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Submission to the Legislative Council Panel on Security on the Implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (October 2008)

Introduction

1. The Committee against Torture ('the Committee') will consider the report by the Hong Kong SAR, as part of the state party report by China on the implementation of Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in November 7th & 10th. In many important areas, however, little progress has been made in the implementation of the recommendations by the Committee made in November 1995 and May 2000. This submission provides a brief overview on the major concerns on the implementation of CAT. For more detailed information, please refer to our shadow report submitted to the Committee on 18 April 2008.¹
2. We would like the LegCo to urge the Government to invite Representatives of the Committee to visit Hong Kong after the hearings to facilitate the dialogue with a view to promoting the implementation of CAT in Hong Kong.

Article 1

3. The Crimes (Torture) Ordinance ('CTO') (Cap. 427) was introduced in Hong Kong to create the offence of torture and provide for its prosecution. However, it only adopts a limited definition of torture. Section 3(4) CTO offers a blanket defence for acts which would otherwise violate s.3(1) of the Ordinance. It in fact exonerates all inflictions of severe pain or suffering so long as the officer concerned could prove that he had a "lawful authority, justification or excuse". Such a defence is too broad to be consistent with the CAT, which requires parties to ensure that "all acts of torture are offences under its criminal law" required by CAT.²

Article 2

4. In many cases the rights of persons detained in custody are not fully protected. Important recommendations on law reforms made in the Report on Arrests by the Law Reform Commission on arrest, detention, interrogation and search have largely been ignored. Police internal guidelines, like those on searches, are inconsistent with human rights. Even when the

¹ <http://www2.ohchr.org/english/bodies/cat/docs/ngos/HRMHongKong41.pdf>

² Art. 4.1 of CAT.

rights are recognised in law, they are often not honoured by the police frontline officers in practice, not to mention those spelt out in their guidelines.

Article 3

5. Hong Kong Government still refused to extend the 1951 Convention because “(the extension of the 1951 Convention) makes us vulnerable to possible abuses”.³ There is no legal right for asylum seekers to seek protection in Hong Kong although the Director of Immigration may exercise discretion in using his general power of immigration control not to force a foreign national to return to his home country to face torture or prosecution. The Hong Kong Government refuses to set up a refugee status determination (‘RSD’) procedure but instead relies on the UNHCR’s Hong Kong sub-office for such determinations. There are administrative measures for the assessment of torture claims under Art.3(1) of the CAT in light of Court of Final Appeal (CFA) judgment in *Prabakar*. However, such procedures are inadequate. The determination procedures are arbitrary, which fails to adhere to the high standard of fairness. No legal assistance is offered to asylum seekers to prepare their applications. We submit that although the Refugee Convention has not been extended to Hong Kong by China, the HKSAR should still comply with the customary international law principle of *non-refoulement*.⁴
6. The current shifting of burden of determination to the UNHCR by the HKSAR is unsatisfactory. First, the UNHCR SOHK is heavily overburdened. Cases in the UNHCR SOHK are accumulating faster than they are being processed.⁵ Secondly, there is no formal system for directing asylum seekers to the UNHCR. Thirdly, the UNHCR procedure “lacks a number of guarantees ensuring procedural fairness such as transparency, written reasons for refusal, independent appeal, provision for legal assistance and judicial review.”⁶
7. The Fugitive Offenders Ordinance (Cap. 503) (‘FOO’) provides for a legislative framework for the entering into an extradition agreement. S.5 of the FOO stipulates the general restrictions for surrender, which deviate from general accepted human rights principles. It offers inadequate protection to requested persons in cases where there are substantial grounds for believing that the person to be surrendered would face a substantial risk of (1) torture and (2) the death penalty.
8. Asylum seekers and refugees in Hong Kong are vulnerable to arbitrary and lengthy detentions. Asylum seekers and torture claimants in detention have gone on hunger strike to protest against unreasonable long periods of detention. Until recently, asylum seekers were often detained for an indefinite time in over-crowded conditions, which leave them in a state of uncertainty and helplessness. The Court has ruled against the Director of Immigration recently on this issue.
9. Moreover, there is a lack of resources offered to asylum seekers in Hong Kong. They do not enjoy the right to work and welfare. Only a minimal level of assistance is offered to them by the SWD through a local social service agency. The agency would only assist them if the asylum seekers could produce immigration papers. The assistance they could receive is basically in kinds and is barely enough for maintaining basic level of subsistence. Their living

