

For information

**Legislative Council  
Panel on Security**

**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**

**Purpose**

At the Panel on Security's meeting to be held on 27 October 2008, Members will discuss issues relevant to the work of the Security Bureau in the second periodic report of the Hong Kong Special Administrative Region (HKSAR) under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). This paper provides relevant information for Members' reference.

**Background**

2. The CAT has been applied to Hong Kong since 1992. To fulfill the reporting requirement on the implementation of the Convention, the Home Affairs Bureau on behalf of the HKSAR Government submitted the first report (as part of China's third periodic report) to the Committee Against Torture of the United Nations (UN) in 1999. Hong Kong's second periodic report was submitted in 2006 as part of the combined fourth and fifth reports of China. As from July 2007, the Constitutional and Mainland Affairs Bureau has taken over from the Home Affairs Bureau responsibility for coordinating the compilation of the UN report.

3. At the meeting of the Panel on Security on 5 December 2006, Members discussed a paper (LC Paper No. CB(2)496/06-07(01) on areas in the second periodic report which are under the purview of the Security Bureau.

**Latest Position**

4. The second periodic report will be considered by the UN's Committee Against Torture in Geneva on 7 and 10 November 2008. A team of HKSAR Government officials will attend the session as part of the China delegation.

5. The Committee has decided on a list of issues to be discussed at the session. This list, together with the written response the HKSAR Government has provided before the session, is now available on the relevant website of the UN. The list of issues and the response are at the Annex for Member's reference.

**Advice Sought**

6. Members are invited to note the content of this paper.

Security Bureau

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UNITED  
NATIONS

**CAT**



**Convention against Torture  
and Other Cruel, Inhuman  
or Degrading Treatment  
or Punishment**

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COMMITTEE AGAINST TORTURE

Forty-first session

Geneva, 3-21 November 2008

**Written replies by the Hong Kong Special Administrative Region\* to the list of issues (CAT/C/HKG/Q/4) to be taken up in connection with the consideration of the fourth periodic report of HONG KONG (CAT/C/HKG/4)**

[26 September 2008]

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\* In accordance with the information transmitted to States parties regarding the processing of their reports, the present document was not formally edited before being edited sent to the United Nations translation services.

## Article 1

**Question 1. Please clarify whether the Hong Kong Special Administrative Region (HKSAR) is considering revising its criminal code to ensure that the definition of torture in section 3 of the Crimes (Torture) Ordinance contains all the elements included in article 1 of the Convention. Also on the issue of definition, please clarify what is meant for “defence of lawful authority, justification or excuse”, which is provided for by section 3 of the Crimes (Torture) Ordinance and explain whether this is in full compliance with article 1 of the Convention.**

1. The definition of torture in section 3(1) of the Crimes (Torture) Ordinance (Cap. 427) includes all severe pain or suffering inflicted by a public official in the performance of his duties, regardless of their purposes. This goes wider than the definition in Article 1 of the Convention.
2. It is therefore necessary to create the defence of “lawful authority, justification or excuse” in section 3(4) of the Ordinance so that an official who incidentally inflicts severe pain or suffering in the performance of his duties would not be subject to criminal sanctions.
3. This would cover situations such as pain caused during a lawful arrest, mental suffering resulting from a sentence of imprisonment, serious injury inflicted by a police officer in the prevention of a crime, or pain caused by a medical surgeon in discharging his legitimate duties.
4. In construing the meaning of the phrase “lawful authority, justification or excuse”, the courts would have regard to the prohibition of torture under article 28 of the Basic Law as well as the prohibition against torture or cruel, inhuman or degrading treatment or punishment under article 3 of the Hong Kong Bill of Rights, which gives domestic effect to article 7 of the International Covenant on Civil and Political Rights (ICCPR). The Hong Kong Bill of Rights Ordinance (Cap. 383) incorporates into the law of Hong Kong the provisions of the ICCPR as applied to Hong Kong. It binds the Government of the Hong Kong Special Administrative Region (HKSAR) and all public authorities as well as any person acting on behalf of the Government or a public authority.
5. Hong Kong courts may also examine an international treaty to assist them in the interpretation of any Ordinance whose purpose was to give effect to the treaty. As the object of the Crimes (Torture) Ordinance is to give effect to the provisions of the Convention Against Torture (CAT), the courts would take into account the meaning of “lawful sanctions” in article 1 of the CAT and the relevant requirements of article 7 of the ICCPR when interpreting the defence in section 3(4) of the Ordinance.
6. In view of article 39 of the Basic Law which entrenches the provisions of the ICCPR as applied to Hong Kong, the defence could not be relied upon to avoid liability in cases of torture under article 3 of the Hong Kong Bill of Rights (ie, art. 7 of the ICCPR). The Ordinance does not authorise the use of this defence in circumstances which would amount to torture under the Convention.
7. Further, the statutory defence only applies where the public official is acting lawfully. The phrase “lawful authority, justification or excuse” requires that the authority, justification or

excuse to be in accordance with the law and have the quality of law. Abuse of power would not meet this standard. Nor could “superior orders” be invoked as a justification for torture.

**Question 2. Please indicate the reasons why the term “public official” under Section 2(1) of the Crimes (Torture) Ordinance only covers officials normally involved in the custody or treatment of persons deprived of their liberty. Is there any initiative to apply a more inclusive term in the definition of torture so as to cover all prohibited acts committed by all kinds of public officials or persons acting in public capacity or with their acquiescence or consent?**

8. 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 in the Correctional Services Department, an office in the Independent Commission Against Corruption, or an office in the Immigration Department.

## Article 2

**Question 3. Please provide further information on the rights of persons detained in police custody, in particular their right of access to legal counsel and to an independent doctor, to be informed of their rights and to inform their family promptly of their detention. Please also provide further information with respect to the law and practice related to the length of custody and pre-trial detention.**

9. The right to liberty and security of person is guaranteed by article 5 of the Hong Kong Bill of Rights, which gives domestic effect to article 9 of the ICCPR. Article 28 of the Basic Law also guarantees the freedom of the person and prohibits arbitrary or unlawful detention.

10. Article 5(1) of the Hong Kong Bill of Rights provides that no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. Article 5(2) relates to the right to be informed of the reasons for arrest and of the charges preferred. Article 5(3) provides that release on bail pending trial should be the norm, and that a person arrested or detained on a criminal charge should be brought before a judge or magistrate promptly so that the question of bail can be addressed. It also provides that the defendant is entitled to be tried within a reasonable time or be released. Article 5(4) further provides that a person who is deprived of his liberty is entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is unlawful. Article 5(5) provides for an enforceable right to compensation for anyone who has been the victim of unlawful arrest or detention.

11. These rights provide protection against, and remedies for, arbitrary arrest or detention. In particular, it shall not be the general rule that persons awaiting trial shall be detained in custody: there is a statutory presumption in favour of bail.

12. Under article 11(2) of the Hong Kong Bill of Rights, a person charged with a criminal offence is entitled to the following guarantees:

(a) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his choosing;

(b) To be tried without undue delay; and

(c) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

13. By virtue of article 35 of the Basic Law, Hong Kong residents also have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies.

#### **Rights of persons detained in police custody**

14. The rights of every detained person in police custody include the following: the right to be supplied with adequate food, refreshment and drinking water; the right to communicate with friends and relatives; the right to request that a friend or relative be notified of their detention; the right to receive medical attention; the right to request for a list of solicitors and the right to have a solicitor or barrister present during any interview with the Police, etc. These rights are listed on a notice to be served to a detained person. Detained persons are asked to sign on the notice to acknowledge that they have been notified of these rights.

15. The Duty Officer, the designated officer in a police station who is responsible for looking after the welfare and the rights of detained persons, will keep under review the need to continue to detain a person. Detainees are not held in police stations for longer than is absolutely necessary. Pursuant to section 52 of the Police Force Ordinance (Cap. 232), whenever a person is detained in custody, “he shall be brought before a magistrate as soon as practicable, unless within 48 hours of his apprehension a warrant for his arrest and detention under any law relating to deportation is applied for, in which case he may be detained for a period not exceeding 72 hours from the time of such apprehension”.

**Question 4. Please explain whether HKSAR authorities would have jurisdiction over Chinese military present in HKSAR for any violation of the rights protected under the Convention. If so, please clarify under which jurisdiction (i.e. civil or military) and where (i.e. in Mainland China or in HKSAR) such persons eventually would be tried and prosecuted.**

16. According to article 14(4) of the Basic Law of the HKSAR and articles 16 and 19 of the Law of the People’s Republic of China (PRC) on the Garrisoning of the HKSAR, members of the Hong Kong Garrison must abide by national laws and the laws of the HKSAR. Any member of the Hong Kong Garrison who contravenes any national law or law of the HKSAR will be investigated for legal responsibility according to law.

17. Jurisdiction over cases involving members of the Hong Kong Garrison is determined in accordance with the provisions of Article 20 of the PRC Law on the Garrisoning of the HKSAR.

18. Criminal offences committed by members of the Hong Kong Garrison are subject to the jurisdiction of the military judicial organs, but acts committed by members of the Hong Kong Garrison, when not performing their official duties, in violation of the personal right or property right of Hong Kong residents (or other persons not of the Hong Kong Garrison) and other criminal offences committed in violation of the laws of the HKSAR are subject to the jurisdiction of the Hong Kong courts.

19. The military judicial organ and the Hong Kong court may transfer to the other party the criminal cases of members of the Hong Kong Garrison under their respective jurisdiction if they consider it to be more appropriate for the other party to exercise jurisdiction.

20. Hong Kong residents or other persons not of the Hong Kong Garrison involved as defendants in the criminal cases of members of the Hong Kong Garrison under the jurisdiction of the military judicial organs are tried by the Hong Kong courts.

21. Where any member of the Hong Kong Garrison, in contravention of the laws of the HKSAR, infringes the civil rights of any Hong Kong resident or other person not of the Hong Kong Garrison, and the parties concerned are unwilling or fail to reach settlement through consultation or mediation, the victim may bring an action in the court. Tort cases arising from acts committed by members of the Hong Kong Garrison when not performing their official duties are subject to the jurisdiction of the Hong Kong courts. Tort cases arising from acts committed by members of the Hong Kong Garrison when performing their official duties are subject to the jurisdiction of the People's Republic of China's Supreme People's Court. Compensation for any loss or injury incurred by the tort is governed by the laws of the HKSAR.

**Question 5. Please comment on the information available to the Committee that, while presumption of innocence is a well-established principle in the judicial system of HKSAR, there would be presumption of guilt in official corruption cases.**

22. The presumption of innocence is entrenched in our law by article 87(2) of the Basic Law and article 11(1) of the Hong Kong Bill of Rights. Article 87(2) of the Basic Law provides that anyone who is lawfully arrested "shall be presumed innocent until convicted by the judicial organs". Article 11(1) of the Bill of Rights provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

23. Although these rights are expressed in absolute terms and are not subject to explicit exceptions or qualifications, it is generally accepted that an encroachment on these rights by way of presumption or reverse onus of proof may be justified if it has a rational connection with the pursuit of a legitimate aim and if it is no more than necessary for the achievement of that legitimate aim.

*Section 10(1) of the Prevention of Bribery Ordinance*

24. Section 10(1) of the Prevention of Bribery Ordinance (Cap 201, LHK) casts a burden of proving the absence of corruption upon a defendant. It provides:

"Any person who, being or having been a prescribed officer-

(a) Maintains a standard of living above that which is commensurate with his present or past official emoluments; or

(b) Is in control of pecuniary resources or property disproportionate to his present or past official emoluments,

shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence.”

A “prescribed officer” generally refers to “any person holding an office of emolument, whether permanent or temporary, under the Government”.

25. Section 10(1) was enacted to meet cases where it would be difficult or even impossible for the prosecution to prove that a particular officer had accepted any bribes, but the outward signs were strongly indicative of corruption having taken place: the officer’s standard of living was on a scale so incommensurate with his official emoluments (or his material possessions were of an amount or value so disproportionate to his official emoluments) as to create a prima facie case that he had accepted bribes.

26. Section 10(1) imposes the burden of giving a satisfactory explanation on the accused. This deviates from the principle that it is for the prosecution to prove the accused’s guilt beyond reasonable doubt, but can be justified in the fight against serious corruption.

