extradite

11. The UN Committee remarked that "the practices in the Hong Kong Special Administrative Region relating to refugees may not be in full conformity with article 3 of the Convention". It recommended that "laws and practices relating to refugees be brought into full conformity with Article 3 of the Convention".

12. The Government has put in place new administrative procedures since end 2004 for assessing torture claims under Article 3.1. Claimants who have failed to establish their claims will be removed from Hong Kong in accordance with the laws. Claimants whose claims are established will not be removed to places where there are substantial grounds for believing that they would be in danger of being subject to torture. That said, they are not automatically entitled

to remain in Hong Kong. They may be removed from Hong Kong if at any time their claimed threat diminishes and protection under the Convention is no longer required. They may also be removed where appropriate to a safe alternative country or territory where they will be received.

13. As at late November 2006, the Immigration Department is handling some 530 cases involving over 560 people. Thirty-six claims (37 persons) have been rejected and ten claimants have lodged appeals according to Article 48(13) of the Basic Law. The Secretary for Security, under the delegated authority from the Chief Executive, is responsible for considering the appeals.

Article 10: Education and information on the prohibition of torture

14. The UN Committee recommended “the continuation and intensification of preventive measures, including training for law enforcement officials”.

15. All relevant disciplined services have provided both basic training and subsequent in-service training or courses for law enforcement officers as well as other relevant staff to remind them of the importance of adhering to the relevant principles and legislation against torture, including the use of minimum force and the requirement to treat people with respect and humanity, in performing their duties. Such training covers, among others, the provisions of the Hong Kong Bill of Rights Ordinance (Cap 383) and the Crimes (Torture) Ordinance. Besides, copies of the "Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", issued by the Office of the UN High Commissioner for Human Rights, have been distributed to all relevant bureaux and departments. Other than training, the adherence to the relevant principles against torture is incorporated into the staff management system as appropriate. For instance, the competency of supporting humanity, including the recognition of the right of prisoners or inmates and ensuring a reasonable degree of their well-being, has been included as one of the assessment criteria for officers' performance appraisal.

Article 13: Right of complaint

16. The UN Committee recommended that “continued efforts be made to ensure that the Independent Police Complaints Council (IPCC) becomes a statutory body, with increased competence”. In line with this recommendation and with a view to further enhancing the existing system, we are taking steps to convert the IPCC into a statutory body, and are preparing the necessary legislative proposals. We briefed the Legislative Council Panel on Security in June 2006 on the main legislative proposals. We aim to introduce a bill into the

Legislative Council in the 2006-07 legislative session after completing our consultation with the IPCC.

17. All relevant disciplined forces have instituted comprehensive complaints systems. The Correctional Services Department, the Immigration Department, the Police Force and the Customs and Excise Department have each established a unit to handle complaints made against the department and its staff. Investigation is conducted independent of other branches of the department. Complaints that indicate the possible commission of a criminal offence are promptly referred to the Police. We also wish to point out that there are also complaints channels outside the relevant disciplined forces, such as petitions to the Chief Executive, Legislative Council and the Ombudsman.

Article 16: Prevention of other acts of cruel, inhuman or degrading treatment or punishment

18. The UN Committee expressed concern that “not all instances of torture and other cruel, inhuman or degrading treatment or punishment are covered by the Crimes (Torture) Ordinance”. It recommended that “efforts be made to prevent other acts of cruel, inhuman or degrading treatment or punishment, in accordance with the provisions of the Convention”.

19. The relevant provisions of the Convention already enjoy the force of law in Hong Kong through –

- (a) Article 28 of the Basic Law, which prohibits the torture of any resident;
- (b) The Hong Kong Bill of Rights Ordinance; and
- (c) The Crimes (Torture) Ordinance.

Acts of the kind envisaged in Article 16 are already prohibited under the law in Hong Kong. As an additional safeguard and where appropriate, Hong Kong courts will construe domestic legislation in such a way as to ensure compatibility with our international obligations, including those imposed under the Convention. For these reasons, the Government considers that the relevant requirements of the Convention are fully met.

