

香港人權監察

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就香港特別行政區根據《禁止酷刑和其他殘忍、不人道或有辱人格的待遇或處罰公約》提交的第三次報告舉行的審議會（2016年6月7日）的書面意見

一、跟進建議

1. 聯合國禁止酷刑委員會（下稱「委員會」）在審議港府的報告，及考慮民間團體的影子報告後，發表《結論性意見》，¹當中提出一系列清晰、可行的建議，以助港府改善香港人權狀況和保障機制。香港政府有責任跟進建議，以確保本港並無違反《禁止酷刑和其他殘忍、不人道或有辱人格的待遇或處罰公約》（下稱《禁止酷刑公約》）。人權監察要求政府立即交代對各項建議的跟進計劃和進度，包括實質措施和時間表。
2. 《結論性意見》第 30 段特別要求特區政府就該文中第 7(b)、9 和 13 段所載的建議，在 2016 年 12 月或之前提交回應。人權監察要求政府立即回應立法會、我等民間團體及其他公眾，是否已開始著手實踐該等建議及實踐細節；若否，政府是否視國際人權公約下的責任為無物。

二、徹查警察濫權 不容有罪不罰 重整監警機制 還香港專業守法警隊

3. 過去，執法人員濫用職權、在行使職權期間使用不恰當武力，卻遲遲未受到相應及相稱的法律追究和制裁的情況時有聽聞；惟在雨傘運動期間，警方在執行職務期間屢次集體對示威群眾使用不恰當武力，或懷疑姑息襲擊示威群眾的人士，警隊高層和政府官員不但沒有即時回應及制止，反而高調「力撐」警隊，予人警隊執行政治任務就有免死金牌之觀感。
4. 警方管理層更有明顯立場，偏向反對向政府抗議的雨傘運動及其示威人士，而且鼓勵警員同樣採取這個立場，在執行任務期間可以對人不對事，失去客觀中立執法原則。

¹ 聯合國文件編號 CAT/C/CHN-HKG/CO/5

5. 期間，有女學警因繫上象徵支持雨傘運動的黃絲帶而被指違反警務人員必須保持政治中立的警隊內部守則而被要求辭職；輔警楊逸朗亦因留守金鐘佔領示威區而遭到停職紀律調查；相反，有便衣警員在佔中執勤時掛上象徵反佔中的藍絲帶，另有高級督察在辦公室門外貼上藍絲帶，被人質疑違反警務人員政治中立原則，警方卻推說警員可享有《基本法》及《人權法》權利，而無再堅持警務人員必須保持政治中立的警隊內部守則。
6. 經鼓勵後催生的警員仇視雨傘運動示威群眾的情緒，結果一再顯現於無數宗警察毆打示威者、途人、記者、急救員，濫用胡椒噴霧、隨意以不同藉口拘捕、作假口供等的事件，令警隊失去聲譽和公信力，市民對警務處表現的滿意指數也直跌。²
7. 在濫用暴力和權力事件曝光後，涉案警員卻遲遲未被拘捕和起訴，警方更拒絕公布使用武力等《警察通例》。
8. 「暗角七警」雖在事發一年後終獲起訴，警方卻選擇同一日同時起訴案中被毆打的曾健超。有關在旺角無故用警棍打多名路人的前分區指揮官朱經緯的投訴，監警會在 2015 年 7 月通過他毆打途人投訴屬實，投訴警察課卻以無稽歪理反對。雖然最後投訴警察課終同意朱經緯毆打途人投訴屬實，而警方近月亦就此案展開刑事調查，但其過程耗時之久，及投訴警察課的無理開脫藉口，均令市民質疑警隊徹查警察濫權的決心和誠意，進一步削弱公眾對「警察查警察」的投訴警察制度的信心。
9. 這兩宗案件之所以能有所進展，多得受害人主動及積極跟進投訴，及傳媒廣泛報導和市民大眾關心；但其他濫用權力和暴力事件，又有多少願意使用這種偏幫警方的投訴機制去尋求公義？被法庭指出口供失實，可能是惡意誣陷市民襲警的警員，又有何跟進？委員會指明要求公布警方使用武力的《警察通例》，但警隊至今未有遵行，連立法會也看不到，當局是否縱容警隊將市民知情、監察警隊免受執法人員濫用武力對待，以至維護自己和公眾權益的權利，甚至行政機關向立法機關問責的《基本法》條文，置諸不顧？

² 香港大學民意研究計劃：市民對香港警務處表現的滿意程度（7/1997-11/2015）
https://www.hkpop.hku.hk/chinese/popexpress/hkpolice/poll/hkpolice_poll_chart.html

10. 政府和警務處一日仍包庇濫暴濫權的警隊的害群之馬，尚在盡忠職守的警員便都要與他們一同背負污名，被視為與警隊壞份子同流合污，對後者極不公平，更造成警隊與市民之間的隔閡。
11. 而且，當警務人員能凌駕於法律之上，違法時無須受到制裁，便是直接威脅法治根基；若執法人員執法時，可以選擇性執法，任意藉執法來對付「政治敵人」濫捕濫告，如此一來，香港便會從法治社會，變成法律只是落實掌權者的一己意願的政治工具，香港就變成極度危險的「以法治人」的專權社會了。
12. 除示威活動外，近年令人咋舌的執法問題，還有美林邨殺人案，錯捕智障疑犯一事。在事件中，明顯可見相關警務人員未有跟從規則，包括未有讓被捕人士服藥，以及懷疑「作口供」。事發後警隊承諾跟進，表示「期望精神上無行為能力人士的權利繼續受到應有的保障，並會重新檢視處理涉及精神上無行為能力人士案件的政策及調查工作的指引。」³然而，對於涉案的警員有何跟進和處罰，則一直未有交代。從此案可見，不如實筆錄口供、引導認罪、在拘禁期間不予以基本權利等違規做法，不只發生在「反政府」人士身上，而是可能發生在每一位被捕人士身上，甚至是無辜被錯捕者。這直接打擊了市民對警隊認真調查案件的信任程度，以及警務人員恪守規則的態度和能力。
13. 因此，警隊、保安局長及律政司有必要嚴肅看待所有有關警員違法、違反警察通例及內部指引的事件，並且確實、認真跟進，在有足夠證據時開展紀律程序，而在有足夠證據證明違法時提出檢控，不予「放生」。並公布《警察通例》，尤其有關使用武力的部分，確保公眾和立法機關能知曉《通例》提供了哪些保障，知情地評論通例有否違反法例和人權標準，以及維護自己權益，並監察警員使用武力時有否違規。
14. 上述事項均受到禁止酷刑委員會的關注，港府實在不應拖延公開《警察通例》和改革監警制度。
15. 此外，《結論性意見》明確要求港府對雨傘運動期間警方和反示威者過度使用武力的指控展開獨立調查，依法起訴和懲處濫權的人，及對受害者提供全面的補救。⁴雨傘運動結束已超過一年，獨立調查必須馬上展開，以免證據流失。警隊進行的內部調查，決不可取代獨立調查。人權監察要求港府立即設立包含

³ 警方回應傳媒有關警方處理田心一宗兇殺案的查詢 2015 年 5 月 12 日
http://www.police.gov.hk/ppp_tc/03_police_message/le.php

⁴ 《結論性意見》第 15 段

國際人權專家的法定調查委員會，調查雨傘運動中警方及反示威人士使用不當武力的情況，包括警隊中縱容和包庇下屬的情況，並公開結果，以便跟進和尋求公道。

三、改善聲請機制 落實保障人權

16. 就改革處理尋求保護者的制度時，政府計劃對一些選定國家的居民實施入境前登記，希望今年內實施。人權監察關注這個入境前登記審批步驟，關乎什麼準則，是否透明和公平，要申請人提交什麼資料，是否能有效確保有免遣返保護需要的人不會在這一步驟便被拒來港，使港府卸掉國際人權法下保障人免於酷刑的責任。
17. 在改善統一審核機制方面，政府提出要加快程序以處理現時積存的大量案件。惟人權監察關注在加快程序下，當局如何確保程序不至違反嚴謹的公正標準 (High standards of fairness)，不遣返聲請得到透徹的逐案審查；允許聲請人和代表律師有充足的時間充分表達聲請理由、獲取和出示關鍵性證據，如自己醫生的專家證據等等。人權監察希望當局在改善統一審核機制及制訂加快程序時，能竭盡所能確保其符合香港在國際人權法上的責任，包括諮詢協助聲請人的律師團體、及其他關注團體等，不要再設計有問題的制度，最終又受到司法覆核推倒重來，欲速則不達。

四、對政府、政黨及媒體的呼籲

18. 委員會在審議結論中寫道：「委員會關切地注意到，中國香港的立場是，延伸適用 1951 年《關於難民地位的公約》『會導致我們的入境制度遭到濫用，從而有損公眾利益』，這個立場給人的表面印象是把所有需要保護的聲請人描述成濫用制度的人。」
19. 委員會的批評，同樣適用於政府、某些政治人物及媒體對免遣返聲請人的態度。否定在港尋求免遣返保護的聲請人的人，往往引述免遣返聲請人中只有低於 1% 聲請人成功的數據，將聲請人標籤為「假難民」，而沒有了解到每一宗聲請個案的資料。事實上，就這個極低的成功率，聯合國已明確質疑是否反映審核標準過於嚴苛，使一些理應受免遣返保護的人得不到保護。⁵至今，政府仍未提出事實根據，證明審核標準及程序合乎嚴格的公正標準。反而，素來審核機制的公平性屢受關注團體、律師、法庭批評，而機制工作人員對聲請人原國家的情況的誤解，亦偶有聽聞。這些因素均可能令成功率未能如實反映情況。

⁵ 《結論性意見》第 6 段。

加上每宗案件均為獨立案件，若在沒有根據下，指超過 99%的聲請人實無保護需要，在此基礎上建議立法或行政措施，正顯露出倡議者對議題理解的粗疏。

20. 人權監察譴責任何人藉宣揚打擊「假難民」，不顧抹黑所有聲請人及「南亞裔」人士，令本已為弱勢的聲請人和少數族裔處於更邊緣地位，甚至提出很可能違反人權的針對免遣返聲請人的政策倡議，尤其是意圖藉此議題在選舉活動中得利的人士。對於有媒體經常作出針對免遣返聲請人的報導，其中很多涉及抹黑，人權監察亦予以譴責。
21. 人權監察認為政府以及平等機會委員會在此議題上有責任帶頭消除歧視、偏見，捍衛香港的人權標準，可惜至今只見專責消除歧視的平機會袖手旁觀，反而過窄地闡釋和執行《種族歧視條例》嚴重中傷的罪行條文，為歧視者開脫，令人齒冷。
22. 人權監察重申，免遣返聲請人在原居地面對的威脅影響到最根本、不可減免的人權，任何意圖將他們尋求保護的嘗試污名化的人，是對人權極不尊重，亦無視公約下的國際義務；這些參與污名化的人，若非出於無知，便是意圖置私利於基本人權之上。

五、維護人權保障、遵守國際條約

23. 人權監察希望強調人權保障制度的重要性。本港的人權保障制度，包括公平公正的司法系統。
24. 本港在英治及回歸後，先後成為多條國際人權公約的適用地區，讓香港的人權體系，與國際接軌。港府以往亦頗重視公約及報告責任，亦因此得到國際社會認許。香港國際大都會及國際金融中心的地位，也建基於公平公正、有效的司法系統和法治保障。
25. 特首梁振英當日輕言考慮退出《禁止酷刑公約》，已令國際社會震驚，及成為笑柄。其對國際人權公約「輸打贏要」的態度十分明顯。
26. 簽訂人權公約的原意，並不是讓國家只在方便時保障人權，而在遇到困難時便立即棄絕。人權公約，往往就是在各國回顧嚴重的人權侵犯時，一同協議，承諾將避免慘劇再發生，並且互相根據條約內容作出監督。

27. 人權監察要求港府承諾遵守對港有效的人權公約，並且在未達標的項目上，依各公約所訂¹，積極完善保障，包括跟進聯合國各有關人權機構的建議。

六、公布報告

28. 民間團體是聯合國人權委員會所重視的持份者之一。港府應明白，民間團體所作的影子報告，對向委員會呈現香港人權實況有重要的貢獻，例如可補政府報告觀點上的不足。人權監察留意到港府在臨近委員會審議其第三次報告時，才完成對問題清單的回應，並呈交予委員會，但未有即時公開該回應。此舉妨礙了民間團體及早就政府報告內容向委員會提交補充資料。人權監察請局方交代和改善公布報告的流程。

二零一六年六月
香港人權監察

**Submission from NGOs
coordinated by the Hong Kong Human Rights Monitor
to the Committee Against Torture
on the implementation of the CAT
in the Hong Kong Special Administration Region, China**

October 2015

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List of Signatories

1. 1st Step Association
2. Act Voice
3. April Fifth Action
4. Asian Migrants Coordinating Body (AMCB)
5. Asian People's Theatre Festival Society
6. The Association for the Advancement of Feminism
7. Association for Transgender Rights
8. Beyond the Boundary – Knowing and concerns Intersex
9. CCC Shum Oi Church Social Concern Fellowship
10. Centre on Research and Advocacy, The Hong Kong Society for Rehabilitation
11. Chosen Power (People First Hong Kong)
12. Civic Act-up
13. Civil Human Rights Front
14. Civil Rights Observers
15. Concord Mutual-Aid Club Alliance
16. Deaf Power
17. The Forthright Caucus
18. Frontline Tech Workers
19. Helpers for Domestic Helpers
20. HK Psychologists Concern
21. Hong Kong Coalition for the Rights of Persons with Disabilities
22. Hong Kong Human Rights Monitor
23. Hong Kong Journalists Association
24. Hong Kong Policy Viewers
25. Hong Kong Red Cross John F. Kennedy Centre Alumni Association
26. Hong Kong Shield
27. Hong Kong Unison
28. Justice and Peace Commission of the HK Catholic Diocese
29. The Labour Party
30. lala Team

31. League in Defense of Hong Kong's Freedoms
32. Nurses Political Reform Concern Group
33. Office of Dr Hon Fernando Cheung Chiu Hung
34. Office of Hon Dennis Kwok
35. Open Door
36. Parents' Association of Hong Chi Inn, SAHK
37. Pink Alliance
38. Power for Democracy
39. Progressive Lawyers Group
40. Progressive Teachers' Alliance
41. Radiation Therapist and Radiographer Conscience
42. Rainbow Action
43. Reclaiming Social Work Movement
44. SEN Rights Association
45. SEN Rights Ltd
46. Silence
47. Student Christian Movement of Hong Kong
48. Transgender Resource Center
49. Women Coalition of HKSAR (WCHK)

List of abbreviations

Authorities	Hong Kong authorities
CAPO	Complaints Against Police Office
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	The Convention on the Elimination of all Forms of Discrimination Against Women
CIDTP	Cruel, inhuman or degrading treatment or punishment
DPOs	Organisations of Persons with Disabilities
HKSAR	Hong Kong Special Administrative Region of the People's Republic of China
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ImmD	Immigration Department
IPCC	Independent Police Complaints Council
JP	Justice of the Peace
LegCo	Legislative Council
NGOs	Non-governmental organisations
SCNPC	Standing Committee of the National People's Congress
The Committee	The Committee Against Torture
The Convention	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
Government	The Government of the HKSAR
The police	The Hong Kong Police Force
UNHCR	The United Nations High Commissioner for Refugees

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Part A:
Background and institutions important to the protection of human rights in Hong Kong

1. Hong Kong and the Committee

- 1.1. We, a number of NGOs, (including DPOs) working on human rights issues in Hong Kong, would like to thank the UN Committee Against Torture for the useful criticisms and recommendations made in your past Concluding Observations regarding the Hong Kong Special Administrative Region (“HKSAR”).
- 1.2. Such criticisms and recommendations have provided us with the legal, moral authority and support for protecting and promoting human rights in Hong Kong. They have also provided us with important means for checking human rights violations and conducting human rights advocacy.
- 1.3. The mandate and past records of the Committee in fighting against torture and cruel, inhuman or degrading treatment and punishment (“CIDTP”), making assessment of the human rights situation, and issuing recommendations for remedies and positive changes for various countries, have given rise to high expectations from many rights conscious NGOs and individuals in Hong Kong that the Committee would denounce human rights abuses and promote proper institutional, legal, policy and administrative safeguards in territories of countries the Convention is applicable, including Hong Kong. With the Committee and other human rights treaty bodies in mind, they are of the belief that they are not alone, especially in difficult situations when they have to face police brutality and other injustice such as those committed in the Umbrella Movement.
- 1.4. Unfortunately, it is necessary to remind the Committee that the HKSAR Government has yet to implement many of your useful recommendations. We therefore urge the Committee to reiterate and follow up on such recommendations as well as taking up other important issues in the concluding observations after the consideration of the part of the state party report of the HKSAR.

2. Umbrella Movement and democratic deficit in Hong Kong

- 2.1. The Chief Executive of the HKSAR holds most of the political and administrative powers in the territory. However, he is “elected” by an Election Committee of 1200 members, a highly restricted franchise who are themselves “elected” or appointed by basically privileged sectors in Hong Kong.
- 2.2. Only half of the 70 seats of the Legislative Council of the HKSAR are elected by universal and equal suffrage in geographic elections. The other half are “elected” by functional constituencies reserved mainly for the business sector and professionals, which have small electorates, some of which totally or partly consist of corporate electors. Pro-democracy political camp gets more number of votes than the pro-establishment camp in the overall elections but gets fewer seats in the Legislative Council than the pro-establishment

one. Since 1995, the United Nations Human Rights Committee has criticised the Hong Kong electoral system for giving undue weight to the views of the business community, and for contravening the requirements of universal and equal suffrage and other articles of the ICCPR.¹

- 2.3. The Basic Law of Hong Kong (“Basic Law”),² the mini-constitution of the HKSAR, contemplates universal and equal suffrage to be realised in the HKSAR. However, the demands and efforts for democratisation of Hong Kong people have been repeatedly objected and obstructed by the Chinese and Hong Kong authorities. The framework laid down in the Decision on 31 August 2014 by the Standing Committee of the National People’s Congress (SCNPC) erected hurdles to screen possible candidates in a way totally inconsistent with the ICCPR. The Umbrella Movement is a people’s movement mainly for the realisation of genuine democratic elections in Hong Kong. Unfortunately the police have often abused their powers in coping with the occupation and protest activities of the people in many incidents in or related to the Movement. (See details in *I. Police Power*) With little electoral legitimacy mandate, the democratic deficit in the HKSAR has led to over reliance of the police force to maintain public order, making police abuse of power more difficult to check. Consequently, the democratic deficit in Hong Kong makes the treaty body reporting mechanisms more important in the protection and promotion of human rights in Hong Kong.

3. National Human Rights Institution

¹ The UN Human Rights Committee has criticised the Hong Kong electoral system for giving undue weight to the views of the business community, thus not meeting the requirements of universal and equal suffrage, equality before the law, and discriminates on the grounds of sex, wealth, class, social and other status. The Human Rights Committee’s calls for complying the Covenant rights contravened have led to little improvements. See paras. 19 and 25, UN Human Rights Committee: Concluding Observations: United Kingdom of Great Britain and Northern Ireland (Hong Kong), 9 November 1995 (CCPR/C/79/Add.57).

A Decision by the Standing Committee of the national parliament (“SCNPC”) on 31 August 2014 imposes on Hong Kong a framework for implementing a so-called universal suffrage of the Chief Executive in 2017 characterized by the screening of candidates first by a Nomination Committee modelled on the current small privileged Election Committee. The top two or three candidates who are supported by over half of the 1200-member Nomination Committee will then be put forth for “one-person one vote election” by the Hong Kong voters. Even so, the Chinese officials has made it clear that the person so “elected” may not get the appointment by the Central Government unless he or she is a “patriot” who “loves the country and loves Hong Kong”.

The SCNPC Decision also requires proposals for full universal suffrage of the Legislative Council to be introduced only by a Chief Executive elected by “universal suffrage”, thereby delaying full universal suffrage to LegCo to only after the first Chief Executive is elected by “one-person one vote election”.

The reform package based on the framework laid down in the SCNPC Decision introduced by the HKSAR Government has been opposed by hundreds of thousands of people taken to the streets on 28 September 2014 in the Umbrella Movement. The pro-democracy LegCo Members vetoed the proposal on 18 June 2015.