³ Security Bureau, ‘Policy on Refugees, Asylum Seekers and Torture Claimants’, July 2006. See also http://www.Thestandard.com.hk/stdn/std/Front_Page/GF20Aa02.html.

⁴ The principle of non-refoulement is enshrined in Art.3 of the Refugee Convention and stipulated in Art.3 of the CAT.

⁵ Table 6, Annex, UNHCR Statistical Yearbook 2006, <http://www.unhcr.org/statistics/STATISTICS/478cda572.html>.

⁶ Mark Daly, ‘Note on the Situation of Asylum Seekers, Refugees and Convention Against Torture (‘CAT’) Claimants in the Hong Kong SAR prepared for Joint Meeting of the Legislative Council Panels on Welfare Services and Security, 18 July 2006, LC Paper No. CB(2)2761/05-06(2).

environment is seriously unsatisfactory. It is difficult for them to apply for the medical fee waivers.

Article 4

10. So far, there have been no prosecutions brought under the CTO despite clear cases of torture.⁷
11. There are insufficient safeguards in the present laws of Hong Kong to protect persons from torture in times of a public emergency. Article 18 of Basic Law has stipulations on times of public emergency, but it is unclear what those relevant national laws might be, and if those laws comply with the CAT.⁸ Although the Hong Kong Government claimed that Art. 18 of the Basic Law should be read in conjunction to Art. 39, it is still difficult to see how the protection could be sufficiently ensured without a proper protection in Article 18 of the Basic Law.

Article 5

12. S.3(5) of the CTO extends the “lawful authority, justification or excuse” defence to acts of torture that are unlawful under foreign law, thereby limiting the government’s responsibility to prosecute such acts of torture. Therefore when an official committed acts of torture within the definition of the CAT but where the law of the place falls below international standards, he would be able to invoke “lawful authority, justifications or excuse” under the foreign law to avoid legal sanctions in Hong Kong. It is thus hardly consistent with the jurisdiction of the CAT.

Article 11

13. Vulnerable groups such as ethnic minorities, sex workers, and asylum seekers are especially vulnerable to police abuses and violence. Such problems have spread to protestors and, recently, to a journalist and a councillor assistant.
14. Ethnic minority youths are often stopped and questioned by the police, during which police officers made derogatory and racist remarks (like “Ah Char”). Verbal protests by these youths often led to retaliation by the officers and were beaten up. Some of them were charged for assaulting police officers as a further persecution and a means to cover up police brutality. Unfortunately, in most cases of such charges, the youths were convicted. More, ethnic minorities are often denied the right of to medical service. They were required to report to police station but often required to wait for several hours and in many cases were asked to return at a different time.
15. Abuses against sex workers may now be made a part of police work. A set of confidential internal guidelines of the Police Force allows police officers in undercover operation for investigating prostitution-related offences, with the approval of their senior, to receive free “hand jobs”. A proportion of the cases involve police officers receiving “hand jobs” many times before they actually arrest the sex worker.⁹ Such arrests and charges are therefore tainted with degrading humiliations.

⁷ See Fourth and Fifth Reports of the PRC under the CAT - Part Two: HKSAR (June 2006), para 63.

⁸ Article 18 of Basic Law, “...In the event that the Standing Committee of the National People's Congress decides to declare a state of war or, by reason of turmoil within the Hong Kong Special Administrative Region which endangers national unity or security and is beyond the control of the government of the Region, decides that the Region is in a state of emergency, the Central People's Government may issue an order applying the relevant national laws in the Region.”