27. Bribery is an evil practice which threatens the foundations of any civilised society. Corruption was endemic in Hong Kong for many years. There is also “notorious evidential difficulty” in proving that a public servant had solicited or accepted a bribe.

28. The insidious nature of corruption offences derives from the fact that corrupt transactions take place in secret, with the parties likely to be mutually satisfied with their illicit arrangement, each having every incentive to conceal it, making detection, investigation and prosecution particularly difficult. The true victim, society as a whole, is generally unaware of the specific occasions on which it is victimized. Unlike dangerous drugs cases, for example, there is no obviously unlawful commodity, like the drugs themselves, which the criminals can be caught in possession of. It is, therefore, necessary to have a reverse onus clause requiring an accused to provide an explanation.

29. Where the charge is laid under section 10(1)(a), the prosecution must first prove the standard of living maintained by the accused during the charge period, and his total official emoluments during that period; then go on to establish that the former is “above that which is commensurate with” the latter. The words in quote convey the idea that the standard of living maintained by the accused could not reasonably, in all the circumstances, have been afforded out of his total official emoluments during that period.

30. Where the charge is laid under section 10(1)(b), the prosecution must first prove the amount of pecuniary resources and other assets in the accused’s control at the charge date, and his total official emoluments up to that date; then go on to establish a disproportion between the two. The words “disproportionate to” convey the idea that the acquisition of the total assets

under the accused's control could not reasonably, in all the circumstances, have been afforded out of the total official emoluments up to that date.

31. The accused has to give a satisfactory explanation as to how he was able to maintain an incommensurate standard of living or how the disproportionate pecuniary resources or property came under his control. In the normal way, the primary facts on which the accused's explanation would be based – such as the existence of any capital or income of his independent of his official emoluments – would be peculiarly within his own knowledge. It is for him to prove such facts, on the balance of probabilities.

32. If the accused proves the factual matters on which he bases his explanation, the court will decide whether or not such matters might reasonably account for the incommensurate standard of living or disproportionate pecuniary resources or property. The explanation requirement is not triggered by trifling incommensurateness or disproportion. No notice will be taken of any incommensurateness or disproportion unless it is of some substance. In judging whether it is of some substance the courts take into account the fact that section 10(1) was introduced to combat serious corruption. Even where that threshold is reached, it is still the case that the slighter such incommensurateness or disproportion the less is required by way of an explanation for the same.

33. The courts recognise that section 10(1) constitutes a strong deterrence in inhibiting public service corruption. What is required of the accused charged with an offence under section 10(1) is not unreasonable. The provisions are consistent with the right to be presumed innocent. Section 10(1) is an acceptable balance which ensures that society is both clean and free.

*Section 14(4) and 24 of the Prevention of Bribery Ordinance*

34. Recently, the Court of Final Appeal in *HKSAR v Ng Po On* (decided on 7 March 2008) considered the question as to whether section 24 read with section 14(4) of the Prevention of Bribery Ordinance were consistent with the presumption of innocence protected by the Basic Law and the Bill of Rights. A person commits an offence under section 14(4) if he, without reasonable excuse, neglects or fails to comply with a notice requiring him to provide information to an investigating officer. Section 14(4) is not itself a corruption offence. It is merely an ancillary offence aimed at promoting the effectiveness of the special powers of investigation conferred by the Ordinance. Section 24 provides that in any proceedings against a person for an offence under the Prevention of Bribery Ordinance, the burden of proving a defence of lawful authority or reasonable excuse shall lie upon the accused.

35. The Court held that the above provisions derogated from the presumption of innocence because they placed a persuasive (legal) burden on the defence to establish the existence of a reasonable excuse on the balance of probabilities. Although making non-compliance with section 14 notices an offence (which provided for a reverse onus) was a rational means of enforcing investigative and prosecutorial powers, the abrogation of the presumption of innocence could not be justified in that particular case. The Court therefore applied a remedial interpretation and declared that the provisions should be read and given effect as imposing an evidential burden only, with the persuasive burden lying on the prosecution.

36. It can be seen from the above that the provisions of the Prevention of Bribery Ordinance do not override the guarantees afforded by the presumption of innocence protected by the Basic Law and the Bill of Rights.

**Question 6. Please clarify how the independence and impartiality of the judiciary is maintained.**

37. The independence of the Hong Kong Judiciary is constitutionally guaranteed by a number of provisions in the Basic Law. Thus,

- (a) HKSAR enjoys “independent judicial power, including that of final adjudication” (art. 2);
- (b) Judges are chosen on the basis of their judicial and professional qualities (art. 92);
- (c) Judges are appointed by the Chief Executive on the recommendations of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors (art. 88). This commission is the Judicial Officers Recommendation Commission created by the Judicial Officers Recommendation Commission Ordinance (Cap 92);
- (d) No judge may be removed except for inability to discharge his duties, or for misbehaviour, by the Chief Executive on the recommendation of a tribunal appointed by the Chief Justice of the Court of Final Appeal and consisting of not fewer than three local judges (art. 89);
- (e) The Chief Justice may be investigated only for inability to discharge his duties, or for misbehaviour, by a tribunal appointed by the Chief Executive and consisting of not fewer than five local judges and may be removed by the Chief Executive on the recommendation of the tribunal and in accordance with the procedures prescribed in the Basic Law (art. 89);
- (f) Appointments and removals of a judge of the Court of Final Appeal or the Chief Judge of the High Court are to be endorsed by the Legislative Council and reported to the Standing Committee of the National People’s Congress “for the record” (art. 90);
- (g) The power of final adjudication is to be vested in the Court of Final Appeal of the HKSAR art. 82);
- (h) The courts are to adjudicate cases in accordance with the laws applicable in the HKSAR and may refer to precedents of other common law jurisdictions (art. 84);
- (i) The courts are to exercise their judicial power “independently, free from any interference” (art. 85);
- (j) Members of the judiciary are immune from legal action in the performance of their judicial functions (art. 85); and

(k) Members of the judiciary who are in service at the time of the establishment of the HKSAR are guaranteed their employment and seniority, with pay, allowances, benefits and conditions of service no less favourable than before (art. 93).

38. The impartiality of the Judiciary is also underpinned by a well-established court system, under which the courts administer justice openly and impartially under the law. Hong Kong's courts and tribunals hear prosecutions and civil disputes at different levels according to their jurisdiction and the nature of cases, including appeals to higher courts. In criminal trials, the judge may sit alone or with a jury. In civil cases, the role of the court is to adjudicate disputes between citizens and between citizen and Government. A structure for appeals is built into the court system to enable appropriate challenges to be made against a ruling in a lower court by way of appeal to a higher court. From the Court of Final Appeal to the Magistracies, one can see the rule of law in action through Hong Kong's court system. The fact that a judge is partial or interested in the outcome of a case is a ground of judicial review.

**Question 7. Please inform the Committee on any plan to extend to HKSAR the application of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.**

39. We are 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.

**Article 3**

**Question 8. Please expand on the Court of Final Appeal (CFA) judgment in the case "Secretary for Security v Sakthivel Prabakar" and on the new procedures for deportation/removal following thereto. What has been the result of the 58 article 3 related claims in paragraph 66 of the report? Please provide case details, including on countries of origin/return. In this respect, please also clarify the measures taken to ensure compliance with the non-refoulement principle as enshrined in article 3 of the Convention, including clarifying what measures, if any, are in place for assessing claims that a person faces a substantial risk of torture on return.**

40. In the case "Secretary for Security v. Sakthivel Prabakar" decided in June 2004, the CFA held that the Secretary for Security should conduct independent assessment of torture claims rather than relying on refugee status determination of the United Nations High Commissioner for Refugees (UNHCR). The CFA also stated in the judgment that high standards of fairness must be observed in determining torture claims, and the potential deportee should be given every reasonable opportunity to establish his claim. The courts would on judicial review subject the administrative determination to rigorous examination and anxious scrutiny to ensure that the required high standards of fairness have been met.

41. In consequence of the Court's decision, as reported in paragraph 66 of HKSAR's fourth periodic report under CAT, the Government has put in place administrative procedures for assessing torture claims under article 3.1. At the time of lodging claims, torture claimants will receive written notice as well as interpreter-assisted explanation of the procedures, including the completion of questionnaire, interview, use of the information collected, determination of the

claim, right to petition etc. Every reasonable opportunity is allowed for claimants to substantiate their case, including opportunities to furnish additional information, respond to a minded-to-refuse letter before the final determination, and appeal by petition against the determination. The determination of claims as well as petitions is also subject to judicial review.

42. With regard to removal and deportation, our position as explained in paragraphs 67 and 68 of the report remains unchanged.

43. Among the 58 article 3-related claims mentioned in paragraph 66 of the report, as at 31 July 2008, 26 out of the 58 cases have been resolved. Of the 39 claimants involved, 15 have departed for their home country or a third country, 14 persons are pending departure arrangements to their home country or a third country, seven persons are remaining in Hong Kong to pursue their appeals/judicial reviews, two persons have absconded, and one person was screened-in. The other 32 cases involving 34 persons are more complex ones, and are under active processing.

44. Where a person subject to deportation/removal from Hong Kong lodges a torture claim under article 3 of the Convention, execution of the relevant deportation/removal orders will be suspended in accordance with the non-refoulement principle. The torture claim will be assessed according to a set of administrative procedures, developed in light of the judgment by the CFA in the case of Prabakar. The procedures are designed to meet high standards of fairness demanded by the Court in that case, and every reasonable opportunity is allowed for claimants to state their case.

45. In assessing individual claims, the Immigration Department conducts in-depth interviews with the claimants, and examines in detail information on the individual's case as well as the country conditions. If the torture claim is substantiated, the person will not be returned to the country where there are substantial grounds for believing that he would be in danger of being subjected to torture. If a claim is found to be unsubstantiated, the screened-out torture claimant may object to the decision of the Director of Immigration by lodging a petition to the Chief Executive. The petition will be considered by the Secretary for Security under the delegated authority from the Chief Executive. In the petition process, the claimant may make further representations as deemed necessary. If the claimant is aggrieved by the refusal of his petition, he may apply for judicial review to challenge the decision of the Secretary for Security.

**Question 9. Please clarify whether the decision in AK v HKSAR (Director of Immigration) has affected HKSAR's recognition or guarantee in local law of a legal right of individuals not to be returned or deported to a country where he/she faces a substantial risk of torture. How is procedural fairness ensured to the person seeking to exercise the rights recognized by the Convention?**

46. The application for judicial review in the case of AK v Director of Immigration raised two issues. The first issue was whether the HKSAR Government had an obligation under customary international law not to expel a refugee to the frontiers of any territory where he would face persecution on account of his race, religion, nationality, membership of a particular social group or political opinion. The second issue was whether – if such an obligation existed – the Government was obliged, as an integral element of that obligation, to determine the true status of all refugee claimants.

47. The Court of First Instance held that there is a universal rule of customary international law which prohibits the refoulement of refugees, but that the rule has not attained the status of a pre-emptory norm (i.e. a norm from which no derogation by any state or jurisdiction is permitted). It further held that the rule has no application in domestic law and the Government has no obligation pursuant to the rule to conduct screening of all refugee claimants.

48. The case concerned persons seeking refugee status, not persons making claims under the CAT. The Court's decision in the case does not affect HKSAR's obligation under article 3 of the CAT.

49. As regards the procedural fairness ensured to persons seeking protection under the CAT, relevant information is set out in question 8 above.

**Question 10. In view of official statements emphasizing ongoing problems in law and in practice regarding article 3, how do the HKSAR's policies since the last review by the Committee give effect to the recommendation that its laws and practices be brought into full conformity with article 3 of the Convention? Please advise on any legislative proposal or other measures in this regard. Is there any plan to extend to HKSAR the application of the 1951 UN Convention relating to the Status of Refugees and its 1967 Protocol?**

50. As reported under question 8 above, following the judgment by the Court of Final Appeal in the case of Prabakar in June 2004, a set of administrative procedures for handling torture claims were introduced. The procedures were designed to meet high standards of fairness demanded by the Court. We have no plan to extend to Hong Kong the application of the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol. Hong Kong is small in size and has a dense population. Our unique situation, set against the backdrop of our relative economic prosperity in the region and our liberal visa regime, makes us vulnerable to possible abuses if the Convention were to be extended to Hong Kong.

