Hong Kong Human Rights Monitor

Shadow Report for
the United Nations Committee against Torture
on the implementation of
the Convention against Torture and other Cruel, Inhuman or
Degrading Treatment or Punishment
in the Hong Kong Special Administrative Region,
the People's Republic of China

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4/F Kam Tak Building, 20 Mercer Street, Sheung Wan, Hong Kong
Phone: (852) 2811-4488 Fax: (852) 2802-6012
Email: info@hkhrm.org.hk
Homepage: http://www.hkhrm.org.hk

The Hong Kong Human Rights Monitor ('the Monitor') is an independent organization which aims at promoting better human rights protection in Hong Kong, both in terms of law and of practical daily life.[1]

[1] This shadow report is primarily drafted by Chow Pok Yin, Stephenson, L.L.B.(Hons), University of Hong Kong, L.L.M in Human Rights Law, University of Nottingham, on behalf of the Hong Kong Human Rights Monitor.

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1.) Executive Summary

1. The Committee against Torture ('the Committee') has on 9th May, 2000 and 17th November, 1995 considered the government reports of Hong Kong submitted by China and the United Kingdom respectively on its behalf.

2. In many important areas, however, substantial improvements have not been made despite repeated recommendations from the Committee and other treaty bodies urging for their change.

3. In this respect, paragraphs 12-22 and 104-105 highlight the Government's failure to bring the definition and jurisdiction of the Crimes (Torture) Ordinance in line with the requirements of Art.1 and Art.5 of the CAT, notwithstanding the Committee's recommendations to amend the relevant parts in its previous concluding observation in 2000.

4. Paragraphs 40-85 outline the Government's lack of a coherent policy towards refugee and torture claimants, such as (a) the lack of a fair and efficient refugee status determining procedure (b) the lack of policies to cater for the basic socio-economic needs of refugee and torture claimants and (c) the existence of arbitrary prosecution policy and detaining procedures, in violation of Art.3 of the CAT as well as customary international obligations with regards to *non-refoulement*. This has been an area of common concern before the Human Rights Committee, the Committee on Social, Economic and Cultural Rights, the Committee on the Rights of the Child, and the Committee against Torture over the past 9 years.

5. Meanwhile, paragraphs 181-211, deal with the issue of the establishment of an independent police complaints procedure. Although the issue has been urged by both the Human Rights Committee and the Committee against Torture for over 13 years, the Government remains unwilling to subject the Police Force to the monitoring of an effective and independent civilian oversight body.

6. The Monitor is of the view that the Government has shown no intention of resolving the above matters and would like to strongly appeal to the Committee to take urgent measures to press for appropriate changes.

7. With regards to torture, contrary to the Government's position, actual cases of torture, commonly directed at ethnic minorities, have been recorded by local NGOs in recent years.

These cases involve severe beatings often coupled with arbitrary detention and malicious prosecutions. No prosecutions against the offenders of torture were made. This will be dealt with in paragraphs 26-30.

8. Furthermore, the condoning of the receiving of sexual services by the Police remains to be a major problem that deserves attention. In essence, the Police allow their undercover agents to receive free sexual services during undercover anti-vice operations. We consider that this practice constitutes inhuman or degrading treatment. As will be shown in paragraphs 107-118 below, reluctance to legislate for the absolute prohibition of sexual engagements in anti-vice operations opens the door for the abuse of authority.

9. Over the past few years, arbitrary strip searching seems to be one of the Police's most favoured means to demonstrate authority. Victims of arbitrary strip search include sex workers, environmentalist and cultural preservationists, and protestors in the anti-WTO demonstration. As will be demonstrated in paragraphs 131-150 clear rules and guidelines that govern strip searches are needed; unjustified strip searches must be outlawed and prohibited.

10. Other areas of concern include, *inter alia*:
    - the lack of protection in the present laws of Hong Kong against torture in the event that a national emergency is declared, which is inconsistent to Art.2 of the CAT (paragraphs 33-37 below); and
    - the lack of proper safeguards in extradition agreements on the requested person's right to fair trial and right to life (paragraphs 88-102 below).

11. A summary of the recommendations to the Committee are as follows:
    - to urge the Government bring the definition and jurisdiction of torture in line with Art.1 and Art.5 of the CAT;
    - to urge the Government to legislate safeguards against torture in case of national emergency in accordance with Art.2 of the CAT;
    - to urge the Government to put into place a fair and efficient refugee status determination procedure and to formulate coherent policies prohibit arbitrary arrest and detention of asylum seekers and torture claimants and to cater for their basic socio-economic needs;
    - to urge the Government to amend the Fugitive Offenders Ordinance and to negotiate for the incorporation of the relevant provisions in existing extradition agreements to

protect requested persons' to protect the requested person from death penalty;

- to urge the Government to account for the present progress concerning negotiations of extradition memorandums with Mainland China;
- to urge the Government to criminalize and prosecute acts of torture in accordance with Art.4 and Art.7 of the CAT;
- to urge the Government to legislate safeguards against arbitrary strip searching, in accordance with Art.11 read in light of Art.16 of the CAT;
- to urge the Government to prohibit the framing and entrapment of sex workers;
- to urge the Government to prohibit manual cavity search of prisoners;
- to urge the Government to adopt recommendations in the Report on Arrest issued by the Law Reform Commission of Hong Kong in 1992;
- to urge the Government to protect juveniles from bullying and to offer assistance to facilitate visitors to juvenile homes; and
- to urge the Government to establish an independent and effective police complaints procedure in line with the requirements of Art.12 of the CAT.

2.) Article 1: Defining Torture (paragraphs 55-61 of the Government Report)[2]

2.1.) The Crimes (Torture) Ordinance ('CTO') (Cap 427)

12. The CTO was introduced in Hong Kong to create the offence of torture and provide for its prosecution. S.3(1) of the CTO deems torture an offence under the laws of Hong Kong. It provides that:-

    "A public official or person acting in an official capacity, whatever his nationality or citizenship, commits the offence of torture if in Hong Kong or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties."[3]

[2] Fourth and Fifth Reports of the Peoples' Republic of China under the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment - Part Two: HKSAR (June 2006) ('the Government Report').

[3] S.2 writes: "(1)… 'public official' includes any person holding in Hong Kong an office described in the Schedule.…
(2) For the purposes of this Ordinance a person shall be regarded as having acted in an official capacity if at the time he acts (be he acting in Hong Kong or elsewhere) that capacity is related either to the Government of, or any public authority in, Hong Kong or to the government of, or any other authority in, a country or territory outside Hong Kong being an authority which is similar or analogous to a public authority in Hong Kong.
(3) For the avoidance of doubt it is hereby declared that section 5 of the Interpretation and General Clauses Ordinance (Cap 1) shall not be construed as extending the definition of "public official" in subsection (1) to 'public officer' within the meaning of section 3 of that Ordinance."

13. The Schedule states: "Offices referred to in section 2:
    1. An office in the Hong Kong Police Force.
    2. An office in the Customs and Excise Department.
    3. An office in the Correctional Services Department.
    4. An office in the Independent Commission Against Corruption.
    5. An office in the Immigration Department."[4]

    The schedule is subject to s.8 of the CTO which provides that "[t]he Chief Executive in Council may by order amend the Schedule."

14. Ss. 3(4) and (5) of the CTO follow s.134(4) and (5) of the British Criminal Justice Act 1988 ('1988 Act'). S.3(4) provides that:-

    "It shall be a defence for a person charged with an offence under this section in respect of any conduct of his to prove that he had lawful authority, justification or excuse for that conduct."

