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Panel on Security

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 27 October 2008**

**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

This paper summarises past discussions by the Panel on Security on the Fourth and Fifth Reports of the People's Republic of China under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - Part Two : Hong Kong Special Administrative Region.

Background

2. The People's Republic of China (PRC) is a State Party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Article 19.1 of CAT requires State Parties to submit periodic reports on the measures they have taken to give effect to their undertakings under the Convention. As part of the combined fourth and fifth reports submitted by PRC, the second report on the Hong Kong Special Administrative Region (HKSAR) under CAT was submitted to the United Nations in June 2006.

3. The second report mainly responds to concerns and recommendations raised by the United Nations Committee Against Torture during its hearing on the HKSAR's first report in May 2000. It also reports on the progress of the implementation of CAT in Hong Kong since the hearing.

Discussion by the Panel

4. The Panel on Security discussed and received views from deputations on the HKSAR's second report on 5 December 2006. The major views and concerns of members are summarised below.

Time required for determination and period of detention

5. Members were concerned about the time required for the determination of refugee status and torture claims. They considered the determination process far too long. Members also expressed concern that some asylum seekers and torture claimants had been detained for a long time. They asked about the offences committed by detained asylum seekers and torture claimants and the length of period, especially the longest period, for which such persons had been detained.

6. The Administration responded that HKSAR had a firm policy of not granting asylum and did not have any obligation to admit individuals seeking refugee status under the 1951 United Nations Convention relating to the Status of Refugees. Claims for refugee status lodged in Hong Kong were dealt with by the United Nations High Commissioner for Refugees (UNHCR). The Immigration Department maintained close liaison with UNHCR Hong Kong Sub-office to ensure persons whose claims for refugee status had been denied and who had no permission to remain in Hong Kong left the territory in accordance with the law. The Government had put in place administrative procedures for assessing torture claims made under CAT. A torture claimant who had failed to establish his claim would be removed from Hong Kong in accordance with the laws. For a torture claimant who had established his claim, he would not be removed to the country where there were substantial grounds for believing that he would be in danger of being subjected to torture upon returning to his place of origin. His removal to another country to which he might be admitted without the danger of being subjected to torture would be considered. Furthermore, if country conditions subsequently changed such that a torture claim established earlier in respect of a particular country could no longer be substantiated, removal to that country would be considered.

7. According to the Administration, the fact that a person being a refugee, asylum seeker or torture claimant would not itself lead to that person's prosecution or detention in Hong Kong. Enforcement actions would be made only if the person concerned had breached the laws of Hong Kong, such as undertaking illegal employment or overstaying.

8. The Administration advised that in the case of a person under detention in accordance with the laws who was also a refugee, asylum seeker or torture claimant, the Director of Immigration might, on a case-by-case basis, exercise his discretion to grant the person release on recognizance pending the determination of his claim by the

relevant authorities or, for mandated refugee, pending his resettlement elsewhere arranged by UNHCR. Considerations would normally be given to –

- (a) whether the person concerned constituted a security risk to the community;
- (b) whether there was any risk of the person absconding and (re)offending; and
- (c) whether removal was not going to be possible within a reasonable time.

9. As regards the detention period, the Administration advised that most asylum seekers and torture claimants had been detained for less than three months.

Need for establishing an independent determination mechanism

10. Some members were of the view that a proper regime should be established for handling torture claims. Appeals relating to torture claims, in particular, should not be determined by the Secretary for Security, but by an independent committee or the court.

11. The Administration responded that a torture claimant aggrieved of the determination of the Director of Immigration could lodge an appeal to the Chief Executive, who had delegated the authority for considering such an appeal to the Secretary for Security. A torture claimant aggrieved of the determination in an appeal could seek judicial review.

Defence for a person charged with torture

12. Some members expressed concern about the reference to "lawful authority, justification or excuse" as a defence for a person charged with torture under the Crimes (Torture) Ordinance (Cap. 427). These members considered that a person's right of not being subjected to acts of torture and other cruel, inhuman or degrading treatment or punishment should be an absolute one. No exception to CAT should be created by legislative means. Lawful sanctions should be subject to CAT.