**Question 11. With respect to asylum seekers and irregular migrants, please clarify whether they are held in detention and, if so:**

- (a) The number of asylum-seekers and irregular migrants held in detention;
- (b) What is the nature of this detention (administrative, criminal);
- (c) Whether foreign persons charged with an administrative or criminal offence enjoy in practice the right to be informed promptly and in a language they understand of the nature and cause of the charge against them;
- (d) Please provide data for the years since the last periodic report on the number of persons deprived of liberty for violation of immigration regulations, disaggregated by age, sex and nationality;
- (e) Please indicate whether irregular migrants and/or asylum-seekers detained for violation of immigration regulations are separated from convicted persons or persons detained pending trial;
- (f) The number of asylum seekers, the number claiming that their return would violate article 3 of the Convention and the details of the relevant legal cases, including their outcomes.

51. As at end of June 2008, 387 persons who had violated immigration laws were held under detention by the Immigration Department. They included 171 persons who were torture claimants and/or known by the Department to be asylum seekers. The mere fact that a person is a torture claimant or an asylum seeker will not lead to that person's prosecution or detention in Hong Kong. A person who is found to be in violation of our laws may be liable to such enforcement actions under relevant authority provided for in the Immigration Ordinance. For example, persons who have entered Hong Kong illegally or breached their conditions of stay may be liable to detention. Persons who are subject to removal or deportation from Hong Kong may also be detained pending their removal or deportation arrangements under the laws.

52. Those who are charged with any offences by the Immigration Department will be promptly informed of details of their charges in languages they understand. Detainees may request to be released on recognizance in lieu of detention and the request will be considered in light of the relevant circumstances.

53. The number of sentenced persons in prison convicted of immigration offences (including illegal remaining, breach of condition of stay, employing the unemployable, and other immigration-related offences) as at mid-year 2006, 2007 and 2008 are as follows:

	2006	2007	2008
Number of persons in prison convicted of immigration offences*	2 097	2 062	1 846
Breakdown by sex - Male	1 084	1 143	1 009
- Female	1 013	919	837
Breakdown by age - Adult	1 907	1 942	1 754
- Juvenile	190	120	92
Breakdown by nationality	51	59	54
- Local Chinese	1 646	1 490	1 275
- Mainland Chinese	400	513	517
- Others			

\* excluding cases where the person has committed other crimes and the principal offence leading to imprisonment is not an immigration offence.

54. The figures show that the number of persons staying in prison for violation of immigration offences have slightly declined over the past three years.

55. Asylum-seekers detained for violation of immigration regulations are separated from convicted persons or persons detained pending trial, unless they are such persons themselves.

56. As at end-June 2008, there are 105 refugees, 1 671 asylum-seekers and 3 279 torture claimants remaining in Hong Kong. There are four series of judicial review cases concerning these persons. The first series concerns whether the Director of Immigration has an obligation under customary international law to conduct independent investigation of a person claiming refugee status. The second series concerns the provision of legal representation to torture

claimants during the assessment process, and the adequacy of instruction and guidance given to Government officers who process torture claims. The third series concerns the validity of deportation/removal orders not executed during the assessment of torture claims, and the power of the Secretary for Security/Director of Immigration to detain persons pending deportation/removal when they have lodged torture claims. The fourth series concerns the prosecution policy of the Secretary for Justice in bringing prosecution against torture claimants before determination of the torture claims. We are not in a position to comment on the final outcome of the court cases at this stage, as legal proceedings are ongoing.

**Question 12. With respect to paragraph 67 and 68 of the HKSAR's report, please indicate:**

- (a) Whether appeals filed against decisions of expulsion/deportation/removal have suspensive effect;**
- (b) Is HKSAR considering the establishment of its own refugee status determination procedure? If so, how will it ensure that the process is fair and reviewable?**
- (c) What is the HKSAR relationship with UNHCR, including in which instances is the case of a migrant refer to UNHCR; please also provide the Committee with copies of any written rules or guidelines in this respect;**
- (d) What is the mandate of the Director of Immigration in relation to the decisions undertaken by UNHCR? Please indicate in how many cases the Director of Immigration ignored the recommendation of UNHCR as to the handling of a specific case;**
- (e) Whether the HKSAR has a list of "safe third countries" for removal; and, if so, how this list is created and maintained;**
- (f) The number of asylum requests registered, the number of requests granted and the number of expulsions/deportations/removals in the years since the last periodic report, disaggregated by age, sex and nationality;**
- (g) Does HKSAR make use of diplomatic assurances and in what context? Are post-return monitoring mechanisms in place to assess what happens to any such returned persons?**

57. Our reply is as follows, seriatim.

- (a) When an appeal is filed against a removal order under section 53B of the Immigration Ordinance, the appellant will not be removed until the appeal is determined by the Immigration Tribunal. Where there is a petition against the decision of deportation, execution of the deportation order will also be withheld until the determination on the petition.
- (b) Refugee claims lodged in Hong Kong are dealt with by the Hong Kong Sub-Office of United Nations High Commissioner for Refugees (UNHCR-HK). We have no plan to initiate a separate refugee status determination process, given that we have a firm policy not to grant asylum and considering that the 1951 Refugee Convention and its 1967 Protocol do not apply to Hong Kong.
- (c) The UNHCR-HK deals with refugee claims lodged in Hong Kong independently. HKSARG does not participate in the process. On UNHCR-HK's advice that an illegal immigrant or overstayer has lodged a refugee claim with the Office, HKSARG will not remove or deport the person before the refugee claim is

determined, unless the person chooses to return to his/her country of origin before the determination of the claim. When a refugee claim is established, the Government will arrange for the refugee's departure according to resettlement arrangements made by UNHCR-HK.

As regards torture claims, HKSARG is responsible for conducting independent assessment of claims lodged in Hong Kong. Torture claimants are not referred to UNHCR.

- (d) As explained above, the Director of Immigration will take into account UNHCR's decision with regard to refugee claims when exercising his discretion. The Director has in no case ignored the recommendation of UNHCR.
- (e) HKSAR Government does not have any list of "safe third countries" for removal at present.
- (f) The numbers of torture claims and refugee claims lodged in Hong Kong from January 2006 to June 2008 are as follows:

Year	No. of torture claims	No. of refugee claims
2006	514	2 481
2007	1 583	1 624
2008 (Jan-Jun)	1 188	415

Between July 2006 and June 2008, 140 persons whose torture claims had been refused were removed from Hong Kong. The number includes persons repatriated voluntarily or under deportation/removal orders. No further breakdown of figures is kept for these cases.

- (g) HKSAR Government has not sought any diplomatic assurance against torture. Persons whose torture claims are established will not be removed to places where there are substantial grounds for believing that they would be in danger of being subjected to torture.

#### Article 4

**Question 13. What legal or administrative measures does the HKSAR have in place to ensure that the Convention's prohibition against torture is not derogated from in public emergency or state of exception? In this regard, please comment on article 18 of the Basic Law and what 'relevant national laws' may be imposed in public emergencies to override those of the HKSAR. How does section 2(1) of the Emergency Regulations Ordinance (Cap 241) empowering the Chief Executive 'to make any regulations whatsoever' comply with the non-derogability of torture?**

#### Constitutional framework

58. Article 56 of the Basic Law (BL 56) of the Hong Kong Special Administrative Region of the People's Republic of China provides that the Chief Executive must consult the Executive Council before making important policy decisions. An exception under BL 56 of the need to consult the Executive Council is the adoption of measures in emergencies.

59. Section 2 (1) of the Emergency Regulations Ordinance (ERO) (Cap. 241) provides that 'on any occasion which the Chief Executive in Council may consider to be an occasion of emergency or public danger he may make any regulations whatsoever which he may consider desirable in the public interest'.

### **Constitutional guarantees**

60. Chapter III of the Basic Law sets out the fundamental rights and duties of Hong Kong residents. Within this chapter, Article 39 of the Basic Law (BL 39) stipulates, inter alia, that the provisions of the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

61. The provisions of the ICCPR as applied to Hong Kong are implemented by the Hong Kong Bill of Rights Ordinance, (BORO) (Cap. 383) and entrenched in our Basic Law by BL 39.

62. Article 4 (1) of the ICCPR acknowledges the need, under strict conditions, for states to take measures during emergencies, which may derogate from their obligations under the ICCPR. However, Article 4 (2) of the ICCPR states that any measures taken at a time of public emergency may not derogate from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18.

63. Article 7 of the ICCPR provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

64. In Hong Kong, enactment and implementation of emergency legislation in time of public emergency are subject to section 5 of the BORO, which implements article 4 (2) of the ICCPR. In particular, section 5(2)(c) of the Ordinance provides that no measures shall be taken that derogates from articles 2, 3, 4(1) and (2), 7, 12, 13 and 15 of the Hong Kong Bill of Rights, which implement articles 6, 7, 8, paragraphs 1 and 2, 11, 15, 16 and 18 of the ICCPR respectively.

65. This means that, should it be necessary for the Chief Executive to make emergency regulations under the ERO, he may not derogate from article 7 and must comply with the Basic Law, BORO and, by extension, the ICCPR as applicable to the HKSAR.

**Question 14. Please provide updated detailed information since the last periodic report on any specific complaint of torture or cruel, inhuman or degrading treatment or punishment or similar offences committed by members of the police forces and other public officials, specifying the number of investigations resulting from these complaints, their status, the authorities before which they are pending and their outcome.**

66. From January 2005 to May 2008, the Complaints Against Police Office (CAPO) has not received any complaint of torture, as defined under the Crimes (Torture) Ordinance (Cap. 427)<sup>1</sup>, alleged to have been inflicted by members of the Police Force.

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<sup>1</sup> Under section 3(1) of Cap. 427, a public official or person acting in an official capacity, whatever his nationality or citizenship, commits the offence of torture if in Hong Kong or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.

67. During the same period, CAPO received a total of 1 695 complaint cases involving allegations of assault<sup>2</sup>. As at 31 July 2008, there were 342 cases which were still under investigation by CAPO or the investigation reports of which were under examination by the Independent Police Complaints Council (IPCC). The investigation reports of the remaining 1 353 complaint cases were endorsed by the IPCC. The allegations of assault in respect of 1 173 complaint cases with investigation result endorsed were classified as “withdrawn”<sup>3</sup> / “not pursuable”<sup>4</sup>, 103 as “false”<sup>5</sup>, 71 as “unsubstantiated”, and four as “no fault”<sup>6</sup>. Two complaint cases involving allegations of assault were curtailed<sup>7</sup>.

68. Complaints involving allegations of improper/unnecessary removal of clothing during searches conducted by police officers may be considered by some complainants as related to “degrading” treatment. During the period from January 2005 to May 2008, CAPO received 45 such complaints<sup>8</sup>. As at 31 July 2008, 19 cases were still under investigation by CAPO or were still being examined by the IPCC. As regards the 26 investigation reports already endorsed by the IPCC, the allegations of improper/unnecessary removal of clothing in 14 complaint cases were classified as “withdrawn”/“not pursuable”, seven as “unsubstantiated” and one as “no fault”. Four complaint cases involving allegations of improper/unnecessary removal of clothing during searches conducted by police officers were resolved by “informal resolution”.

**Question. 15. Please provide information, disaggregated by sex, age and nationality of victims, on the number of investigations, convictions and sanctions that have been applied in the years since the last periodic report in cases of human trafficking and commercial sexual exploitation. In this respect, please also provide information on the measures taken to prevent and combat trafficking in children, especially for the purpose of sexual exploitation.**

69. Hong Kong is not a point of origin, transit or destination for internationally trafficked men, women, or children. Over the years, cases of trafficking recorded are rare. There was only one suspected trafficking case in 2007<sup>9</sup>. In the case, two Filipina were arrested for trafficking

<sup>2</sup> May involve more than one allegation and may cover allegation(s) other than assault.

<sup>3</sup> A complaint is classified as “withdrawn” where the complainant does not wish to pursue the complaint made.

<sup>4</sup> A complaint is classified as “not pursuable” where the identity of the officer(s) being complained against cannot be ascertained; or where there is insufficient information to proceed with the investigation; or when it has not been possible to obtain the co-operation of the complainant to proceed with the investigation (e.g. when the complainant declines to make a statement).

