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Paper for the Panel on Security

**Information paper relating to the implementation of the United Nations
Convention against Torture and Other Cruel, Inhuman or
Degrading Treatment or Punishment 1984 in selected jurisdictions**

Background

Article 7 of the International Covenant on Civil and Political Rights prohibits torture, cruel, inhuman or degrading treatment or punishment. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (the Convention) expands on the scope of obligations not to commit torture and other forms of punishment or treatment.

2. The implementation of the Convention by its States Parties is monitored by the Committee against Torture (CAT Committee). Under the Convention, all States Parties are obliged to submit regular reports to the CAT Committee on the measures they have taken to give effect to their undertakings under the Convention. States Parties must report initially one year after the entry into force of the Convention for the State Party concerned and then every four years¹. The CAT Committee examines each report and addresses its concerns and recommendations to the State Party in the form of "concluding observations"². In addition to the reporting procedure, the CAT Committee may also, under certain circumstances, consider individual complaints or communications from individuals claiming that their rights under the Convention have been violated³, undertake inquiries⁴, and consider inter-state complaints⁵.

¹ Article 19.1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT).

² Article 19.3 and 19.4, CAT

³ Article 22 of CAT provides that a State Party may at any time declare under this article that it recognizes the competence of the CAT Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention.

⁴ Article 20, CAT.

⁵ Article 21, CAT.

3. The Convention has been applied to Hong Kong since 1992⁶. At present, torture claims made under Article 3 of the Convention are handled by the Immigration Department according to a set of administrative procedures. At the meeting of the Panel on Security on 2 November 2010, members asked the Research Division to undertake a research on the mechanisms for handling torture claims in the United States, Australia, the United Kingdom, Switzerland and Japan (the selected jurisdictions) and the Legal Service Division to advise whether these mechanisms had been subject to legal challenge in order to assist members in considering the Administration's legislative proposal on a statutory mechanism for handling torture claims.

Judicial authorities on the implementation of the Convention in the selected jurisdictions

4. The Legal Service Division has reviewed decisions of the domestic courts concerning the implementation of the Convention in Australia, the United States (US) and the United Kingdom (UK). These cases primarily relate to the merits of the applications based on the facts of individual cases (i.e. whether the claimant has established a credible claim for protection on the ground that he was likely to be tortured upon deportation), the proper construction of relevant legislative provisions under the respective domestic laws⁷ and whether decisions made by the authorities under the relevant laws were made correctly⁸. We have not been able to find any decisions of the domestic courts in the above three jurisdictions that touch upon the lawfulness of the statutory mechanisms for handling torture claims or whether those mechanisms are incompatible with the Convention. As to Japan and Switzerland, we have not been able to find relevant cases on the subject.

⁶ Since 1 July 1997, CAT applies to the Hong Kong Special Administrative Region through the People's Republic of China : United Nations Treaty Collection Webpage (2011) *Chapter IV Human Rights, Item 9 Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* (endnote 6). <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en#5> [Accessed April 2011].

⁷ For example, the application and interpretation of section 198(6) of the Australian Migration Act 1958 which deals with the removal of an unlawful non-citizen was considered in *NATB & Others v Minister for Immigration and Multicultural and Indigenous Affairs* 80 ALD 799 (Federal Court of Australia) 16 December 2003 and *Saak v Minister for Immigration and Minister for Immigration and Multicultural and Indigenous Affairs* 2004 FCA 104.

⁸ For example, in *R (on the application of MD (Gambia)) v Secretary of State for the Home Department* [2011] All ER(D) 189, the issues before the English Court of Appeal were whether the Secretary of State's decisions under the UK Nationality, Immigration and Asylum Act 2002 to include Gambia in the list of "safe" countries for deportation and to certify the claimant's case as clearly unfounded were correctly made.

CAT Committee's comments and observations on domestic laws of the selected jurisdictions

5. In monitoring the implementation of the Convention by States Parties through a reporting procedure and consideration of complaints, the CAT Committee will give its views and observations to the States Parties concerned. To assist members of the Security Panel in considering the Administration's legislative proposal on torture claim screening mechanism at the Panel meeting on 12 April 2011, the ensuing paragraphs set out the comments and observations given by the CAT Committee on the domestic laws of the selected jurisdictions to implement the Convention.

