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**Submission to the Panel of Security  
on the Concluding observations of the UN Committee Against Torture**

**Feb 2009**

The Committee against Torture (the Committee) has published its six-page concluding observations on the HKSAR. It expressed its concerns and recommendations on a number of Hong Kong issues. The Hong Kong Human Rights Monitor urges the HKSAR Government to take immediate effective legislative, administrative and other measures to address those concerns and to implement those recommendations.

**Extend various Optional Protocols to HKSAR**

While in its written replies to the list of issues to be taken up in connection with the consideration of the fourth periodic report of Hong Kong, the government replied that “the HKSAR is committed to implementing the Optional Protocol and, in preparation for its formal application to the HKSAR, are drawing up proposals for giving effect to the provisions of the Optional Protocol in domestic legislation”.<sup>1</sup> The Committee encourages the HKSAR to complete the process to give effect to the provisions of the Optional Protocol on the sale of children, child prostitution and child pornography, so to allow the extension of its application to HKSAR.<sup>2</sup>

The Monitor also urges the government to issue a plan of actions on the extension of various optional protocols, and a concrete schedule and timeline for the extension.

**Definition of Torture**

The Committee, in its Concluding Observation in 2001, listed a number of concerns over the Crimes (Torture) Ordinance. The Committee was 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”.<sup>3</sup> Over eight years there has been no improvement or action to the ordinance. Although the Government replied to the Committee stating that “The definition of the term “public official” in section 2(1) of the Ordinance is not exhaustive, but inclusive, as it is defined as “including” any person holding an office described in the Schedule to the Ordinance, i.e., an office in the Hong Kong Police Force, an office in the Customs and Excise Department, an office

<sup>1</sup> Paragraph 39, 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.

<sup>2</sup> Paragraph 14, Concluding Observations of the Committee against Torture: HKSAR, 2008.

<sup>3</sup> Paragraph 33, Concluding Observations of the Committee against Torture: HKSAR, 2000.

in the Correctional Services Department, an office in the Independent Commission Against Corruption, or an office in the Immigration Department”, the Committee was unsatisfied with it.<sup>4</sup> The Committee, in its recent Concluding Observations, again recommended the government “consider adopting a more inclusive definition of the term “public official” in the definition of torture as to clearly include all acts inflicted by or at the instigation of or with the consent or acquiescence of all public officials or other persons acting in an official capacity”.<sup>5</sup> The Monitor is concerned that the definition excludes many persons, including officers in the detention facilities for minors run by the Social Welfare Department. We propose to amend the ordinance to include at least the Chief Executive, all political appointees and “public officer” as defined in the Interpretation and General Clauses Ordinance (Cap. 1), which means “any person holding an office of emolument under the Government, whether such office be permanent or temporary” into the Crimes (Torture) Ordinance. The Ordinance should also be applied to any civilian, law and order, and military personnel of the central or local governmental authorities in Mainland China.

In response to the Committee’s calls for the abolition of the defense contained in section 3(4) of the Crimes (Torture) Ordinance (“defence of lawful authority, justification or excuse”), the government opines that the defense is necessary to cover matters such as the reasonable use of force to restrain a violent prisoner.<sup>6</sup> The Monitor opines that the freedom from torture is an absolute right and the Convention expressly prohibits any excuses or defence and such reason to retain the defense is totally unjustified. For instance, a law enforcement officer may use reasonable force but can never use any acts of torture to enforce the law. The Monitor urges that government to commit to adopt the recommendation of the Committee to abolish the defense.

Meanwhile, the Committee also recommended the Central Government to incorporate article 1 of the CAT into Hong Kong’s Basic Law.<sup>7</sup> The Monitor would like the Government to express its views on this recommendation, and, if there is any, the progress of its discussion with the Central Government on the incorporation.

### **Refugees and non-return to torture**

The Committee recommends the HKSAR to consider adopting a **legal** regime on asylum establishing a comprehensive and effective procedure to examine thoroughly the merits of each individual case.<sup>8</sup> Such a legal and institutional reform is also the best way to address the criticisms made in a number of recent court cases.<sup>9</sup> It is also important to building into the system legal assistance to assist asylum seekers to prepare their cases and other legal rights.

The Committee also recommends the HKSAR to ensure effective post-return monitoring arrangements.<sup>10</sup> The Monitor also notes that a research will be conducted by the Government on the issue. The Monitor would like to urge the government to inform the LegCo and the public on the kinds of existing post-return monitoring arrangements and the details of the research.

### **Transfer of fugitive offenders/sentenced persons**

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<sup>4</sup> Paragraph 8, 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.

<sup>5</sup> Paragraph 5, Concluding Observations of the Committee against Torture: HKSAR, 2008.