**Security Bureau
November 2006**

Conclusions and recommendations of the Committee against Torture on the Report on the HKSAR under the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.

CAT/C/24/Concl.3

9 May 2000

COMMITTEE AGAINST TORTURE

24th Session

1-19 May 2000

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION

Conclusions and recommendations of the Committee against Torture (Note: this document only contains extracts of paragraphs concerning the Hong Kong Special Administrative Region)

China

1. The Committee considered the third periodic report of China (CAT/C/39/Add.2) at its 414th, 417th and 421st meetings on 4, 5 and 9 May 2000 (CAT/C/SR.414, 417 and 421), and adopted the following conclusions and recommendations:

I. Introduction

2. The third periodic report of China consists of two parts. Part I covers the whole of China, with the exception of the Hong Kong Special Administrative Region, and Part II covers the Hong Kong Special Administrative Region only.

3. The Committee welcomes the third periodic report of China, which conforms with the general guidelines for the preparation of State party reports. The Committee expresses its appreciation for the additional information and replies provided by the State party and the continued and constructive co-operation of China with the Committee.

PART I - CHINA, EXCLUDING THE HONG KONG SPECIAL ADMINISTRATIVE REGION

V. Recommendations

19. The State party is invited to consider, in respect of both its mainland part and the Hong Kong Special Administrative Region, declaring in favour of articles 21 and 22 of the Convention and withdrawing its reservation under article 20, and to

ensure, the continued applicability of article 20 in the Hong Kong Special Administrative Region.

PART II - HONG KONG SPECIAL ADMINISTRATIVE REGION

VI. Factors and difficulties impeding the application of the provisions of the Convention

26. The Committee notes that the reintegration of the Hong Kong Special Administrative Region into China created no factors and difficulties impeding the application of the Convention.

VII. Positive aspects

27. The Committee expresses its appreciation to the Government of China for the steps taken to ensure the continued application of the Convention in the Hong Kong Special Administrative Region, the authorities of which have prepared parts of the report.

28. The Committee welcomes the release of all Vietnamese refugees and migrants and the closure of the Pillar Point detention centre.

29. The Committee welcomes the adoption of legislation to facilitate the extradition of persons suspected of having committed acts of torture.

30. The Committee notes as positive the strengthening of the independence of the Independent Police Complaints Council.

31. The Committee welcomes the increase of the maximum sentence for certain sexual crimes such as incest and the abolition of the requirement of corroboration in respect of sexual offences.

32. The Committee welcomes the introduction of training courses and other educational measures targeting law enforcement personnel, and the fact that interviews of detainees are videotaped.

VIII. Subjects of concern

33. The Committee is concerned that the reference to "lawful authority, justification or excuse" as a defence for a person charged with torture, as well as the definition of a public official in the Crimes (Torture) Ordinance, Chapter 427, are not in full conformity with article 1 of the Convention.

34. The Committee is concerned about the fact that there are as yet no prosecutions under the Crimes (Torture) Ordinance, despite circumstances brought to the attention of the Committee justifying such prosecutions.

35. Concern is expressed that not all instances of torture and other cruel, inhuman or degrading treatment or punishment are covered by the Crimes (Torture) Ordinance.

36. It is noted with concern that the practices in the Hong Kong Special Administrative Region relating to refugees may not be in full conformity with article 3 of the Convention.

IX. Recommendations

37. The Committee recommends that the necessary steps be taken to ensure that torture, as defined in article 1 of the Convention, is effectively prosecuted and appropriately sanctioned and that efforts be made to prevent other acts of cruel, inhuman or degrading treatment or punishment, in accordance with the provisions of the Convention.

38. The Committee recommends that continued efforts be made to ensure that the Independent Police Complaints Council becomes a statutory body, with increased competence.

39. The Committee recommends the continuation and intensification of preventive measures, including training for law enforcement officials.

40. The Committee recommends that laws and practices relating to refugees be brought into full conformity with article 3 of the Convention.