Meaning of "torture"

6. Article 1 of the Convention defines "torture" as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".

7. The CAT Committee is concerned that neither the US⁹ nor Australia¹⁰ has an offence of torture at the federal level, and that the laws of Switzerland¹¹ and Japan¹² both lack a definition of torture in accordance with Article 1 of the Convention.

8. The US considered that the Convention did not extend to persons who feared private entities that a government was unable to control: *Matter of S-V*¹³. However, the CAT Committee held that police inaction in the face of blatant acts of torture, cruel, inhuman and degrading treatment constituted the State's acquiescence in the perpetration of such acts, giving rise to accountability under the Convention: *Dzemajl et al v Yugoslavia*¹⁴.

⁹ *Conclusions and recommendations*, CAT Committee [25 July 2006] para. 13.

¹⁰ *Concluding observations*, CAT Committee [22 May 2008] para. 8.

¹¹ *Concluding observations*, CAT Committee [25 May 2010] para. 5.

¹² *Conclusions and recommendations*, CAT Committee [3 August 2007] para.10.

¹³ *The United States of America's Report to the CAT Committee* [6 May 2005], para. 36.

¹⁴ CAT 161/00, Joseph S., Schultz J. and Castan M. 2004, *The International Covenant on Civil and Political Rights Cases, Materials and Commentary* (Second Edition) pp.198-202.

Article 3 – Non-refoulement

9. The principle of non-refoulement is reflected in Article 3 of the Convention which provides that no State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. The prohibition against refoulement should be enshrined in a State Party's domestic legislation as an express and non-derogable provision¹⁵. The CAT Committee notes with concern that the 2006 Immigration Control and Refugee Recognition Act of Japan¹⁶ does not expressly prohibit deportation or removal to countries where there is a risk of torture.

10. While a claimant under Article 3 of the Convention has to present an arguable case of a "personal and present" danger that goes beyond mere theory or suspicion (i.e. there must be a factual basis for the claimant's position), the CAT Committee considers that the risk does not have to be "highly probable"¹⁷.

11. The US authority has held that isolated instances of mistreatment rising to the level of torture are insufficient to establish that the complainant will "more likely than not" be tortured if returned to Haiti: *Matter of J-E-*. To prevent transfers to countries where the transferees more likely than not will be tortured, the US government obtains assurances from the receiving State that it will not torture the transferee¹⁸. The CAT Committee is concerned about the reported reliance by the US¹⁹ and the UK²⁰ on "diplomatic assurances" (especially since 11 September 2001) in transferring or extraditing a person to another State, and the lack of transparency of such procedures including the absence of adequate judicial scrutiny and effective post-return monitoring mechanisms to assess if the assurances have been honoured.

¹⁵ *Concluding observations* (Australia), CAT Committee [22 May 2008], para. 15. The prohibition of torture is accepted by the international community as a peremptory norm, i.e. an absolute value from which nobody must deviate: *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet (No 3)* [1999] 2 All ER 97, 108-109.

¹⁶ *Conclusions and recommendations*, CAT Committee [3 August 2007] para. 14(a).

¹⁷ CAT General Comment 1, para. 5 – 7, Joseph et al 2004, pp. 233-4.

¹⁸ *The United States of America's Report to the CAT Committee* [6 May 2005], paragraphs 30 and 36.

¹⁹ *Conclusions and recommendations*, CAT Committee [25 July 2006] para. 21.

²⁰ *Conclusions and recommendations*, CAT Committee [10 December 2004] para. 4(d).

12. The CAT Committee has reminded States Parties that they must not rely on diplomatic assurances as a safeguard against torture or ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment, and that if a State Party uses such assurances, it must provide in its next report to the CAT Committee information on:

- (a) the number of cases of extradition or removal subject to receipt of diplomatic assurances or guarantees since 11 September 2001;
- (b) its minimum requirements for such assurances or guarantees;
- (c) any subsequent monitoring it has undertaken in such cases; and
- (d) the legal enforceability of the assurances or guarantees given²¹.