<sup>5</sup> A complaint is classified as “false” where there is sufficient and reliable evidence to prove that the allegations are untrue, be it a complaint with clear malicious intent or a complaint which is not based on genuine conviction or sincere belief but with no element of malice.

<sup>6</sup> A complaint is classified as “no fault” where the allegation is made because of a misinterpretation of the facts or because of a misunderstanding or when there is sufficient reliable evidence showing that the actions of the officer concerned were fair and reasonable in the circumstances, done in good faith and conformed with the legal requirement for police officers to obey lawful orders.

<sup>7</sup> A complaint is classified as “curtailed” where a complaint is registered with CAPO but is not to be investigated further owing to special circumstances (such as known mental condition of the complainant).

<sup>8</sup> May involve more than one allegation and may cover allegation(s) other than improper / unnecessary removal of clothing during searches.

<sup>9</sup> The Hong Kong Police Force has detected three cases in 2007 which involved persons being arrested for the offence of “trafficking in persons to or from Hong Kong for the purpose of prostitution” under section 129 of the Crimes Ordinance (Cap. 200 of HK Laws), in which trafficking means bringing another person into, or taking another person out of, Hong Kong. But as evidence revealed that those

six fellow countrywomen into Hong Kong for the purpose of prostitution. Through close cooperation between the Hong Kong Government and the Philippines Consulate and thorough investigation by the Hong Kong Police, the two Filipina traffickers were successfully convicted and were both sentenced to three-year imprisonment. Our experience shows that people came voluntarily due to the comparative economic prosperity of Hong Kong in the region, rather than being trafficked into HK by force, fraud or coercion.

70. Under the policy directive of Security Bureau, all law enforcement departments in Hong Kong are taking concerted and coordinated efforts to halt human trafficking, including trafficking of children:

(a) The Immigration Department and the Customs and Excise Department continue to identify suspect vessels used in sea-borne smuggling/trafficking operations and to intercept vessels believed to be modified/adapted for use in transporting illegal immigrants;

(b) The Immigration Department exercises full vigilance at airport immigration counters. Surveillance operations are conducted at the transit lounge, transfer area, docks and departure gates to combat the increasing use of HKSAR as a transit avenue of migrants who enter on legitimate travel documents that are then exchanged in transit locations for forged or falsely acquired third country documents;

(c) In addition to the stringent actions in ensuring the integrity of the land border and sea boundary of the SAR on a day-to-day basis, the Hong Kong Police collect intelligence and investigate suspect organisers and conduct joint investigations with other enforcement agencies as and when appropriate;

(d) There are exchanges of intelligence between different law enforcement agencies, with local consulates, and with foreign as well as Mainland authorities on activities of forgery syndicates, trends and related matters; and

(e) We adopt a tough prosecution policy against forged travel document users, couriers and suppliers. The maximum penalty for arranging passage to HKSAR of unauthorized entrants is a fine of \$5,000,000 and imprisonment for 14 years.

71. The following statistics relate to the numbers of counts and persons arrested in connection with commercial sexual exploitation during the past three years.

Offences	2005	2006	2007
Control over person for the purpose of unlawful sexual act or prostitution	5 (5)	16 (17)	1 (1)
Causing prostitution of person	0 (0)	0 (0)	3 (1)
Living on earnings of prostitution	108 (77)	96 (64)	52 (52)

( ) denotes number of arrests

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being trafficked in two of the cases for the purpose of prostitution are on their own volition without any use of force, coercion or fraud, those two cases have not been counted as “trafficking cases”.

**Question 16. According to the information before the Committee, domestic violence cases in HKSAR have risen in 2006-7 by as much as 50 per cent with a particular large number of cases involving immigrants from the mainland. Please clarify how such abuses, including but not limited to rape, marital rape, assaults and other acts of domestic violence are criminalized in accordance with the requirements of the Convention. Are the sentences commensurate with the gravity of the crimes? Please provide data on cases of domestic violence and prosecutions, trials and convictions thereof. What other measures are available to provide protection from such abuses and assistance to persons affected?**

72. The Government is committed to preventing and tackling domestic violence and has adopted a series of measures to combat domestic violence and strengthen services for victims of domestic violence.

73. The Police handle all domestic violence reports professionally and conduct thorough investigations according to the circumstances of each report. Where there is evidence of an offence, the Police will take firm and decisive actions to effect arrest and prosecution would depend on sufficiency of evidence.

74. The criminal legislative framework seeks to punish all acts of violence, irrespective of the relationship between the abuser and the victim, and independent of where the acts of violence occur. The Offences Against the Person Ordinance (Cap. 212), imposes criminal sanctions on, inter alia, murder, manslaughter, attempts to murder, wounding or inflicting grievous bodily harm, exposing child whereby life is endangered, ill-treatment or neglect by those in charge of children or young persons, assault occasioning actual bodily harm and common assault; while the Crimes Ordinance (Cap. 200) criminalises acts of intimidation, arson, destroying or damaging property and sexual offences (including rape/marital rape, incest, indecent assault), etc.

75. The sentences passed by the judges and magistrates are commensurate with the gravity of the offence. Offenders convicted of rape, murder, manslaughter, arson or wounding with intent to do grievous bodily harm are liable to a maximum penalty of imprisonment for life. Other less serious offences such as assault, threat of violence or destroying or damaging property carry a maximum penalty ranging from 3 to 10 years' imprisonment.

76. The Police received 1 811 and 2 505 crime-related domestic violence reports in 2006 and 2007 respectively, 1 408 (78 per cent) and 2 199 (88 per cent) cases were dealt with in 2006 and 2007 respectively by way of prosecutions or binding over order granted by the court under the Magistrates Ordinance (Cap. 227).

77. Since November 2006, a series of enhancement measures to strengthen the Police's response at the initial handling and subsequent investigation stage of a domestic violence report have been implemented with a view to improving proficiency in scene handling, early identification of risk factors, follow-up investigation, timely referral to social workers and after-care service. In May 2008, the Police also implemented a new workflow for the management of victims of serious domestic violence cases, with a view to strengthening the support and safety assurance for the victims throughout the case enquiry and legal proceedings, and enhancing the communication and collaboration with the Social Welfare Department (SWD) and non-governmental organisations.

78. To assist frontline officers in obtaining thorough background information for risk assessments and initial investigation, the Police have secured funding to develop the Enhanced Central Domestic Violence Database with enhanced functionality, accessibility and data storage capacity. The Database is scheduled to come into operation in late 2008.

79. In addition, the Police will roll out a new Training Day Package on Handling of Domestic Violence Cases between October and December 2008 to all frontline police officers. The training package focuses on domestic violence dynamics, the psychology of the parties involved, questioning techniques as well as new measures for handling such cases (e.g. on victim management and procedures for handling cases involving violence among relatives) and relevant legislation.

80. Separately, SWD adopts a three-pronged approach, i.e. preventive measures, and provision of supportive services and specialised services, to help victims of domestic violence and prevent domestic violence. Over the past few years, the Government has devoted additional resources to strengthen the support and specialised services for victims of domestic violence. In 2008-09, the total annual recurrent expenditure involved in services related to family and child welfare amounts to HK\$1.58 billion.

81. There are currently 11 Family and Child Protective Services Units (FCPSUs) under SWD. They are specialised units manned by experienced social workers that provide a coordinated package of one-stop service and arrangement of various services for victims, their families and batterers in domestic violence cases. They provide necessary support for the victims and children to help them tide over the difficult period, lessen trauma associated with violence and live a new life. Social workers of FCPSUs perform the role of a case manager to coordinate a wide range of services and assistance including crisis intervention, short-term accommodation at refuge centres, Family Crisis and Support Centre or Multi-purpose Crisis Intervention and Support Centre, counselling, clinical psychological services, medical treatment, housing assistance, financial assistance, etc.

82. There are also 61 Integrated Family Service Centres (IFSCs) set up across the territory that provide a wide range of preventive, supportive and therapeutic welfare services to families in need. A major focus of the IFSCs is on early intervention. They pro-actively reach out to the needy families to support them in developing mutual help networks in the community and enhancing their resilience.

83. In handling domestic violence cases, the prime focus is to respond immediately to stop the violence, ensure safety of the victims and their families and provide support, in particular to the victims. If the victims and children are considered to be of high-risk of further violence, immediate action will be taken (subject to the victims' consent as appropriate) to arrange for shelter, temporary accommodation or residential service for the victims and their children. In case of need, social workers would also facilitate the victims to seek legal protection through application of an injunction order under the Domestic Violence Ordinance (Cap. 189) or initiating the application of a Care or Protection Order under the Protection of Children and Juveniles Ordinance (Cap. 213) to protect the children. The Government introduced a Domestic Violence (Amendment) Bill (the Bill) into the Legislative Council (LegCo) in June 2007 to expand the scope of protected persons considerably to cover also former spouse / cohabitants of opposite sex, immediate and extended family members, enhance the protection for minors who

are under the age of 18 and victims of domestic violence, and empower the court to require the abusers to attend an anti-violence programme seeking to change the abusive attitude and behaviour. The Bill was passed by the LegCo in June 2008 and came into operation on 1 August 2008.

84. To ensure adequate support for victims and children who require immediate accommodation away from their home, additional resources have been allocated to increase the capacity of refuge centres for women and residential childcare services. Enhanced measures have also been implemented with the Housing Department in assisting victims of domestic violence with genuine and long-term housing need which cannot be resolved by their own means, through splitting of tenancy, conditional tenancy and compassionate rehousing.

#### Article 5

**Question 17. Please indicate whether HKSAR applied the principle of 'aut dedere aut judicare' when the alleged offender of an act of torture committed abroad is present in its territory. In this respect, please indicate whether HKSAR authorities have ever prosecuted anyone present in HKSAR territory who has committed a crime of torture outside HKSAR, irrespective of the definition or legal provisions related to torture in that country.**

85. To date, the HKSAR has not received any requests for surrender of persons alleged to have committed an offence of torture, so the principle of aut dedere aut judicare has not been put into practice. Under section 3 of the Crimes (Torture) Ordinance, Hong Kong has jurisdiction over persons acting in an official capacity who commits an act of torture, whether in Hong Kong or elsewhere. Persons acting in an official capacity cover those acting in the official capacity of a foreign government or a foreign public authority. The decision to prosecute an offence under section 3 of the Ordinance rests with the Secretary for Justice. If surrender of a fugitive offender who commits an act of torture outside Hong Kong is refused, prosecutions proceedings can be initiated against him in Hong Kong.

86. There are no cases in which the HKSAR Government has prosecuted for the offence of torture an individual present in the territory of the HKSAR who has committed a crime of torture outside Hong Kong.

#### Article 6, 7, 8, and 9

**Question 18. With reference to paragraph 79 and 80 of HKSAR's report, please update the Committee on any progress with respect to arrangements between the Mainland and HKSAR for the transfer of fugitive offenders and/or sentenced persons. Can HKSAR transfer to the Mainland a detainee who would risk receiving the death penalty therein?**

87. According to Article 95 of the Basic Law, Hong Kong may, through consultations and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other. Over the years, the Government of the HKSAR and the Mainland authorities have been exchanging views on specific arrangements and

issues related to the transfer of sentenced persons. At present, both sides continue to exchange views on the matter with a view to reaching an agreement at an early date.

88. Discussions on a formal surrender of fugitive offenders arrangement between the Mainland and the HKSAR are ongoing. Given the complexity of the issues involved, both sides would continue the discussions in a careful manner, with a view to reaching an agreement.

89. Death penalty safeguard is one of the usual safeguards found in our agreements on surrender of fugitive offenders. We have included the safeguard in the draft arrangement. Discussions on the safeguard are ongoing.

**Question 19. Please provide information on cases, if any, where HKSAR authorities have rejected a request for extradition by another State for an individual suspected of having committed a crime of torture, and thus have engaged its own prosecution as a result.**

90. There have been no such cases where the HKSAR authorities rejected a request for extradition by another State for an individual suspected of having committed a crime of torture and thus have engaged its own prosecution as a result.

**Article 20**

**Question 20. Please provide more detailed information on the instruction and training provided for law enforcement officials and other public officials with respect to human rights and specifically the treatment of detainees and the measures for the prevention of torture and cruel, inhuman or degrading treatment or punishment. Please also provide information on training in areas such as non-coercive investigatory techniques. What monitoring and evaluation is used to assess the impact of these programmes, if any?**

**Hong Kong Police Force**

91. The Force emphasizes respect for the rights of members of the public and has included this as one of the eight core values of the Police Force, as reflected in the Force's Vision, Statement of Common Purpose and Values promulgated in 1996.