⁹ Zi Teng, *Report on the Convention on the Elimination of All Forms of Discrimination against Women – Sex workers in Hong Kong (2006) (NGO report to the CEDAW committee's 36th session).*

16. Another situation is that the undercover police officer accepts oral or full sex sexual services during the operation but claims that they only received a hand job from the sex worker. Some police officers also took advantage of their position to acquire free sexual services while not in the course of an undercover operation, often by threatening sex workers with false charges, or other retaliation. The experience of NGOs providing services to sex workers confirms that, framing in connection with prostitution-related offences are common. For example, the police officer put condoms and lubricants into girls' bag and accusing them of engaging in sex work in breach of their condition of stay, an immigration offence punishable by imprisonment. Entrapment often takes place as well.
17. It seems that little has been done by the police and the Government to prevent these practices. The Security Bureau states in its submission to Legislative Council that, there might be instances where there is a "strong operational need for the Police officer posing as a customer to receive some form of sexual service from a sex worker so as to maintain his cover to collect the necessary evidence to secure successful prosecution against the offenders".¹⁰
18. Police brutality and framing extend to human rights defenders and social activists. In a recent court case, Mr. Cheng Tak Man, an assistant to a District Councillor was arrested when he was peacefully monitoring the moving of his client, an elderly women, who had been accidentally locked up in a closed housing block, and herself. In Cheung Sha Wan police station, he was beaten up by the police officer while the latter shouted, "assaulting police officer" in beating him up. Police officers in the police station did not react to such shouts, showing that police beating people up in this manner is not uncommon in that police station. Mr. Cheng was acquitted after a trial before a magistrate. So far no action was known to have been taken by the police in investigating the incident. LegCo should review the measures taken by Cheung Sha Wan Police Station and other parts of the Police Force in preventing police brutality.
19. Arbitrary strip searching has become a matter of grave concern in Hong Kong. Again vulnerable groups are more vulnerable to arbitrary strip searches. These searches are frequently done in an inappropriate manner and often coupled with irrelevant and humiliating demands. On 5 October 2007, 15 environmental protestors who demanded a halt to demolition work at Lee Tung Street were arrested for obstruction of a public place and obstructing a police officer in the due execution of duty and were detained overnight. Many of them were strip searched in the police station. A male detainee reported that he was strip searched twice and required to lift up his genitals. It was also reported that a male officer entered into the detention area where one of the female detainees was being strip searched and made sexual remarks.¹¹
20. There are inadequate laws, guidelines and policies to safeguard the rights of persons who may be searched by the police.¹² The local legal provisions (Police Force Ordinance, Cap. 232) have limited and rough provisions on searching of the person. Safeguards governing strip searches are limited in their scope and basically set out in internal Police General Orders and Force Procedures Manual which have no force of law.
21. As a result of the public outcry in response to the recent cases of abuse, the Government has revised the relevant guidelines in Police General Order and Force Procedures Manual, which

¹⁰ Security Bureau, 'Supplementary information on Police's undercover operations against vice activities', submission to Legislative Council Panel on Security, September 2006, LC Paper No. CB(2)3021/05-06(01), para 4.

¹¹ 'Police Strip-Search Slammed,' Sing Tao Daily 7 Nov 2006.

¹² Joshua But, 'Panel urged to probe protest strip-search,' S.C.M.P., 31 Oct 2007.

has taken effect from 1 July 2008.¹³ However, the new guidelines require repeated routine searches on arrested and detained persons at different stages without the need to assess each individual case where there is a necessity to conduct any search say on objective grounds of reasonable suspicion. The guidelines are concerned not about the justification for a search but the type of searches to be conducted. This necessarily leads front line officers to conduct searches without exercising discretion. This fettering of discretion is no more prominent than the provision, “The Commissioner of Police has determined that a search will be conducted on all persons to be detained in police custody.” Moreover, degrading and humiliating treatments, such as touching one’s genitals, making sexual remarks and observation by officers with the opposite sex during search and are not denounced or prohibited by the new guidelines, leaving room for further abuses.