13. Other views and observations of the CAT Committee on the implementation of Article 3 of the Convention are as follows:

- (a) States Parties must not institute procedures which automatically expel certain categories of people, or use a "list of safe countries" automatically to deny protection to persons seeking refuge or deemed to be from those countries²².
- (b) A State Party should not rely solely on its ministers' discretionary powers to meet its non-refoulement obligations under the Convention²³;
- (c) A State Party must explicitly incorporate into its domestic legislation a mandatory requirement for a thorough assessment in each case of whether there are substantial grounds for believing that the claimant would be in danger of being tortured upon expulsion, return or extradition, taking into account all relevant considerations including²⁴:
 - (i) whether there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights in the State to which the claimant is to be expelled, returned or extradited and whether that situation has changed;

²¹ *Concluding observations* (Australia), CAT Committee [22 May 2008], para. 16.

²² *Concluding observations* (Finland) 1997, Joseph et al 2004, 9.86 at p.245.

²³ *Concluding observations* (Australia), CAT Committee [22 May 2008] para. 15.

²⁴ CAT General Comment 1, para. 8, see Joseph et al 2004, pp.234.

- (ii) whether the complainant has been tortured or maltreated by or at the instigation of or with the acquiescence of persons acting in an official capacity in the past, especially in the recent past²⁵;
 - (iii) whether there is medical or other independent evidence to support the claimant's claim of torture or maltreatment in the past and whether there are any after-effects;
 - (iv) whether the claimant has engaged in political or other activity which would make him/her particularly vulnerable to torture were he/she to be expelled, returned or extradited; and
 - (v) whether there is any evidence as to the claimant's credibility and whether there are any relevant factual inconsistencies in the claimant's story²⁶.
- (d) States Parties should allow torture claimants to challenge refoulement decisions²⁷. Independent review bodies should be established²⁸ to provide aggrieved torture claimants with effective remedies to challenge or appeal against expulsion, repatriation or extradition orders. The execution of such orders should be suspended while the appeal/challenge is being determined²⁹.

Torture claims vs political asylum applications

14. Determinations under Article 3 of the Convention are conceptually different from issues of political asylum or refugee status under the United Nations Convention relating to the Status of Refugees 1951 (the Refugee Convention): *X v Spain* and *Mohamed v Greece*³⁰. A finding of violation of Article 3 of the Convention by the CAT Committee does not affect the decision of a competent national authority in granting or refusing asylum: *Aemei v Switzerland*³¹.

²⁵ In the UK, when the available evidence establishes a "reasonable likelihood" that the applicant has been tortured in his or her country, the caseworker must consider the case very carefully: *The United Kingdom's Report to the CAT Committee* [6 November 2003], para. 46.

²⁶ The Swiss asylum appeals body has ruled that the fact that a victim was too ashamed to mention details of torture (burns on intimate parts of her body) at hearings and described them only at the appeal stage does not necessarily affect her credibility: *Switzerland's Report to the CAT Committee* [2 July 2008], para. 86.

²⁷ *Conclusions and recommendations* (US), CAT Committee [25 July 2006] para. 20.

²⁸ *Conclusions and recommendations* (Japan), CAT Committee [3 August 2007] para. 14.

²⁹ *Concluding observations* (Australia), CAT Committee [22 May 2008] para. 17; *Concluding observations* (Switzerland), CAT Committee [25 May 2010] para. 10.

³⁰ CAT 23/95 and CAT 40/96, Joseph et al 2004, pp.243-4.

³¹ 34/95, Joseph et al 2004, p.245.

15. While Article 1F of the Refugee Convention denies refugee status to people who have committed war crimes, crimes against peace or humanity or other serious non-political crimes, the test under Article 3 of the Convention is absolute: States Parties must not expel, return or extradite anybody, even war criminals and murderers, if their expulsion, return or extradition would foreseeably result in their torture: *Paez v Sweden*³².

16. The CAT Committee has noted that Article 5(2) of the Swiss Asylum Act of 1999 allows a person in danger of being tortured to be expelled if there are substantial grounds for believing that the person represents a threat to the security of Switzerland or, having been convicted and sentenced for a particularly serious crime or offence, must be considered a public menace. Article 68(4) of the Swiss Federal Act on Foreign Nationals of 2005 further permits the immediate expulsion of a foreigner from Switzerland if the person concerned has seriously or repeatedly violated, or represents a threat to, public security and order or represents a threat to internal or external security. The CAT Committee is concerned that these provisions could lead to a violation of the principle of non-refoulement under Article 3 of the Convention³³.

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³² CAT 39/96, Joseph et al 2004, pp.244-5.

³³ *Concluding observations*, CAT Committee [25 May 2010], para. 10.