92. All recruits to the Force, including both recruit constables and probationary inspectors, receive training on this and other related topics, e.g. human rights, ethnic minority groups and police accountability, etc, as part of their foundation training. In-service officers also attend regular training sessions on similar topics under their continuation training programmes.

93. An important message conveyed to Force members during training is that police officers should respect the rights and freedoms of all members of the public – including the victim, the suspect and the witness – when interacting with them. Thus, non-coercive investigatory techniques should be adopted, and no police action should involve torture, or inhuman or degrading treatment to any member of the public.

94. The Force's training programmes also emphasize that all police officers should treat all members of the public equally, regardless of their ethnicity, nationality, culture, religion and gender.

95. The effectiveness of the training is gauged through different means such as a quality assurance mechanism for training courses for police officers, evaluation of course contents, and assessments on the officers on the taught subjects.

96. We should emphasize that training is but one element to ensure that police officers pay due regard to human rights in performing their duties. The Police have drawn up internal guidelines and put in place an internal accountability system to ensure that police officers are held accountable for their judgement and actions. Officers may be subject to disciplinary action if they fail to comply with Force orders or guidelines on this subject. Officers in breach of relevant legislation may be subject to criminal investigation.

### **Immigration Department**

97. The powers of an immigration officer to arrest and detain are prescribed under the Immigration Ordinance (Cap. 115) and Immigration Service Ordinance (Cap. 331). The treatment of detainees by the immigration officers adheres to the Immigration Service (Treatment of Detained Persons) Order. Relevant internal instructions, guidelines and standing orders are also in place to ensure treatment of suspects and detainees is in compliance with the statutory requirements. Immigration officers receive induction and in-service training in relation to the Hong Kong Bill of Rights Ordinance, the Crimes (Torture) Ordinance, the "Rules and Directions for the Questioning of Suspects and the Taking of Statements" and the anti-discrimination legislation. Immigration officers are trained to handle all detainees with due respect to the relevant human rights and not to use any coercive means in their investigation. Any statement obtained by an immigration officer that are not made voluntarily, including a statement that has been obtained coercively, is inadmissible in criminal proceedings. In addition, a statement or confession under caution may also be subject to a video or audio recording provided that the suspect agrees. The Immigration Department appoints "Custody Officers" to ensure that detainees are treated properly and impartially, as well as "Review Officers" to regularly review the need for further detention of a particular detainee. Detainees who consider that they have received improper treatment by immigration officers may lodge complaints through various channels (e.g. complain to the visiting Justices of Peace, the Ombudsman and the Chief Executive). The relevant authorities will investigate into the complaints and take actions as appropriate.

### **Correctional Services Department**

98. All correctional staff in Correctional Services Department have been made aware that torture is a criminal offence. They are familiar with the relevant legislation/guidelines, including the Crimes (Torture) Ordinance (Cap. 427), the Hong Kong Bill of Rights Ordinance (Cap. 383), the Prison Rules (Cap. 234A) and the United Nations Standard Minimum Rules for the Treatment of Prisoners, which are covered by their induction and in-service training.

### **Customs and Excise Department**

99. The Customs and Excise Department has issued instructions in the form of internal orders, guidelines, circulars, work manuals and codes of practice for compliance on the proper exercise of their powers and treatment of detainees or arrested persons. Non-compliance with these instructions may lead to disciplinary actions or even criminal prosecutions.

100. The Customs and Excise Department provides different types of training to officers at different stages of their career, covering areas on, among others, the Hong Kong Bill of Rights Ordinance, Rules and Directions for Questioning Suspects, Rights of Detainees, Personal Search, Use of Force Principles, Control of Suspects, Skills on Investigation, etc.

**Question 21. Please indicate whether there are programs to train medical and health personnel to detect signs of torture and whether they are prepared to assist in the rehabilitation of victims. Is there any training to develop more gender sensitive treatment both in legal and medical institutions?**

#### **Training for medical and health personnel**

101. The Social Welfare Department (SWD) arranges different training programmes for social workers and related professionals, including medical and para-medical professionals, teachers, child care personnel and the Police on handling domestic violence cases. From time to time, the SWD also publishes and updates relevant procedural guidelines for professionals in the relevant field to strengthen multi-disciplinary collaboration in handling child abuse, battered spouse, elder abuse and sexual violence cases.

#### **Gender related training for civil servants**

102. Gender related training is also provided to civil servants of various grades and ranks to raise their awareness of gender issues, and facilitate their taking into consideration gender perspectives in their work. So far, over 2,700 civil servants, including officers from SWD, Department of Health, Auxiliary Medical Services, Department of Justice, and staff of various bureaux and departments, have attended such training courses.

103. Programmes to train medical and health personnel to detect signs of torture and assist in the rehabilitation of victims; training to develop more gender sensitive treatment in medical institutions

104. Currently, there are no special programmes for training medical doctors to detect signs of torture or special training on the development of gender sensitive treatment in the public hospitals. However, in the mainstream specialist training programmes which are intended to train up specialist doctors (including emergency physicians, psychiatrists, paediatricians, obstetricians and gynaecologists and geriatricians) more commonly involved in this group of victims, there has been an increasing emphasis on the generic contents aimed to heighten the awareness of doctors in detection, treatment and rehabilitation related to victims suffering from various kinds of catastrophes and trauma.

105. As for nursing personnel, the Institute for Advanced Nursing Studies conducts regular training courses on management of family violence, care of victim of rape, assessment of sexual assault victim and elder abuse to train nursing personnel the skills to manage torture victims. The Institute has also launched a training programme on Family Violence in the e-Learning Centre for interested health personnel.

**Question 22. Please elaborate on what kind of training is provided to officials dealing with the expulsion, return or extradition of foreign nationals.**

106. Immigration officers are provided with training on counselling skill and resistance control in handling escort duties pertaining to removal or deportation. In all cases, immigration officers rely primarily on patience, counselling skills and verbal persuasion to secure the cooperation of the persons in effecting removal or deportation. Even in justifiable circumstances where a use of force is inevitable, immigration officers would only use minimum necessary force (e.g. by using "Humane Restraint Wrap").

**Article 11**

**Question 23. Please provide updated information on the number of persons and the occupancy rate of the places of deprivation of liberty in the criminal justice system. Could you please also elaborate on the reasons why HKSAR has an unusually high proportion of its female population deprived of their liberty?**

107. The penal population and the occupancy rate of the correctional institutions in Hong Kong from 2005 to 2007 are set out in the table below:

Penal Population and Occupancy Rate from 2005 to 2007 (as at the end of the year)			
	2005	2006	2007
Penal Population	11 311	11 364	10 946
Occupancy Rate	102.3%	98.5%	98.9%

108. The table below shows the number of admission of sentenced persons from 2005 to 2007:

Admission of Sentenced Persons from 2005 to 2007			
	Male	Female	Total
2005	15 384 (60.3%)	10 139 (39.7%)	25 523
2006	14 081 (63.3%)	8 147 (36.7%)	22 228
2007	12 924 (68.5%)	5 950 (31.5%)	18 874

109. The number of female sentenced persons and its proportion to the total number of sentenced persons have been decreasing in recent years. Mainland prisoners account for a significant percentage (about 50 per cent) of the female penal population in Hong Kong. The imprisonment rate of the local female population in Hong Kong is not unusually high.

**Question 24. Please inform the Committee on measures taken to protect and guarantee the rights of vulnerable persons deprived of their liberty, and notably women, migrants, persons suffering from mental illness and children. Please also inform the Committee on measures taken to ensure that deprivation of liberty for persons under 18 years old is always used as a last resort. What measures alternative to detention are used or planned?**

### **Measures to protect the rights of vulnerable persons**

110. The rights of vulnerable persons are protected by different pieces of legislation in Hong Kong. For example, the Juvenile Offenders Ordinance (Cap. 226) stipulates that young persons should be separated from adults while in custody. The relevant sections of the Ordinance are set out below :

Section 11(3) - “A young person sentenced to imprisonment shall not be allowed to associate with adult prisoners”; and

Section 6 (1) - “No child or young person while- (a) detained in a police station; (b) being conveyed to or from any criminal court; or (c) waiting before or after attendance in any criminal court, shall be permitted to associate with an adult (not being a relative) who is charged with any offence other than an offence with which the child or young person is jointly charged”.

111. Currently, young prisoners aged below 21 who are detained in Correctional Services Department (CSD)’s institutions are separated from prisoners aged 21 and above.

112. In accordance with the Prison Rules (Cap. 234A), the facilities for detaining female must be separated from those for male. Besides, only staff of the same gender may discharge “intimate” duties such as body search and supervision of bath.

113. CSD has issued guidelines to its staff members on the treatment of inmates with physical and mental illness. For instance, such inmates may be placed on Medical Officers’ observation list for intensified care, special cellular accommodation may be provided for the physically handicapped, and psychological services would be arranged for those with such needs.

114. Persons under CSD’s custody are informed of their rights and the channels for making complaints upon their admission to CSD’s institutions. Apart from the complaint channel within the penal system, various outside channels of complaint are available to prisoners in Hong Kong. These include the lodging of complaints with Legislative Council Members, the Ombudsman, the Independent Commission Against Corruption, etc.

### **Sentencing options for young offenders**

115. The existing legislation ensures that due consideration is given to non-custodial options in the case of young offenders. The relevant legislation is as follows:

Section 109A(1) of the Criminal Procedure Ordinance (Cap. 221) which stipulates that “no court shall sentence a person of or over 16 and under 21 years of age to imprisonment unless the court is of opinion that no other method of dealing with such person is appropriate”. Section 109A(1A) provides that “This section shall not apply to a person who has been convicted of any offence which is declared to be an excepted offence by the Third Schedule.”; and Section 11(2) of Juvenile Offenders Ordinance (Cap. 226) which states that “No young person shall be sentenced to imprisonment if he can be suitably dealt with in any other way”.

116. Apart from sentencing to correctional institutions for detention, young offenders may be dealt with under the Police Superintendent Discretionary Scheme, put on probation, given a suspended sentence or a Community Service Order.

117. For measures taken to protect and guarantee the rights of persons suffering from mental illness who are deprived of their liberty, please refer to the answer in question 25.

**Question 25. With respect to mental illness and to paragraph 89 of the HKSAR's report, please elaborate on the administration of electro-convulsive therapy (ECT) to patients with severe depressive illness. In particular, please provide statistical data, similar to those contained in paragraph 179 of the HKSAR's previous report (CAT/C/39/Add.2), on the pattern of application of ECT in the reporting period. Please also elaborate on the rights of persons placed under involuntary treatment in psychiatric hospitals.**

118. Electro-convulsive therapy (ECT) is only performed for patient's benefit in public hospitals, according to international evidence-based guideline as a therapeutic intervention. The pattern of application of ECT in the past 3 years has been as follows:

	<b>2005-2006</b>	<b>2006-2007</b>	<b>2007-2008</b>
No. of patients receiving ECT	103	126	87
No. of ECT Treatments	815	775	498
Average No. of ECT Treatments per patient	7.91	6.15	5.72

119. The Mental Health Ordinance (Cap. 136) protects the rights of detained patients. It also prescribes the criteria for compulsory detention. Even when these very stringent criteria are met, the power to detain is not invoked except in cases where all other means having been fully considered, detention in hospital is considered the most appropriate means of providing the care and treatment that a patient needs. The criteria for the compulsory admission of persons to mental hospital are as follows:

- They must be suffering from a mental disorder as defined by the Ordinance;
- The mental disorder must be of a nature or degree which makes admission to mental hospital appropriate;
- Medical treatment must be necessary for the patients' own health or safety or for the protection of other persons; and
- The treatment cannot be provided in some other way, such as on an out-patient basis.

120. Under the Mental Health Ordinance, a medical assessment is mandatory before a patient is detained in a mental hospital for observation. Prior to the making of an order, patients have the right to be heard by a judge or magistrate, if they so wish.

121. Section 45 of the Mental Health Ordinance provides for the compulsory detention of mentally disordered persons concerned in criminal proceedings. That is, if on the basis of

medical testimony the court is satisfied that a convicted offender is suffering from mental disorder, it may order that person's admission to, and detention in, a mental hospital for psychiatric treatment if that is the most suitable method of disposing of the case.