<sup>6</sup> P. 6, Annex B, Hearing of the Second Report of the HKSAR under the CAT, Security Bureau, 29 January 2009. LC Paper No. [CB\(2\)737/08-09\(03\)](#).

<sup>7</sup> Paragraph 6, Concluding Observations of the Committee against Torture: HKSAR, 2008.

<sup>8</sup> Paragraph 7, Concluding Observations of the Committee against Torture: HKSAR, 2008.

<sup>9</sup> HCAL 51, 105-107, 125, 126/07.

<sup>10</sup> Ibid.

While the Government expressed that the HKSAR and the Mainland authorities have been exchanging views on specific arrangements and issues related to the transfer of fugitive offenders and sentenced persons, the Monitor would like the Government to inform the LegCo and the public on the details and progress of the arrangements, especially the details of safeguards against “death penalty” and arrangements to facilitate post-return monitoring.

### **Training**

The Monitor opines that it is inadequate to only have general awareness among health care professionals. As the Committee stresses, more specific training programs and detailed guidelines for medical doctors and other health professionals are needed to detect and document signs of torture.<sup>11</sup> These would also be useful to detect and documents signs of torture as well as domestic violence.

Meanwhile, the Monitor would like the Government to inform the LegCo and the public the details on the current autopsy procedures especially the requirements on the type of examinations and the details of documentations.

### **Strip search and body cavity search**

The Monitor would like to urge the LegCo, especially the Subcommittee on Police's Handling of Sex Workers and Searches of Detainees, to closely monitor the further reviews of and improvements to the guidelines on searches of the body.

The Monitor would like the HKSAR Police Force to disclose the progress on the consideration of using electronic tools to perform certain searches and the results of the trial conducted.

It is highlighted by the Committee that there are allegations of abusive strip searches, including in facilities of the **Immigration Department** and of the **Correctional Services Department**.<sup>12</sup> The Government should follow up on these allegations. An effective monitoring mechanism should be established to investigate such allegations.

The Committee also expresses its concern over the allegations of the routine practice of conducting body cavity searches of those entering in prison.<sup>13</sup> The Monitor notes that the Correctional Services Department claiming to a local newspaper that “drug traffickers have invented ingenious ways to smuggle drugs into prisons” and “body-cavity searches are the only way to keep our prisons drug-free”.<sup>14</sup> The Monitor is of the opinion that this is not a justification to conduct body-cavity search on ALL persons upon their admission into a prison. Such searches should still be conducted on reasonable justifications and suspicion. We are afraid that the Correctional Services Department is in fact conducting a media campaign to justify this routine procedure.

### **Police operations**

While there are internal guidelines for the conduct of officers engaging in police operations in the context of prostitution-related offences, the guidelines allow sexual services like masturbation services. The Monitor opines that such guidelines may open the way to corrupt the police officers involved in such actions, and thus urge the Government and Police Force to amend the guidelines to

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<sup>11</sup> Paragraph 9, Concluding Observations of the Committee against Torture: HKSAR, 2008.

<sup>12</sup> Paragraph 10b, Concluding Observations of the Committee against Torture: HKSAR, 2008.

<sup>13</sup> Paragraph 10c, Concluding Observations of the Committee against Torture: HKSAR, 2008.

<sup>14</sup> “Strip searches ‘a must to keep jails drug free’”, Hong Kong Standard, 12 January 2009.

strictly disallow any excessive sexual services including masturbation services. Moreover, as the Committee highlighted its concern on all existing attitudes among the Police Force, suggesting that such abuses may be condoned. The Monitor urges that Police Force to disclose statistics on the number of cases involving the receiving of different kinds of sexual services in undercover police actions.

### **Independent investigation of police misconduct**

For many years, CAPO has been criticized as an ineffective institution in handling the complaints against police. The Committee stressed that the Government should continue to take steps to establish a fully independent mechanism mandated to receive and investigate complaints on police misconduct.<sup>15</sup> The Monitor would like the LegCo to set up a sub-committee to study the functions and performance of CAPO and that of the current and future IPCC. A genuine reform on the complaint against police mechanism should be conducted on the basis of the study.

### **The Way Forward**

The Committee recommends the Government to widely disseminate all the documents related to the CAT hearing, including various state reports and the Concluding Observations. After 2 months of the publication of the concluding observations, the Government has still not uploaded the concluding observations to its website. The Monitor urges the Government to adopt the recommendations of the Committee to widely disseminate all the related information and documents.

Meanwhile, the Committee is especially concerned about the issues on **refugees and non-return to torture, strip search and body cavity search**, and **independent investigation of police misconduct**, and requests the Government to provide information to the Committee's recommendations regarding the listed 3 issues. The LegCo should closely monitor the developments in these three areas.

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Paragraph 12, Concluding Observations of the Committee against Torture: HKSAR, 2008