² The full text of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China is available at <http://www.basiclaw.gov.hk/en/basiclawtext/decreed.html>

- 3.1. There is no National Human Rights Institution organised in line with the Paris Principles in the HKSAR.
- 3.2. There are a number of statutory bodies with very limited mandates. They are entrusted with narrow jurisdictions over certain aspects of human rights. These bodies, even having their mandates taken together, leave most human rights, such as freedom of assembly and press freedom, unattended. The head and members of such bodies are appointed by the Chief Executive. Such power can be used to appoint his supporters and even cronies to such independent bodies to influence its attitude and work. This is particularly unsatisfactory as shown in the growing fear of the current Chief Executive using his power of appointment to bring under control of entities, whose effectiveness and credibility depend a lot on their independence and autonomy. These sagas include controversial appointments to the senates of the University of Hong Kong and Lingnan University. (For details, please refer to the *“Supplemental Communication to the United Nations Special Rapporteur on the Right to Education on the Recent Events Surrounding the Delayed Appointment of Professor Johannes M.M. CHAN to the Post of Pro-Vice-Chancellor at the University of Hong Kong”*, to be submitted by the Hong Kong Human Rights Monitor in November 2015)
- 3.3. The Independent Police Complaints Council (“IPCC”) is responsible for monitoring and reviewing the police force’s handling of complaints against police officers. It has very limited jurisdictions and powers, not even the power to investigate serious complaints. (See details in part 13) In its current form, the IPCC could hardly provide effective remedies to victims of police malpractices and abuse of powers, not to mention providing effective check of police power.
- 3.4. **Recommendations:**
- 3.4.1. We urge the Committee to maintain its call on the HKSAR Government to establish a statutory independent national human rights institution with the widest possible mandate and proper resources in line with the Paris Principles.
- 4. Derogation and emergency**
- 4.1. **Emergency Regulations Ordinance 1922**
- 4.1.1. The Emergency Regulations Ordinance³ grants the Chief Executive sweeping powers to “make any regulations whatsoever which he may consider desirable in the public interest” “on any occasion which the Chief Executive in Council may consider to be an occasion of emergency or public danger” (section 2(1)), a threshold basically subjective and arbitrary. Such regulations may provide for, among other things, arrest, detention, exclusion and deportation; authorising the entry and search of premises; and forfeiture and

³ Laws of Hong Kong, Chapter 241.

disposition of property; suspending or amending any enactment; and censorship. Emergency regulations may also empower the Government to require persons to do work or render services, and to control or forfeit property (section 2(2)). Any provision of an enactment, including the Crimes (Torture) Ordinance⁴ and the Fugitive Offenders Ordinance,⁵ inconsistent with any such emergency regulation will have its operation and effect suspended (section 2(3)). All these potentially violate the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”).

4.1.2. The wording of the Emergency Regulations Ordinance does not conform to the requirements in Article 4 of the ICCPR that any limitation on rights must be compatible with the nature of the right and necessary to promote the “general welfare in a democratic society.” Since the Emergency Regulations Ordinance contravenes the ICCPR, it violates Article 39 of the Basic Law, which requires that “restrictions [on rights and freedoms] shall not contravene the provisions” of the ICCPR and undermines the protection under the CAT. Thus, the Government has an obligation to revise the Emergency Regulations Ordinance itself and repeal all provisions that are inconsistent with the CAT, the ICCPR and the Basic Law.

4.2. **Articles 14, 18 and 39 of the Basic Law of Hong Kong**

4.2.1. Article 18 of the Basic Law of Hong Kong provides, “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.”

4.2.2. Article 18 lacks procedural and other safeguards on the declaration of a state of emergency. Key words such as “turmoil”, “endangering” “national unity or security”, “beyond the control of the [HKSAR] government” and “relevant national laws” are all undefined, leaving the provision open to abuse. Hong Kong is therefore vulnerable to be “decided” to be in a state of so called “war” or “turmoil”, in which Hong Kong would not be able to protect itself against the arbitrary imposition and enforcement of certain draconian national legislation in the territory, including those inconsistent with the Convention or conducive to conditions for its violation.

4.2.3. Article 39 of the Basic Law provides, “The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law” and such restrictions in the “law” “shall not contravene” the provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and

⁴ Ibid., Chapter 427.

⁵ Ibid., Chapter 503.

Cultural Rights (“ICESCR”), and international labour conventions as applied to Hong Kong.

- 4.2.4. However, it is unclear whether the word “law” as used in Article 39 of the Basic Law and the requirement of the law’s conformity with international human rights standards apply also to Chinese national laws when they are extended to Hong Kong by means of Article 18 of the Basic Law.⁶
- 4.2.5. Article 14 of the Basic Law allows the HKSAR Government to “ask the Central People’s Government for assistance from the garrison in the maintenance of public order and in disaster relief” “when necessary”. There are no procedural or other safeguards. Such a power apparently can be triggered even without any reference to “national emergency” or “turmoil beyond the SAR Government’s control”. The Chinese military, which have brutally suppressed the pro-democracy movement of people in e.g. Beijing in June 1989, may be called upon to maintain public order in Hong Kong.

4.3. **Recommendation:**

- 4.3.1. The Committee should echo the concerns of the UN Human Rights Committee in relation to the scope of the Emergency Regulations Ordinance and its incompatibility with the principle that any restrictions on rights be narrowly construed and strictly necessary. The Committee should urge that the Emergency Regulations Ordinance be amended to conform to international standards under the CAT and other international human rights treaties, including those on emergency and derogation of rights in such situations.
- 4.3.2. The Committee should express the treaty obligations that all laws applicable to the HKSAR, whether locally enacted ones or those provisions in the Basic Law and any national laws extended to the territory, should be consistent with the CAT and other international human rights treaties. No authorities, police and armed forces included, could avoid observing such human rights obligations, including those specially designed in those human rights treaties for state of emergency.

5. **National Security Legislation**

- 5.1. Article 23 of the Basic Law provides, “The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People’s Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the

⁶ For example, Article 8 of the Basic Law provides that “The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.” Article 8 does not refer to Chinese national law.

Region from establishing ties with foreign political organizations or bodies.”

- 5.2. The provision was expanded to its current form after the June 4th Massacre in China in 1989 to prevent Hong Kong to become a “base of subversion against China”. Corresponding terms have been used in China for cracking down peaceful public assemblies, banning legitimate civil society organisations, censoring media, curbing free speech, suppressing political participation of political opposition, and justifying torture of and CIDTP for various politicians, activists, minorities and ordinary people.
- 5.3. Proposed legislation was introduced in 2002 by the HKSAR Government in an attempt to enact such national security law envisaged under Article 23. Such “Article 23 legislation” attempted to restrict freedoms of expression, assembly, association, academic pursuit, industrial actions, etc. It also sought to expand police and executive powers and limit the right to legal representation and fair trial, and other basic human rights. The legislation was set to create a large number of offences making the public vulnerable to prosecution or persecution. The vague and broad concepts pave the way to arbitrary misuses.
- 5.4. On the eve of forcing its way through the final legislative process, the legislative proposals triggered massive opposition. Over half a million people took to the streets to protest against the Bill on 1 July 2003. The Government initially tuned down the Bill by promising concessions, then suspended and finally withdrew the Bill altogether under public pressure.
- 5.5. In recent years, the notion of national security has been expanded by the Mainland Chinese leadership⁷ and their supporters to cover political, economic, social, cultural (ideology included) and information “security”. The newly enacted National Security Law has adopted such a similar vague and broad concept.⁸
- 5.6. The Macau SAR has enacted its own Article 23 legislation, which is much worse both in form and substance than the defeated 2002 legislative proposals by the HKSAR Government. The piece of national security law has set a very bad example for Hong Kong.
- 5.7. **Recommendations:**
 - 5.7.1. We urge the Committee to state explicitly in its concluding observations for the HKSAR that it requires the HKSAR Government to inform the Committee when any consultation or legislative proposals on enacting any national security legislation under Article 23 of the Basic Law is due to be conducted or proposed, and to

⁷ See the key points in the speech by Xi Jinping in the first meeting of the Central National Security Commission in “Adhere to comprehensive national security perspective, Stick to approach with Chinese characteristic ” Chinese Communist Party News, 5 October 2014, available at <http://cpc.people.com.cn/xuexi/BIG5/n/2015/0720/c397563-27331861.html>

⁸ Amnesty International, “China: Scrap draconian new national security law” 1 July 2015, available at <https://www.amnesty.org/en/latest/news/2015/07/china-scrap-draconian-new-national-security-law/>

follow by timely supplementary reports to the Committee to enable it to closely follow up the development.

Part B: Substantive issues

I. Police Power

6. Use of excessive force

6.1. There is a growing concern over the use of excessive force by the police during the Umbrella Movement. Tear gas, batons, pepper sprays and tear gas sprays were widely used against demonstrators inappropriately and unnecessarily and the use of force were questioned by the public as abusive and excessive.

6.2. Use of Tear Gas against peaceful protesters

6.2.1. On 28th September 2014, after news reports of the arrest of some student leaders, many people tried to go to the Civic Square or the pavement outside the Government Headquarters to protect student protesters sitting in there. They were stopped by police before they had a chance to cross the busy Harcourt Road because the footbridges and other pavements leading to their destination had been cordoned off by the police.

6.2.2. The stranded persons gathered in thousands on the spots they were stopped, demanding to reopen of the way. The growing crowd broke through the thin ad hoc police cordon formed on the side of Harcourt Road. The protesters were again stopped by multiple layers of police officers in cordons, holding steel barricades tightly bound together. The police, with those barricade strongly set up, could hold the cordons with their bare hands without problems and there was no need for the stepping up of the use of force.

6.2.3. Some protesters had their eyes and breathe partly protected with goggles, masks, cling film and umbrellas tried to buy time to pull the iron barricade apart from bit by bit. The scuffles proved to be futile and could only last for a limited period of time until they could not bear the pepper spray any longer. Most of the protesters were protesting peacefully on the Road and did not know what was going on in the front. After repeated failure to try to pull the barricade apart and with the appeal from certain dignitaries, at least the pulling on the side nearer to the Red Cross' office stopped for more than 20 minutes.

6.2.4. Anyway, the police's efforts to play the need to stop protesters crossing the police cordon to avoid trampling on protesters behind them could hardly succeed as the protesters wanted to cross the police cordons with a view to protecting the students, not to hurt

- them. There is hardly any need for using teargas to hold the police cordons to protect the protesters behind them.
- 6.2.5. However, the police firing teargas without effective warning might have led to trampling and other injuries to the protesters. Therefore, the use of force by the police on demonstrators, especially the use of tear gas, could hardly be justified.
 - 6.2.6. After all, it served little operational purposes to keep the cordon just to separate the protesters in front and at the back of the police cordon. Of course, there was no good reason to escalate the use of force by using teargas against peaceful protesters simply to keep a useless cordon.
 - 6.2.7. The police started to fire tear gas at the protesters at 5:58 pm suddenly and with only short and ineffective warnings even to protesters near the cordons, not to mention those thousands at the back.
 - 6.2.8. Many people were hit by tear gas and it caused a large numbers of injuries. A female student was sent to the hospital suffering from dyspnea, convulsion and painful eyes. At least 26 people were sent to the hospital that day.⁹
 - 6.2.9. The protesters assembled peacefully without any violent behaviour or carrying any offensive tool or weapon. Some brought along masks, goggles, clinching film and umbrella for self protection in anticipation of arbitrary and indiscriminate use of pepper spray by police officers on protesters. They only used umbrellas to protect themselves by blocking and deflecting pepper spray. By exaggerating the umbrellas and even masks, goggles, cling film and umbrellas to be weapons could not justify their use of the first canister of tear gas and subsequent 86 canisters to be followed in the following hours.
 - 6.2.10. In any case the use of a total of 87 rounds of tear gas canisters at peaceful protesters was certainly unreasonable, disproportionate and excessive.
 - 6.2.11. There were many examples of unjustified use of tear gas. For example, a protester asked to leave the protest area, the police did not give any response and after a few seconds the latter fired tear gas to the protester. In another instance, a media report showed that a police poked an elderly man who was sitting in the protest area peacefully. When the man turned his face towards the police, the police fired the man with pepper spray.¹⁰
 - 6.2.12. The use of tear gas posed a real threat to public safety and public health; especially to persons with respiratory problems and when there are elderly, children and other innocent persons at the protest area or in the vicinity. Most of the tear gas was fired at the people

⁹ "Tear gas, pepper spray, suppression – Emergency medical stations overwhelmed with patients. Police high-handed clearance action, 26 sent to hospitals for treatment" Apply Daily (Hong Kong) 29 September 2014, available at <http://hk.apple.nextmedia.com/news/art/20140929/18883297>

¹⁰ "Aiming and shooting at citizens' body can cause serious injuries" Apply Daily (Hong Kong) 30 September 2014, available at: <http://hk.apple.nextmedia.com/news/art/20140930/18884541>

from the top but there were people got fired at and hit directly and have their clothing charred and skin burnt. One of the human rights observers of the Hong Kong Human Rights Monitor had one of the teargas canister exploded next to him and he has been suffering from serious respiratory difficulties and burning eyes for more than half an hour.

6.3. **Prepared to fire at peaceful protesters on 28th September**

6.3.1. There are widespread reports that the police force brought 12 Gauge Remington 870 shotguns, which can be used for firing rubber bullets, and Colt AR-15, which can fire 5.56mm NATO Rounds or .223 Remington Rounds. Some police even pointed the gun towards people. Also, during the operation, the police showed some banners with the words: "DISPERSE OR WE FIRE." It showed that the police were prepared to fire at protesters by anytime.

6.3.2. On 2 October 2014, photos were taken of the police carrying rubber bullets, long shotguns and bean bag canisters into the Chief Executive's Office, which was near to the protest area. According to Ming Pao Daily News¹¹, a senior police officer admitted that they had brought the weapons such as rubber bullets and tear gas into the Chief Executive's Office. The source also claimed that they would use the weapons for sure if the protesters broke through the police cordon line outside the Chief Executive's Office.

6.3.3. The protesters did not have any weapons and most of them demonstrated peacefully. There was no reason for the police to escalate the use of the level of force like rubber bullets and bean bags canisters on peaceful protesters. It is also inappropriate to deploy so many lethal weapons on site as it causes a high risk to public safety. Such measures would not encourage police officers to be more restrained but would tempt them into use them when they are so readily available.

6.4. **Use of batons**

6.4.1. **Batons as the standard level of force:** For some time during the Umbrella Movement, police batons have become the standard means for dealing with protesters targeting protesters and occasionally even the general public, causing a large numbers of injuries. While guideline on use of batons stipulates hitting limbs only, police officers have been intentionally or recklessly hitting heads or necks, which can cause permanent disabilities or even death.

6.4.2. **Indiscriminate uses of batons causing numerous injuries:** From 18 to 20 October, clashes between the police force and protesters happened every night. Police tried to disperse people with batons and pepper sprays. At least 40 people were sent to the hospital on

¹¹ "Police executive admits delivering rubber bullets into Chief Executive's Office – will definitely take action once protesters charge" Mingpao (Hong Kong) 2 October 2014, available at <http://news2.mingpao.com/ins1410021412245808283>

the first two days and many of them suffered head injuries.¹² The OCLP medical team in Mong Kok received 13 people on the same three days, seven of them got head injuries with blood streaming. On 6 November, at least 15 people were injured by batons during the clash. On the 30 November, police used batons and pepper spray to suppress the protesters after the HKFS tried to surround the government headquarters, causing a large numbers of injuries. At least 61 protesters were sent to the hospital and many protesters had blood streaming.

- 6.4.3. **Cancellation of requirement to submit report on the use of batons:** There were media reports suggesting that the requirement for submitting a report after using batons had been cancelled during the Umbrella Movement. If it is true, that means the police management had given up an important means to ensure proper use of batons and officers were actually encouraged to use batons casually with less restriction. When asked if the requirement had been changed or not, the police did not give a definite response. Both the failure to provide a clear answer to such an enquiry and any ease of requirements in recording the use of force are contrary to the police's commitment to be transparent, accountable and show a respect for human rights.
- 6.5. **Police guidelines on use of force breached and ignored:** A widespread breaches or neglects of police guidelines and principles on the use of force has been observed:
- 6.5.1. **Assaulting people who already complied with the order to leave:** A more striking case was Superintendent Chu King-wai's case. On 25 November 2014, Superintendent Chu, the then commander for the Sha Tin Police Division, was filmed hitting pedestrians with a baton. In the video clip, it is clearly shown that a victim, who was following the order of the police to leave and therefore any force against that victim should be stopped, but was hit by Chu with a baton on his back. However, according to Mingpao Daily, Chu explained that he "unintentionally touched" the victim with his baton and he used his baton "as an extension of (his) arm to pat" the victim. (Please also refer to parts 12.2-12.4 for a further discussion of this case).
- 6.5.2. **Deliberate brutality toward defenseless arrestees/detainees:** On 15 October, Ken Tsang Kin Chiu, one of the protesters, was kicked and punched by a group of police officers at a dark corner near the protest area after arrested. The scene was filmed by television, showing that the torture lasted for at least 4 minutes. It is strongly believed to be not an isolated case of deliberate brutality toward defenseless persons by the police.

¹² "At an emergency medical station in Mong Kok, a female nurse was beaten by police on her back while she was tending to an injured police officer" Mingpao (Hong Kong) 21 October 2014, available at <http://news.mingpao.com/pns1410211413828236569>

- 6.5.3. **Sheltering bad apples by keeping police guidelines confidential:** Since the Chapter 29 of the Police General Orders, which contains the rules on the use of force and firearms, is not disclosed to the public, members of the general public would have difficulty in challenging police's excessive or improper use of force. In response to allegations against the police, government officials would routinely say that the police have exercised restraints and strictly complied with guidelines and principles on the use of force, denying any violation. When the government is indifferent to legitimate allegations of police violation of guidelines, and the public has no way to monitor compliance of the guidelines, violations are basically unchecked, which not only let police brutality go unpunished, but also encourage continuous violations.
- 6.6. **Recommendations:**
- 6.6.1. The Committee should urge the government to disclose the Chapters of the Police General Orders and related guidelines and procedures on the use of force and different kinds of weapons and equipment or supplies capable of doing harm to the person or property, including firearms, water cannons, sound cannons and riot control gears, and to take steps to ensure all guidelines on the use of force are consistent with the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. Any new guidelines should be scrutinised by entities entrusted with monitoring human rights, such as a human rights commission, an independent police monitoring body such as the IPCC after necessary reforms, the LegCo, etc.
- 6.6.2. The Committee should request the Government to properly discharge of its duty to ensure compliance of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials by promptly and thoroughly investigating allegations of police use of excessive force in violation of the Basic Principles and domestic laws and regulations, and carry out criminal prosecutions or disciplinary actions where appropriate. The investigation should be conducted by an independent entity. The Committee should reiterate to the Government that it must not allow impunity of Government officials or police officers who commit violations on human rights. Impunity is also a threat to the rule of law, without which safeguard to human rights would be undermined.
- 6.6.3. We urge the Committee to recommend that the police be more transparent in their protocols and Police General Orders on the use of force, and to disclose their internal review on the police operation during Umbrella Movement (which is already completed in April 2015) to sever the massive human rights violations committed by the force during the Movement, allow public scrutiny, and to regain legitimacy and public trust of the police force.
- 6.6.4. We also ask the Committee to require the government to develop clear mechanisms for victims of acts of torture or ill-treatment perpetrated or endorsed by government officials to obtain full redress, compensation and rehabilitation.

6.6.5. A proper mechanism for advising enforcement agencies on sourcing and purchase of weapons, riot gears, equipment (e.g. sound cannons), supplies, uniforms and services capable of doing harm to person or property should be established to ensure compliance with treaty obligations and protection of human rights.

7. Cruel and Ill-treatment of Medical Service Providers in the Umbrella Movement

7.1. During the Umbrella Movement from September to December 2014, the police intimidated and attacked voluntary medical service providers (first aiders). They prevented, delayed and obstructed the provisions of medical services by voluntary medical service teams in the demonstration areas to injured civilians and protesters there. NGO investigation showed that the police also intentionally inflicted violence on medical service providers in the demonstration areas.

7.2. Although numerous official complaints were filed and media reports were published on such problems, so far no police officers have been held accountable for the violence and cruel treatments they have inflicted on the medical service providers and their patients.