    S.3(5) provides that:

    (5) For the purposes of this section "lawful authority, justification or excuse" means-
    (a) in relation to pain or suffering inflicted in Hong Kong, lawful authority, justification or excuse under the law of Hong Kong;

[4] See Schedule to the CTO.

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

15. Under Art.28 of the Basic Law ('BL'), "torture of any resident or arbitrary or unlawful deprivation of the life of any resident is prohibited."[5] Art.39 of the Basic Law provides that :-

> "The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.
> The rights are freedoms enjoyed by the Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

16. The Hong Kong Bill of Rights Ordinance (Cap.383) ('HKBORO') provides for the domestication of the ICCPR. In relation to torture, Art.3 of the HKBORO mirrors Art.7 of the ICCPR which provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment…."[6]

2.1.1. Limiting the definition of torture

17. It is generally understood that torture under Art. 1 of the CAT includes four elements as follows:
- severe mental or physical pain or suffering that is,
- intentionally inflicted;
- for a proscribed purpose, for example, obtaining evidence or information;
- by official action or approval.[7]

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[5] Art.28 of the BL,
"The freedom of the person of Hong Kong residents shall be inviolable.
No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited. Torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited"

[6] S.8, Art.3 HKBORO: "No torture or inhuman treatment and no experimentation without consent.
No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

[7] Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, 1465 UNTS 85, ('CAT'), Art. 1:
"For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has

The second limb of Art.1(1) excludes only "pain or suffering arising only from, inherent in or incidental to lawful sanctions."[8]

18. However, s.3(4) CTO provides a blanket defence for acts which potentially falls into the jurisdiction of s.3(1) of the CTO and, as such, operates to exclude all forms of pain or suffering so long as the officer concerned could prove that he had a "lawful authority, justification or excuse." The Monitor is unable to agree with the Government's position that the defence of "lawful authority, justifications or excuse" under s.3(4) of the CTO is <u>simply an attempt to give effect to the second limb of Art.1(1) of the CAT.</u>[9] The defence is simply too broad to be consistent with the requirements of the CAT. It is also inconsistent with Art.4 of the CAT which requires parties to ensure that "all acts of torture are offences under its criminal law."

19. Moreover, the defence is too vague to be justified under Art.1(1) of the CAT. What would amount to a "lawful authority, justification or excuse" [10] is not sufficiently clarified. While it would seem that a "lawful justification" as defence for the crime of torture is justifying the unjustifiable, a "lawful excuse" for the crime of torture, i.e. an excuse that would negate the culpability of the perpetuator who has committed torture is simply inconceivable.[11] On the face of

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committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity… ." This definition was held to be customary international law in the case *Prosecutor v. Anto Furundzija* [1998] ICTY 3, para 160.

[8] Academics suggested that "[d]uring the drafting process this clause was originally subject to the proviso that the lawful sanctions must themselves be consistent with the UN Standard Minimum Rules for the Treatment of Prisoners, but as the Minimum Rules were not themselves originally intended to be legally binding, it was considered inappropriate to incorporate them into the binding UNCAT." See Nigel Rodley and Matt Pollard, 'Criminalization of torture: state obligations under the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment' [2006] E.H.R.L.R. 115, 120. The authors referred to the parallel provision contained in the 1975 Declaration Against Torture and the Swedish draft convention in support of their position. The former writes: "For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners." Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 3452 (XXX), annex, 30 UN GAOR Supp. (No.34) at 91, UN Doc. A/10034 (1975).; See also the Swedish draft convention, UN Doc. E/CN.4/1285, which served as a starting point for the UNCAT drafting process.

[9] The second sentence of Art.1(1) of the CAT writes "[Torture] does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

[10] Academics distinguished the concept of a justification and an excuse; while "justifications negate the wrongfulness of the conduct, excuses negate the culpability of the actor for his wrongful conduct," Miriam Gur-Aye, 'Should the criminal law distinguish between necessity as a justification and necessity as an excuse?' (1986) L.Q.R. 711.

[11] Ibid.

the wording, the defence clause seemed to be an attempt to insert a "codification of a necessity limb" [12] for circumstances allowing the use of torture, but such would be inconsistent with Art.2 of the CAT where "no exceptional circumstances… may be invoked as a justification of torture."

20. The fact that the government interprets "torture" unreasonably narrowly is reflected in the facts of the *Chuen Lai Sze* case.[13] The police officers (defendants) in this case beat the victim severely and poured water into his nose and mouth causing him to lose his consciousness. However, the police officers were only charged with assault, despite such acts clearly falling within the definition of torture both in Art.1 of the CAT or s.3(1) of the CTO.[14]

21. In the Committee's 2000 Concluding Observations, the Committee is expressly concerned with the reference to "lawful authority, justification or excuse" as a defence for a person charged with torture, "no prosecutions were brought under the [CTO]…despite [the presence of] circumstances… justifying such prosecutions," and that "not all instances of torture and other cruel, inhumane or degrading treatment or punishment are covered by the [CTO]." [15] Yet, the Government has not attempted to introduce any amendments to the CTO and has adopted a defensive stance towards this legislation.[16] The Government seems to be unaware that the CTO is unsatisfactory compared with laws in other jurisdictions. For example, s.3 of the Crimes (Torture) Act 1988 of Australia emphasizes the adherence to the CAT in its application.[17]

[12] See Adam Raviv, 'Torture and Justification: defending the indefensible' 13 Geo. Mason L. Rev. 135.

[13] *Chuen Lai Sze v. HKSAR,* (1999) HKCFA 33.

[14] See, for example, *Ramirez v. Uruguay (4/77)*, where the Human Rights Committee is of the view that suffocation in water amounts to torture.

[15] Conclusions and recommendations of the Committee against Torture on the Report on the HKSAR under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2000), CAT/C/24/Concl.3, para 34-35. ('2000 CAT Concluding Observations').
Similarly, the Committee had repeatedly criticized the 1988 Act in various occasions; See Conclusions and recommendations of the Committee against Torture, United Kingdom of Great Britain and Northern Ireland, U.N. Doc. A/54/44 (1998), para 76(e).; Conclusions and recommendations of the Committee against Torture, United Kingdom of Great Britain and Northern Ireland, U.N. Doc. A/51/44 (1996), para 77(c).

[16] In paragraph 58 of the Government Report, the Government insists that the defense was intended to give effect to the second limb of Art.1(1) of the CAT despite the Committee's Concluding Observation in 2000. Moreover, in the same paragraph, the Government claims that "the defence was intended to cover matters such as the reasonable use of force to restrain a violent prisoner."

[17] S.3 Crimes (Torture) Act 1988 of Australia writes "[torture] does not include any such act arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the International Covenant on Civil and Political Rights… (2) Except so far as the contrary intention appears, an expression that is used both in this Act and in the Convention (whether or not a particular meaning is given to it by the Convention) has, in this Act, the same meaning as it has in the Convention."

22. Although the Government claimed in its initial report that neither "exceptional circumstances" nor "superior orders" could be invoked in the law of Hong Kong as a justification for torture,[18] the wording of s.3(4) tends to suggest the contrary. Legislative steps should be taken to clarify this doubt. As an example, the Canadian Criminal Code s.269.1 prohibits torture and expressly states that there shall be no lawful authority defence to the offence of torture.[19]

List of questions

23. The Monitor recommends the Committee to ask the Government:
    - to clarify the precise meaning of the words "lawful authority, justification and excuse" as well as the context in which such a defence could be invoked;
    - to clarify whether "the reasonable use of force to restrain a violent prisoner" referred to in the Government's initial report is the only circumstance envisaged by the Government under s.3(4), and if so the reason behind the Government's reluctance to bring s.3(4) in line with Art.1 of the CAT; and
    - if the Government maintains its position on the meaning of s.3(4) of the CTO, whether the Government is willing to replace the present defence clause in s.3(4) of the CTO with a new provision which would simply stipulate that "for the purpose of the offence of torture under this ordinance, torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions"[20] or whether the Government is willing to adopt the wording of s.3 Crimes (Torture) Act 1988 of Australia.