122. Patients and their relatives may apply to the Mental Health Review Tribunal, an independent statutory body, for review of their detention and treatment. If the review finds that the detention and treatment should continue, they may apply again after 12 months or earlier with the leave of the Tribunal. The Ordinance also provides that if neither the patients nor their relatives apply for review their cases will periodically be referred to the Tribunal. The Tribunal has the power to direct that a patient be discharged. Persons applying to the Tribunal may apply for legal aid. Patients may be represented before the Tribunal by anyone they wish, except by other mental patients.

123 The rights of detained patients are well protected and respected under the Mental Health Ordinance. Specifically:

(a) All detained patients must be given an explanation of their rights under the Mental Health Ordinance. The matters covered must include the procedures for securing their discharge, the conduct of their treatment, how they can make a complaint and their rights in relation to Mental Health Review Tribunals;

(b) A relative of every detained patient should be kept fully advised of the patient's rights, unless the patient objects;

(c) Like all other persons, detained patients are entitled, at their own expense, to seek legal advice or a second medical opinion;

(d) The Mental Health Regulations prevent arbitrary interference in the privacy and freedom of patients in mental hospitals. They prescribe clear conditions under which a medical superintendent may impose restrictions on the communication (such as letters and parcels) between patients and persons outside. Superintendents must inform the patients and the persons with whom they are in communication of a decision to impose such restrictions.

**Question 26. Please clarify whether there are precise procedural rules or guidelines regarding the body or cavity search of arrested persons and what consent rules and other protective measures apply. According to information before the Committee, there are routine compulsory rectal searches of prisoners under Rule 9 of the Prison Rules. Please comment on whether the HKSAR government plans to use alternative means of inspecting prisoners, as reportedly pledged by authorities in 2005.**

### **Hong Kong Police Force**

124. Police officers must comply with the provisions in the International Covenant on Civil and Political Rights, the Basic Law and the Hong Kong Bill of Rights Ordinance when carrying out searches of persons. Given a search may be perceived as an invasion of a person's dignity, privacy and constitutionally entrenched human rights, the scope of any search to be carried out must be determined on an individual case-by-case basis according to the prevailing circumstances.

125. Body searches on arrested persons upon arrest are conducted under the legislative power granted to the police officers under section 50(6) of the Police Force Ordinance (Cap. 232), which provides that “(where) any person is apprehended by a police officer it shall be lawful for such officer to search for and take possession of any newspaper, book or other document or any portion or extract therefrom and any other article or chattel which may be found on his person or in or about the place at which he has been apprehended and which the said officer may reasonably suspect to be of value (whether by itself or together with anything else) to the investigation of any offence that the person has committed or is reasonably suspected of having committed”.

126. Also, in common law, the Police have a duty to take all reasonable measures to ensure that detainees do not escape or assist others to do so, do not injure themselves or others, do not destroy or dispose of evidence and do not commit further crime. For this purpose, the Commissioner of Police has determined that a search will be conducted on all persons to be detained in police custody. The scope of such searches is to be decided by the Duty Officer of the police station concerned.

127. The rules and procedures governing the body searches of arrested persons as well as detainees are set out in the Police General Order and other internal procedural documents in the Police Force, are reviewed from time to time and enhanced as appropriate. Following a review conducted by the Police earlier this year, the search arrangements have been further improved, including : the searching officer should explain to the person to be searched the reason(s) for and the scope of the search before conducting a search; the details of the search (including the reasons for and the scope of the search) should be properly recorded; and a clear delineation is to be made between searches of different degree of intrusiveness – i.e. “non-removal of clothing”, “removal of clothing” and “removal of underwear”, and the officer authorising the search should be prepared to justify his decision on the scope of a search. Moreover, a search involving bodily contact should only be carried out by an officer of the same sex as the individual to be searched. In the case of search of an arrestee, a search involving removal of underwear should only be carried out in the privacy of a police station (or other locations offering equal privacy) with the prior approval of an officer of or above the rank of Sergeant. These arrangements provide appropriate safeguards to prevent arbitrary searches and to ensure that the officers handling the search respect the rights and dignities of the individuals concerned.

128. The procedure for “cavity” search is specifically provided for under the Dangerous Drugs Ordinance (Cap. 134). Such searches can only be performed by medical practitioners or nurses upon the request of a police officer of or above the rank of Inspector (or a member of the Customs and Excise Service of or above the rank of Inspector).

### **Correctional Services Department (CSD)**

#### *Guidelines on conducting body search*

129. The search procedures adopted by CSD are based on the relevant rules in the Prison Rules (Cap. 234A). For example:

Rule 9(2) – “The searching of a prisoner shall be conducted with due regard to decency and self-respect, and in as seemly a manner as is consistent with the necessity of discovering any concealed articles”;

Rule 9(3) – “No prisoner shall be stripped and searched in the sight of another prisoner unless a senior officer considers it necessary in the interests of the security of a prison or the safety of any person”; and

Rule 10 – “No prisoner shall be searched other than by an officer of the same sex”.

130. CSD is prudent in the conduct of searches. All correctional staff of CSD have received training in searching, which covers, among other things, the relevant rules and theory and practical exercises.

*Alternative to rectal search*

131. CSD does not have any plan to substitute the existing means of rectal searches with other devices at this stage. The Department has studied the feasibility of using X-ray devices for rectal searches, but found that such devices could not detect small quantities of drugs concealed in the body.

**Customs and Excise Department**

132. The Customs and Excise Department has precise procedural rules/guidelines regarding search on body cavity. Officers are specifically prohibited from examining the body cavity of a suspect. Even if there is reasonable suspicion that narcotics are concealed inside a suspect's body cavity, there are strict and objective prerequisites to be met before the suspect may be referred to a government hospital for a body cavity check. The decision on such body cavity check has to be made by an officer at the rank of Senior Inspector or above.

**Question 27. Please comment on the information received by the Committee that sex workers have often complained in the last years about the treatment received during both undercover operations and in investigations and interrogations, including allegations of unnecessary and intrusive strip searches and the reported receiving of free sexual services by the police through abuse of their position. Has there been any investigation into these allegations and any measures taken to ensure that these persons are protected in accordance with the Convention, and those responsible for any abuses held accountable?**

133. Police anti-vice operations are targeted at persons controlling sex workers and those operating vice establishments. In the process, it is necessary for the Police to demonstrate that sexual services are being offered, payment for those services has been made and the relevant person(s) are controlling other person(s) for the purpose of prostitution, etc. There is an operational need for the Police to conduct covert operations in order to collect the necessary evidence for charging vice-operators. The Police have drawn up stringent regulatory measures and guidelines for such operations to prevent abuse.

134. The aim of undercover anti-vice operations is confined to gathering evidence of the offer or solicitation of sexual services, and the extent of bodily contact involved is limited to what is necessary to achieve the purpose of the operation. The Police have put in place a number of safeguards to prevent abuse. Police officers involving in covert operations are carefully selected having regard to their psychological condition, integrity, etc. to ensure that they are suitable for the tasks. All officers taking enforcement actions are required to strictly comply with the Police's internal guidelines governing anti-vice operations. In addition, supervisors of the operations have to brief the undercover officers before the commencement of each operation.

After the conclusion of each operation, officers acting as agents must report to the handling officers on the details of the operations. All relevant information has to be faithfully recorded and is admitted as evidence in court, if prosecutions are instituted.

135. For more effective control of the conduct of frontline officers engaging in anti-vice operations, the Police reviewed and revised their internal guidelines governing anti-vice operations in late 2007. Under the revised guidelines, officers at the rank of Deputy District Commander or Senior Superintendent are designated a more active role in supervising such undercover operations, with more vigorous control over the scope and extent of the evidence to be gathered (including the extent of body contact with sex workers). Moreover, the revised guidelines reinforce the key principle that in the process of gathering evidence, police officers undertaking undercover operations are not allowed to receive oral sex or sexual intercourse service offered by sex workers.

136. Regarding the handling of body searches, the Police have in place appropriate orders for compliance by police officers. Specifically, the Police have reviewed the arrangements for the handling of searches in 2008 and the new arrangements took effect on 1 July 2008. For details of the new arrangements, please refer to our response to question 26 above.

137. The Police maintain a dialogue with the sex workers' associations to discuss the latter's concerns. Representatives of the Police meet with the sex workers' associations from time to time. During these meetings, the Police have urged the sex workers to provide detailed information on alleged misconduct of police officers so that necessary investigations could be carried out.

138. Any person aggrieved by Police action, including anti-vice operations and body searches, may lodge complaints. All reportable complaints are subject to the rigorous checks and balances under the two-tier police complaints system, which has been codified under the Independent Police Complaints Council Ordinance. (Please refer to our response to question 29 below for details.) All complaints against members of the Police Force, irrespective of the identity and background of the complainants, are taken seriously and the identity of the complainants is kept confidential. If a complaint case is established, the Police will take appropriate follow-up action having regard to the circumstances surrounding the specific case. Where criminal offences are involved, the Police will seek the advice of the Department of Justice on whether prosecution should be instituted. Where misconduct or non-compliance of internal police procedures is involved, disciplinary proceedings may be instituted against the officer concerned.

139. During January 2007 (when the Police started to keep such statistics) to May 2008, 34 complaints were received from sex workers or referred from sex workers' associations. For those cases with investigation completed and investigation report endorsed by the Independent Police Complaints Council, none of them was substantiated.

### **Articles 12 and 13**

#### **Question 28. Is there a special central register to keep an overview over complaints and investigations with respect to allegations of torture and other cruel, inhuman or degrading treatment?**

140. Hong Kong has well-established mechanisms to ensure proper investigation and follow up of all complaints against public officials. As reported under article 2 in HKSAR's initial and second reports, instances of alleged use of torture are rare in Hong Kong. We consider that our

systematic safeguards and preventive measures are effective, and there is no need for a special central register of complaints/allegations relating to torture.

**Question 29. With reference to paragraph 106 of the HKSAR's report, please describe any development with respect to the conversion of the Independent Police Complaints Council (IPCC) into a statutory body. Also with respect to investigations of allegations of police misconduct, including excessive use of force and abuse of power, please further elaborate on the two-tier system provided by the Complaints Against Police Office (CAPO) and the Independent Police Complaints Council (IPCC). In particular, please clarify:**

**(a) What are the criteria for classifying a complaint of torture as unsubstantiated and how many claims (of torture or other ill-treatment, including police abuse) were considered substantiated?**

**(b) What kind of powers the IPCC has with respect to the findings of the CAPO;**

**(c) What kind of follow-up is given to findings of police misconduct by the CAPO and the IPCC;**

**(d) Whether there is any other body, outside the police, where complaints about allegation of police misconduct can be filled. If so, please provide information as to its composition, mandate and activities.**

141. Under the existing two-tier police complaints system, the Complaints Against Police Office (CAPO) of the Police is responsible for handling and investigating complaints lodged by members of the public against members of the police force. CAPO operates independently from other Police formations to ensure its impartiality in handling the complaints.

142. The Independent Police Complaints Council (IPCC) is an independent civilian oversight body specifically appointed to monitor and review CAPO's handling and investigations of reportable complaints<sup>10</sup>. Members of the IPCC are drawn from a wide spectrum of the community. Their ability, expertise and commitment to public service are tapped to ensure that the complaints are dealt with fairly and impartially.

143. There are effective checks and balances to ensure that all complaints are handled thoroughly, fairly and impartially. CAPO submits a list of reportable complaints and a list of non-reportable complaints<sup>11</sup> to the IPCC periodically. A list of non-reportable complaints

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<sup>10</sup> Generally, a complaint is categorized as a reportable complaint if it –

- (a) relates to –
  - (i) the conduct of a member of the police force while on duty or in the execution or purported execution of his duties;
  - (ii) the conduct of a member of the police force who identified himself as such a member while off duty; or
  - (iii) any practice or procedure adopted by the police force;
- (b) is not vexatious or frivolous and is made in good faith;
- (c) is made by or on behalf of a complainant directly affected by the police conduct or is made by an authorized representative of such a complainant; and
- (d) is not anonymous.