7.3. These constituted clear violations of **Articles 10, 12, 13, 14 and 16 of the Convention.**

7.4. **Details on the violations:** We hereby set out information on incidents over such violations for the Committee's information:

7.4.1. On 28 September 2014, the police fired tear gas directly at a first aid station in a tent to stop patients from getting medical treatment and to disperse medical service providers from carrying out their humanitarian duties. Such actions inflicted pains and caused further injuries to the already wounded protesters. It was also reported that medical volunteers were also pepper sprayed when the police tried to disperse the protesters.

7.4.2. On 3 October 2014, a large number of thugs attacked protesters in the demonstration site in Mong Kok. A doctor reported that the police ignored the thugs' attack at the first aid station. He was beaten by eight to nine people when he was treating an injured person and the station was torn down. Police officers nearby only verbally told people to calm down and were slow to stop the attacks to the first aid station and medical service providers. The doctor was badly injured at his head, back and legs, and was recommended to rest for a week.

7.4.3. In the morning of 1 December 2014, a doctor on duty in paramedic uniform was attending a severely bleeding protester at a temporary voluntary first aid station near a demonstration site in Admiralty. Police requested him to stop treatment and leave. He abided, but another team of police arrived and waved his baton at them. The doctor explained to the police that the patient needed immediate treatment. The police continued to disrupt his treatment and even attempted to arrest him and the patient. Other helpers in the area

- intervened and escorted them to another location to continue with the treatment.
- 7.4.4. The police entered a medical service tent in the demonstration area attempting to arrest protesters who were receiving medical treatment at the moment.
 - 7.4.5. A first aid volunteer was told by the police that “no one asked you to be here and the fact that you are here makes you a protester”.
 - 7.4.6. A police attacked a first aider with a baton in an action to clear a demonstration area in Admiralty. The first aider asserted his identity as a medical volunteer, but the attack continued. He was forced to leave the area and later diagnosed with suffering from retinal detachment due to attacks on the head by police baton. Surgeries were required to restore part of his eyesight and he was unable to work for months after the incident.
 - 7.4.7. A nurse wearing a vest and helmet with explicit red cross sign was hit 3 times by police baton by the police when she was providing treatment to a patient in the demonstration site. The attack stopped only after the police realized that the patient being attended was also a police officer.
 - 7.5. A year has passed and few **police officers have been prosecuted** for their violent behaviors during the Umbrella Movement. It is a violation of the **Articles 2, 12, 13, 14 and 16** of the Convention.
 - 7.5.1. The police have apparently failed to provide effective education and adequate information regarding the prohibition against torture during the training of its law enforcement personnel, constituting a breach of the **Article 10**.
 - 7.5.2. As the police turned a blind eye on the physical and mental anguish they inflicted on the medical service providers and ignored complaints lodged by first aiders, there were no investigations on these human rights violations prohibited by the Convention and other international human rights treaties and none of the victims received any apology, let alone compensation. There was also no sign that the police are taking any measures to prevent such violations of the Convention from happening again. Therefore, we believed the **Articles 14 and 16** of the Convention are also breached.
 - 7.6. **Recommendations:**
 - 7.6.1. We ask the Committee to request the Government to prohibit the use of all forms of violence against medical service providers; to take further steps to ensure that medical service providers can safely provide uninterrupted humanitarian medical support during demonstrations, by, for example, providing in the training of its law enforcement personnel a clear guideline for crowd management highlighting the need to protect medical service providers.
 - 7.6.2. Collect and disseminate statistical data on the number of complaints of alleged ill-treatment to medical service providers during the Umbrella Movement, as well as information on their investigation and prosecution, and the results of the proceedings, including both penal punishment and disciplinary measures.

7.6.3. *Also the recommendations in paras 6.6.4 and 13.10.*

8. Obstruction & threats to human rights observers in observing public demonstrations

8.1. As reaffirmed in international human rights instrument,¹³ it is important for human rights observers and journalists to have access to places of source of information, especially where human rights abuses are possible or a conflict is developing. Such access to scenes by human rights observers and journalists would be of great value in preventing abuses and holding human rights violators accountable for any rights violations, including torture and CIDTP.

8.2. Human rights observers and journalists are important human rights defenders. Hindrance of human rights observers' and the media's access to venues of police regulation of demonstrations would make it less effective for the public to ensure police accountability and more difficult to check any police abuses in handling protests against the authorities.

8.3. The Hong Kong Human Rights Monitor ("HKHRM") has conducted a project of observing demonstrations in Hong Kong since 1996. Observers under strict guidelines are sent to observe police handling of demonstrations to see whether their measures violate or are in line with international standards laid down in human rights treaties.

8.4. The police promised in 1998 to assist HKHRM's observation of demonstration.¹⁴ It is also the police's announced policy to facilitate media coverage of demonstrations.

8.5. However, as police measures dealing with the Umbrella Movement getting rough, the police no longer welcome human rights observers and journalists to monitor their operations.

8.6. Human rights observers and journalists were not allowed to enter some places sealed off by the police from time to time during the Movement.

8.7. When observers and journalists were already on the scene and when the police have difficulties in driving them away, sometimes

¹³ General Comments No. 34 of the UN Human rights Committee on freedom of expression enshrined in article 19 of the ICCPR. See also Principle 19 of the Johannesburg Principles.

¹⁴ The police reaffirmed the promise in another meeting in 2012 and in its reply to a question in the Legislative Council in early 2015. See "On-site observations over large-scale public order events" Legislative Council Question 15, 21 January 2015, available at <http://www.info.gov.hk/gia/general/201501/21/P201501210543.htm>

the police would attempt to block the sight of arrests or other operations by forming a “human-wall” around the police officers in action.¹⁵ The secrecy is detrimental to the police exercise of restraints.

- 8.8. In their operation to disperse protesters on Lung Wo Road near the Chief Executive’s Office in the early morning of 15 October 2014, many police officers have shown a marked lack of restraints in their use of force. Many protesters and even voluntary medical service providers were wounded, some quite seriously, mostly by police batons. In that clearance operation, several officers were caught on video attacking Ken Tsang in the shade of a building in a park nearby.
- 8.9. In the same early morning on the side of the park, a human rights observer, who was wearing the HKHRM’s observer uniform,¹⁶ and was not obstructing or posing threat to the police whatsoever, was targeted by several police officers, who shouted “even observers won’t be spared”, and tried to chase him down. The observer had to run, for fear that he would be attacked if caught by those police officers who appeared to be violent and have lost control. By the words of the police officers, it was clear that they were aware that the observer was acting in the capacity of a human rights observer, not a protester.
- 8.10. In the same morning a police officer raised his shield and hit an observer on his head, although not heavily, when the observer was on the move in response to a commotion due to a sudden use of pepper spray. The observer did not pose any threat to that officer causing him to raise the shield in defense. The suspected reason of such motion was to delay observers from observing the scene where force was used.
- 8.11. Three human rights observers, two in the Monitor’s uniform and one in plainclothes, were recording a conflict between the police and protesters happening on the road from the pavement by videotaping with cameras and smartphones on 19 October 2014. They stood close to the wall and did not obstruct the work of the Police. Suddenly, a group of police charged onto the said walkway, wielded their batons and used that knocking on the steel gates of shops to threaten all people including observers to leave, despite the

¹⁵ See e.g. https://docs.google.com/file/d/0B-6wYCOW1_IdUy00aW5pbjdLZnM/edit?usp=drive_web

¹⁶ The uniform include an bright orange tee-shirt big characters of “human right observers” on the chest and back and noticeable size character on both sleeves, and an orange cap or red helmet with obvious characters of “human right observers” on difference sides.

observers repeatedly declared that they were human rights observers. Under such a circumstance, the three observers decided to retreat. However, as they were leaving shoulder by shoulder along the wall, another group of police who held batons and shields forcefully pressed against the observers on the wall. It was even when some policemen were shouting “let the observers leave!” One of the observers sustained minor bruises as a result. The use of force was completely unnecessary.¹⁷

8.12. During the clearance of the remaining protesters in Admiralty on 10 December 2014, a number of observers were not allowed to stay on the flyover to observe the clearance operation below while journalists were allowed. Some incoming observers were denied access while leaving observers were required to produce their identity papers and have their name and ID number to the police recorded like other leaving protesters in spite of their observer uniform and cards.

8.13. Journalists also faced violence, obstruction, arrest, detention and even criminal charges against them by the police during the Umbrella Movement. Please refer to the shadow report submitted by the Hong Kong Journalists Association for details.

8.14. In response to a Legislative Council question on 21 January 2015 on obstruction of HKHRM human rights observers, the police reaffirmed their promise to assist observers to observe demonstrations.¹⁸

8.15. **Recommendations:**

8.15.1. The Committee should urge the HKSAR Government to respect the role of human rights observers (and journalists) as human rights defenders in the promotion and protection of human rights.

8.15.2. The Government should ensure that human rights observers (and journalists) would not be subject to, or threatened with, any violence, harassment or other cruel, inhuman or degrading treatment or punishment from any law enforcement agencies or personnel.

8.15.3. The Government, especially the police, should facilitate, not to obstruct, the work of human rights observers (and journalists) in observing demonstrations and access to places of possible human rights violation to verify and report if there are or have been violations of human rights.

¹⁷ https://drive.google.com/file/d/0B-6wYCOW1_IdMmILRE96UFlvamM/view?usp=sharing

¹⁸ See above 14.

9. Unlawful arrest, false imprisonment, and persecution by prosecution

9.1. It is questionable whether certain arrests made by the police during the Umbrella Movement were justified, and whether the prosecution was fair in bringing certain cases to court. The most worrying omen in the Umbrella Movement is the acquiescence by the Authorities to police officers, who have abused their powers or, in some cases, have failed to exercise their powers, allowing others to abuse pro-democracy protesters.

9.2. According to the Police, 955 persons have been arrested in relation to the Umbrella Movement, among which about 200 have been prosecuted.¹⁹

9.3. Unlawful Arrests and false imprisonment

9.3.1. According to news reports, at least some arrests appeared to be arbitrary where the arrestees demonstrated no sign of an arrestable offence, but were singled out for arrest. It raises the suspicion that some police officers had been using unlawful arrests and arbitrary detention to harass and punish protesters because they were involved in clashes and/or verbal abuse with such protesters personally or viewed such protesters as troublemakers or enemies of the police force, inconsistent with obligations under **Articles 1, 2, 4, 10, 11, 12, 13 and 16**.

9.3.2. For instance, as reported by the *Apple Daily*, on 30 November 2014, a victim passed by the proximity of the protest site in Mong Kong with his friend, when his friend was pushed by some police officers, to whom the victim thus stepped up against to argue with. But he was grabbed from the crowd and pushed to the ground, physically attacked by police officers causing him multiple injuries, and arrested for “assaulting a police officer.”²⁰ Soon after a video of the incident went viral on the Internet, which shows that the victim had not assaulted any police officer.²¹ Only on 21 January 2015, the date of the trial, was he informed that the charge had been dropped.

9.3.3. In another incident, a man who questioned aloud the legality of the idling of several coaches’ engines used by the police, which was a legitimate question since the Motor Vehicle Idling (Fixed Penalty) Ordinance was passed²² sparked an argument between some citizens and the police officers; amidst the exchange, a police officer suddenly accused a person who was filming the incident on his

¹⁹ Press Conference, 29 July 2015.

²⁰ “Worker arrested and injured by police when passing by protest site; with charge dropped, he will claim for damages against Commissioner of Police” A18 *Apple Daily* (Hong Kong) 22 January 2015

²¹ Footage of the incident on 30 November 2014 (Start from 01:00. The first man taken away by police is believed to be the victim’s friend)

https://www.youtube.com/watch?v=MapwAy_uoQw

²² While many know that it is against the law for a driver to allow the engine of his vehicle to operate while stationary on a road, only few of them, including many police officers, know the exceptions for drivers of law enforcement vehicles in a law enforcement action. Hence, it was a legitimate question to ask.

phone of hitting him and arrested this person.²³ According to the video footage, it seems unlikely that the person had assaulted that police officer.²⁴ And although being accused of assaulting a police officer, he was arrested for behaving disorderly in public places,²⁵ further inviting the question of whether he really did assault a police officer.

9.3.4. Even journalists have been targeted by such unlawful arrests. For example, on 27 November 2014, officers pinned an *Apple Daily* photojournalist to the ground. He was handcuffed and detained, and accused of repeatedly hitting an officer's head with his camera. Upon medical examination, he was diagnosed with a sprain in his right wrist and a bruised left ankle. Footage taken by fellow journalists showed that it was, in fact, the officer who had bumped into his camera as he turned, contrary to what the police had claimed. He was detained for more than 24 hours before being released unconditionally.²⁶

9.3.5. **Authorities' failure to respond:** To the best of our knowledge, the Authorities have taken no active measures during the Movement to curb such abusive practices but to wait for complaints to go to the CAPO, a branch of the police force responsible for handling public complaints. Beside the police force, the Authorities must have had knowledge of the problem from complaints and media reports. For example, the case regarding the idling engines of police coaches mentioned in para 9.3.3 was reported by the media in early October 2014 after a video of the incident showing the police's allegedly false accusation of assault went viral on the Internet.²⁷ Only CAPO, among all Authorities, had responded to this incident publicly. In response to press questions, it expressed that they have received complaints related to that incident, and would handle it in accordance with the established procedures fairly. Nevertheless, similar abuses persisted, even escalated, begging the question of whether the Authorities had taken the problem seriously and taken measures to curb such abuses. To the contrary, however, Government officials and senior police officers repeatedly expressed approval towards police performance, without acknowledging or addressing the problem of severe and widespread abuses. The situation only worsened, as exemplified by all the cases cited above, a violation of Articles 2, 6, 12, 14 and 16.

9.4. **Unreasonable imposition of bail:** Most of the arrestees chose to apply for bail pending the police's decision to press charges or not. However, there are cases in which the arrestee is bound by bail over

²³ "Framing a hotel staff for assault, police accused of abusing powers" A06 *Apple Daily* (Hong Kong) 6 October 2014

²⁴ *Apple Daily* edited footages of the incident from different angle to better show the incident: https://www.youtube.com/watch?v=yIw_HGxBcdc

²⁵ Hong Kong Law Chapter 245 s.17B

²⁶ Please refer to Hong Kong Journalists Association's shadow report submitted to the Committee in October 2015 for a more detailed account of harassment against journalists.

²⁷ Above 24.

a long period of time without the police making a decision on whether to press charges or release the person. This is not exclusive to the Umbrella Movement. For example, in 2005, a protester arrested experienced more than one year bound by bail. He had to report to a police station regularly without any information of the progress of his case. The police confirmed that there was no rule dictating the maximum period of bail. Such an endless period of bail does not only cause inconvenience to the individual, but the practice itself is also, with the tormenting threat of prosecution hanging overhead, tantamount to harassment or cruel, inhuman, degrading punishment or treatment, in violations of **Articles 1, 2, 4, 10, 11, 12, 13 and 16**.

9.5. **Prosecution as persecution**

- 9.5.1. Reports of court hearings of Umbrella Movement-related cases reveal that the police not only made arbitrary arrests against protesters but also brought some cases that were so unsound that the framing of protesters is suspected. In cases relating to at least nine defendants, charges have been dropped after video evidence supplied by the defence cast doubt on police testimony,²⁸ contravening **Articles 1, 2, 4, 10, 11, 12, 13 and 16**.
- 9.5.2. In one case, a police officer accused a student of hitting him in the mouth from the front when the constable was carrying out crowd-control duties during a protest in Mong Kok on 28 November 2014 after the Occupy sit-in there had been cleared. In his written statement, the constable claimed he witnessed the student pulling his arm backwards in a catapulting action before punching him. But from a video produced by the defence to the court, the student had been behind the constable the whole time during the shooting of the footage. The magistrate said the video showed the constable becoming emotional, turning around and then starting to chase the student. Had not the defence received the video footage from a concerned citizen who agreed to be a defence witness, the innocent student could have been wrongfully convicted. As the magistrate of this case commented, assault accusations are ones that are easy to be raised, but hard to defend.²⁹
- 9.5.3. Another case in point is two men being accused of assaulting police officers while one of them tried to free the other one from being arrested, both men were able to find a footage proving that they were, in fact, arrested at separate times, and that the second arrestee was not present when the first arrestee was being arrested.

²⁸ Karen Cheung, Legal scholar calls for database of false police testimony after Occupy cases reveal unreliability, *Hong Kong Free Press* (Hong Kong) 26 September 2015 <https://www.hongkongfp.com/2015/09/26/legal-scholar-calls-for-database-of-false-police-testimony-after-occupy-cases-reveal-unreliability/>

²⁹ *South China Morning Post* 2015-04-15 report of the magistrate's verdict. "Hong Kong magistrate slams police officer over wrongful allegation that student punched him"

The DoJ then decided to withdraw the charges on the day of the trial.³⁰

9.5.4. These two cases are only examples among a number of problematic prosecutions of Umbrella Movement-related cases; these cast serious doubts on Hong Kong police officers' competence, if the mistakes are innocent, and integrity, if they intentionally tried to frame citizens.

9.6. **Unchecked discretion and undue advantage of police in criminal process:**

9.6.1. The police possess the powers to arrest, investigate crimes, and file charges to the Magistrates' Courts, allowing them to have a dominant role in the criminal process up to the hearing of the case when prosecutors from the Prosecutions Division take over. The possession of such wide discretionary powers is prone to abuse, necessitating proper restraints on the exercise of these powers, especially when a conflict of interest arises, say, from the nature of the offence (e.g., obstruction of and assault of police officers) or circumstances of an offence, such as during public demonstrations where the police are responsible for regulating the protest, which could easily create tension between the police and participants. Any actual, potential, or perceived conflict of interest can compromise the fairness in exercising these powers and weaken public confidence. The alleged imaginary charges placed against protesters related to the Movement perhaps best illustrate this point.

9.6.2. Further to those powers, police officers as prosecution witnesses are often advantaged by the courts' presumption that police officers are usually honest and reliable witnesses. Compounded with the observation that assault charges are easy to prove but hard to disprove, targeted citizens are, indeed, in real danger of wrongful conviction; even when they are rightly acquitted, the criminal process done in bad faith probably has exerted on them enormous psychological pressure and social and economic losses. Such practices not only jeopardise justice on the individual level, but also severely damage the system, turning criminal prosecutions into a tool of persecution, a favourite tool among autocratic authorities against their people, contravening **Articles 2, 10 and 11**.

9.7. **Secretary of Justice fails duty to ensure justice in criminal prosecutions:**

9.7.1. The blame, however, is not on the police alone. The Basic Law (the Constitution of the HKSAR) Article 63 stipulates, "The Department of Justice of the Hong Kong Special Administrative Region shall control criminal prosecutions, free from any interference." According to the Department of Justice (DoJ), the Secretary of Justice (SoJ) is ultimately responsible for all prosecution decisions. Apparently, the SoJ has the non-delegable duty to ensure the quality of all

³⁰ "Conviction rate for Occupy-related cases is just 36%, an acquitted citizen accuses police of abusing powers and taking out on protesters" A11 Apple Daily (Hong Kong) 29 June 2015

prosecution decisions, in particular to ensure there is no conflict of interest when making prosecution decisions and to uphold criminal justice. The aforesaid poor quality prosecution decisions not only cause injustice but also affect public confidence in prosecutions in the community and criminal justice. The DoJ is inexcusable, and has violated **Articles 2, 6, 10 and 11**.

9.7.2. However, other than withdrawing charges in several cases, albeit without stating the reason, the public has not seen any effort by the DoJ to curb such alleged wrongful conduct by the law enforcement agency that lay charges on behalf of the Public Prosecutor.³¹ It is utterly unacceptable for the DoJ of a jurisdiction where the rule of law is practised to let law enforcement agencies make prosecution decisions unchecked and to allow culprit officers to enjoy impunity. A more stringent scrutiny over cases should be adopted, especially for cases brought by the police with an actual, potential, and perceived conflict of interest.

9.8. **Recommendations:**

9.8.1. The authorities should conduct an in-depth and thorough investigation into cases where police officers are suspected of arresting citizens without justifiable reason, and take criminal or disciplinary procedures when appropriate to punish wrongdoers.

9.8.2. When the police have an actual, potential, or perceived conflict of interest in a case, the case must be reviewed by a trained and qualified prosecutor of the DoJ before a charge is laid.