Recommendation

24. The Monitor recommends the Committee to urge the Government to amend s.3(4) of the CTO.

3.) Article 2: Preventing Torture (paragraphs 62-64 Government Report)

[18] Committee against Torture, Consideration of reports submitted by States Parties under article 19 of the convention, China, U.N. Doc. CAT/C/39/Add.2 (2000), para 107. ('Initial Report to the Committee against Torture'); See also Part II, fn.2 of the Government Report.

[19] The Canadian Criminal Code s.269.1(3) writes "[i]t is no defence to a charge under this section that the accused was ordered by a superior or a public authority to perform the act or omission that forms the subject-matter of the charge or that the act or omission is alleged to have been justified by exceptional circumstances, including a state of war, a threat of war, internal political instability or any other public emergency."

[20] See s.3 Crimes (Torture) Act 1988 of Australia, *supra*.

3.1.) Implementation of the Convention

25. Although the CAT has been partially domesticated in the CTO, actual practice means that the CTO has not been fully implemented. Up until now, there have been no prosecutions brought under the CTO, despite clear cases of torture.[21] The Government claims in its Report that "[f]or an act to qualify as torture, there must be evidence that severe pain and suffering were intentionally inflicted by the authorities acting in their official capacities. So far, no cases have met those criteria on the strength of the evidence. And, as indicated above, there have been no cases where torture has even been alleged since 1998."[22] However, the true situation is quite different from that which the Government depicts.

3.1.1.) Torture in relation to ethnic minorities

26. In a written submission to the Legislative Council, the Hong Kong Unison Limited ('Unison') has outlined allegations of torture by the police towards ethnic minorities.

27. In one incident, a Pakistani teenage passenger was stopped by the police. The teenager was called "Cha Jai" (a discriminatory and insulting nickname in Cantonese for members of south-Asian groups) by the police and was told to get out of the car. The teenager requested not to be called "Cha Jai", and he was then dragged out of the car by the police officer. Yet, the officer accused the victim of resisting arrest and assaulting a police officer, and called for backup. Soon, 10 police officers arrived at the scene and the victim was beaten up and brought to the police station.[23]

28. In the course of the victim's detention, he vomited blood four times but the police refused to arrange for him to have a medical examination. The police told him that if he wanted a medical examination he would be denied bail, and if he wanted bail, he would have to promise not to have a medical examination. Also, during the course of his detention, he was

[21] In the *Chuen Lai-sze* case, earlier brought to your Committee's attention in our previous shadow report, the victim was not only handcuffed and punched by the chest. One of the officers also pressed his thumbs onto the victim's neck and poured water into his nose and mouth causing him to lose consciousness. Yet, the officers were not charged under the CTO (which would attract a maximum sentence of life imprisonment) but was instead charged under s.39 of the Offences against the Person Ordinance (CAP. 212) for assault occasioning actual bodily harm. See *Chuen Lai Sze* case, *supra,* para. 20.

[22] See Government Report, para 63.

[23] The Unison has conveyed its concerns over torture to the Government in various occasions. In a submission to the Legislative Council, they outlined alleged cases of torture by the police on file with the Unison. See Submission on Independent Police Complaints Council Bill from Hong Kong Unison Limited (in Chinese), December 2007, LC paper No. CB(2)550/07-08(01), para 1.3.

not provided with food. The victim finally gave in and went for his medical checkup in a local clinic only after his release.[24]

29. The victim then attempted to file a complaint to the Complaints Against Police Office ('CAPO'). However, during the recording of his statements, he was suspicious that his statements are not accurately jotted down and thus refused to give further statements unless accompanied by a social worker. However, he was labeled "not cooperative" and the case was therefore classified as "unsubstantiated" and not pursued by CAPO.[25]

30. According to the NGO Unison, which specializes in work with Hong Kong's ethnic minorities, the above case is only one of several incidents where ethnic minority teenagers have been subjected to police violence. In such cases, they are often arbitrarily arrested and detained and their right to medical access denied during their custody. Other forms of violence and intimidation take the form of an excessive and unnecessary use of handcuffs during "arrests" and the unlawful searching of homes without warrant.[26] They were also often humiliated with highly degrading remarks.

<u>*List of questions*</u>

31. The Monitor recommends the Committee to ask the Government:
    - whether the Government is aware of the allegations of torture as quoted above;[27]
    - what has the Government done to investigate into the above allegations of torture, and if investigation has been conducted what are the findings of the Government;
    - if investigations has not been conducted, whether the Government would be willing to initiate investigations (with the assistance of Unison)[28] and keep the Committee updated as to the progress of the investigation;

[24] Ibid.
[25] Ibid.

[26] Ibid.
[27] Note that the Government has subsequently responded to the submission by Unison, however, it has not responded particularly to incidences of alleged torture. See Security Bureau, 'Administration's response to the issues raised in the submissions of Zi Teng, JJJ Association, Action for REACH OUT, Civil Human Rights Front, Hong Kong Christian Institute, Hong Kong Human Rights Monitor and Hong Kong Unison Limited,' January 2008, LC paper No. CB(2)829/07-08(02).
[28] The Committee may wish to note that local NGOs are usually unwilling to disclose their client's information (especially in the present context where the Police themselves are the alleged perpetuator) unless NGOs are fully assured of their safety.

- to provide the video taping of the interrogation with the victim (if available);
- to provide information as to the using of video taping devices during interrogations and in temporary holding areas;
- to provide information as to the current training given to frontline officers in relation to enhancing cultural awareness and respect to ethnic minorities within the Force;
- to provide the Committee with the relevant sections of the Police Force Procedures Manual, and Police General Orders in relation to stop, search, arrest, detention and interrogation;
- to provide the relevant statistics as to the reporting of police misconduct by ethnic minorities; and
- to clarify the measures taken to ensure the rights of suspects in custody.[29]

[29] The Monitor notes that in many occasions, persons in custody do not know their rights, nor were they informed of their rights. Notices afforded to persons in custody were only given after their release and not in the language they could understand. See Notice to Persons Under Investigation by, or Detained in the Custody of, the Police (material provided by the Police to the Monitor, on file with author) ('the Notice'). A representative from the Amnesty International (HK) raised doubts as to the wording used in the Notice in a joint-meeting with the Police Force (on 12th February 2008). Fore example, the right to receive medical attention is written as a right to "request medical attention," which could be misleading.

Recommendations

32. The Monitor recommends the Committee to:
    - urge the Government to investigate the above allegations of torture and to make its findings available to the Committee in subsequent follow-up proceedings;
    - urge the Government to make public the Police Force Procedures Manual, and Police General Orders (currently these information has been withheld from the public and thus making it difficult for the general public to hold individual officers accountable for the abusing of police power, nor is the general public aware of their rights);
    - urge the Government to strengthen human rights-related training and education to frontline officers.

3.2 Art.2(2) of the CAT and the "State of Emergency"

33. Art.2(2) of the CAT writes that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture." The Monitor contends that there are insufficient safeguards in the present laws of Hong Kong to protect persons from torture in times of a public emergency.