<sup>11</sup> Non-reportable complaints include complaints against a member of the police force who is off-duty and who has not identified himself as a member of the police force; complaints which are vexatious or frivolous or not made in good faith; complaints which are lodged by someone who is not directly affected party; anonymous complaints.

includes a brief description of all non-reportable complaints in the reporting period and the reasons for categorizing the complaints as non-reportable complaints. The IPCC may require the Police to provide explanations to support categorizing a complaint as a non-reportable complaint and it may advise the Police of its opinion of whether a complaint should be categorized as a non-reportable complaint. The Police will have regard to such opinion and reconsider the categorization of the complaint. Complaints which are neither reportable complaints nor non-reportable complaints will be dealt with in accordance with other existing established complaint systems (please refer to the examples set out in the answer to specific question (d) below).

144. As for reportable complaints, CAPO prepares a detailed investigation report on each of these cases for submission to the IPCC. The IPCC rigorously examines the reports. Where IPCC members have doubts about a particular investigation, they may invite the complainants, complainees and witnesses to interviews. The IPCC can also ask CAPO to submit for its reference documents or information relevant to a reportable complaint. In discharging their oversight responsibility, IPCC members may observe Police investigations into reportable complaints in person, on either a surprise or scheduled basis. If the IPCC is not satisfied with the result of a CAPO investigation, it can ask CAPO to clarify any doubts or reinvestigate the complaint. It may also bring the case to the personal attention of the Chief Executive, together with recommendations as to its disposition. The IPCC, thus, has effective means to ensure that the investigations of all reportable complaints are conducted thoroughly and impartially.

145. The IPCC also monitors Police investigations into reportable complaints directly through the Observers Scheme, under which IPCC members and a wide pool of lay observers can undertake scheduled or surprise observations of the interviews and collection of evidence conducted by the Police during investigations. IPCC members and observers will report to the IPCC their comments on whether an interview or collection of evidence has been conducted in a fair and impartial manner as well as any irregularities detected.

146. The Independent Police Complaints Council Ordinance was enacted on 12 July 2008, codifying the existing police complaints system and turning the IPCC into a statutory body. The Ordinance clearly sets out the IPCC's functions, powers and operation in the police complaints system, therefore enhancing the transparency of and the community's confidence in the system.

147. The main functions of the IPCC as provided for under the Ordinance include the following:

- (a) To observe, monitor and review the handling and investigation of reportable complaints by the Police and to make recommendations in respect of the handling or investigation of such complaints;
- (b) To monitor actions taken or to be taken in respect of a member of the police force by the Commissioner of Police in connection with any reportable complaint and to provide its opinion on such actions;
- (c) To identify any faults or deficiencies in the practices or procedures adopted by the Police that have led to or might lead to reportable complaints and to make recommendations in this regard;
- (d) To review anything submitted to it by the Police pursuant to the Ordinance;
- (e) To promote public awareness of the role of the IPCC; and

(f) To do all such things that are reasonably necessary for, or incidental or conducive to, the performance of its functions under the Ordinance.

148. The Ordinance provides the IPCC with a wide range of powers for discharging its functions, including :

- (a) To require the Police to provide information or materials relating to reportable complaints and clarify the facts, discrepancies or findings;
- (b) To require the Police to investigate or re-investigate reportable complaints;
- (c) To interview persons for the purpose of considering the Police's investigation reports on reportable complaints;
- (d) To require the Police to provide explanations in relation to any actions taken or to be taken in respect of a member of the police force in connection with reportable complaints;
- (e) To require the Police to compile and submit to the IPCC statistics of the types of conduct of members of the police force that has led to reportable complaints;
- (f) To require the Police to submit to the IPCC reports on any actions taken or to be taken by the Police in respect of the IPCC's recommendations; and
- (g) To require the Police to consult the IPCC on any proposed new or significant amendments to police orders or manuals relating to the handling or investigation of reportable complaints.

149. IPCC members and observers are also empowered to attend any interview conducted by the Police in respect of a reportable complaint and observe the collection of evidence by the Police in the investigation of a reportable complaint at any time and without prior appointment. In addition, the statutory IPCC will be able to employ its own staff to assist it in discharging its functions of monitoring the Police's handling and investigation of reportable complaints.

150. Following the enactment of the IPCC Ordinance, the IPCC is working on the necessary transitional arrangements with a view to commencing operation as a statutory body at the earliest opportunity.

151. On the specific issues raised under this question, our response is as follows:

- (a) Generally, a complaint against a member of the police force would be substantiated if there was sufficient reliable evidence to support the allegation. As reported under question 14 above, for the period between January 2005 to May 2008, CAPO did not receive any complaints of torture, as defined under the Crimes (Torture) Ordinance, which were alleged to have been inflicted by members of the Force. Of the complaint cases involving allegations of assault received by CAPO during the period where the investigation reports were endorsed by IPCC, none of the allegations of assault was found substantiated;
- (b) With regard to the findings of CAPO, please refer to the information given above on the police complaint system and the powers of the IPCC, now reflected in the IPCC Ordinance;

(c) Breaches of discipline by police officers that were identified in complaint investigations would be dealt with by way of disciplinary actions by the Commissioner of Police in accordance with established procedures. IPCC would monitor the actions taken or to be taken in respect of any member of the Police Force by the Commissioner of the Police in connection with a reportable complaint and may provide its opinions on such actions. Where criminal offence is involved, the officer concerned could also be subject to criminal proceedings;

(d) Members of the public can file their complaints against members of the Police Force through various channels. After referral to CAPO, a reportable complaint will be properly and thoroughly handled by CAPO and will be subject to the rigorous checks and balances provided for under the two-tier police complaints system. For cases that do not fall under the category of reportable complaints, CAPO will look into the facts of the case and refer it to the relevant police formation or other appropriate authorities for necessary follow-up action. For example, complaints which arise from the issue of a traffic summons or a fixed penalty ticket and relate solely to the validity of the summons/notice will be investigated by the police formation where the summons/notice is originated. The case will be reviewed by the Police Central Traffic Prosecutions Division and any aggrieved party may take the case to the magistrate. The Equal Opportunities Commission, the Privacy Commissioner for Personal Data and the Commissioner on Interception of Communications and Surveillance may also handle complaints against members of the police force which fall under their respective statutory functions. Every complaint received by CAPO, irrespective of whether it is categorized as a reportable complaint, will be examined and handled in a fair and proper manner.

**Question 30. Please also provide data related to the period since the last HKSAR report with respect to:**

- (a) The number of complaints filed with the Complaints Against Police Office (CAPO) investigating the conduct of police forces' members which are reviewed by the Independent Police Complaints Council (IPCC), and the number of disciplinary, civil and/or criminal proceedings initiated as a result of those complaints, and the number of convictions or disciplinary sentences;**
- (b) The number of complaints from persons deprived of their liberty filed with the Department's Complaints Investigation Unit, the results of the investigations and the number of disciplinary, civil and/or criminal proceedings initiated and concluded as a result of those complaints;**
- (c) The number of complaints filed with the Immigration Department for alleged abuse of authority of ill-treatment by members of the Immigration Service and the results of the investigations thereto.**

152. CAPO submits an investigation report on each reportable complaint against members of the police force to the IPCC. From January 2005 to May 2008, IPCC endorsed the investigation results of 8 486 reportable complaints involving 14 428 allegations. Among these, 296 reportable complaints involving 407 allegations were substantiated. As a result, 503 police officers were subject to disciplinary actions ranging from verbal advice to formal disciplinary proceedings. One officer, who was prosecuted and convicted of a criminal offence, was sentenced to imprisonment.

153. Cases of Grievance Related to Prisoners and Public Handled by CIU from 2005 to 2007:

		2005	2006	2007
A.	Cases of grievance received	185	172	158
B.	Cases received by CIU and have been endorsed by CSD Complaints Committee (CSDCC)			
	"Substantiated", "Not Fully Substantiated" or "Substantiated Other Than Reported"	3	3	3
	"False" or "False and Malicious"	44	32	29
	"Faultless"	19	24	16
	"Not Proven"	0	0	0
	"Unsubstantiated"	33	31	36
	"Curtailed"	60	62	60
	"Not pursuable"	13	9	17
	"Withdrawn"	7	9	6
	Sub-total:	179	170	167
C.	Follow-up action taken			
	Recommendation for service improvement	14	19	14
	Disciplinary proceedings instituted against inmate	1	0	2
	Disciplinary proceedings against staff	0	1	0
	Advice given to staff	12	4	8

\* The handling of complaint cases may take months to complete. Hence, a case received in 2005 may be endorsed by CSDCC in the following year.

154. Since the last report, there were seven complaints received by the Immigration Department for abuse of power of ill-treatment. All were found unsubstantiated after investigation.

**Question 31. Please explain whether HKSAR has taken, or envisage to take, any steps to establish a fully independent national human rights institution in conformity with the Paris Principles with, inter alia, investigate, oversight and monitoring powers. What are the limitations in the present oversight mechanisms, for instance the ombudsperson, and other independent, civil mechanisms?**

155. There already exists in Hong Kong an extensive mechanism for protection of human rights. The constitutional and legal provisions are firmly underpinned by the rule of law, an independent judiciary, statutory bodies and institutions and a comprehensive legal aid system. The legislative safeguards are enshrined in the Basic Law, the Hong Kong Bill of Rights Ordinance and other relevant ordinances. They are buttressed by the rule of law and an independent judiciary. We also have an existing institutional framework of organizations,

including the legal aid services, the Equal Opportunities Commission, the Office of the Privacy Commissioner for Personal Data and the Ombudsman, which help promote and safeguard different rights. The effectiveness of the existing mechanism and the work of the Government and these bodies are continually and closely monitored by the Legislative Council, the public, and the media. We, therefore, do not see an obvious need for establishing another human rights institution to duplicate or to supersede existing mechanisms and currently have no plans or timetable for the establishment of such an institution.

**Question 32. Please indicate the measures taken to ensure that complainants and witnesses on abuse and ill-treatment committed by public officials are protected against all ill-treatment and intimidation as a consequence of the complaint or the evidence given.**

156. Safeguards have been built in the system to minimize the opportunity that the complainants and witnesses on complaint cases against police officers would be interfered with. Examples include the following :

(a) A complaine e should not be forewarned of the complaints against him by another police officer and that a breach of such an order amounts to a disciplinary offence. This is to minimize the opportunity for a complaine e/police witness involved in a complaint to interfere with other witnesses or to conceal, destroy or alter evidence;

(b) A complaine e will only be notified of the complaint when he is called upon to assist in the investigation. Any person who attempts to intimidate or interfere a complainant or a witness in a complaint investigation will be subject to criminal or disciplinary sanctions; and

(c) The retention and transfer of a complainant's personal data is governed by the Personal Data (Privacy) Ordinance. Such data would only be accessible by officers directly involved in the complainant investigation of a particular case.

**Article 14**

**Question 33. Please indicate whether the right to compensation depends on the existence of a judgment in criminal proceedings ordering compensation. Can compensation be obtained by a victim of torture or cruel, inhuman or degrading treatment the perpetrator of which has been subjected to a disciplinary, but not to a penal, sanction? Has compensation or rehabilitation been provided to persons who are victims of trafficking in humans or other forms of sexual exploitation, including children?**

157. Although the power to order a person to pay compensation for personal injury and/or loss of or damage to property under section 73 of the Criminal Procedure Ordinance (Cap. 221) can be invoked by the court only if that person has been convicted of an offence, the right to claim damages against a public official or the HKSAR Government under the Crown Proceedings Ordinance (Cap. 300) is not dependent on the existence of a judgment in criminal proceedings; nor is the right to seek remedy or relief in respect of a violation of the Bill of Rights under section 6 of the Hong Kong Bill of Rights Ordinance dependent on such a judgment.

158. Services for victims are detailed in the reply to question 34.

**Question 34. Please indicate in further detail what services exist for the treatment of trauma and other forms of rehabilitation of victims of torture or other cruel, inhuman or degrading treatment.**

159. On humanitarian grounds, the Administration, in collaboration with non-governmental organisations and on a case-by-case basis, offers assistance-in-kind to torture claimants who are deprived of basic needs during their stay in Hong Kong while their claims are being processed by the relevant authorities. The types of assistance offered include temporary accommodation, food, clothing, other basic necessities, appropriate transport allowances, counselling and medical services. The type of assistance offered to the individual varies according to the needs and personal situations of the person concerned, including the availability of his own resources and the resources available to him from other sources.