9.8.3. The Authorities should conduct an in-depth and thorough investigation into cases where police officers are suspected of making up allegations to frame citizens and should prosecute those complicit in perjury and the like. For misconduct falling short of criminality, disciplinary action should be taken against the perpetrator when appropriate. As for all police officers whose written statements and answers in cross-examination are self-contradictory or in any way unreliable, and the police officers in charge of these cases, even if their mistakes are innocent, should have their competence, and even integrity, called into question. Appropriate evaluation and personnel arrangements should be put in place to have them discharged, demoted, or moved to other positions matching their abilities and credibility to prevent them from doing further harm to the administration of justice in Hong Kong.

9.8.4. The DoJ should be required to find out factors contributing to such questionable cases and to come up with effective measures, including improved prosecution and police guidelines, to ensure the credibility of police witnesses and to prevent the police from sending such cases to the court for prosecution.

9.8.5. The DoJ should regularly follow up on the implementation of such measures to monitor their compliance and to make further improvements.

³¹ Hong Kong Law Chapter 227 Magistrates Ordinance, s.12.

10. Torture, or cruel or inhuman treatment to detainees and arrested

10.1. Arrested persons beaten by police inside police vehicle

10.1.1. Four protestors had been arrested by the police in a demonstration in the public area of the Legislative Council on 13 June 2014. They alleged the police officers had beaten them in a police vehicle. The police officers verbally threatened them and interrogated them with the questions “who is your boss?”, and “which triad organisation are you affiliated with?” The entire incident lasted for around 20 minutes.

10.1.2. The victims recognised through hearing voices that there were 4-5 police officers involved in the incident. They explained that they cannot recognise the facial appearance of the police officers because the police officers ordered them to keep their head down and only allowed them to look at the floor. Also, the lights had been switched off and windows were covered with curtain.

10.1.3. A victim claimed that he had been asked by the police to verbally agree that the injury of his mouth was due to the dryness of his skin.

10.1.4. A victim claimed that the police requested him to clean the blood on his ear and neck in the toilet. The police also asked whether he wanted to access to a lawyer when the victim was cleaning up his blood. He was under threat and therefore agreed that a lawyer was not needed.

10.2. Arrested person beaten by police at a sheltered place

10.2.1. Mr. Ken Tsang was arrested when the police were dispersing the demonstrators on Lung Wo Road on 16 October 2014. Mr. Tsang was escorted to a dark corner by a group of police following the arrest. He was beaten by a group of police officers for several minutes. The incident was captured by the video camera of the TVB news crew and shown on TV news. The public was outraged by the incident.

10.2.2. Mr. Ken Tsang complained that the injury to his spinal cord has not recovered yet since the incident occurred.

10.2.3. The seven police officers were arrested for the offence of wounding with intent to cause grievous bodily harm a year after the alleged attack. In reply to the challenge of unnecessary delay, the Department of Justice claimed that they were seeking legal advice before making the prosecution.

10.2.4. Mr. Tsang was also arrested on the same day for resisting police officers in their execution of duty and 4 counts of obstructing police officers in their execution of duty even though he has had received a letter from the police that there has been insufficient evidence to prosecute him for the offences he has been arrested for.³² There is public suspicion that the police try to find faults to prosecute him as a retaliation for leading the officers to face prosecution and bringing embarrassment to the police force. The arrest and laying of charges and attending the same magistrate court on the same days as the 7

³² The original offences include failure to present identity document.

officers was suspected to be a media strategy to undermine the victim's integrity to save the face of the 7 officers and the police force. The Secretary for Justice denied it and claimed that the two cases involved issues of cross charging and having the cases proceeding the similar time would be in the interest of fairness. However, he has offered no explanation as to why it is still pursuing totally different charges when there was no evidence to support prosecution of Mr. Tsang for those charges he was originally arrested for.

10.3. **Magistrate's worry over possible beating up of accused by police:** It was reported that Mr. Chan Pak Shan had been arrested by the police and charged for assaulting a police officer and unable to present his identity document. Mr. Chan was not found guilty for the both charges after trial. The Magistrate stated that there is a "reasonable possibility" that Mr. Chan had been beaten up by the police, which affected the integrity of the police's witness statement. The Magistrates stated that the injury to Mr. Chan's eye is likely caused by a punch. The bruise on Mr. Chan's face and the scratch on his chest are not likely caused by his resistance to the police.

10.4. **Recommendations:**

10.4.1. The Committee should urge the Government to adopt effective measures to check and prevent any abuses and cruel, inhuman or degrading treatment or punishment ("CIDTP") by the police. Video recording devices should be installed and operational in police vehicles and to cover areas in police station involving the handling of arrested persons, except sensitive areas in the toilet or corners in temporary holding areas for sleeping and use of toilet. The video footages and relevant records should be properly kept and dealt with.

10.4.2. The Government should provide human rights training and legal education to the police, including the concept of torture and CIDTP and the legal liabilities of the officers for using malicious or excessive force.

10.4.3. *Also the recommendation of investigation and punishment in para 6.6.2*

11. **Degrading treatment in the detention of arrested persons**

11.1. The Hong Kong Police arrested 511 demonstrators for participating in a peaceful but unauthorised assembly after the 1 July rallies in 2014. They had been detained in the Police College overnight, a place not designed for detention purposes. The arrested persons complained (1) not allowed access to a lawyer; (2) not provided with food and water for several hours during detention; (3) detained in the police vehicle for over several hours; and (4) the request to use a toilet had been refused.

11.2. It was reported that only one telephone had provided for the 511 arrested persons to contact lawyers and family members.

- 11.3. It was reported that the police refused the lawyers, Legislative Councillors and three Justices of the Peace (“JPs”) access to visit the arrested persons detained in the police college. The solicitor, barrister and Justices of the peace are the persons listed in the Police General Orders who can visit detained persons in the course of duty (Chapter 49, paragraph 3(d) and 3(g)).
- 11.4. Most of the arrested demonstrators were unconditionally released the next day without facing any charges. As of September 2015, only 25 out of 511 arrested demonstrators were prosecuted for “participating and organising unauthorised assembly.”
- 11.5. The prolonged detention after arrest for 1 July 2014 protesters is not an isolated case. There were cases in which the arrestees complained that they should have been released much earlier with or without bail but instead they were kept in police detention for a unjustified lengthy period of time, during which there were little efforts to process their cases. A case in point is Joshua Wong, one of the student leaders of the Umbrella Movement, aged 17 at the material time, being detained for 46 hours without bail after being arrested for organising and participating in an unauthorised assembly, etc., on 26 September 2014. A High Court judge granted an order (writ of habeas corpus) for his immediate release, holding that the length of detention was “unreasonably long”. A non-Occupy case in point is the 52-hour detention of a mentally incapacitated man for the investigation of a homicide, even after having received compelling evidence of his alibi soon after the arrest.³³
- 11.6. **Issues concerned:**
- 11.6.1. The arrested person detained in a place not designed for detention purposes which resulted in the failure to fulfil basic human rights of the arrested persons. For example, there could be no video recording in place to prevent police torturing detainees, telephones for detainees to make phone call, or beds for detainees to rest in;
- 11.6.2. Detaining arrested persons in places other than a police station may be in violation of the Police General Orders;
- 11.6.3. Even when detained in a police station, a prolonged and unjustified detention in poor conditions with improper treatment is yet an additional way to punish the protesters.
- 11.6.4. It is unlawful and unreasonable for the police to refuse the lawyer to have access to their client and not allow an arrested person to access a lawyer.
- 11.6.5. The police unreasonably denied the JPs to visit the detained persons, jeopardised the function of the JP act as an observer and person for redress.
- 11.7. **Recommendations:**

³³ Please refer to Part B II. Vulnerable Group: Persons with Disabilities, *part 15* for a detailed report of this incident.

- 11.7.1. We urge the Committee to express grave concern about the detention of arrested persons in a place not designed for such purpose;
- 11.7.2. We urge the Committee to urge the Hong Kong Government to establish a “service pledge” regarding the response time to the arrested persons for the request to exercise rights, including access to legal service, medical treatment, food, water, toilet, and bathing, etc in order to ensure human and non-degrading treatment to arrestees;
- 11.7.3. We urge the Committee to urge the government to ensure JPs can visit the detained person; See also the recommendations in 16.9 especially “Lay Observer Scheme” in 16.9.9
- 11.7.4. We urge the Committee to express grave concern about the high percentage of “arrest and detain without charges”, which may imply that the decision to detain the arrestees instead of discharge upon entering a recognizance is systematically ill-founded, serving the purpose of punishing arrested demonstrators without a fair trial.

12. Delay in & avoidance of criminal prosecution against police officers

- 12.1. The criminal prosecution on alleged beating of Ken Tsang (mentioned in paras 6.5.2 and 10.2) by several police officers in the Admiralty zone on 15 October 2014 was conducted under a very slow pace. The police only laid charges against the seven officers a whole year after the incident. During an informal identity parade, alleged police officers were allowed not to cooperate with identity parade procedures, they refused to open their eyes and stand up to let Mr. Ken Tsang see them properly.³⁴
- 12.2. Another obvious example is Mr. Osman Cheng being hit by Superintendent Chu, as mentioned in paras 6.5.1 and 13.8-9. The incident occurred on 26 November 2014, after which Mr. Cheng had promptly filed complaints to CAPO. However, despite months of complaints, the police delayed formal criminal investigation on the case, and refused IPCC’s view that the complaint of “assault” is substantiated, which carries criminal and civil liabilities. Instead, the police insisted that Superintendent Chu only committed “unnecessary use of authority”, which would normally lead to the usual penalty of a warning or a written record, which at most would only affect promotion and extension of service pending retirement of the police officer. But a warning or written record to Chu would almost be meaningless as during the course of the prolonged handling of this case, he has already had his service extended and retired recently before a final verdict was made by CAPO on his case.
- 12.3. If the allegation of “unnecessary use of authority” was established, Chu could still have had to face disciplinary hearing; but due to the delay, caused by police’s dragging on the investigation of the

³⁴ SCMP, 2015, “Arrested Hong Kong police have same rights as lawmakers, says police commissioner” . (<http://www.scmp.com/news/hong-kong/law-crime/article/1774757/arrested-hong-kong-police-have-same-rights-lawmakers-says>, access on 25 Sep 2015)

complaint against him and by disagreeing with IPCC on the final verdict, Chu has been allowed to slip smoothly into retirement before a final verdict is delivered and before the chance and embarrassment to subject himself to disciplinary hearing and the possible penalties.

12.4. There are worries that by refusing to classify the case as assault, the police would claim that there is no criminal case to follow up on, therefore not to conduct criminal procedures on Superintendent Chu, ensuring his impunity. If so, the complaints handling procedures of CAPO and IPCC, which is exclusive for the police force, would be used to shield police officers from the applicability of criminal law of Hong Kong. With the bias of and protection from CAPO, Chu may well be “more equal” than other non-police residents and make a mockery of the principle of equality before the law.

12.5. *Recommendations are made in para 13.10.*

13. Absence of an independent mechanism for monitoring police conduct

13.1. Hong Kong runs a two tier monitoring police system; all alleged complaints would first be directed to CAPO. After CAPO finished their investigations, some of them are delivered to the IPCC for further review.

13.2. **Lack of independence, and the *sub judice* principle of CAPO:** CAPO is a problematic mechanism. It is a branch of the police force, although it claims to be independent of other police units. In the course of the investigation of a complaint case, if criminal elements are detected, the CAPO may classify the case as *sub-judice* in which case the involved criminal allegations shall be handled first. Only upon completion of the criminal investigation and the related judicial proceedings will CAPO re-institute the mechanism of the complaint investigation.

13.3. **Worry that CAPO can tip off officers:** In Ken Tsang’s case, the beating he endured was clearly of criminal nature. But when he reported the crime to the police and requested criminal investigation of being beaten, the case was transferred to the CAPO, which, with questionable independence, leaves huge room for potential tipping off or inadvertent leakage of sensitive information to police officers involved in the alleged act of beating Tsang up.

13.4. Its bias in favour of the police can be seen in Superintendent Chu’s case. (See paras 12.2-4 for this case)

13.5. **Membership of IPCC has no legitimacy:** Chairperson, Vice-chairperson and all other members of IPCC are appointed by the Chief Executive without any democratic endorsement, which might undermine the credibility, independence and impartiality of IPCC in its discharging of its duty especially on issues that might adversely

affect the image or interest of the authorities. Their willingness and determination to defend human rights are also dubious. In fact, some members of IPCC have expressed unwillingness to read the powers of the IPCC liberally to actively engage in monitoring the police e.g. observing demonstrations in the streets.

- 13.6. **IPCC has limited power:** Source of functions and powers of IPCC come from Independent Police Complaints Council Ordinance,³⁵ which limits the role of IPCC as a body for reviewing investigations conducted by CAPO, not itself. IPCC has no powers to investigate any complaints, no power to have the final say on the classification of complaints and whether a case is substantiated or not, and no power to impose penalties but only to make recommendations and comments on the police's decisions. For instance it does not even have the power to require the police force to provide it with a copy of their new handbook on policing demonstrations.
- 13.7. Its approach depicted in the Ordinance is basically complaint-driven. One of the rare exceptions lies in section 8(1)c that gives IPCC vague powers to engage in studying problems in the police force in a more pro-active manner, "to identify any fault or deficiency in any practice or procedure adopted by the police force that has led to or might lead to reportable complaints, and to make recommendations (as the Council considers appropriate) to the Commissioner or the Chief Executive or both of them in respect of such practice or procedure." However, such a function was not accompanied with the powers of discovery, search and seizure of documents and materials reasonably necessary for its discharge of its duty, nor any power to summon witnesses and to offer protection to them. So the power to engage in the kind of section-8 study is in no way comparable to the power to conduct *suo moto* investigation.
- 13.8. **Lack of Enforcement in implementing IPCC decision:** In current mechanism, IPCC is ineffective in imposing its own decision on the police. Investigation on Osman Cheng's complaint against Superintendent Chu was basically completed in July 2015, on which IPCC ruled Superintendent Chu has committed the assault.³⁶ Yet, CAPO replied and suggested the Council to dismiss the assault verdict. With IPCC upholding its decision, police refused to conduct criminal investigation, leaving the superintendent to retire smoothly. This is a landmark example in showing that the police can disobey the decision of IPCC without any consequences. At most, IPCC Chairperson could submit his opinions and recommendations to the

³⁵ Ibid., Chapter 604.

³⁶ SCMP, 2015, "Police bid change ruling officer assaulted Hong Kong occupy protestor lacks evidence", (<http://www.scmp.com/news/hong-kong/law-crime/article/1841428/police-bid-change-ruling-officer-assaulted-hong-kong-occupy>, access on 25 Sep, 2015)

Chief Executive. But if the Chief Executive refuses to take action, the verdict of CAPO or the police will prevail.³⁷

13.9. **Ineffective police complaint mechanism:** Superintendent Chu's case is the litmus test of the effectiveness of the police complaints mechanism in Hong Kong. Such police refusal to accept the classification of "assault" by IPCC against the overwhelming evidence in the footage of Chu's acts highlights the readiness of CAPO, the Commissioner of Police and the police to undermine the complaints system of police investigating police in Hong Kong, and its readiness to sacrifice the credibility, accountability and professionalism of the police to ensure impunity of its senior officers if not also police officers generally. The system simply does not work.

13.10. **Recommendations**

13.10.1. We urge the committee to reiterate the importance of the IPCC to be transformed into an independent and effective police monitoring body, as repeatedly demanded by the Committee's Concluding Observations in 2000 and 2009.

13.10.2. We also ask the Committee to condemn the HK Police Force for delaying criminal investigation or disciplinary actions against police officers accused of violating the law or police regulations against protesters.

14. **Police identification**

14.1. There is concern over **Police Officers failing to prove their identity during exercise of police power**. It is important that Police Officers should prove their identity in the execution of their duty. If they conceal their police identification numbers and warrant card, the public would have difficulty in identifying and complaining against those police officers, who have violated police powers, hindering victims' access to effective remedies for their violated rights, and provide for impunity of officers at fault.

14.2. During the Umbrella Movement, the media reported that a large number of police officers concealed their police identification numbers by wearing reflective yellow vests which they were wearing or deliberately removed the numbers from their own or their colleague's uniform during the operations so that members of the public would not be able to identify them. Human rights observers have also observed groups of plain-clothes police officers dealing with protesters in the streets failing to wear their warrant cards on the top of their police vests. The failure to display warrant cards

³⁷ This is because the Commissioner of Police is charged with "the supreme direction and administration of the police force" and he is only "subject to the orders and control of the Chief Executive" under section 4 of the Police Force Ordinance, Hong Kong Law Chapter 232.

apparently was systematic at least with the acquiescence from their supervisors or senior officers on the spot.

14.3. Under Chapter 20 of the Police General Orders on Disclosure of Identity to Members of Public upon Request, officers exercising statutory powers are required to disclose adequate personal information to identify themselves whenever reasonably practicable upon request. This chapter specifically spells out that police officers should display their warrant card or disclose the identification numbers to public.

14.4. **Recommendations:**

We call on the committee to urge the HKSAR Government to make sure police have reminded front-line uniformed officers of the proper donning of uniform and to follow the rules and prove their identity during the exercise of police power. The police guidelines should clearly point out that supervisors or senior officers failing to require junior officers to wear or display warrant card properly should be held responsible and face disciplinary actions.

II. Vulnerable Group: Persons with Disabilities

15. **The case of maltreatment against a wrongfully arrested autistic man – known hereafter as Mr. A – with moderate intellectual disabilities. The maltreatment included the denial of medication, food and water to Mr. A; a highly unprofessional interrogation procedure; and an excessively long detention period, violating Articles 10, 11 and 12.**

15.1. **Background of the case:** On 2 May 2015, an autistic man (Mr. A) with moderate mental disabilities was arrested for homicide of an elderly man in April 2015. The arrest was quickly revealed to be lacking justification – among other reasons, Mr. A had a credible alibi.³⁸ Even so, he was detained for 52 hours before being released on bail with a holding charge of manslaughter, only to have the charge dropped days later. During the process of detention and interrogation, the police committed several serious maltreatments against Mr. A and his family. (Please also see Appendix I for a report by the victim’s family)

15.2. **Ignoring Mr. A’s rights as a person with special needs:** Mr. A exhibits severe communication difficulties, which make his mental disabilities obvious. It would be bizarre for the police to claim that they could not identify Mr. A as a person with special needs³⁹ when

³⁸ “Family blast police over handling of autistic man’s arrest, detention” South China Morning Post, 10 May, 2015

³⁹ While the Police guidelines to conducting enquiries or taking statements are not disclosed to the public, a Government official explained to the LegCo that the Police has to adhere to internal guidelines when handling cases involving persons with physical disabilities

they stopped, interviewed him under caution, and subsequently arrested him (at 5:15p.m. on 2 May 2015). It must be noted that all the procedures were carried out while Mr. A was alone, without appropriate adult⁴⁰ and legal support for a suspect with mental disabilities. The fact that, due to his mental condition, the police contacted Mr. A's family immediately after the arrest based on contact information found in the suspect's bag shows that the police was aware that Mr. A has special needs, because the police would not have contacted the family of normal adult suspects.

15.3. **Using prohibited tactics in interrogations:** The police claimed that Mr. A had confessed to the homicide at the interview under caution shortly before he was arrested, when he was not accompanied by anyone. However, when Mr. A's brother examined the "written record" of that interview, he found a fluent, logical conversation that Mr. A cannot not possibly make due to his severe communication difficulties, a characteristic of his autism. Also, a typical characteristic of autistic persons is repetitive behaviour, including speech. The police later conducted a second interrogation of Mr. A in form of a video interview in the presence of his brother as an "appropriate adult",⁴¹ in which the police asked him leading and closed end questions calculated to extract affirmative answers from him, and demonstrated action of pushing a person, asking Mr. A to "show" how he pushed the old man. By meaninglessly repeating words and action, and randomly saying yes or no, Mr. A was considered by the police to have "admitted" that he had committed homicide – an egregious example of using prohibited tactics in interrogation. This is a strict violation of police protocol and a violation of the Convention. The legal rights of Mr. A were clearly exploited. The most serious point of concern remains how the police knowingly used inappropriate and misleading interrogative techniques on a vulnerable person with mental disabilities.