34. Article 18 of the Basic Law provides that "[i]n 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 (of Hong Kong)." It has been unclear what those laws might be and whether the laws would comply with the CAT.

35. Furthermore, s.2(1) of the Emergency Regulations Ordinance (Cap. 241), which empowers the Chief Executive on any "occasion of emergency or public danger" to "make any regulations whatsoever which he may consider desirable in the public interest", is *prima facie* inconsistent with Art.2(2) of the CAT which seeks to prohibit torture even in "a state of war or a threat of war, internal political instability or any other public emergency." Under such circumstances, the regulations imposed by virtue of the Ordinance (or other national laws which might apply to Hong Kong) might provide for the "lawful authority, justification or excuse" for torture or other types of cruel, inhuman or degrading treatment or punishment under the terms provided by s.3(4) and 3(5) of the CTO. Note that the power therein under the Emergency Regulations Ordinance potentially allows for the derogation of <u>any</u> human rights safeguards which is inconsistent with Art.4 of the ICCPR, which in turn provides that certain articles including Art.6 (right to life), Art.7 (freedom from torture), Art.8 (freedom from slavery) and Art.13 (freedom from arbitrary expulsion of aliens lawfully in territory) shall be non-derogable.[30]

36. The Government claims that Art.18 of the Basic Law should be read in conjunction to Art.39, thus Art.18 should not be construed as being inconsistent with the ICCPR.[31] However, given the context of an emergency situation, it is difficult to see how these rights could be sufficiently protected without proper legislative safeguards or how these rights, if violated, could subsequently be remedied.

37. In light of the above, the Monitor submits that Art.18 of the Basic Law fails to correspond to the ICCPR and would like to draw your Committee's attention to the UN Human Rights Committee's 1995 Special Report on Hong Kong where it

[30] Art.4, ICCPR.
[31] See 'Initial Report to the Committee against Torture', *supra,* para 104.

was critical of the argument that Article 18 of the Basic Law corresponds to the ICCPR.[32]

List of questions

38. The Monitor recommends the Committee to ask the Government:
    - to clarify what the "relevant national laws" are at times of public emergency.

Recommendations

39. The Monitor recommends the Committee to:
    - urge the Government to legislate to the effect that the right to be free from torture and other cruel, inhuman or degrading treatment or punishment is non-derogable under all circumstances.

4.) Art.3: Torture as a ground for refusal to expel, return or extradite

[32] See Human Rights Committee, 'Special report (Hong Kong): United Kingdom of Great Britain and Northern Ireland' dated August 1996, CCPR/C/117, para 15, "[t]he Committee also regrets that there is not yet detailed legislation to cover emergency and that the provision in article 18 of the Basic Law on that subject appears not to correspond with the provisions of article 4 of the Covenant."

4.1) In relation to asylum seekers and torture claimants

40. The following paragraphs seek to outline the following aspects of the situation of refugees and asylum seekers in Hong Kong :
    - the present asylum policy and related laws in Hong Kong;
        - the Government's "firm policy not to grant asylum," and the absence of a fair refugee status determination ('RSD') procedure;
        - the performance of the UNHCR sub-office in Hong Kong (UNHCR SOHK);
        - the international and domestic law applicable to Hong Kong;
    - the lack of resources tendered to asylum seekers and refugees; and
    - detention and prosecution policies.

4.1.1.) The present asylum policy and related laws in Hong Kong

4.1.1.1.) The Government's "firm policy not to grant asylum" and the absence of a fair refugee determination ('RSD') procedure

41. There is no law or policy in Hong Kong offering protected status for refugees or asylum seekers. Neither the Immigration Ordinance (Cap.115) nor immigration guidelines provide for any different treatment for asylum seekers or refugees from other persons seeking entry to Hong Kong. The Government does not have a RSD procedure but instead relies on the UNHCR's Hong Kong sub-office to process asylum applications. The UNHCR communicates its decision on the status of the asylum seeker to the Director of Immigration, who has unfettered discretion to decide whether or not to abide by the decision or choose to ignore it in making its immigration decision.[33]

42. However, this "contracting" out to UNHCR does not imply that there is adequate communication between the two offices. When an asylum seeker seeks leave to enter, "[t]here is no formal system for directing asylum seekers to the UNHCR… and access to the UNHCR depends on individual initiative and knowledge or on the discretion of immigration officials who may or may not contact the UNHCR sub-office when approached by someone claiming asylum."[34] That is, there is no written procedure (be it in the form of law, Immigration Rules or internal guidelines) for referring a case to UNHCR. In these circumstances, the asylum seeker may simply be sent on an airplane and deported back to where s/he has come from.

43. Even if the person is directed to go to the UNHCR for its RSD procedure the result is far from satisfactory. The procedure lacks "a number of guarantees ensuring procedural fairness such as:
- transparency;
- written reasons for refusal;
- independent appeal;
- provision for legal assistance; [and]
- judicial review.

[33] In *A.K. v. Director of Immigration*, HCAL 132/2006, the High Court held that the Director of Immigration has an unfettered discretion in deciding whether or not to grant refugee status. In paragraph 191 of the judgment, the Court noted that: "In any event, the UNHCR is not unaccountable. It is accountable to the Director himself. If in any particular case, the Director has reason to believe that he should not act upon a determination made by the UNHCR, whether favourable or unfavourable to a claimant, he does not have to act upon it. He can ask that the determination be reconsidered, he can ignore it. He has many options open to him."; Please also note that the case would be appealed.

[34] Kelley Loper, 'Hong Kong's International Legal Obligations towards Refugees and Asylum Seekers', Submission to the Joint Meeting of the Legislative Council Panels on Welfare Services and Security on the situation of asylum seekers, refugees and claimants against torture in Hong Kong, dated 18th July, 2006, L.C. Paper No. (2) 2761/05-05(07).

The UNHCR in Hong Kong does not even comply with its own published procedural standards, including legal representation for unaccompanied minors."[35]

44. Since the UNHCR does not give reasons for negative decisions and the Secretary for Security (who has the power to make a deportation order) relies solely on the UNHCR's unexplained rejection, a person who is a refugee can be *refouled* without any meaningful review.[36] The problem was highlighted in the case *Sakthevel Prabakar v. Secretary for Security* before the Court of Final Appeal:[37]

> "As the only basis for the Secretary's adverse determination is UNHCR's unexplained rejection of refugee status, the Secretary would not be able to inform the potential deportee of the reasons for such determination. Nor would the Secretary be able to offer any reasons to the court in any judicial review challenge..."[38]

Not only is the reluctance to give reasons for the refusal of refugee status incompatible with the principles of natural justice, the room for arbitrary decisions is also inconsistent with the principle of non-discrimination. Note that the decision in the case was independent of the reservations on Art.13 of the ICCPR.[39]

45. The Government claimed, in its Report, that administrative measures are in place for the assessing of torture claims under Art.3(1) in light of the CFA judgment in *Prabakar*.[40] In fact procedures are grossly inadequate. In a submission to the LegCo, Mark Daly has highlighted the problems,

> "Under CAT, and post *Prabakar,* the HKSAR has implemented 'discretionary' 'non statutory' screening procedures for CAT claimants only [contrast one under the Refugee Convention]… Despite the seriousness of the consequences of the decision there is no provision for legal representation – no legal aid, no Duty Lawyer Service ('DLS') – despite the Court of Final Appeal in *Prabakar* stating that such CAT screening should adhere to high standards of fairness.