Article 12 and 13

22. In the current system, all complaints against police abuse in Hong Kong are referred to the Complaints against Police Office (‘CAPO’), which is a branch of the police force. CAPO is responsible for investigating the complaints, or overseeing the handling of complaints by other fellow officers.
23. The performance of CAPO is unsatisfactory. In many cases, the prospective complainant has been discouraged from making or pursuing a complaint. Tipping off of police officers is not criminal and inadequate efforts have been made to this. Obviously, the CAPO is actually a convenient place for the Police to dismiss complaints. The NGO community have little confidence in this complaint procedure due to the lack of independence of CAPO.
24. The Independent Police Complaints Council (IPCC) purports to be a civilian oversight body, but its powers are limited. The IPCC is not empowered to conduct investigations. The IPCC could only study the investigation report, review the classification of investigations (on whether it is substantiated or not) and to give non-binding advice to CAPO. The IPCC is thus far from effective in combating police misconduct.
25. In July 2008, the IPCC Bill was passed to establish the IPCC as a statutory body. All private amendments moved by LegCo Members to improve the Bill were either barred or defeated. The legislation has actually made the IPCC less flexible in many aspects, any genuine amendments giving the IPCC real and effective powers has not been made. So after the passage of the IPCC Bill, the IPCC still lacks the powers to:
 - a. conduct investigations on complaints;
 - b. investigate complaints from a third party;
 - c. determine if complaints were substantiated; and
 - d. determine the penalty for a substantiated complaint.
26. The then (now former) Chairperson of the IPCC, *Ronny Wong Fook-hum*, QC, SC, in his testimony before the LegCo Bills Committee, described the system proposed by the Bill to have “all the odds stacked against the complainant” and warned that the Bill could make the council “an instrument being used to protect the police”.¹⁴

Article 16

¹³ Security Bureau, ‘Letter dated 27 June 2008 from the Administration to the Panel on Security regarding the Police’s guidelines on the handling of searches of detainees’, <http://www.legco.gov.hk/yr07-08/english/panels/se/papers/secb2-2439-1-e.pdf>.

¹⁴ Recorded proceedings of the testimony by *Ronny Wong Fook-hum*, QC, SC, before the Bills Committee on 24 April 2008 on these points could be found at about 0:58:00 to 01:02:00 in the LegCo website: <http://www.legco.gov.hk/public/search/search.html>.

27. In many cases, detentions are carried out without proper and adequate safeguards to protect the rights of detained persons, which would result in claims of inhuman and degrading treatments.
28. In December 2005 during the World Trade Organization Ministerial Meeting, over 1,100 demonstrators were arrested and detained overnight, and their human rights were seriously violated. Neither clothing nor blankets were offered to the detainees despite the long hours in cold weather. Food, water and access to toilet facilities were not properly provided. There were not enough holding areas for the detainees. They were forced to stay in open parking area or overcrowded detention cells.¹⁵
29. In June 2005, 80 mainland women suspected of prostitution were arrested and kept in 200-square feet open-air steel cage for 13 hours under immense heat and fierce sunshine.¹⁶ During the detention, the detainees were not allowed to use the toilet and hygiene conditions inside the cage was unacceptable.

¹⁵ Please refer to Hong Kong People's Alliance on WTO and Asian Human Rights Commission, 'Human Rights Violations during the Policing, Arrests, and Detentions during the WTO Protestors in Hong Kong, December 2005', LC Paper No. CB(2)1521/05-06(01).

¹⁶ Clifford Lo, 'Crackdown on triads sees 500 arrested', S.C.M.P., 15 June 2005.