15.4. **Unjustifiably extending the length of detention even in face of alibi:**

or special needs (including mentally incapacitated persons (MIPs))
<http://www.info.gov.hk/gia/general/201212/19/P201212190463.htm>; The Police General Orders - Chapter 49 "Detained Person with Special Needs" defines persons with special needs to include those who are or suspected to be mentally incapacitated, and those with physical communication difficulties. <http://www.police.gov.hk/info/doc/pgo/en/Epgo049.pdf>

⁴⁰ According to the Hong Kong Police General Orders Chapter 49, an appropriate adult in respect of a detained person is defined as:

- (a) a relative, guardian or other person responsible for care or custody of that person;
- (b) someone who has experience of dealing with a person with a particular special need, but who is not a police officer nor employed by police, such as a social worker; or
- (c) failing either of the above, some other responsible adult who is not a police officer nor employed by the police.

<http://www.police.gov.hk/info/doc/pgo/en/Epgo049.pdf>

⁴¹ *ibid.*

- 15.4.1. In spite of the requests and reminders of the family that the hostel where Mr. A resided could prove that Mr. A was without doubt at his residence at the time of the manslaughter – the police failed to visit the 24-hour manned hostel to verify in a timely fashion the alibi. Even worse, the police persisted with holding a high-profile press conference in which they claimed triumphantly that they had successfully arrested a suspect for the homicide case, who is autistic and committed the attack because he had psychological issues concerning pets, an allegation without any ground, and completely fabricated by the police.
- 15.4.2. Before lunch time on the day after the arrest (3 May 2015), the police had already gotten hold of the CCTV video footage and documentation from the hostel and had the assurance of the members of hostel staff of Mr. A's presence at the hostel at the time of the alleged manslaughter. After the verification of the alibi, the police persisted with detaining Mr. A in custody for over another 33 hours (till after 9 p.m. on yet another day on 4 May 2015). The total length of the detention was more than 52 hours, beyond the usual practice of 48 hours.⁴² At the end of the detention, Mr. A was even not released unconditionally, but on bail for a "holding charge of manslaughter", which was only dropped days after. One hour – let alone 52 hours – in detention for a person with autism would be distressing; 52 hours in detention for a person with psychosocial disabilities, even on credible charges, is a denigration of the person's human rights.
- 15.5. **Denial of medication and water:** Mr. A had clearly-labeled prescribed medication in his bag, which was searched by the police after his arrest. In spite of this, and against the repeated requests of Mr. A's family (to which the police had promised to follow up), the police did not give medicine to Mr. A for the entire length of detention. The police claimed that Mr. A did not vocalize a request for medicine. Yet it was clear that Mr. A's communication skills were very limited and he was incapable of vocalizing a request for medication to the police. In addition, water and food was also insufficiently provided to Mr. A with the same reason that the suspect did not personally make a request. Incidentally, when family members visited Mr. A, he promptly drank several cups of water when handed over by his family. Also, it was apparent that Mr. A has been neglected in his need for timely use of toilets. Such cruel, inhuman and degrading treatments are totally unprofessional and unjustified. Such treatment and denial of physiological needs during a detention period are serious violations of Mr. A's human rights.

⁴²A person who is detained in custody by the police shall be brought before a Magistrate as soon as practicable and generally within 48 hours from the time of the arrest. While the 48-hour rule is only a usual practice and not stated by law (see HK Law CAP 232, Police Force Ordinance, s52(1)), violation of which can be a factor to challenge the voluntary nature of a statement obtained, see R v Hudson [1981] 72 Cr App R 163. It is also recommended by the Human Rights Committee General Comment No.35 (CCPR/C/GC/35), para 33.

15.6. *The recommendations are made after part 16 at para. 16.9*

16. Other cases of maltreatment by law enforcement personnel

16.1. In addition to the wrongful arrest of Mr. A, there are other notable cases relating to worryingly unprofessional behavior and maltreatment by law enforcement personnel, which are inconsistent with **Articles 10, 11 and 12.**

16.2. The police have exploited the weakness of persons with disabilities to obtain confessions. In one case, the police was accused of obtaining a “confession” by exploiting a suspect’s below average intelligence, who was later found not guilty by the jury unanimously. The judge criticised the police for obtaining a “confession” from the defendant by exhausting him with 41 hours of detention and 9 continuous hours of questioning until 2:30 a.m., which is inappropriate and unsatisfactory especially for a person with below average intelligence. He requested the prosecution to follow up with the police and the Secretary for Justice.⁴³ This case is believed to be a tip of the iceberg of the police’s intentional exploitation or insensitivity to the weakness of persons with mental problems.

16.3. Recently, a thirteen-year-old girl with mild intellectual disabilities was abandoned by her mother, and was sent to a small group home for children with disabilities by the Authorities. In the trial of the mother, it was revealed that the police took a number of half-naked photos of the girl, which were kept in the case file, easily accessible by personnel at the police station. The judge questioned the necessity of the photos, because there was no apparent injury on the girl requiring photographic evidence, and demanded the police to destroy the photos as soon as the case was closed.⁴⁴ Moreover, the photos were taken without medical examination, by police officers in violation of the Force Procedures Manual that all such photo-taking should be carried out by the Identification Bureau after a medical examination.⁴⁵ The conduct of the police exploited and degraded a child with disabilities.

16.4. There are several cases of persons with hearing impairments reporting having difficulties with law enforcement personnel. A person (Mr. B) was an unlicensed hawker. When caught by the hawker control team, he requested a pen and paper in order to communicate with the law enforcers, but this eminently reasonable and deliverable request was denied. Mr. B then used sign language

⁴³ “Judge criticises police for its forceful mean of obtaining a confession from Tse Chun-Kei – detention for 40 hours, and continuous questioning for 9 hours” Stand News (Hong Kong) 23 March 2015 <https://thestandnews.com/society/法官批警方逼謝臻麒認罪手法-先拘留40小時-後連續盤問9小時/>

⁴⁴ See Thomas Chan “Magistrate chides Hong Kong police for taking half-nude photos of child-abuse victim” South China Morning Post (Hong Kong) 24 June 2015 <http://www.scmp.com/news/hong-kong/law-crime/article/1825338/magistrate-chides-hong-kong-police-taking-half-nude-photos+&cd=1&hl=zh-TW&ct=clnk&gl=hk&client=safari>

⁴⁵ “Usual practice: photographing in hospital under instruction by medical doctor” Mingpao (Hong Kong) 11 June 2015 <http://news.mingpao.com/pns1506111433958221430>

in an attempt to communicate with the hawker control team, a gesture that was mistaken as an attempt to attack a law enforcement officer. In another case, a man (Mr. C) with hearing impairments lost his wallet and reported the case to the police. However, the police requested Mr. C to find a sign language interpreter by himself rather than arranging for one, claiming they could not assist him with this requirement. In effect, the police excluded Mr. C or any other persons with hearing disabilities police service.

- 16.5. Apart from persons with disabilities, the police are also insensitive towards ethnic minorities' language difficulties, and sometimes even hold discriminatory and racist attitudes against them. Not only does the police's attitude dissuade ethnic minorities from seeking help from the police, it could even cause danger to them. In 2009, a Nepalese man, Limbu Dil Bahadur was shot dead by a police constable who was responding alone to call-out on a hillside in Ho Man Tin during an identity check. Among other criticisms of the fatal shooting, the police officer made his warnings towards Limbu in Cantonese, without regard whether the ethnic minority man understood the warning.⁴⁶
- 16.6. The above cases reflect that the problems of how the police handle law enforcement matters with individuals with disabilities are systematic and not isolated. The Government must take actions in training, monitoring observance of guidelines, and curbing the persistent pattern of indifferent treatment towards persons with special needs.
- 16.7. After the wrongful arrest of Mr. A and the unjustified taking of nude photographs of a child with disabilities in police care, the police announced that they would review their training and protocol. However, the review process was an internal review that did not enable DPOs and other professionals to contribute. By its nature, the review lacked transparency and public accountability.
- 16.8. In Hong Kong, while a duty lawyer service is available to defendants whose case is heard in a magistrates' court, there is no comparable service provided by the government during detention and investigation process, leaving persons with disabilities or communication difficulties at a marked disadvantage.
- 16.9. **Recommendations** (for parts 15 & 16)
We cordially ask the Committee to make the following recommendations to the Government:
 - 16.9.1. Existing problems are exacerbated by inadequate training, poorly observed protocol, and a persistent pattern of indifferent treatment towards persons with special needs. The government must review law enforcement officials' handling of people with special needs and

⁴⁶ See Phyllis Tsang, "Widow in tears over shooting video" South China Morning Post (Hong Kong) 18 September 2009.

- disabilities. We recommend the government consider legislation as an option to safeguard the legal rights of people with disabilities.⁴⁷
- 16.9.2. We strongly suggest the Government to extend duty lawyer service to vulnerable persons, such as persons with disabilities or communication difficulties, during their detention in police station after arrest. The Government should provide special training for duty lawyers in assisting vulnerable persons so that they are capable of advising persons with special needs on their rights, and their appropriate adults on their roles.
 - 16.9.3. The above cases reflect that the police's mishandling of law enforcement matters with persons with disabilities is systematic and not isolated. Law enforcement officers should be trained to know clearly how to identify and assist people with disabilities, ethnic minorities, linguistic minorities, the elderly and other persons with communication problems. Violation of their rights must not be tolerated; appropriate disciplinary actions must be taken against those who violate existing rules and guidelines; and proper criminal actions should be instigated to address any violation of criminal law.
 - 16.9.4. The police protocol for handling persons with mental disabilities and other special needs should be made accessible and transparent to the public, so that not only persons with disabilities and communication difficulties and their carers can know their rights, the general public can participate in monitoring rights protection for the vulnerable.
 - 16.9.5. Police guidelines on persons in detention's access to medication and medical care must be revised immediately to ensure detainees who cannot communicate the need to officers are still provided with timely medical care and access to medication, whether when done at the time officers find prescribed drugs in their belongings, or when reminded by their family members, carers, etc.
 - 16.9.6. While it is the professional duty of the case officers to continuously reconsider the necessity of continuing detention of a suspect with respect to the evidence gathered, we suggest the Government to put in place legislation or rules forbidding unjustified continuous detention, such as when credible alibi is obtained, intentional or reckless violation of which attracts criminal or disciplinary penalty.
 - 16.9.7. Police officers must also not withhold from suspects and/or their appropriate adults information advantageous to their immediate release. We ask the Government to criminalise such practice, especially when used upon detained persons with special needs.
 - 16.9.8. We urge the Government to make clear guidelines that appropriate adults are informed of their roles and powers adequately in order for them to discharge their duty properly.
 - 16.9.9. We also urge the Government to consider setting up a "Lay Observer Scheme" to authorise citizens who are concerned of civil and human rights to enter any police station at anytime to observe

47 Legislative Council, Hong Kong, Papers and Deputations of Meeting of Panel on Welfare service, retrieved from: <http://www.legco.gov.hk/yr14-15/english/panels/ws/agenda/ws20150613.htm>

police practice, in order to raise concerns and possible suggestions to improve detention conditions.

- 16.9.10. Last but not least, the review exercise by the police on its policies towards persons with disabilities must at least allow DPOs' participation.

17. Inhuman treatment for persons with disabilities in hostel settings, and physical and mental abuse in social service units for persons with disabilities

17.1. Background situation

- 17.1.1. In Hong Kong, the community care and support service for people with disabilities is far from satisfactory. Due to the lack of community support services, a large proportion of people with disabilities have no choice but to resort to residential care services.
- 17.1.2. In recent years, the demand for residential care services has increased exponentially, with the waiting time often being as long as ten or thirteen years. The government has responded to the increase in demand by building extremely large-sized hostels in remote areas, residential complexes designed with the capacity for 300 to 1200 persons with disabilities.⁴⁸
- 17.1.3. At the same time, abuses in institutions for persons with disabilities and elderly are frequently reported.

17.2. Issues of concern

- 17.2.1. Problems arose following the government's decision to build such large hostels in remote settings. The distance hinders monitoring of human rights conditions inside, and the large number of residences in many of the hostels makes staff management, staff morale, and accountability difficult to manage. The setting and service provision of these large hostels often leads to inhuman treatments, including fixed living time schedule without self-determination.
- 17.2.2. Parents have reported that their children with disabilities residing in hostels often suffer from different kinds of ill-treatment, including psychiatric drug over-dosed, frequent unaccounted for physical injury, inhuman restraint using wheel-chair or safety jacket, and solitary confinement in an isolation room. While some are said to have suffered from direct infliction of harms, such as slapping, some are neglected which can result in severe physical or psychological damages. In one case, a lady, aged 23, with moderate intellectual disabilities and epilepsy, had been able to walk, sing and dance before living in a hostel. After four years in hostel, however, she is now unable to walk and wheel-chair bound due to a lack of walking exercise, as there was not enough staff to look after her unsteady walk.
- 17.2.3. The elderly also face abuses in caring home. In May 2015, shocking footage of a dozen of naked elderlies on the podium of an elderly home in Hong Kong was exposed. Journalist's inquiry shows that it

⁴⁸ Legislative Council, Hong Kong, Paper of Finance Committee, retrieved from: <http://www.legco.gov.hk/yr14-15/chinese/fc/fc/papers/f15-17c.pdf>

was the usual practice of that elderly home to strip residents naked while they wait for their turn to be bathed. The scene was clearly visible to people in high-rise buildings nearby.⁴⁹ The Social Welfare Department, which is responsible for licensing elderly homes in Hong Kong, confirmed that it had received a number of complaints against this elderly home in the past years; however only warning letters were issued, no prosecution was effected. After the recent media attention and public outrage, the application for renewal of licence covering only parts of the elderly home had been refused.

17.2.4. Another worrying practice is the excessive use of constraints to persons with disabilities or special needs, which are administered with medication or physical constraints. Students with autism or Attention Deficit Hyperactivity Disorder are often required by their teachers to take medication for behavior modification whenever the teacher find them difficult to manage or want to punish their behaviour; mentally challenged people face high risk of excessive physical constraint when hospitalized and when residing in caring homes, also as a form of punishment for so-called “bad” behaviours. It would be a dangerous tendency if this type of punishment or practice became more widespread in the field. While there may be necessity to restrain a person with disabilities for their care or safety of themselves or others in strictly justified cases, the dignity of the person with disability must be respected. Professionals responsible for the care of persons with disabilities must bear in mind that for the protection of persons with disabilities’ dignity, restraints should be a last resort to use on persons with psychosocial disabilities, and only in the absence of success of all other methods and not for the purposes of saving manpower or reducing workload.

17.2.5. The Government’s lenient attitude towards malpractices of caring home, hostels, school teachers and all other support service providers is tantamount to condoning cruel, inhuman and degrading treatment towards the vulnerable, contravening **Article 16**. The Government has an inexcusable duty to make sure the institutions are treating the vulnerable users right, whether by legislation, law enforcement, revising licensing policies, providing trainings, etc.

17.3. **Recommendations**

We cordially ask the Committee to make the following recommendations to the Government:

17.3.1. The Government should provide adequate support to the elderly, persons with disabilities and other vulnerable persons to enable them to live in their family, if still possible, to avoid being institutionalized. For those who really need residential services, small group homes are preferred. The Government should stop

49 “Elderlies stripped to wait for shower in open area” Mingpao (Hong Kong) 26 May 2015 <http://news.mingpao.com/pns1505261432577551357>; Danny Mok and Jennifer Ngo “Hong Kong police probe care home for leaving elderly naked in open air” South China Morning Post (Hong Kong) 27 May 2015 <http://www.scmp.com/news/hong-kong/law-crime/article/1810017/hong-kong-police-probe-care-home-leaving-elderly-naked-open>

- building large-sized residential care complexes, which are more prone to human rights violations.
- 17.3.2. The government should strengthen law enforcement and monitoring of service provision in those service units, by more stringent licensing conditions and laws with proper civil and criminal remedies in their violation to prevent and prohibit all physical and mental abuses.
- 17.3.3. The Government should also establish an independent Third Party Advocate mechanism, or a dedicated division in a statutory human rights commission, to represent and advocate for the rights and welfare of persons with disabilities and special needs.

III. Vulnerable Group: LGBT people

18. Surgical requirement for gender recognition

- 18.1. The process for transgender/transsexual⁵⁰ people in Hong Kong to change their legal sex is governed by administrative regulations of the ImmD of the Security Bureau that require evidence of the completion of sex-reassignment surgery (SRS). This surgery must specifically include the removal of reproductive organs (sterilisation) and genital reconstruction.⁵¹ Though some transgender people do wish to have SRS, for many it is not necessary, desirable, or even possible. For those who do wish to have SRS, it is a lengthy and difficult process in Hong Kong involving long waits for consultations, with clinics and providers not knowledgeable enough or willing to provide trans-related healthcare services, during which they must continue to rely on identification documents with the incorrect sex indicator. In 2014 the Hong Kong Government introduced legislation that would have elevated the requirement for SRS from a regulation to a statutory law (such legislation has since been defeated in the Legislative Council).⁵² This happened at the same time as the

⁵⁰ Transgender people are a diverse group of individuals whose gender identity and/or gender expression differ from social norms related to their gender of birth; transsexual people are a subset of transgender people who identify as, and desire to live and be accepted as, a member of another sex permanently.

⁵¹ See Question 22, "What procedures should be followed and what supporting documents should be submitted if I want to change the sex entry on my identity card?" on website of the Hong Kong Immigration Department. The specific requirements are:

- (i) for sex change from female to male: removal of the uterus and ovaries; and construction of a penis or some form of penis;
- (ii) for sex change from male to female: removal of the penis and testes; and construction of a vagina.

Available at: http://www.gov.hk/en/residents/immigration/idcard/hkic/faq_hkic.htm

⁵² "Draft law to define who is transgender is expected to provoke debate." *South China Morning Post*, 2 March 2014. Available at: <http://www.scmp.com/news/hong-kong/article/1438216/draft-law-define-who-transgender-expected-provoke-debate>
"Transgender marriage law vetoed by LegCo." *South China Morning Post*, 23 October 2014. Available at: www.scmp.com/news/hong-kong/article/1622339/legco

Government established an Inter-departmental Working Group on Gender Recognition (IWG) that has no clear mandate to repeal medical preconditions to legal gender recognition. We are concerned that, as the IWG conducts a multi-year consultation, the SRS requirement for gender recognition would be maintained in the meantime. We are also concerned that the IWG refused to include any representatives from the transgender or intersex communities.

18.2. International human rights bodies, legal and health authorities, including the UN Special Rapporteur on Torture, have called for the removal of medical preconditions to trans people's legal gender recognition. The requirement violates **Articles 1, 2 and 16**.

18.3. **Recommendations:**

We ask the Committee to require the Government to:

18.3.1. Repeal mandatory medical requirements, including SRS requirements, for transgender/transsexual people to gain legal gender recognition;

18.3.2. Ease the burden on those who are pursuing SRS by allowing them to obtain appropriate identification earlier in their transition;

18.3.3. Ensure the availability of qualified healthcare and other support services for trans people, including those who wish to pursue SRS and those who do not.

19. Involuntary surgeries on intersex infants and children

19.1. Intersex infants and children in Hong Kong are subjected to unnecessary and irreversible medical procedures without their consent. Often doctors recommend these surgeries on the basis of conforming them into culturally accepted "normal" gender appearances, so as to avoid future gender confusion. However, these genital-normalizing surgeries, performed without the consent of infants and children, can have long-term negative physical and psychological consequences on the intersex individuals.⁵³ The Hong Kong Government publishes no statistics relating to intersex infants, and provides no education or guidelines to medical providers to minimise the risk of harm to intersex infants or children. When intersex adults find that they do not identify with the sex to which they have been assigned during their infancy, they are subjected to the same requirements as transgender/transsexual people are in order to change their legal sex on identification documents. This means these intersex adults will be forced to undergo full SRS, including sterilisation and genital reconstruction. As with transgender people, however, intersex people are excluded from the IWG.

19.2. International human rights and health authorities, including the UN Special Rapporteur on Torture, have also called for the suspension of genital-normalizing surgeries performed on intersex infants and

⁵³ See comments from representative of the Hong Kong Hospital Authority from 4:35 to 5:13 in this video documentary about Dr. Small Luk, available at: <https://vimeo.com/125847211>

children who are unable to give informed consent. Such practice is inconsistent with **Articles 1, 2 and 16**.