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[35] Mark Daly, 'Note on the Situation of Asylum Seekers, Refugees and Convention Against Torture ('CAT') Claimants in the Hong Kong SAR prepared for Joint Meeting of the Legislative Council Panels on Welfare Services and Security, 18-7-2006, LC Paper No. CB(2)2761/05-06(2). ('Note on the Situation of Asylum Seekers')

[36] *Sakthevel Prabakar v. Secretary for Security*, FACV No. 16 of 2003. ('*Prabakar*')

[37] Ibid. In the case, the applicant was a member of the Tamil minority of northern Sri Lanka. Refusing to fight for the Liberation Tigers of Tamil Eelam ('LTTE', often known as "the Tamil Tigers"), he received death threats from the LTTE. He subsequently fled to Colombo. On suspicion that he might be a member of the LTTE, he was "subjected to torture which took various forms, often of considerable severity." He then managed to obtain a forged Canadian passport intending to leave for Canada and apply for refugee status. He took a flight to Canada via Hong Kong, where he was arrested for the possession of the forged Canadian passport.

[38] Ibid, para 47.

[39] The reservation is read as follows: "[t]he Government of the United Kingdom reserve the right not to apply article 13 in Hong Kong in so far as it confers a right of review of a decision to deport an alien and a right to be represented for this purpose before the competent authority," full text available at http://www.unhchr.ch/html/ menu3/b/treaty 5_asp.htm.

[40] See the Government Report, para 66.

Other problems include the fact that the process takes a very long time, often years, which is neither fair to the individual nor efficient from the standpoint of administration. It also seems that information gathered by the [Department of Immigration] during CAT interviews can be used to prosecute the applicant for 'immigration' offences. Paragraph 2 of the 'Notice to Person Making a Claim under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' says:

> 'The information provided in the interview will only be used for the purposes of assessing a claim under Article 3 of the Convention. It will not be used for any other purpose save that, if any part of it [is] relevant to further immigration decisions concerning the claimant, it may be taken into account' [which could be misleading]."[41]

46. Far from adapting its procedures to meet the criticisms voiced by the Court of Final Appeal and in the Legislative Council, , the Hong Kong Government has on the contrary, on various public occasions demonstrated its determination to continue with its existing practices. For example, in July 2006, the Security Bureau announced that:

> "Hong Kong is small in size and has a dense population. Our unique situation, set against the backdrop of our relative economic prosperity in the region and our liberal visa regime, makes us vulnerable to possible abuses if the 1951 Convention were to be extended to Hong Kong. We thus have a firm policy of not granting asylum and do not have any obligation to admit individuals seeking refugee status under the 1951 Convention."[42]

47. In 28th February, 2007, the Security Bureau reiterated its position:

> "The Government has a firm policy of not granting asylum. Our unique situation…makes us vulnerable to possible abuses. The Government both before and after the handover has consistently rejected the notion that Hong Kong is subject to the principle of refugee *non-refoulement* as a rule of customary international law. The rejection lay behind not extending the UK's obligations under the Refugee Convention to Hong Kong before the handover; and the later decision not to extend the People's Republic of China's obligations under the Refugee Convention to the HKSAR. Both before and after 1997, the Government has consistently acted on the basis that it is under no such duty."[43]

However although the Government has not signed the Refugee Convention, it is obliged to abide by the customary international law principle of *non-refoulement*

[41] See 'Note on the Situation of Asylum Seekers', para 4. The fairness of torture claim administrative procedures will subject to a major test case challenge in the case HCAL 51/07 which would be heard on the 29th April 2008. One of the issues involves the lack of legal representation during the assessment, where the lack of knowledge of the law and the language problem substantially jeopardized their claim.

[42] Security Bureau, 'Policy on Refugees, Asylum Seekers and Torture Claimants', July 2006. See also http://www.thestandard.com.hk/stdn/std/Front_Page/ GF20Aa02.html

[43] Speech by Chu King Man, the Principal Assistant Secretary (Security) of the Security Bureau, 28 February 2007, recorded in the judgment *A.K. v. Director of Immigration* , HCAL 132/2006, para 151.

(enshrined in Art.3 of the Refugee Convention) and also stipulated in Art.3 of the CAT. It appears that the Government is reluctant to honour this obligation.

48. To our very great disappointment, in a recent case, *A.K. v. Director of Immigration,* the High Court of Hong Kong ruled in favour of the Government's position that it was not bound by the *non-refoulement* principle, having nonetheless recognized the existence of a customary international law principle which prohibits the *refoulement* of refugees,

> "by [a] consistent and long-standing objection, Hong Kong has refused to accede to the rule and the rule being contrary to Hong Kong's laws, has not been incorporated into its domestic law… [a]s the rule has no application in domestic law, the Hong Kong Government is under no obligation pursuant to the rule to conduct a screening of all refugee claimants… [I]n determining whether to exercise his statutory discretion on humanitarian or compassionate grounds in respect of a person who claims that, if *refouled,* he faces a real risk of persecution, the Director is not obliged to himself determine first whether that person faces such danger but may allow that determination to be made by the UNHCR provided that the Director does not, in so doing, fetter his discretion."[44]

49. The correctness of the Court in arriving at the conclusion that Hong Kong is not subject to the customary international law rule of *non-refoulement* is in doubt.[45] Moreover, the Court seemed to also have ruled that the Director is not subject to any prescribed procedures to ensure fairness, which is at odds with the *Prabakar* case. This unsatisfactory situation is the reality behind the misleading statement in the Government's Report.[46]

50. As the Human Rights Committee observed in its 2006 Concluding Observations, there is an "absence of adequate legal protection of individuals against deportation to locations where they might be subjected to grave human rights violations, such as those contrary to articles 6 and 7 of the Covenant."[47] The situation remains the same now and there is no sign of any intention on the part of the Government to rectify the situation.

4.1.1.2.) The overloaded UNHCR sub-office in Hong Kong

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[44] Ibid., para 194.

[45] Surprisingly, the Court seemed to be suggesting that a local administration such as Hong Kong is free to "repudiate" the customary international law principle of *non-refoulement.* Also, it seems that the Court has misunderstood the persistent objector rule as implied in the *Asylum* Case, which only applies to an emerging rule of customary international law and failed to pay attention to the *Nicaragua* case where the ICJ is of the view that "instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule." *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) (Merits)* (1986) ICJ Rep 14, para 186.

[46] See the Government Report, *supra,* para 65-66.

[47] Concluding Observations of the Human Rights Committee – Hong Kong Special Administrative Region (2006), CCPR/C/HKG/CO/2, para 10.

51. The UNHCR SOHK is heavily overburdened. According to the annual statistics published by UNHCR, in 2006, there were 1097 RSD applications to the Hong Kong sub-office pending at the beginning of 2006, while it received 3035 applications during the year, with 2407 cases pending at the end of the year. Cases are thus accumulating faster than they are being processed.[48] In fact, they had only seven to eight staff[49] in the office to process refugee claims from about 1800 asylum seekers. These figures reflect the inadequate support the sub-office is receiving. This has inevitably affected the quality of their service.

52. According to a survey conducted by Society of Community Organizations (SOCO), a local NGO, on asylum seekers in Hong Kong, the major problems that exist with the UNHCR SOHK's procedures are briefly as follows:
    - the right to legal representation is denied, as 91% of the interviewees are not informed of their right to be legally represented; no legal aid nor duty lawyer is provided;

[48] Table 6, Annex, UNHCR Statistical Yearbook 2006, available at http://www.unhcr.org/statistics/STATISTICS/478cda572.html.
[49] The figure is provided by the Hong Kong Refugee Advice Centre.