#### **Article 16**

**Question 35. Please inform the Committee of measures undertaken to prohibit the use of corporal punishment in all settings.**

160. Corporal punishment is prohibited in the following settings.

##### **(a) Child care centres**

161. Under the Child Care Services Regulations, Cap. 243, sub leg A, regulations 15 and 45R, corporal punishment of a child is prohibited in registered child care centres and mutual help child care centres. The maximum penalty is a fine at level 4 and imprisonment for 1 year.

##### **(b) Schools**

162. Regulation 58 of the Education Regulations, Cap. 279, sub leg A, provides that “no teacher shall administer corporal punishment to a pupil”. Regulations 101 and 102 of Cap. 279A further provide that any teacher who contravenes regulation 58 commits an offence which is punishable by a fine at level 5 and imprisonment for one year.

##### **(c) Probation of offenders**

163. Corporal punishment may not be inflicted on a probationer in any institutions approved for the reception of persons who are required to reside therein by a probation order: Probation of Offenders Rules, Cap. 298, sub leg A, rule 37(2)(a). For the purpose of this rule, the term “corporal punishment” includes “striking, cuffing or shaking or the intentional infliction of any form of physical pain as a means of punishment.”

##### **(d) Prisons**

164. The sanction of corporal punishment was removed from Prison Rules (Cap. 234A) in 1981 and its use has been prohibited in all correctional institutions since.

**Question 36. Please clarify the elements and workings of the system identified in paragraph 77 of the HKSAR report, for proper treatment of persons in detention. What administrative rules govern its operation, and how does it reflect the suggestions in the Report on Arrest of the Law Reform Commission of Hong Kong?**

165. Since 1998-99, the Police, the Immigration Department, the Customs and Excise Department and the Independent Commission against Corruption have put in place a system whereby designated Custody Officers and Review Officers ensure proper treatment of persons in detention and review the need of their further detention. In particular, the Custody Officer continuously monitors the conditions of detainees, reviews the grounds for their detention and looks after their welfare. The detention is also monitored and reviewed by the Review Officer. The details of detention and associated reviews are properly recorded. The system is written into departmental orders for compliance by all staff concerned and ensures that no person is detained more than necessary.

**Question 37. Please comment on allegations before the Committee that, following the demonstrations in connection with the WTO Ministerial Meeting in December 2005, mass arrest and overnight detention of more than 1100 demonstrators was carried out without adequate safeguards to protect the rights of the detainees, resulting in claims of inhuman and degrading treatment.**

166. The Police conducted a comprehensive after-action review following the WTO Ministerial Conference held in December 2005, including an examination into the circumstances of the arrest and detention of some 1 100 people following the disturbances on 17 December 2005. We submitted a review report to the Legislative Council Panel on Security in June 2006. We set out below the major findings of the review in respect of the allegations concerning the mass arrest and overnight detention of over 1 100 demonstrators.

#### **Arrangements for demonstration**

167. It must be emphasized that the Police facilitated the conduct of peaceful demonstrations during the Ministerial Conference period as far as possible. The Police discussed at length with the organizers of the key demonstrations. For cases which were smaller in scale involving a small number of participants, the Police held discussions with the organizers and issued letters of no objection without delay.

#### **Use of Force**

168. The Police had been upholding the principles of “exercising maximum restraint” and “using minimum force” in the use of force during the Conference period. The force used by the Police was defensive and was used in response to the escalation of force used by the demonstrators. It fully conformed to the United Nation’s basic principles on the use of force by law enforcement officials and the Police’s internal guidelines.

169. The Police had investigated into the justifications for and the propriety of the use of force after each and every incident during the Conference period. The investigation results concluded that all incidents involving the use of force during the Conference period were justified and the degree of the force used by the Police was appropriate. The Magistrate at the trial for the case

relating to the Conference in fact also commended the Police for their great restraint in handling the disorder.

### **Arrest actions**

170. The major mass arrest during the Conference period took place on 18 December 2005, after some persons charged at the Police cordon on a massive scale and launched violent attacks against the police officers, resulting in numerous injuries and bringing the traffic in Wan Chai area to a complete standstill. The Police had no choice but to take arrest action. Over 1 100 people were arrested by the Police on that day. The arrest action was based on the reasonable belief that those involved had violated the laws of Hong Kong, and was in discharge of the Police's statutory duty to maintain law and order and to safeguard life and property. Although some arrested persons refused to cooperate, the Police accommodated special requests made by the arrestee during the arrests as far as possible. For those requiring medical treatment, arrests were made in hospitals only after the completion of medical treatment.

### **Detention**

171. Despite prior preparations, the need to handle this biggest single mass arrest action ever conducted by the Police on 18 December 2005 was a great challenge to the Police's detention facilities, interpreters, transport vehicles and other supporting facilities. Moreover, most of the arrested persons did not speak Chinese or English and some refused to cooperate with the Police. The Police made their best endeavours to safeguard the fundamental rights of the arrested persons. Despite the shortage of interpreters, the Police adopted appropriate measures to inform them of the offences they had committed at the scene of arrest and to explain to the arrested persons collectively their rights. A dedicated officer was also sent to visit all detention facilities to inform the detained arrestees again of the offences for which they were arrested and their rights.

172. Special regard was paid to the right of the arrestees to basic necessities during their detention. In particular, the Police were mindful of the needs of arrested persons in relation to hot food, drinking water, blankets, using toilets, medical treatment, making outside contact, and appropriate measures were made to accommodate their needs in these areas.

173. As regards the comfort of the arrestees, while there were isolated cases of overcrowdedness in the detention facilities, the Police had made every effort to reduce the number of persons detained in each cell. Where the investigations confirmed that there was insufficient evidence for prosecution, the arrested persons concerned were released as soon as practicable.

174. With regard to the right of the detainees to have access to lawyers, during the detention of the arrested persons in this incident, most police officers exercised flexibility and allowed lawyers who visited the detention facilities and requested to interview the arrested persons to see the arrested persons even when they could not provide the names of their clients.

175. As for the right of the detainees to have the arrest/detention notified to the consulate of their home country in Hong Kong, arrangements were made for staff members from the South Korean Consulate, the US Consulate and the Japanese Consulate to meet the arrested persons.

**Question 38. Please provide updated statistics on cases of abuse of the aged and the governmental responses thereto. What supervision of homes for the aged does the Government provide? Have any state employee been found responsible for such abuses?**

176. Based on the information collected by the Central Information System on Elder Abuse Cases, 612 and 146 elder abuse cases were reported in year 2007 and the first quarter of 2008 respectively.

177. The objective of the Government's elderly policy is to enable elders to live with dignity, and provide them with necessary support, with a view to enhancing their sense of belonging and enabling them to enjoy a quality life. The Government's responses to tackle the problem of elder abuse include preventing elder abuse by improving community awareness and cultivating the climate of respecting elders and good neighbourliness, enhancing workers' skills and awareness in case handling in the respect of professional intervention, empowering elders by educating elders to understand their rights and encouraging them to make use of community resources and seek early assistance, and amending the Domestic Violence Ordinance to enhance protection on victims of domestic violence, including elders.

178. The Labour and Welfare Bureau and the Elderly Commission have jointly launched the "Pilot Neighbourhood Active Ageing Project – Caring for Elders", which provides funding support to organizations to carry out district-based programmes for promoting care for elders and abuse prevention through neighbourhood support networks. These organizations will set up elder caring groups with trained elder volunteers or recovered abuse victims. These elder caring group members, accompanied by social workers, will work with residential and district bodies to pay visits and provide counselling services to the elders with tense relationships with their families, and provide them with suitable support. The Radio Television Hong Kong will also produce radio drama series to promote the messages of caring for elders throughout the territory and to attract participation of more organizations.

179. The quality of residential care homes for the elderly (RCHEs) will directly affect the quality of life of elder residents. The HKSAR Government is therefore committed to enhancing the quality of RCHEs and ensuring that their services are provided at a satisfactory level. Apart from licensing control which forms the first line of defence against non-compliance, we also help RCHEs to enhance their capability, which is another effective way of ensuring that the elderly residents will receive proper care in RCHEs.

180. A dedicated team is established under the Social Welfare Department (SWD) to enforce the relevant Ordinance and Regulations to ensure RCHEs' compliance with the licensing requirements. The team conducts regular and unannounced inspections on RCHEs, and will handle complaints against RCHEs.

181. On top of the statutory licensing requirements, SWD has set out a list of requirements in a "Code of Practice for Residential Care Homes (Elderly Persons)" and guidelines on topical issues for RCHEs to follow. The guidelines cover key aspects relating to the quality of care for elderly residents and will be updated from time to time.

**Question 39. Please comment on allegations of breaches of the convention in respect to treatment of teenagers belonging to ethnic minorities, such as those submitted to the Legislative Council by the Hong Kong Unison Limited, and provide information regarding any investigations into such allegations. Do the police videotape interrogations, particularly in temporary holding areas? How many complaints of police misconduct stem from persons belonging to ethnic minorities, and what has resulted from them?**

182. Respect for the rights of members of the public, and fairness, impartiality and compassion in dealing with the public are among the core values of the Hong Kong Police Force. In its submission to the Legislative Council Bills Committee on the Independent Police Complaints Council Bill dated 6 December 2007, the Hong Kong Unison Limited referred to certain allegations relating to, inter alia, improper use of force by police officers against youngsters belonging to ethnic minorities. Based on the limited information mentioned in the submission, the allegations could not be investigated. That said, we should point out that any excessive use of force, let alone torture, is a criminal offence. If such allegation were substantiated, the officer concerned would be liable to criminal prosecution.

183. As reported under question 14 above, for the period between January 2005 to May 2008, CAPO did not receive any complaint of torture, as defined under the Crimes (Torture) Ordinance, alleged to have been inflicted by members of the Force. And of the complaint cases involving allegations of assault received by CAPO during the period where the investigation report was endorsed by IPCC, none of the allegations of assault was found substantiated.

184. Interviews with suspects are video-taped in more serious cases. Examples include cases where trial is reasonably expected to be held at either District Court or the Court of First Instance, the offence involves a penalty of imprisonment of five years or more, or the nature of the crime may involve significant public interest.

185. All interviews, whether or not video-taped, are conducted in accordance with the “Rules and Directions for the Questioning of Suspects and the Taking of Statements”. In particular, the Rules and Directions provide that a person liable to be arrested should be cautioned before further questioning by law enforcement agencies, and set out the procedures to be adopted in handling persons being questioned or in the police’s custody as well as their rights. Non-compliance with the Rules may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings.

**Question 40. Please elaborate on the right of abode policy in HKSAR and explain how this is compatible with the protection of family unity.**

186. The criteria for eligibility for the right of abode in Hong Kong are prescribed in Article 24 of the Basic Law (BL24) and the Immigration Ordinance (Cap. 115).

187. In January 2002, the Court of Final Appeal handed down judgment on the right of abode cases. Mainland residents who have no legal right to stay in Hong Kong must return to the Mainland. The Director of Immigration may exercise his discretion on a case-by-case basis to allow individual Mainland residents to stay if there are exceptional humanitarian or compassionate considerations.

188. We fully understand the wishes for family reunion. However, it has to be equally recognised that such wishes are not an absolute right. Governments worldwide require people who wish to join their families to submit, prior to entering the jurisdictions in question, formal applications for processing in accordance with local laws and policies.

189. Eligible Mainland residents who wish to settle in Hong Kong must apply under the One-way Permit Scheme for exit permits from the Mainland authorities in accordance with the relevant national laws and administrative regulations. To ensure orderly entry at a rate that our socio-economic infrastructure can practicably absorb, the Scheme is subject to a daily quota of 150, or 54,750 a year. Applications are assessed by Mainland authorities in accordance with a points-based system. Since July 1997, over 500,000 Mainland residents have settled in Hong Kong under the Scheme. The above arrangements for eligible Mainland residents to enter Hong Kong are consistent with the relevant provisions of the Basic Law on right of abode and relevant decisions taken by the Court of Final Appeal.

190. Mainland residents may also apply for Two-way Permits from the relevant Mainland authorities to visit their family members in Hong Kong. In 2007, 1,838,703 Two-way permit holders entered Hong Kong on exit endorsement for visiting relatives.