19.3. Recommendations:

We therefore ask the Committee to make the following requests to the Government:

- 19.3.1. Compile and publish statistics relating to intersex people to assist in formulating policies to address the human rights issues that intersex people face;
- 19.3.2. Investigate the long-term physical and psychological impacts that genital-normalizing surgeries have on intersex infants and children, and the potential torture concerns that arise from these surgeries;
- 19.3.3. Postpone gender-normalizing surgeries on intersex infants until they are able to give informed consent; and,
- 19.3.4. Educate and sensitizing frontline workers, including government officials, law enforcement officials, healthcare workers, social workers and teachers, as well as the general public, as to the existence of intersex people and their needs.

20. Treatment of transgender people in detention and prison

20.1. LGBTI community organisations have received first-hand accounts of multiple cases of inhuman or degrading mistreatment of trans people by law enforcement authorities in Hong Kong. Such mistreatment includes verbal abuse, strip searches, sexual assaults, involuntary haircuts, denial of access to hormone replacement therapy, lack of access to appropriate clothing such as brassieres, and isolation in solitary confinement.⁵⁴ In addition to the authorities being insensitive or even disrespectful to the needs of transgender people, such mistreatment also results from law enforcement authorities relying solely on transgender people's legal sex as recorded in their identification documents, rather than their actual gender presentation or medical evidence of transition. The treatments are inconsistent with **Articles 1, 2, 10, 11 and 16**.

20.2. Recommendations:

We ask the Committee to urge the Government to establish clear and transparent procedures to ensure the safety and respectful treatment of transgender people and to prevent cruel, inhuman or degrading treatment by the authorities. Procedures should take into

⁵⁴ See e.g., "Transgender woman: Hong Kong customs officials behaved 'like animals' during body search." *South China Morning Post*, 3 November 2013,. Available at: <http://www.scmp.com/news/hong-kong/article/1346238/transgender-woman-hong-kong-customs-officers-behaved-animals-during>
"Misunderstood and stateless in Hong Kong: A transgender woman's nightmare." CNN, 5 September 2014. Available at: <http://edition.cnn.com/2014/09/05/world/transgender-asylum-hong-kong/>
"Transgender woman takes Hong Kong police, prison officers to court over all-men detention ordeal." *South China Morning Post*, 14 June 2015. Available at: <http://www.scmp.com/news/hong-kong/law-crime/article/1821259/transgender-woman-takes-hong-kong-police-prison-officers>

account the diverse individual circumstances of transgender people beyond what is indicated by their legal identification.

21. Conversion therapy

- 21.1. In 2011 the Hong Kong Social Work Department (SWD) hosted a training conducted by Dr. Hong Kwai-wah, a therapist with a practice offering conversion therapy in Hong Kong.⁵⁵ Despite strong criticism from the community and legislators, the SWD has dismissed concerns about Dr. Hong being hired to conduct a training program on working with LGBT youth and confirms that there is no policy or guidelines that would prohibit or discourage social workers from referring vulnerable LGBT youth for conversion therapy.⁵⁶ Of additional concern, in 2014 the Government's Equal Opportunities (Sexual Orientation) Funding Scheme—ostensibly a part of the Government's efforts to eliminate discrimination—sponsored projects of the Society for Truth and Light and the Post-Gay Alliance, both organisations associated with Dr. Hong and the promotion of “conversion therapy”.⁵⁷ It is submitted that such therapy is against **Article 16**.

IV. Vulnerable Group: Women – domestic and sexual violence

22. Domestic Violence – Limitations of existing protections for victims of domestic violence

- 22.1. Law reform has broaden the scope of the Domestic Violence Ordinance⁵⁸ to include spouses, former spouses and their children, cohabitants and former cohabitants (including same-sex partners) as well as immediate and extended family members. However, the protection provided is only civil remedies, confined mainly to the granting of injunction orders. A lot more is required to eradicate domestic violence, including reforming the criminal justice system

⁵⁵ See “Hiring of 'gay cure' doctor stirs anger.” *South China Morning Post*, 18 June 2011. Available at: <http://www.scmp.com/article/970899/hiring-gay-cure-doctor-stirs-anger>
Additional materials about the “conversion therapy” training organized by the Social Welfare Department (SWD) available at: <http://wigayleaks.rainbowactionhk.org>

⁵⁶ See webcast of the 12 May 2015 meeting of the Subcommittee on Strategy and Measures to Tackle Domestic Violence and Sexual Violence (in Chinese) available at: <http://webcast.legco.gov.hk/public/en-us/SearchResult?MeetingID=M15040035>
English-dubbed version available at: <https://www.youtube.com/watch?v=v5kLe8sE2DM>

⁵⁷ A full list of sponsored projects for 2014-15 available at: http://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/the_rights_of_the_individuals/past_sponsored_projects/2014-15e.pdf
Sponsored projects for 2015-16 available at: http://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/the_rights_of_the_individuals/equalsdofs_2015-16/Liste.pdf

⁵⁸ Hong Kong Law, Chapter 189.

and providing appropriate social welfare support, so as to fulfill obligations under **Article 2**.

22.2. The Housing Department has the discretion to grant public rental housing to victims of domestic violence, which is however not as of right. In fact, in recent years, the Authorities have turned down many applications that social workers of NGOs regarded as needy. Without a safe place to stay, victims may be forced to put up with domestic violence, which put their safety at risk. There is also a lack of social support for the emotional and psychological needs of the children who witness domestic violence.

22.3. **Domestic violence and LBT victims**

Despite the extension of the then DVO to cover same sex cohabitation relationships, the government has failed to extend resources correspondingly. It has never provided training on gender identity issues nor is there any mention of this group of victims in the manuals of the institutions that would receive such victims. Notably, there is a lack of refuge shelters accepting LBT victims. Many Transgender women who have been placed in the “male section” of a major shelter have complained about mistreatment and consequential impact on their psychological health. In short, LBT victims are offered extremely thin protection against domestic violence.

22.4. **Domestic violence and ethnic minority victims**

Despite the high incidence of domestic violence among ethnic minority (EM) families, there are a disproportionately low number of complaints among this group, revealing a reluctance or inability to effectively engage available resources. Victims suffer from cultural, structural and language barriers in accessing law enforcement, medical and other government services. For example, the use of shelters, counselling and other group therapy are not useful to EM women by EM women is limited because of the lack of accommodation of their dietary needs and other language and cultural barriers. . EM women also often fail to have access to public housing. They are ill-advised of their rights, sometimes misinformed by social workers and the police. They harbour misunderstandings about the impacts of a complaint on their own immigration status and fear of separation from their children. Due to the lack of employment or employability, they have little choice but to buckle under the pressure of financial dependence.

22.5. **Domestic violence and women with disabilities**

22.5.1. Women with disabilities are particularly vulnerable to domestic violence due to their physical, intellectual or cognitive disabilities, which may render them uninformed about their rights. Their circumstances often inhibit their access to available services to seek protection against such violence. Like other vulnerable groups, they may also fear repercussions against complaints, particularly, if the

perpetrator is also the primary carer. Moreover, their high level of dependence on family makes it even harder to detect such cases and unlikely that this group of victims will come forward. There is also a concern regarding existing refuge centres' capacity to cope with the specific needs of this group.

22.6. The Government should take active measures to prevent and protect against domestic violence, and to prosecute and punish perpetrators in accordance with the law, by means including public education, reform of laws to provide appropriate remedies to ensure effective protection against recurring violence, provision of resources to provide for housing, medical and other social welfare needs of survivors and their families, and appropriate punishment to deter such conduct.

22.7. **Recommendations**

We ask the Committee to make the following recommendations to the Government:

22.7.1. Set up a domestic violence court to handle all criminal and civil cases involving allegations of domestic violence, including breaches of injunction orders. The criteria used to categorize various cases of violence and disputes should be made transparent. A no-drop prosecution policy should be built into the existing prosecution mechanism for domestic violence cases to enable the case to continue without the victim's cooperation provided that there is admissible evidence sufficient to justify instituting or continuing proceedings, and that the general public interest requires that the prosecution be conducted. (This is also of vital importance for migrant domestic workers because their complaints are often abandoned because they have to leave Hong Kong due to the two-week rule, or are threatened by their employers. See Part 25.4 for detailed discussion.

22.7.2. Provide additional resources to render available housing and counselling services to all survivors of domestic violence and children who have witnessed domestic violence, in a manner that is accessible to them, with interpretation and accompanying medical services where necessary.

22.7.3. Revise the policies, extend resources and provide training to law enforcement officers and social service agencies, including government-subsidized NGOs, and to raise their awareness to protect all victims of domestic violence, including LBT and EM victims and women with disabilities more effectively, and to ensure all refuge centres are LBT, EM and disability friendly.

23. **Sexual Violence**

23.1. **Sexual violence against female protestors during public demonstrations**

There are a number of sexual violence complaints by female protestors or witnesses to such crimes. During the Umbrella Movement, numerous female protestors were sexually assaulted

and threatened by counter-protest thugs. The situation was perhaps at the worst on 3 October 2014, on which women's and gender NGOs received many requests for assistance in which victims were verbally abused by counter-protest thugs, such as "if you come out to demonstrate, you should expect to be groped!" and "you have big boobs so why not let us fondle them!"; some were even directly indecently assaulted.⁵⁹ According to a statement by Amnesty International, who had first-hand witness accounts of women being physically attacked and threatened, while police stood by and did nothing, one woman at the demonstration in Mong Kok (one of the sites of Umbrella Movement) said a man grabbed her breasts while she had been standing with other protesters at around 4pm. She also witnessed the same man assault two other women by touching their groins. Several police officers witnessed this but failed to take any action against the man.⁶⁰ It seems that the thugs were organised in targeting female protesters in order to intimidate them from participating in the demonstration. In fact, on that day counter-protest thugs initiated seemingly concerted attacks against two Umbrella Movement protest sites (Mong Kok and Causeway Bay). Despite the scale and involvement of violence in the confrontations, only a small amount of police was deployed to the areas. They only formed a thin human-chain to separate the two camps, and told people to stay calm, without using pepper spray or other weapons, a dramatic contrast to its heavy means employed against relatively peaceful protesters on 28 September 2014. Some reports even show that the police released alleged assailants,⁶¹ some of which returned and assaulted protesters again.⁶² These raised strong suspicions that the police acquiesced or condoned the attacks in order to disperse the public gatherings⁶³ or to punish protesters⁶⁴.

⁵⁹ Association for the Advancement of Feminism (representing a number of NGOs) "Against Sexual Violence Insist on Peaceful Resistance" In-Media (Hong Kong) 3 October 2014, available at <http://www.inmediahk.net/node/1026811>

⁶⁰ Amnesty International, "Hong Kong: Women and girls attacked as police fail to protect peaceful protesters" 3 October 2014, available at <https://www.amnesty.org/en/latest/news/2014/10/hong-kong-women-and-girls-attacked-police-fail-protect-peaceful-protesters/>

For further examples, see "Police not taking female protesters' complaints of sexual assault seriously" Apple Daily (Hong Kong) 5 October 2014, available at <http://hk.apple.nextmedia.com/news/art/20141005/18889896>; "Medical volunteer in Mong Kok says counter-protest people indecently assaulted female student" In-Media (Hong Kong) 4 October 2014, available at <http://www.inmediahk.net/node/1026818>

⁶¹ For example, a journalist witnessed when a gang of masked thugs entered the protest site in Causeway Bay and beat protesters up, police officers there only formed a human-chain to separate the camps, which was so loose that the thugs passed through at least 4 times to chase and beat up protesters. He also witnessed that some inspectors not only did not arrest the thugs, but said appeasing words to them. The thugs finally left without resistance from the police – "Police appeasing gangsters, more surreal than movie plot" Apple Daily (Hong Kong) 5 October 2014, available at <http://hk.apple.nextmedia.com/news/art/20141005/18890010>

⁶² "Police escorts assailant away from scene" Apple Daily (Hong Kong) 5 October 2014, available at <http://hk.apple.nextmedia.com/news/art/20141005/18890066>

⁶³ "Police and thugs in cooperation? 3 supporting evidences disclosed" Apple Daily (Hong Kong) 4 October 2014, available at <http://hk.apple.nextmedia.com/realtime/news/20141004/52979567>

Overall, only a handful of cases of sexual violence of the entire Umbrella Movement were taken up by the police and resulted in prosecution. The police refused victims' or witnesses' requests to take action and allowed the perpetrator to leave. For example, in one of the Umbrella Movement protest sites (Causeway Bay), a male having crawled between the legs of a group of protesters including female protesters, touching their legs, was escorted away by police officers but released blocks away. According to a press conference the said male hosted, he was not arrested or charged.⁶⁵ Women's right to participate in social movements are threatened by violence condoned by police. These are in violations of obligations under **Articles 1, 2 and 16**.

23.2. **Police's lack of gender sensitivity and perpetration of sexual violence**

The police are accused of being gender-blind when handling female protesters, or even intentionally inflicting sexual violence. For example, in 2013 a male police officer "bear-hugged" a female student from behind, touching her breasts in the process while a woman officer stood nearby, in an action of stopping her from protesting against the Chief Executive.⁶⁶ However, the IPCC has just announced cessation of pursuing on a complaint of this case, claiming that the victim has failed to respond to their inquiries.⁶⁷ The police have also pushed and hit female protesters at their breasts.⁶⁸ It was even reported that in a conflict between protesters and three police officers, the police officers said with threat "shut up or we will bring you back to a police station to rape you".⁶⁹ Yet, there's no official response or disciplinary action against the police for any alleged sexual violence during regulating public demonstrations. These are violations of **Articles 10, 11, 12 and 16**.

⁶⁴ Wall Street Journal reports that "[w]hen news that protesters were being attacked in Mong Kok emerged, ... the mood among many officers [the interviewee (a police officer)] spoke with was celebratory, with police sharing pictures of one bloodied protester and laughing." ' "It's not that we don't want to help you," the police officer said, describing the kinds of replies he heard. "We'll help you, but we'll let the mob fight you for a while" first, he said.' – Te-Ping Chen, Lorraine Luk and Prudence Ho "Hong Kong Police's Reputation as 'Asia's Finest' Hurt After Tear Gas Use" Wall Street Journal 4 October 2014, available at <http://www.wsj.com/articles/hong-kong-polices-use-of-tear-gas-during-protests-hurts-reputation-of-asias-finest-1412398431>

⁶⁵ Video of the incident (start from 6'50", the man in purple shirt), available at <http://www.houruinan.com/12-V0cxZ2s0QllGWW8.html>

⁶⁶ Ng Kang-chung and Jolie Ho "Students accuse police of abusing power at universal suffrage protest" South China Morning Post (Hong Kong) 30 May 2013, available at <http://www.scmp.com/news/hong-kong/article/1249764/student-protesters-file-complaint-against-police-use-force>

⁶⁷ "IPCC: Complaint against 'bear hug' cop can't be pursued" Hong Kong Economic Journal 23 October 2015, available at <http://www.ejinsight.com/20151023-ipcc-complaint-against-bear-hug-cop-cant-be-pursued/>

⁶⁸ See videos of 2 cases for examples: police pushed, if not indecently assaulted, the breast of a woman protester (at 01'00"): <http://cablev.i-cable.com/video/?id=213300&lang=>

⁶⁹ "Witness testifies that the police threatened a girl a saying "shut up or we will bring you back to a police station to rape you" Apple Daily (Hong Kong) 1 December 2015, available at <http://hk.apple.nextmedia.com/realtime/news/20141201/53184058>

23.3. **Victim blaming and discouragement of self-protection and reporting of sexual violence**

Besides not combatting sexual violence, officials have been discouraging self-protection and retaliating against reporting of crimes of sexual violence by blaming the victims and even punishing victims for seeking help. In 2013, the Secretary of Security said that part of the rape cases happened after the victims have consumed too much alcohol, therefore young women should not drink too much, implying that rape victims are responsible for their ordeal. In 2015, a small-built female protester shouted “indecent assault!” amid a scuffle with the police; however, she was later arrested for assaulting a male police officer by bumping her chest against his arm. The officer sustained no injury from the “attack”,⁷⁰ while the female protester was pushed to the ground by police officers and was bleeding prominently over her face, a scene clearly caught on a DBC news video.⁷¹ Although the physical contact was clearly established, the magistrate chastised the female protester by saying “You used your female identity to trump up the allegation that the officer had molested you. This is a malicious act,” adding that it had caused great harm to the officer’s reputation.⁷² The arrest, prosecution, and conviction of the female protester are criticised for further discouraging victims of sexual violence to report crimes of sexual violence. These acts of victim blaming and possibly retaliating against female protesters who allege indecent assault raise serious concern of whether the police and the magistrate involved can handle cases of sexual violence without bias (especially those involving a police officer as the alleged perpetrator), or would blame the victim instead of bringing the wrong-doers to justice; concerns are also raised that victims face undue pressure in the criminal process, deterring them from reporting the crime to the police or from identifying suspects. These are violations of **Articles 10, 11, 12 and 16.**

23.4. **Recommendations**

We ask the Committee to make the following recommendations to the Government:

- 23.4.1. The IPCC and CAPO must adopt a no-drop investigation policy when investigating complaints of police officers sexually assaulting

⁷⁰ Chris Lau, “‘He touched me’: Woman protester counters Hong Kong policeman’s claim she ‘attacked’ him with her breast” South China Morning Post (Hong Kong) 3 July 2015, available at <http://www.scmp.com/news/hong-kong/law-crime/article/1831774/protester-accused-assault-claims-hong-kong-police-officer>; “Hong Kong police officer says protester assaulted him with her breast” South China Morning Post (Hong Kong) 30 June 2015, available at <http://www.scmp.com/news/hong-kong/law-crime/article/1829253/hong-kong-police-officer-say-protester-assaulted-him-her>

⁷¹ Video of the incident, 1 March 2015: <https://www.youtube.com/watch?v=X9xWwltW6Y8>

⁷² Thomas Chan, “Hong Kong protester convicted of assaulting police officer with her breast” South China Morning Post (Hong Kong) 17 July 2015, available at <http://www.scmp.com/news/hong-kong/law-crime/article/1840630/hong-kong-protester-convicted-assaulting-police-officer-her>

citizens to enable the case to continue without the victim's cooperation provided that there is admissible evidence sufficient to justify instituting or continuing proceedings, and that the general public interest requires that the investigation be conducted.

- 23.4.2. To conduct a thorough, independent and transparent inquiry to account for the allegedly condoning of thug attacks on protesters that happened on 3 October 2014.
- 23.4.3. To reinforce the non-retaliation principle for complainants (victims or third-parties) of sexual violence, especially when the alleged perpetrator is in a law enforcement agency.
- 23.4.4. To set up a one-stop rape crisis and support centre in the hospital in accordance with the WHO's guidelines to offer all-rounded services to the victims to meet their physical, emotional, legal and other needs. The Centre can offer necessary medical treatment, allow the victims to complete legal procedures and provide counseling to assist them after the tragedy.

V. Vulnerable Groups: Refugees or non-refoulement claimants in Hong Kong, Migrant Domestic Workers, Victims of Human Trafficking and Forced Labour

24. Refugees or non-refoulement claimants in Hong Kong

24.1. Seek extension of the 1951 Refugee Convention to Hong Kong

Several treaty bodies have recommended that HKSAR seek extension of the 1951 Refugee Convention, including CAT in its previous concluding observations (CAT/C/HKG/CO/4 para 7). However the HKSAR Government has claimed that doing so will subject its immigration regime to abuses and thus undermine public interest, a claim that begs evidential support.

24.2. Issues related to the new Unified Screening Mechanism ("USM")

24.2.1. The USM was introduced by the HKSAR ImmD on 3 March 2014 to assess "non-refoulement" claims "in one go" on the three grounds of i) torture under Part VIIC of the Immigration Ordinance;⁷³ ii) torture or cruel, inhuman or degrading treatment or punishment (CIDTP) under Article 3 of Section 8 of the Hong Kong Bill of Rights Ordinance;⁷⁴ and iii) persecution with reference to the non-refoulement principle under Article 33 of the 1951 Convention relating to the Status of Refugees. As a result, the UNHCR Sub-office in Hong Kong has been phasing out its refugee status determination (RSD) in Hong Kong.

24.2.2. The HKSAR Government was compelled to implement the USM after the HKSAR Court of Final Appeal ("CFA") issued 2 judgments

⁷³ Laws of Hong Kong, Chapter 115.