    - the interviews are conducting very briefly. 61% of the interviewees felt that they were unable to give a full account of their situation;
    - the processing time is too long, 43% of the interviewees have waited for 7 months for a decision, while 22% have been waiting for 13 – 24 months for a decision;

    Other problems include:
    - interpreters not provided or of doubtful quality, so that decision-takers do not receive accurate information about the asylum seekers ;
    - no record of the interview is provided;
    - no written reasons are given for refusal;
    - there is no complaints procedure within the UNHCR mechanism where those aggrieved could lodge a complaint.[50]

53. In the *Prabakar* case the Court found that the UNHCR had refused refugee status, even though the applicant was able to produce:

[50] See Joint Submission by the Societies of Community Organizations, Hong Kong Human Rights Commission, Voices of the Rights of Asylum Seekers and Refugees, to the Panel on Welfare Services and Panel on Security entitling the 'Denial of Asylum Seekers' Rights,' July 2006, LC Paper No. CB(2)2747/05-06(03).

- Photographs of scars and a medical report with the doctor's suggestion that the applicant "is likely to have been the victim of torture some years ago";
- A certificate issued by the Red Cross stating that its delegates had visited the respondent in detention together with a letter from the Red Cross verifying the authenticity of that certificate stating that the respondent had suffered great hardship and recommended him to leave Sri Lanka "for his future security"; and
- Amnesty's report concerning torture in custody in Sri Lanka which stated that for years, torture had been among the most common human rights violations reported in that country and that it continued to be reported "almost (if not) daily in the context of the ongoing armed conflict between the security forces and [the Tamil Tigers] fighting for an independent state".[51]

54. Another troubling feature of the UNHCR assessment is the procedure for on the spot airport assessment by the UNHCR, whereby the potential claimant is identified by immigration officers as someone wanting to make a refugee claim to the UNHCR, and is then detained for the UNHCR to determine the claims on the spot under pressure of a time-table for summary removal set by the Immigration Department. In these cases, neither legal representation nor a translator is provided, nor can a full medical report be obtained. Some of these cases have been challenged in the local courts where the claimant has been lucky enough to get access to an outside lawyer acting *pro bono*.[52]

4.1.1.3. International and Domestic Law

55. The principle of *non-refoulement* is part of customary international law. Art.14(1) of the Universal Declaration of Human Rights ('UDHR') proclaims that "everyone has the right to seek and to enjoy in other countries asylum from persecution."[53] The 1951 Convention and its 1967 Protocol has been viewed as 'an important emerging norm of customary international law.'[54] The UNHCR Executive Committee Conclusion No. 82 'reaffirms that the institution of asylum… derives directly from the right to seek and enjoy asylum set out in Article 14(1).'[55] Similar words appeared in

[51] *Prabakar, para 35.*

[52] See Mark Daly, 'Note on the Situation of Asylum Seekers' *supra*.

[53] Universal Declaration of Human Rights, December 10, 1948, U.N.G.A res. 217 (LXIII).

[54] Subrata Roy Chowdhury, 'A Response to the Refugee Problems in Post Cold War Era: Some Existing and Emerging Norms of International Law', (1995) 7 *IJRL* 100, 102.; See Alice Edwards, 'Human Rights, Refugees and the Right "to enjoy" Asylum' [2005] I.J.R.L 295, 300.

[55] Executive Committee Conclusion No. 82(XLVIII) on 'Safeguarding Asylum', 1997, para. (b).; See Alice Edwards, *supra,* at 300.

the 1967 Declaration on Territorial Asylum.[56] Art.7 of the ICCPR provides for the right to be free from torture, inhumane and degrading treatment. General Comment No.20 of the HRC incorporates the principle of *non-refoulement* into Art.7. [57] This interpretation is subsequently confirmed in European jurisprudences such as *Soering*.[58] Note also the General Recommendation No.22 on Art.5 of the Convention on the Elimination of all Forms of Racial Discrimination (the Convention has been extended to Hong Kong) which obliges parties to observe the principle of *non-refoulement* and the non-expulsion of refugees.[59] Finally, Art.3 of the CAT expressly prohibits the return of a person where there is substantial ground for believing that his return would expose him to torture. These sources show a general acceptance to the principle; in addition State practice seeking to justify deviation from the principle reinforces the *opinio juris* that States accept the normative effect of the principle. The Government should strictly abide by this important rule of customary international law.

56. Art.3 obliges states not to return a person where the Government is satisfied that there are substantial grounds for believing the person is in danger of being subjected to torture. Since what could give rise to "substantial grounds" must be identified, the wording of Art.3 of the CAT impliedly obliges governments to administer a RSD procedure. This is reinforced by the wording of General Comment No.1 of CAT on *non-refoulement*, where the State parties "are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture,"[60] with respect to the "factual basis of the author's position,"[61] in light of the non-exhaustive list of requirements. Furthermore, since it is recognized that *non-refoulement* is a principle of customary international law, "Art. 1 and 33 (of the 1951 Refugee Convention) read together place a duty on

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[56] Declaration on Territorial Asylum 1967, U.N.G.A. Res. 2312 (XXIX), 14 Dec. 1967.

[57] Human Rights Committee, General Comment 20 on Art.7 ICCPR, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994). Paragraph 9 writes: " In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*. States parties should indicate in their reports what measures they have adopted to that end."

[58] *Soering v. United Kingdom* 1989 11 EHRR 439.

[59] Committee on the Elimination of all kinds of Racial Discrimination, General Recommendation No.22 on Art.5 CERD on refugees and displaced persons , U.N. Doc. A/51/18, annex VIII at 126 (1996) writes "(b)States parties are obliged to ensure that the return of such refugees and displaced persons is voluntary and to observe the principle of non-refoulement and non-expulsion of refugees;"

[60] Committee against Torture, General Comment 1, Communications concerning the return of a person to a State where there may be grounds he would be subjected to torture, U.N. Doc. A/53/44, annex IX at 52 (1998), para 6.

[61] Ibid, para 5.

States parties to grant, at a minimum, access to asylum procedure for the purpose of refugee status determination."[62] Moreover, paragraph 9 of the General Comment 20 to Art.7 of the ICCPR comments that, "[s]tate parties should indicate in their reports what measures they have adopted to that end" with respect to the *non-refoulement* of persons facing risk of torture, inhumane or degrading treatment.[63] Implicitly, it indicates that the principle of *non-refoulement*, is a positive obligation where the government concerned should assist and assess those seeking protection under this principle.

57. In addition, Art.13 of the ICCPR states that "An alien lawfully in the territory of a State… may be expelled therefrom only in pursuance of a decision reached in accordance with law…"[64] A leading jurist, Manfred Nowak, considers that refugee claimants who have received the permission to stay pending the determination of their status are protected by Art.13.[65] HRC General Comment 15 states that in certain circumstances an "alien may enjoy the protection of the Covenant even in relation to entry or residence… when considerations of… prohibition of inhuman treatment… arise."[66] Such circumstances would logically seem to include where an alien is an asylum seeker. General Comment 15 goes on to state that:

> "if the legality of an alien's entry or stay is in dispute any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13. …[B]y allowing only those [expulsions] carried out 'in pursuance of a decision reached in accordance with law,' its purpose is clearly to prevent arbitrary expulsions."[67]

Art.13, as explained in General Comment 15, also seems to point to the requirement of a fair asylum policy in which a fair RSD procedure is indispensable.

[62] See Alice Edwards, *supra,* she went on to say "[a]ccess to asylum procedures is also debatably an implied right under the 1951 Convention (although such procedures are not necessary to accord refugee protection), and is an accepted part of the State practice."

[63] HRC, General Comment No.20, *supra.*

[64] Art.13 ICCPR.