13. The Administration explained that for the purpose of section 3(5) of Cap. 427, "lawful authority, justification or excuse" meant –

- (a) in relation to pain or suffering inflicted in Hong Kong, lawful authority, justification or excuse under the law of Hong Kong;
- (b) in relation to pain or suffering inflicted outside Hong Kong -

- (i) if it was inflicted by a public official acting under the law of Hong Kong or by a person acting in an official capacity under that law, lawful authority, justification or excuse under that law; and
- (ii) in any other case an authority, justification or excuse which was lawful under the law of the place where it was inflicted.

The Administration advised that this defence was consistent with Article 1.1 of CAT which provided that "[Torture] does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions". The defence was intended, and was also necessary, to cover matters such as the reasonable use of force to restrain a violent suspect/prisoner. It was not intended, nor would the courts be asked to interpret them as such, as authorising conduct intrinsically equivalent to torture as defined in Article 1 of CAT.

Possible abuse of the existing mechanism

14. Some members expressed concern about the situation of abuse of the existing mechanism by asylum seekers and torture claimants. They asked about the number of persons granted refugee status by UNHCR and the number of such persons who had settled overseas.

15. The Administration advised that information provided by UNHCR had suggested that, in comparison with other countries, there was a more widespread abuse of refugee status and torture claims in Hong Kong. As at 30 April 2008, the accumulated number of torture claimants was 3 196. Among them, 1 591 were known to have lodged refugee claims. So far, UNHCR had granted refugee status to 35 of them and 14 of these refugees had settled overseas. However, there had not been any successful claim among the torture claim cases. Among the cases handled up to the end of April 2008, 91% of torture claimants did not make any claim until after having arrived in Hong Kong for an average of 15.1 months. Most of these claimants, i.e. 91%, lodged their torture claims only when they were arrested for undertaking illegal employment or committing other criminal offences in Hong Kong, or when they faced imminent removal or deportation from Hong Kong. 48% of all torture claimants lodged their claims after an average of 11.5 months since lodging refugee status claims with UNHCR. These figures indicated that there was a possible abuse of the existing mechanism by illegal immigrants/overstayers who had sought employment in Hong Kong.

Humanitarian assistance to refugees, asylum seekers and torture claimants

16. Some members advised that they had received complaints about inadequate assistance to torture claimants released on recognizance. These members held the view that the Administration should render appropriate assistance, including legal aid, to asylum seekers and torture claimants.

17. The Administration responded that it had, in collaboration with non-government organisations and on a case-by-case basis, offered assistance-in-kind on humanitarian grounds to refugees, asylum seekers and torture claimants who were deprived of basic needs during their presence in Hong Kong pending resettlement overseas or while their claims were being processed by relevant authorities. The type of assistance offered included temporary accommodation, food, clothing, other basic necessities, appropriate transport allowances, counselling and medical services. To facilitate better coordination and provision of services, the Administration had commissioned the International Social Service (ISS) Hong Kong Branch to provide assistance-in-kind services to mainly vulnerable asylum seekers and torture claimants. As at 31 March 2008, ISS was supporting 1 752 such clients on commission, and there were another 483 cases pending ISS's assessment and service arrangement.

Relevant papers

18. Members may wish to refer to the following minutes of meetings and papers for further details of the discussions -

- (a) minutes of meeting of the Panel on Security on 5 December 2006 [LC Paper No. CB(2)880/07-08];
- (b) Administration's paper entitled "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" for the meeting of the Panel on Security on 5 December 2006 [LC Paper No. CB(2)496/06-07(01)]; and
- (c) Administration's letter dated 24 June 2008 providing supplementary information relating to the Fourth and Fifth Reports of the People's Republic of China under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - Part Two: Hong Kong Special Administrative Region [LC Paper No. CB(2)2429/07-08(01)].