⁷⁴ *Ibid.*, Chapter 383.

which respectively required that (a) the HKSAR was bound to assess risk of CIDTP pursuant to Article 3 of the Hong Kong Bill of Rights Ordinance where such was claimed prior to exercising powers of removal of a person to the impugned country; and (b) in accordance with the high standards of fairness, the HKSAR must independently assess persecution risk (and could not simply rely on the refugee status determination by UNHCR) prior to exercising removal powers.⁷⁵ The reactive approach of the Government and repeated failures to put in place a comprehensive and fair screening mechanism continue to create misery for claimants. The approach also has resulted in delays in assessments and rising numbers of claimants as claimants have the right to be re-screened under the new USM system, which, despite the repeated criticisms by experts including the various UN treaty bodies over the years, is used by the Government to demonize the claimants and justify further restrictive and draconian policies.⁷⁶ It is strongly doubted that the authorities genuinely wish to improve the government protection mechanism, as they only take care of the 'bare minimum' in terms of human rights standards.⁷⁷

24.2.3. Unreasonable time constraints to make submissions: Under the screening mechanism, contrary to the recommendations of the legal professional bodies and NGO's, claimants have unreasonable time constraints to make their submissions (to find legal assistance, complete the questionnaire, and produce all evidentiary documents to support their claim, such as identity cards, medical reports or certificates.) If a rejected claimant wishes to file an appeal, they have 14 days from when the decision was issued.) This timeframe is overly restrictive. Claimants require more time to secure legal assistance and interpretation; many claimants — having been forced to leave their countries in a hurried fashion — may not necessarily have all their documents on-hand upon arrival to Hong Kong; some claimants may even be suffering from trauma and stress related to their experience in their countries of origin, as well as their situation upon arrival to Hong Kong. According to the Administration, the deadline may be extended if claimants were to have legitimate grounds, but what constitute "legitimate grounds" is uncertain. In spite of the present unfairness the Government are presently proposing to further "fast track" the process by no longer providing the full set of documents held by the ImmD (only some selected by

⁷⁵ *Ubamaka v Secretary for Security* (FACV 15/2011), (2012) 15 HKCFAR 743; and *C v Director of Immigration & United Nations High Commissioner for Refugees (Intervener)* (2013) 16 HKCFAR 280.

⁷⁶ See the criticisms of the Law Society and the Bar Association set out in Mark Daly, "Refugee and Non-Refoulement Law in Hong Kong: The Introduction of the Unified Screening Mechanism" *Hong Kong Lawyer*, October 2014.

⁷⁷ Justice Centre Hong Kong, *Meeting the Bare Minimum: Hong Kong's New Screening Process for Protection. A stocktake of the first months of implementation of the Unified Screening Mechanism for Non-refoulement Claims*, May 2014, available at <http://www.justicecentre.org.hk/framework/uploads/2014/03/USM-Briefing-Meeting-the-Bare-Minimum-HK-New-Screening-Process-for-Protection.pdf>

the immigration officer) to the claimant and the lawyer, by prearranging interviews (even before submission are completed) — moves that are opposed by the legal profession.

24.2.4. **Extremely low successful rate:** According to Government’s data, recognition rate of claims has remained lower than 1%.⁷⁸ The extremely low successful rate of claim is a huge contrast to that of other well-developed jurisdictions,⁷⁹ and raises serious questions about the fairness of the process. The extremely low recognition rate not only begs the question of whether the system is overly rigid with the aim of dismissing claims rather than to offer protection to the genuine claimants, but also casts doubt on the quality of decision-making and their use of COI. In one case Director of Immigration decision-maker stated that because in Pakistan there are churches, then a claimant would not be at risk of persecution due to conversion to Christianity.⁸⁰ In another case, the Adjudicator’s reasons for decision on rejection got the name of the country wrong. Also, rejections of claimants from countries like Yemen, Central African Republic and Somalia, with high recognition rates in other countries, also raise concern with respect to the quality of the decision-making.

24.2.5. **Government’s biased media strategy against refugees:** The HKSAR authorities continue to use cases and data proactively in the media as proof that refugees are abusers fostering an anti-foreigner climate that seems to permeate the decision-making process. In a Government discussion paper for the Legislative Council (7 July 2015) Security Bureau refer to “foreigners who smuggled themselves into Hong Kong” “overstayers” and collectively as “illegal immigrants”. Recent media reports after “briefings” by Immigration officials blame asylum-seekers for delays saying that their requests

⁷⁸ Since the commencement of the USM, 2237 claims have been determined, of which only 12 cases were substantiated, including 2 from appeal.

⁷⁹ Although the UNHCR did not publish statistics on acceptance rates in Hong Kong, when its sub-office conducted RSD, the number oscillated around 10% in the experience of an NGO which specialises on assisting protection claimants in Hong Kong (Justice Centre). UNHCR’s global recognition rate in 2011 was 83%. To give an example of acceptance rates in other countries, the average EU acceptance rate for protection was about 19% in 2013, although with high variations among the member states. US asylum acceptance rates in 2011 were 66%, 45% in Canada, 33% in the UK and 28% in Germany. See: Eurostat, “Final decisions on (non-EU) asylum applications, 2013 (number, rounded figures)”, available at [ec.europa.eu/eurostat/statistics-explained/index.php/File:Final_decisions_on_\(non-EU\)_asylum_applications,_2013_\(number,_rounded_figures\)_YB15_II.png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Final_decisions_on_(non-EU)_asylum_applications,_2013_(number,_rounded_figures)_YB15_II.png); Kagan, Michael, “UNHCR leads major asylum systems with 83 percent recognition rate in 2011”, 17 December 2012, available at rsdwatch.wordpress.com/2012/12/17/unhcr-leads-major-rsd-systems-with-83-percent-recognition-rate-in-2011/

⁸⁰ “928 non-refoulement claims in July and August, some people falsely claim religious persecution”, Oriental Daily (Hong Kong) 13 October 2015, available at http://www.on.cc/hk/bkn/cnt/news/20151013/bkn-20151013183916534-1013_00822_001.html; the interview in which the Director made the statement can be found at <http://www.dbc.hk/radio1/programme-archive/ld/21504>

for medical evidence including mental health assessments are further attempts to abuse and game the system. Yet, there are numerous cases where the claimants have been promised access to a medical evaluation by the Government only to have it delayed by one year or more without explanation. In other cases, claimants have been waiting for interviews for over one year and the Immigration officers have simply not arranged it. In addition, the training and qualifications of the health professionals is not provided to the lawyers to confirm that they have, at least, been trained in the use of the Istanbul Protocol. Furthermore, the trigger for a claimant who wishes to obtain medical evidence is firmly in the hands of the Immigration officer who decides if it is necessary as opposed to the claimant and her lawyer.

- 24.2.6. **No published decisions:** As for rejected claimants who wish to appeal, they and their lawyers have no access to previous decisions of the Torture Claims Appeal Board (TCAB)/Adjudicators despite repeated requests from lawyers, professional bodies and NGO's. While written decisions are provided to individual protection claimants under the USM at both the first instance and the appeal stage, none of these decisions are publicly available in a redacted format. The Law Society and Bar Association of Hong Kong have noted that this is not fair to appellants when the Director of Immigration, as the respondent in all appeal cases, would necessarily have access to all prior appellate decisions.⁸¹ Furthermore, published decisions (with necessary redactions to protect the claimant's identity) help ensure consistency and accountability in decision-making, transparency in the decision-making process and enable claimants (and their legal representatives) to more effectively prepare their case.
- 24.2.7. It is believed that as the frontline case workers who work closely with protection claimants, the legal profession, the UNHCR, civil society and other concerned stakeholders have an important role in monitoring and making suggestions to enhance the USM.
- 24.2.8. **Torture claims only accepted when at risk of being removed from HK:** Under the current law, the ImmD would only accept a person's torture claim when he/she is at risk of being removed from Hong Kong, i.e. has overstayed their visa, or must have entered Hong Kong without valid visa. Either scenario is undesirable and counter-intuitive. During the period pending overstay, protection

⁸¹ Joint Letter by the Law Society and Bar Association of Hong Kong to the Secretary of Security, 2 May 2014, at para. 21, available at [http://www.hkba.org/whatsnew/misc/Unified%20Screening%20Mechanism%20of%20Non-refoulment%20Claims%20%20Joint%20leter%20dd%202%20May%202014%20to%20Security%20Bureau%20..\(webpage\).pdf](http://www.hkba.org/whatsnew/misc/Unified%20Screening%20Mechanism%20of%20Non-refoulment%20Claims%20%20Joint%20leter%20dd%202%20May%202014%20to%20Security%20Bureau%20..(webpage).pdf)

claimants receive no assistance from the Government and can fall into destitution. More worrying so, a study of Government's media strategy suggests that the Government has proactively changed its discourse of refugees after the European Refugee Crisis to start calling refugees "illegal immigrants", even though they indeed have no choice but to overstay in order to file protection.⁸² They also refer to them in the public mostly in the context of crime and abuse,⁸³ making the public think that protection claimants are law-breakers, and opportunists who come to exploit Hong Kong's system.

24.2.9. **Vulnerable protection claimants:** While some protection claimants are vulnerable and require special care, it is unclear to what extent the ImmD relies on protection claimants to self-identify that they have special needs in the claim form. The full criteria used as a basis for determining whether people have "special needs" and grounds for prioritisation, and how ImmD officers are trained to handle claimants with "due care" all need further clarification. In the past, the UNHCR sub-office in Hong Kong offered social worker who acted as a focal point for this group and liaised with NGOs and other service providers who identified vulnerable people to contact. The UNHCR also employed accelerated RSD processing procedures. It is uncertain whether the USM also has in place such accelerated procedures for vulnerable claimants.

24.2.10. **No right to work but insufficient subsidies:** Protection claimants are not allowed to work or to volunteer in Hong Kong, whether after their claims are determined as meritorious or even substantiated. While the Director of Immigration has the discretion to grant work permit, it is rarely granted.⁸⁴ While they are in Hong Kong, they can only rely on the subsidies provided by the Government, which place the recipients below the poverty line set by the Hong Kong Government, and on whatever resources they have brought with

⁸² For example, in press conferences by the Immigration Department on 7 August and 30 August 2015: Oriental Daily, "Only 36 successful non-refoulement claimants", 26 August 2015, available at http://www.on.cc/hk/bkn/cnt/news/20150826/bkn-20150826162926122-0826_00822_001.html (in Chinese); Oriental Daily, "Many are abusing the USM, and number of 'refugees' in Hong Kong exceeds ten thousand", 7 August 2015, available at http://hk.on.cc/hk/bkn/cnt/news/20150807/bkn-20150807033026594-0807_00822_001.html (in Chinese); Commercial Daily, "A backlog of more than ten thousand pending non-refoulement claims strains Hong Kong's resources", 7 August 2015, available at http://www.hkcd.com.hk/content/2015-08/07/content_3478138.htm (in Chinese)

⁸³ See for example "Director of Immigration: Most protection claimants aren't real refugees" The Sun (Hong Kong) 21 September 2015, available at <https://hk.news.yahoo.com/入境處長-聲請多非真難民-224024233.html>, in which the Director of Immigration said some protection claimants only file their claims when they have been caught working without permit, as an exploitation of the system. While stressing on the instances and likelihood of abuses of the protection scheme, he fails to acknowledge genuine claimants who are in dire need of protection, and make an impression to the public that protection claimants are opportunists.

⁸⁴ From 30 November 2014 to 31 July 2015, only 2 applications for permission to work from substantiated torture claimants and mandated refugees have been granted.

them when they left their country of origin. The failure of providing adequate subsidy or the permission to earn income force protection claimants into destitution, tantamount to cruel, inhuman and degrading treatment or punishment, inconsistent with **Article 16**.

24.2.11. **Lack of arrangement for successful claimants:** Even after having passed the hurdles of non-refoulement claim procedure, it is uncertain what would happen next to a successful claimant. Aside from indicating that persons who establish persecution risk may be referred to the UNHCR for consideration under its mandate and possible resettlement, there is no further publicly available information as to any agreement and/or procedures on referral to UNHCR. For instance, some claimants who have established persecution risk under the USM may have previously been rejected on their refugee status determination with the UNHCR. What then becomes of such persons? In regard to persons who successfully establish their claim on other grounds (torture, CIDTP) – the government has alluded that they will be able to be resettled to a third country, but has provided no details about how.⁸⁵ There is no information about how this will happen in practice and which countries, if any, the government has been in negotiations with. It seems that they will not be properly relocated outside Hong Kong but stranded in the territory for an indeterminate number of years. The adults among them will be barred from work (and even volunteering) and with hurdles to vocational training. Those law abiding ones will soon find themselves compelled to live on government assistance and unable to participate in the local community. They will then have to choose between continuing to lead an outcast destitute meaningless life with no prospect in Hong Kong, or be forced to return to their home country to face possible torture or CIDTP there. Thus, while the Government may argue that it does not practise refoulement, it in effect imposes constructive refoulement on those who have little choice but to leave Hong Kong with their children and family to face dangers back home.

24.3. **Recommendations:**

24.3.1. We ask the Committee to urge the HKSAR Government to implement the recommendations to extend the 1951 Refugee Convention and the 1967 protocol to the HKSAR.

24.3.2. We ask the Committee to inquire on the Government's progress of adopting by way of legislation enhancements to the USM that the Bar Association, Law Society and other NGOs have raised a lot of concerns about.

24.3.3. We urge the Committee to require the Government to develop regularly updated, disaggregated and publically accessible statistical

⁸⁵ See discussion at the LegCo Panel on Security, Agenda Item II. Screening of Non-refoulement Claims, 2 July 2013.

data on the applications made under the USM and decisions by the ImmD; and the TCAB/Adjudicators to publish suitably redacted decisions.

- 24.3.4. We urge the Committee to ask the Government to improve the training of those involved in the process, with particular attention to the decision-makers, to ensure, inter alia, better access to and understanding and of country of origin information, so as not to unreasonably reject claims.
- 24.3.5. We urge the Committee to require the Government to remove the rule that that a person seeking non-refoulement protection must first overstay their visa be liable to removal, and to desist from public media campaigns to label refugees as illegal immigrants and refer to them in the public only in the context of crime and abuse.
- 24.3.6. We ask the Committee to require the Government to extend the timeframe for providing the questionnaire and supporting documents, as well as the timeframe for lodging an appeal. The Government should also allow claimants to properly substantiate their claims with adequate time periods and the independent ability to obtain medical evidence to support their claims.
- 24.3.7. The Government should allow successful and long term claimants to work so that they and their families, particularly children, do not fall into destitution and CIDTP.
- 24.3.8. We ask the Committee to inquire whether there is any effective resettlement mechanism for claimants whose claim under the USM has been substantiated; if not, require the Government to implement one.

25. Violence and abuses against migrant domestic workers

- 25.1. In Hong Kong, there are more than 300,000 migrant domestic workers (“MDWs”)⁸⁶ from the Philippines, Indonesia, Thailand, etc. As shown in recent high-profile cases of exploitations of MDWs in Hong Kong,⁸⁷ they are very vulnerable to human rights violations.

⁸⁶ The HKSAR Government prefers to call them “Foreign Domestic Helpers” (“FDHs”).

⁸⁷ For example, in January 2014, Erwiana Sulistyaningsih, an 23-year-old Indonesian domestic worker was found to be in a critical condition, which she alleged to be caused by physical abuse by her employer for months. The employer was convicted of 18 charges, including 8 charges of assaulting and criminally intimidating Erwiana and another Indonesian maid, Tutik Lestari Ningsih. The trial judge (Woodcock) said that this type of abusive conduct could be prevented if domestic helpers were not forced to live with their employers. (see South China Morning Post “Topics: Erwiana Sulistyaningsih, available at <http://www.scmp.com/topics/erwiana-sulistyaningsih>). In 2013, it came to light that Kartika Puspitasari, a 30-year-old Indonesian domestic worker had been tortured by her employers for 2 years; the employers (a couple) were convicted of wounding the victim with a bicycle chain, fists, hot irons, a paper cutter, a hanger and a shoe, and were sentenced to 3 years and 3 months, and 5.5 years in prison respectively. (see Julie Chu and Thomas Chan, Hong Kong couple jailed for 'torturing' Indonesian domestic helper, South China Morning Post (Hong Kong), 18 September 2013). In another case, an Indonesian domestic worker claimed to have been repeatedly raped by the father of her employer in 2013, and had become pregnant as a result, filed criminal complaint against the man; the prosecution prosecuted the man, but later ceased pursuing the case because the victim could not be contacted (Case number: HCCC409/14); A scholar has conducted a research project, and had documented 300 cases concerning domestic-helper abuse over a 4-year period. One of the case concerns a domestic worker abused by her employer, a couple where the male is a police officer. The

Their situation is sometimes even described as “modern slavery”, exemplifying violations of **Articles 1, 2 and 16**. Here are some factors that are believed to contribute to their misery:

- 25.2. **Debt-bondage contract:** For instance, Indonesian MDWs are commonly forced into modern slavery in HK by Indonesian recruitment agencies and HK placement agencies by paying excessive agency fees under conditions of debt bondage (often with loan and financing agreements between MDWs and finance companies signed in Hong Kong), confiscating documents and restriction of movement (as exemplified in Kartika and Erwiana’s cases⁸⁸). Indonesian MDWs normally pay agency fees as high as US\$2710 over a seven month deduction period.⁸⁹ The high proportion of deductions leaves them practically empty-handed in the first seven months of their employment.
- 25.3. **Mandatory live-in arrangement:** It is mandatory that MDWs live with their employer, which increases risk of physical and sexual abuse, lack of privacy and overly long working hours. A survey results from more than 3000 female MDWs in Hong Kong who have worked and lived with their employers 24 hours a day shows that 58% of them have experienced verbal abuse, 18% have experienced physical abuse, and 6% sexual abuse. The statistics could have understated the situation, because of the respondents’ lack of awareness of what constitute abuses.⁹⁰
- 25.4. **Two-Week Rule:**
- 25.4.1. While a MDW may find it forbidding to file a complaint against the employer or agency during the employment period, doing so after the contract is over may be difficult as well. It is because when a MDW’s contract expires (or even prematurely terminated), he or she is normally only allowed to stay in Hong Kong for two weeks. Even though there are rooms for the Immigration to exercise discretion under certain exceptions, the Two-Week Rule discourages MDWs from insisting on their own rights and from seeking for justice on

worker fled and filed a well-evidenced and compelling criminal complaint against the policeman and then sought refuge in one of the city’s charity-run shelters for abused domestic helpers. However, her female employer turned up at the shelter and threatened her, forcing her to leave Hong Kong immediately without pursuing the case. (see Shocking extent of maid abuse in Hong Kong laid bare, South China Morning Post (Hong Kong), 1 March 2014; research project conducted by Professor Hans Ladegaard).

⁸⁸ See above.

⁸⁹ Amnesty International, Submission to the Legislative Council’s Panel on Manpower – ‘Policies Relating To Foreign Domestic Helpers And Regulation Of Employment Agencies’ (Hong Kong) 2014, available at <http://www.legco.gov.hk/yr13-14/english/panels/mp/papers/mp0227cb2-870-3-e.pdf>

⁹⁰ Mission for Migrant Workers Limited, “Live-in Policy increases female FDW’s vulnerability to various types of abuse” April 2013 (Hong Kong), p11-12

human and labour rights abuses cases for fear of being forced to leave Hong Kong and having to find another employer from afar and face another round of agency rip-off. ImmD refuses to process visa application of MDWs who are considered as “premature termination of contract”.

- 25.4.2. In fact, International labour bodies and various treaty bodies have called for the abolition of HK’s Two-Week Rule for over a decade. In 2006, the UN Committee on the Elimination of Discrimination against Women claimed the rule pushes helpers “to accept employment which may have unfair or abusive terms and conditions in order to stay in Hong Kong”.⁹¹ In 2013, the UN Committee on Economic, Social and Cultural Rights recommended Hong Kong to “[t]ake immediate action to repeal the Two-Week Rule and the live-in requirement and eliminate conditions that render migrant domestic workers vulnerable to compulsory labour and sexual assault.”⁹² The UN Human Rights Committee⁹³ and the UN Committee on the Elimination of Racial Discrimination⁹⁴ have also called for its repeal.
- 25.4.3. Even when MDWs are allowed to stay while making claims of labour and other rights, they could only stay as visitors, are not allowed to work, and have to pay huge sums if they need public medical services. They also need to pay for visa renewal. Moreover, during the stay for making claims, they no longer receive free accommodation from the employer and have to live on their own savings. Only some receive free accommodation in shelter homes.
- 25.5. The mechanism unfriendly for pursuing remedies for rights violations, and the lack of rights education and protection further marginalise this vulnerable group, exposing them to the dire situation of forced labour. Under the pressure to repay the debt, they have little bargaining power in work and working condition; when they face abuses such as being required to work for long indeterminate working hours, enjoying no or reduced rest days and inadequate accommodation, having their first 7 months’ salaries eaten up as various fees to the agencies designated by the authorities in home country, and facing of or fearing physical, verbal and sexual abuses, they often do not dare to seek help. While Government made a lot of promises on improving protections for MDWs following Erwiana’s case but follow up has been small, and focused just on awareness-raising rather than considering changing laws or policies.