[65] M. Nowak, *U.N. Covenant on Civil and Political Rights -- CCPR Commentary* (Kehl am Rhein: N.P. Engel, 1993), 242 quoted in Gerald P. Heckman, 'Securing procedural safeguards for asylum seekers in Canadian law: an expanding role for international human rights law?' 2003 I.J.R.L. 212, 224. Heckman writes in his footnote 73, "Nowak notes that under Art. 31 of the 1951 Convention, States parties cannot penalize refugees and refugee claimants who come directly from the territory in which they faced the threat to their life and freedom, provided they present themselves to the authorities without delay and show good cause for their illegal entry and presence. This obligation would prohibit states from denying such refugee claimants at least temporary residency pending a determination of their claims. In such circumstances, the claimants would presumably be protected by Art. 13 ICCPR."

[66] HRC, General Comment No. 15 on Art.13 ICCPR on the expulsion of aliens, U.N. Doc. HRI/GEN/1/Rev.1 at 18 (1994).

[67] Ibid.

58. The absence of a fair and effective RSD procedure also amounts to a "constructive *refoulement* through process."[68] As pointed out by the Amnesty International, governmental acts or omissions could amount to constructive *refoulement* when they create the "indirect effect of forcing people to return to a situation where they risk facing serious human rights violations… which is similarly prohibited by customary international law."[69]

59. These international law obligations apply to Hong Kong irrespective of Hong Kong's reservation to Art.13 of the ICCPR which only applies to the region "in so far as it confers a right of review of a decision to deport an alien and a right to be represented for this purpose before the competent authority,"[70] and does not go so far as to withhold a person from his right to asylum and his right to have his case determined in a fair and proper procedure (but only his right to review that decision). This conclusion is supported by the wording of Art.9 of the HKBORO.[71]

60. The principle of *non-refoulement* can also be found in Hong Kong's domestic law. Basic Law Art.28 of the Basic Law states *inter alia* that "torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited"; Art.39 provides that ICCPR, ICESCR and international labour conventions shall "remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region…. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article." Art.41 of the Basic Law extends the above-mentioned rights to non-residents: "Persons in the Hong Kong Special Administrative Region other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed in this Chapter."[72]

[68] Terminology used in Susan Kneebone, 'The Pacific plan: the provision of "effective protection"' (2006) I.J.R.L. 698, 699, 720.

[69] For the source of the definition, see http://www.amnestyusa.org/document.php?lang=e&id=93A86FF7D9EEC4EC80256 FBD0068A582. See also Amnesty International (Hong Kong), 'Submissions by Amnesty International (Hong Kong) for consideration by the Legislative Council on 18th July 2006 relating to the matters concerning Refugees and Asylum Seekers', LC Paper No. CB(2)2761/05-06(06).

[70] Reservation entered into by the United Kingdom of Great Britain and Northern Ireland on behalf of Hong Kong, text available at, http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm.

[71] Art.9 of the HKBORO writes " person who does not have the right of abode in Hong Kong but who is lawfully in Hong Kong may be expelled therefrom only in pursuance of a decision reached in accordance with law."

[72] Art.3 of the HKBORO further writes "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." While Art.9 of the HKBORO writes that "[a] person who does not have the right of abode in Hong Kong but who is lawfully in Hong Kong may be expelled therefrom only in pursuance of a decision reached in accordance with law …"

61. According to the Court of Final Appeal in the *Leung Kwok Hung case,* the words "unless as prescribed by law" in Art.39 of the Basic Law denotes that the law which restricts such rights must be prescribed with sufficient precision and that "[a] law which confers discretionary powers on public officials, the exercise of which may interfere with fundamental rights, must give an adequate indication of the scope of the discretion."[73] Therefore, any argument to the effect that the Director of Immigration has an unfettered discretion under the Immigration Ordinance should be rejected and would be inconsistent with both the domestic and international law.

62. Thus, while Art.3 of the CAT applies to Hong Kong. It is clear that Hong Kong is not acting *bona fide* in its implementation. The governmental policies with regard to asylum seekers seek to defeat the principle of *non-refoulement*, rather than attempting to adhere to it. To conclude, a statutory RSD procedure which incorporates a high standard of fairness as well as human rights and refugee law protections is urgently needed.

[73] *Leung Kwok Hung and Others v. HKSAR* FACC Nos. 1 & 2 of 2005, para 25-29.

4.1.2.) Detention and prosecution policies

63. Asylum seekers and refugees in Hong Kong are vulnerable to arbitrary detention. Long periods of detention have often left asylum seekers in a state of helplessness. Human rights lawyers note that asylum seekers are arrested, detained and prosecuted for not holding valid visas and failing to produce immigration papers. Even when they have a valid visa, owing to the length of RSD procedures, their visa usually expires before the completion of RSD.[74] At that moment they are in domestic legal terms merely illegal immigrants. If they approach the Immigration Department to extend their visas or to obtain a recognizance they are often rejected and will be asked to leave Hong Kong, which they are unable to do.[75] The Government "allows UNHCR to carry out RSD

[74] See Legislative Council Secretariat, 'Panel on Welfare Services and Panel on Security: Minutes of joint meeting held on Tuesday, 18 July 2006 at 2:30 pm in the Chamber of the Legislative Council Building' LC Paper No. CB(2)3077/05-06 ('Minutes of July 2006 Meeting');, *supra,* para 7.

[75] See also Society for Community Organization ('SOCO'), Hong Kong Human Rights Commission and Voices of the Rights of Asylum Seekers and Refugees, 'Denial of Asylum Seekers' Rights,' submission to Panel on Welfare Services and Panel on Security, July 2006, LC Paper No. CB(2)2747/05-06(03), para 6. ('Denial of Asylum Seekers' Rights').
The Monitor notes that two cases testing the conduct of the administration in dealing with the issue of non-refoulement are pending. The first case challenges the government's prosecution of asylum seekers (1) without valid traveling documents and (2) with a valid 14 day traveling visa but has overstayed because of the delaying of assessment reports.

but ignores and/or reserves the right to prosecute/detain asylum seekers holding UNHCR papers."[76]

64. The "arbitrariness" of this government practice is fully reflected in an incident which took place on 29th June, 2006, when the police "raided" a government sponsored shelter, arresting 13 asylum seekers, among them children aged 1.5 to 3 years old.[77] Although the police later stated that they were not aware that the accommodation was government-funded, it took enormous efforts for human rights lawyers and advocates to negotiate the release of the detainees from custody (the raid took place on the day when a judicial review concerning the Social Welfare Department ('SWD') leaving asylum seekers destitute was heard in the High Court).[78]

65. Asylum seekers are often detained for an indefinite time in over-crowded conditions and at times deprived of their basic needs.[79] Asylum seekers and torture claimants detained in the Castle Peak Bay Immigration Centre have gone on hunger strikes to protest against unreasonable treatment. They are also denied access to legal or other outside assistance.[80] Applications for legal aid to challenge decisions to detain are often denied, if not delayed, "despite unlawful detentions being priority matters for the Courts."[81] There is also a lack of an administrative detention review procedures.[82] The Director of Immigration has the discretion to "grant release on recognizance to asylum seekers in detention on the merit of individual cases."[83] There is however no practical way of challenging a refusal to grant release on recognizance save in an extreme case which would justify the time, delay, cost and uncertain outcome of a judicial review. These arrangements are in violation of Art.28

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[76] Ibid.

[77] Norma Connolly, 'Asylum seekers refuse food in quest for bail,' S.C.M.P., 2006-07-07.; See SOCO, 'Denial of Asylum Seekers' Rights'.