⁹¹ Concluding comments of the Committee on the Elimination of Discrimination against Women 25 August 2006 (CEDAW/C/CHN/CO/6), para 42.

⁹² Committee on Economic, Social and Cultural Rights “Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China”, 13 June 2014 (E/C.12/CHN/CO/2), para 43.

⁹³ In Human Rights Committee, “Concluding observations on the third periodic report of Hong Kong, China, adopted by the Committee at its 107th session (11 – 28 March 2013)” 29 April 2013 (CCPR/C/CHN-HKG/CO/3), para 21.

⁹⁴ Committee on the Elimination of Racial Discrimination, “Concluding observations of the Committee on the Elimination of Racial Discrimination – CHINA (including Hong Kong and Macau Special Administrative Regions)”, 15 September 2009, para 30.

25.6. **Recommendations:**

- 25.6.1. We urge the Committee to reaffirm the need to abolish the Two-Week Rule to prevent torture or cruel, inhuman and degrading treatment of MDWs.
- 25.6.2. We urge the Committee to reaffirm the need to allow live-out arrangements subject to employment negotiation between the parties to prevent torture or cruel, inhuman and degrading treatment of MDWs.
- 25.6.3. The Government should legislate for MDWs' protections, instead of only relying on rights awareness education.
- 25.6.4. We ask the Committee to urge the HKSAR Government to introduce legislation to tighten regulations of agencies and finance companies and banks, including criminalising local, foreign and cross border loans or other financial arrangements for or related to any debt bondage or similar agreement, and to negotiate agreements with sending countries to regulate employment agencies and finance companies and banks, to open up the agency market, to remove the mandatory requirements for MDWs to go through agencies for jobs (especially for renewal of contracts), to ban excessive fees of all descriptions charged by agencies, and to prevent and detect all kinds of conflict of interests of any official and corruption in the sending and receiving jurisdictions.
- 25.6.5. The law should be amended to require Hong Kong recruitment agencies to ensure with continuing due diligence, including verifying with arriving MDWs, that they only receive MDWs from foreign agencies which have not overcharged such MDWs, failing which should face severe punishment. The Government should investigate and punish recruitment agencies, which charge excessive fees from MDWs in Hong Kong or collaborate with foreign agencies in overcharging MDWs.
- 25.6.6. We urge the Government to educate the MDWs, their employers and employment agencies on each of their rights and obligations. We urge the Government to oblige employers of MDW to attend an educational session on MDW rights as a precondition to hiring an MDW. The Government should require all new and renewed MDWs to attend free and mandatory training camps on contents of their contracts, their employment and other rights and channels of complaints, and to establish and strengthen their support networks with other MDWs, trade unions and other support groups. MDWs should be required to attend regular compulsory interviews to check if they have been properly treated in accordance with their contract and to identify any abuses against them by any parties, especially the employers. When there is a need, follow up support services should be provided or referred to the MDWs concerned. Adequate funding should be provided to NGOs to provide such training, interviews and follow up support services.

25.6.7. Also, the EOC should be more proactive in community capacity building, policy advocacy and conducting formal investigations into policies that violate the rights of MDWs and other new immigrants.

26. Human trafficking and forced labour

26.1. The Government denies that the HKSAR territory is a source, destination or a transit point for human trafficking. However, there are high-profile cases of exploitation and abuses of migrant domestic workers. There are also reports that some intending MDWs have been brought to Hong Kong under the pretense of an entertainment visa or MDW visa, and find themselves trafficked into prostitution.

26.2. Hong Kong lacks a comprehensive anti-human trafficking law, a national plan of action or even a concerted strategy, and was downgraded to Tier 2 in the US State Department's annual Trafficking in Person's Report.⁹⁵ The lack of policy, proper procedures, and dedicated personnel to handle human trafficking cases and the lack of law on forced labour have opened a dangerous loophole that inadequate protection is offered to victims of human trafficking, especially those for forced labour.

26.3. Hong Kong has no legislation which prohibits "trafficking" as defined in the Palermo Protocol. While there is a provision in the Crimes Ordinance⁹⁶ which prohibits human trafficking⁹⁷ for the purposes of prostitution, it does not prohibit other forms of trafficking and forced labour. The anti-trafficking legislation in Hong Kong is archaic and inadequate. It focuses on movement, which detracts from the fact that the essence of trafficking is exploitation. The legislation fails to protect MDWs trafficked for forced labour or under the false pretences of a domestic worker contract or an entertainment visa, into Hong Kong. It also fails to address the problems of MDWs entering Hong Kong under a de facto debt-bondage contract for indeterminate long working hours under bad working conditions and subject to all forms of exploitations and abuses (see the immediately preceding chapter on MDWs). It fails to comply with international human rights standards set in the Convention, the Palermo Protocol (UN TIP Protocol), CEDAW and other relevant core UN human rights treaties.

26.4. The Department of Justice has amended its Prosecution Code in 2013 to add a new section⁹⁸ on "human exploitation", which "includes activities that demean the value of human life such as sexual exploitation, enforced labour, domestic servitude, debt bondage and organ harvesting." The Code requires prosecutors to handle such cases "with an appropriate level of understanding, skill

⁹⁵ Tier 2 countries "do not fully comply with the minimum standards of the U.S. Trafficking Victims Protection Act but are making significant efforts to do so." See: US State Department, Trafficking in Persons Report 2014, available at www.state.gov/j/tip/rls/tiprpt/

⁹⁶ Laws of Hong Kong, Chapter 200.

⁹⁷ The definition of "trafficking" in the Crimes Ordinance is restricted and akin to smuggling.

⁹⁸ Section 18 Human Trafficking Cases, The *Prosecution Code*, Department of Justice, available at <http://www.doj.gov.hk/eng/public/pubsoppapcon.html#18>

and sensitivity” and reminds them that reference can be made to “applicable international standards and practices concerning human trafficking victims.” However, the Code can only be used to prevent criminal prosecution of victims and bears no deterrence on traffickers/perpetrators. It is uncertain whether the Code has ever been applied. Some ill practices take place in MDWs’ countries of origin. The Hong Kong Government must not turn a blind eye to cross-border exploitation, including human trafficking of domestic workers, which has the effect of condoning exploitation of MDWs that work in Hong Kong for local employers, and allow debt bondage loan agreements to be freely concluded, signed and enforced in Hong Kong or in countries of origin for domestic work in the territory. Cross-border initiatives are necessary to deal with such problems.

26.5. There is an absence of policies or legislation which protect victims of human trafficking.⁹⁹ The Government made repetitive statements that although there are no specific protection regimes for victims of human trafficking, there are general regimes which protect vulnerable persons. Such statements are void of substance. See paragraph 25.4 on the “two-week rule” above.

26.6. **Recommendations:**

26.6.1. We ask the Committee to urge the HKSAR Government to request the Central Government to extend the UN Trafficking Protocol to the HKSAR (ratified by the People’s Republic of China in 2010) and incorporate its provisions into legislation and practice. The enactment should be comprehensive, encompassing forced labour and all other forms of trafficking in accordance with international standards in the Convention, the other core rights treaties and the Palermo Protocol.

26.6.2. We ask the Committee to urge the Government to put into place a legislative regime which confirms the protection of victims of trafficking.

26.6.3. We ask the Committee to urge the Government to criminalize all forms of human trafficking and forced labour, and to forthwith implement policies and provide training to frontline officers in relevant government departments to identify victims of human trafficking.

26.6.4. The Government should also investigate the root causes of trafficking, particularly among certain vulnerable sectors, such as foreign domestic workers, sex workers, and asylum seekers/non-refoulement claimants.

⁹⁹ A judicial review HCAL 15/2015 has been filed by a Pakistani male who worked in Hong Kong for over 3.5 years, during which he was repeatedly beaten and threatened, had his passport confiscated, had no freedom of movement and was not paid any wages whatsoever. When he made complaints to the Immigration Department, the Police and the Labour Department, none of them took any steps to carry out an investigation or offer any guidance for him to seek redress. It is the Applicant’s claim in that case that the Government’s failures were systemic and occurred primarily because of the absence of any legislative framework to prevent human trafficking and forced labour. Leave to Apply for Judicial Review has been granted in that case and the substantive hearing will be held in January 2016.

26.6.5. Inter-governmental task forces should be established, and bilateral agreements with the MDW sending states should be negotiated and concluded, to ensure protective measures for MDWs are legally binding and enforceable on both parties, to eradicate aggressive loan agreements that are de facto debt-bondage contract, to get rid of *exorbitant* charges and fraudulent agencies, and to eradicate all forms of human trafficking, including the modern form of human trafficking of MDWs for forced labour and other abuses.

Appendix I – Wrongful arrest of an autistic man in May 2015 – Victim family’s report

Ordeal of the mistaken arrest and detention of a mentally disabled man (hereafter “the victim”) with autism and mild intellectual disability, in connection with the manslaughter of an elderly man in Mei Lam Estate, Hong Kong.

By Mr. and Mrs. Au, brother and sister-in-law of the victim

1. The police do not follow guidelines nor have sufficient knowledge and/or training to appropriately handle members of the public they come into contact with who have intellectual disabilities or trouble expressing themselves. (**Articles 10 and 11**; CAT/C/CHN-HKG/Q/5 paras 13 and 16). The victim was unaccompanied when he was arrested and interviewed under caution upon arrest, until his mother received a call from the police and went meet him at the police station. In addition to the fact that the victim exhibits obvious autistic and mental disability characteristics, the call by police to his mother asking her to come to the police station, which is not necessary for general adult suspects, was an indication of their recognition of his mental disabilities. Nevertheless, police procedures were conducted when the victim was on his own, in violation of the police’s internal guideline, which stipulates that for a person suspected or known to be an mentally incapacitated person shall be interviewed or have a statement taken from him by police officers in the presence of an appropriate adults (can be a relative, guardian, a social worker, etc., but never a police officer), unless any delay in interviewing such person poses an immediate risk of harm to persons or serious damage to property.¹⁰⁰ This was in spite of the police force receiving the training to identify vulnerable persons with special needs. When the mother of the victim arrived at the police station, she was informed that her son had admitted all those the police stated during the arrest process.
2. The police requested the family member of the victim to co-sign a record of the interrogation that took place at the arrest, despite the fact that none of the family members was there to witness the interrogation. Although the victim’s brother told the police repeatedly that the victim is not capable to have made any of the admissions in the record of interrogation due to his mental disability and autism, and that he was in a home for the disabled when the manslaughter occurred, the police insisted on proceeding, on the basis that the victim had admitted everything. Despite the brother’s protest that the victim could not have understood the record of the interview, the procedures, and his rights, the officer still copied this statement onto the record: “I have read the above statement and I have been told that I can correct, alter or add anything I wish. This statement is true. I have made it

¹⁰⁰ Security Bureau, Hong Kong Police Force “Procedures for Handling Cases Involving Persons with Disabilities or Persons with Special Needs” For information to Legislative Council Panel on Welfare Services meeting on 13 June 2015, June 2015 (Hong Kong) <http://www.legco.gov.hk/yr14-15/english/panels/ws/papers/ws20150613cb2-1695-1-e.pdf>

of my own free will”, only adding that “[the brother of the suspect] said [the suspect] did not understand the content of the statement (the one quoted above), and could not copy it, therefore asked me to copy the statement.” The family finds this action absolutely obscure. The brother, without any appropriate legal advice, co-signed the record nevertheless.

3. While the victim was detained in the police station, the police denied him of his prescribed medication, even though they have searched and seized his drugs, which were in formal package, with clear label of his name, dosage and administration. (**Articles 10 and 11**; CAT/C/CHN-HKG/Q/5, para. 13) In fact, the brother had reminded the police to give the victim his own prescribed drugs. In response, the police said the duty officer would follow up and there was nothing to worry about – an assurance which was not kept. Such a failure cannot be justified.
4. On seizure of the victim’s labelled medication, the police should have realized the victims’ need for mediation. Even without the victim’s own requests, they should have given him his medication in accordance with the descriptions on the label, or medical advice should be sought immediately in accordance with the existing police guidelines.¹⁰¹
5. The extremely long period of detention (>50 hours) can have possible long-term effects on the victim, because his regular daily routine, required due to his autism, was disrupted when he was arrested. The detention experience could cause him serious mental pain. (**Articles 10 and 11**; CAT/C/CHN-HKG/Q/5 paras 13, 16) Apart from medication, the victim was handcuffed from time to time, and the police did not provide him enough water or washroom access. But for a well-trained carer of special needs patients, water and washroom access would be scheduled regularly without the patient needing to ask. In fact, when family members were able to see him and give him water, he immediately gulped several glasses, showing that he was extremely thirsty; and when the brother accompanied him to the washroom, he also showed signs that he wasn’t given sufficient washroom access. Such lengthy detention, accompanied with unjustified application of physical restraints from time to time, and other poor treatment, probably amounts to cruel, inhuman and degrading treatment, if not also torture.
6. During the interview, the police asked the victim leading questions, apparently taking advantage of his mental conditions, which make him prone to repeating words of others without meaning them. When the victim’s answer was not relevant or did not make sense, the interviewing officer would rephrase the question, usually into a yes-no question, with

¹⁰¹ Hong Kong Police General Orders 49-36
<http://www.police.gov.hk/info/doc/pgo/en/Epgo049.pdf>

“yes” pointing towards an answer that satisfied the police’s case against him. The police did not stop until he answered yes to such leading questions. An excerpt of questions is as follows:

- “Were you angry with the old man¹⁰²? Yes or No?”
- “You don’t like dogs, do you?”¹⁰³
- “Did you push the old man with your left hand, or with both hands like this?” (the officer then demonstrated pushing, which allegedly caused the death of the victim of the subject case)¹⁰⁴

7. Fortunately, the process of this “confession” was recorded by video, and in the presence of the victim’s brother. Although the brother did not understand his role as an appropriate adult, thus had not interrupted the problematic interview, the practice by the police against suspects with intellectual disabilities can be exposed.
8. The police invited the media to the scene of the crime shortly after the arrest, and announced the “true, physical features” of the “suspect”, including his hair-style, height, typical attire, mental disorder, and some “imaginary features” like violent tendency, hatred towards dogs, and a history of having disputes against people due to hygiene problems. It is highly questionable whether such feeding media with misleading belittling information was proper and necessary, especially considering that the victim had mental disabilities. Such unprofessional conduct on the part of the police could also prejudice the public’s perception that people with mental disorders are more prone to using violence.
9. According to the care home, the police were provided by the care home on the next day of arrest (about twenty hours later) with video recordings and written records that show without doubt that the victim was at the care home at the time of the crime. Despite this proof of alibi, the police continued to detain the victim.
10. This unfortunate event aroused public concern over whether there are police guidelines for interviewing persons who lack mental capacity to be interrogated. While the Authorities later made clear that such interview guidelines do exist, they insisted that they must not be disclosed to the public. With no access to such guidelines, it is impossible for the public to know their rights and the rights of a mentally disabled friend or family member, should they come into contact with the police. Without knowing the guidelines, it is impossible to monitor and to provide check against the police’s interaction with persons of lower mental capacity, or to seek remedy for damages sustained.

¹⁰² The victim of subject manslaughter

¹⁰³ The victim of the manslaughter case was said to be killed during an quarrel caused by him walking his dog.

¹⁰⁴ The old man was seen walking his dog, when he got into an argument with a man, who pushed him, causing him to fall on the ground. He was later certified dead.

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聯合國要求獨立調查雨傘運動中警察濫用武力

委員會不點名關注朱經緯案

要求適時妥善檢控濫權警員

2015 年 12 月 10 日

新聞稿：供即時發放

查詢：請電 (+852) 9788 3394 羅沃啟 (總幹事)

雨傘運動中警隊濫用武力

聯合國禁止酷刑委員會（委員會）香港時間昨晚發表審議結論，關注警隊在雨傘運動期間濫用催淚彈、警棍及胡椒噴霧，又對正遵從指示離去的示威者使用武力、縱容反示威人士襲擊示威者等。

要求獨立調查及妥善檢控

委員會要求港府就雨傘運動中警方及反示威人士的過度武力進行調查，適時及妥善地檢控襲擊者及縱容下屬和反示威人士襲擊示威者的人員，確保受害人得到完整的補救，包括獲得賠償，並加強警隊就成員濫用武力所需承擔責任的培訓。同時，委員會又要求警方公布《警察通例》及其他指引中，所有關於使用武力的指引，並確保其符合國際標準。

香港人權監察歡迎聯合國的建議，並要求港府第一時間設立包含國際人權專家的法定調查委員會，調查雨傘運動中警方及反示威人士使用不當武力的情況，包括警隊中縱容和包庇下屬的情況，並公開結果，以便跟進和尋求公道。

不點名關注朱經緯案和七警案

實質上，委員會已不點名地關注前警司朱經緯懷疑毆打途人案和七警案。人權監察認為，委員會的意見對試圖拖延案件、「放生」前警司朱經緯的警隊，實為當頭棒喝。人權監察希望七警案中當局能妥善地進行檢控、警務人員作證時亦不會「放水」，強調若政府設法讓毆打市民、違反法例的警員逍遙法外，包括控方和警方檢控涉嫌濫權警員時放軟手腳，不但會嚴重打擊警隊形象及日後執法能力，選擇性執法更是對法治的一大挑戰。

預演「佔領中環」大規模拘捕與被捕及羈留人士權益

委員會亦關注 2014 年七一遊行後示威者被捕時出現的種種權利受侵犯的投訴，包括有被捕人士無法得到律師協助、未能及時得到不受警方干涉的獨立的治療、未能及時通知家人或親友其被捕的消息等，顯示被捕人士的基本法律權益保障

實質上十分不足，亟待改善。委員會要求港府於 2016 年 12 月向委員會報告改善拘捕程序中被捕人士權利的保障的進度。人權監察認為，委員會的意見已同時回應了美林邨殺人案等有社會心理障礙人士被苛待案、近年示威人士被捕後受到差劣待遇，以及雨傘運動期間，多名市民懷疑被無理拘捕甚至起訴等，政府務必嚴肅跟進。人權監察要求政府落實 1992 年法改委《拘捕問題報告書》的建議，仿照英國《1984 警察與刑事證據法》，第一時間就警方拘捕和羈留疑人的權力和程序、以及被捕者的權益等，訂立清楚的法例。

監警機制嚴重缺陷急須修正

就投訴警察機制而言，委員會在 2000 年及 2009 年就香港的審議結論，已建議政府提高監警會的權限，甚至設立一個新的、真正獨立及有實質調查權力的監管機構，以真正有效地監察所有紀律部隊和公職人員。在是次審議結論中，委員會再次對投訴警察制度欠獨立、監警會無權進行調查表示關注，又遺憾政府無提供監警會為何沒有接納投訴警察課有關雨傘運動 47 宗投訴的調查報告，建議香港政府設立一個完全獨立的接收投訴及進行調查的監管機構。

34 項建議範圍廣泛

此外，委員會關注免遣返聲請機制，以及外傭、變性人、跨性別人土的待遇等，總共向港府提出 34 項建議，包括多項香港人權監察及其他民間團體曾向委員會報告和游說的項目，肯定了民間團體參與國際公約報告的貢獻。

遺憾政府深夜發新聞稿圖削聯合國審議結論的影響力

政府於昨晚十時前後才分別發出中英文新聞稿回應委員會報告。人權監察質疑政府企圖藉此減少傳媒對報告的報導和採訪回應的機會，以削弱聯合國審議結論的影響力，對此表示遺憾。同時，人權監察認為政府未有回應所有關注及建議，而且部分回應草率，尤其對委員會十分關注的警權及監察警察機制的問題，只一再強調現行做法已完善，拒絕承認缺陷、不思進取。香港有責任履行和落實《禁止酷刑公約》下的責任，委員會成員均為人權專家，其意見對於協助香港政府履行公約責任、保障基本人權十分寶貴。人權監察促請政府認真對待委員會的意見，並向公眾詳細交代將如何落實委員會的建議。