[78] Mark Daly, 'Note on the Situation of Asylum Seekers,' para 6.

[79] See 'Denial of Asylum Seekers' Rights'. Note also that Art.10(1) of the ICCPR which provides that those deprived of liberty must be treated with humanity.

[80] 'Refugee Concern Network ('RCN'), 'Submission to Joint Meeting of the Panel on Welfare Services and Panel on Security', LC Paper No. CB(2)2761/05-06(04), 5. ('RCN submission to the Government')

[81] See Mark Daly, 'Note on the Situation of Asylum Seekers'.

[82] Mark Daly notes further that "[e]ven under the Dogs and Cats Ordinance a person aggrieved by a decision specifying the place or period of detention of a dog or cat can appeal to an Administrative Appeals Board." Ibid., at fn 8.

[83] Under these circumstances the Director would have regard to "(a) whether the person concerned constitutes a security risk to the community; (b) whether there is any risk of the person absconding and (re)offending; and (c) whether removal is going to be possible within a reasonable time." See 'Minutes of the July 2006 Meeting', *supra,* para 4. The policy is at least objectionable on the following grounds: (1) no weight is given to the fact that the offence of overstaying is government induced; (2) in relation to (b), it seems highly unlikely that an asylum seeker could abscond and it is inconceivable to "re-commit" the offence of overstaying or illegal entry; (3) in relation to (a), it is highly discriminatory and arbitrary – a HK resident would not be detained for the mere fact that they pose a "security risk". It seems that the government policy is only applicable to those who have committed a separate offence other than one that is connected to his being an asylum seeker.

(freedom from arbitrary arrest and detention), Art.35 (right to legal advice, access to courts, and timely protection of lawful rights) and Art.39 (rights as provided under ICCPR) of the Basic Law.[84]

66. The UN Working Group on Arbitrary Detention stated in their 1998 Report that, "[A]rticle 14 of the [UDHR] guarantees the right to seek and to enjoy in other countries asylum from persecution. If detention in the asylum country results from exercising that right, such detention might be 'arbitrary'."[85] The issue is also dealt with in the communication *A v. Australia*, before the Human Rights Committee, concerning the detention of boatpeople, asylum seekers, arriving at the border of Australia.[86] The Committee is of the view that "the notion of 'arbitrariness' must not be equated with 'against the law' but could be interpreted more broadly to include such elements as inappropriateness and injustice."[87] Although the detention of individuals requesting asylum could not be said to be arbitrary *per se*, nor is there a rule of customary international law which would render all such detention arbitrary, the Committee notes that the purpose of the detention and the length of the detention must be justified.[88] In *C v. Australia* concerning the detention of an asylum seeker, the Committee was of the view that the State has to demonstrate that "there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions."[89]

67. Therefore, if the Government insists that such arrests and detentions are legitimate, the Government should be ready to justify the measures employed. However, it is difficult to see how the detentions could be justified for situations that are created by the government itself (i.e. the failure to produce documents because of the government's failure to issue them; "overstaying" attributable to the delay in processing the asylum seeker's case or the absence of an effective government administered RSD procedure).

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[84] These rights are extended to asylum seekers and refugees by virtue of Art.41 of the Basic Law, "[p]ersons in the Hong Kong Special Administrative Region other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed in this Chapter."

[85] UN Working Group on Arbitrary Detention, 'Question of the Human Rights of all Persons subjected to any form of Detention or Imprisonment', E/CN.4/1998/44. See also http://www2.amnesty.se/wwwflykt.nsf/9bc2ede1e784f23dc125683d0067fa3a/88cd22ed46a17facc1256d6400415628?OpenDocument.

[86] *A v. Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (1997).

[87] Ibid.

[88] Ibid.

[89] *C v. Australia*, Communication No. 900/1999, U.N. Doc. CCPR/C/76/D/900/1999 (2002).

68. Moreover, it is only reasonable for a person claiming to exercise his/her right to asylum entering any territory to enjoy the principle of non-penalization. Otherwise, the right to asylum could not be said to be a right at all. This idea is expressed through Art.31 of the 1951 Convention which requires that:

> "[s]tates shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened…, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."[90]

The concept of non-penalization has been expressed in various occasions;[91] EXCOM conclusion on the Protection of Asylum Seekers reaffirmed that asylum seekers should "not be penalized or exposed to any unfavorable treatment solely on the ground that their presence in the country is considered unlawful."[92]

69. Finally, it should be stressed that the arbitrary detention and arrest of asylum seekers has serious consequences additional to those resulting directly from the arrest. NGOs are aware of rape victims (women and children) who are fearful of reporting their cases to the police due to the fear of being arrested and detained for overstaying[93] (indicating a huge discrepancy between the Government practice and that recommended by the UNHCR).[94] Asylum seekers try to hide away from the police so their freedom of movement is effectively restrained.[95] Children do not dare to go to school for the fear of arrest.[96] These are all reasons why a

[90] 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137. Adopted on 28 July 1951; entered into force on 22 Apr. 1954. ('1951 Convention').

[91] Alice Edwards, *supra,* "The Conference of Plenipotentiaries to the 1951 Convention clearly intended that refugees not be penalised through recourse to criminal prosecution for their illegal entry or presence.";
See also G. Goodwin-Gill, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Nonpenalization, Detention and Protection', in E. Feller, V. Turk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection,* (Cambridge University Press, 2003) 185, at 191-192, referring to statements by the Danish representative and the United Kingdom representative, from the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records: UN doc. A/CONF.2/SR.13, 15; UN doc. A/CONF.2/SR. 35, 18, quoted in Alice Edwards, *supra,* at fn. 175.

[92] EXCOM Conclusion: Protection of Asylum-Seekers in Situations of Large-Scale Influx, No.22 (XXXII) (1981), para B.2.(a).

[93] SOCO, 'Denial of Asylum Seekers' Rights', 5-6. See also a letter written from a NGO, RainLily, to the LegCo Panel on Welfare Services and Panel on Security, dated 18th July, 2006, LC Paper CB(2)2788/05-06(03) (in Chinese), outlining alleged differential treatment by the Police in their investigation into a case concerning an asylum seeking female (claiming to have been raped) who turned to RainLily for assistance. The letter also mentioned that no charge was laid against the alleged perpetuator and the victim was charged with overstaying.

[94] See EXCOM Conclusion No.98 – Conclusion on Protection from Sexual Abuse and Exploitation.

[95] Leslie Kwoh, 'Asylum seekers 'go into hiding' to avoid arrest', S.C.M.P., 2006-7-17.

[96] SOCO, 'Denial of Asylum Seekers' Rights', 2-3.

temporary legal status must be given to asylum seekers and refugees.

4.1.3.) The lack of resources offered to asylum seekers and refugees in Hong Kong

70. The lack of resources offered to asylum seekers and refugees in Hong Kong has raised growing concern amongst local NGOs. As mentioned above, the Government considers itself as having no obligation to formulate an asylum policy. In addition, the Government considers itself free from any obligation to assist asylum seekers and refugees except on "humanitarian grounds" a minimal level of assistance is offered. Most of these services are offered by the SWD.

71. According to the SOCO and other NGOs, however, when asylum seekers approach the SWD for assistance, they are being asked to produce immigration papers (which were never issued by the Immigration Department ('ImmD')) or to reveal their identity to the ImmD, or else, they should approach their consulates (which is bizarre for, in the case of flight from government persecution, the last person an asylum seeker should be required to look for help is the alleged prosecutor or torturer).[97] If they fail to do so, the SWD would usually not assist and they are warned not to return, or else, they would call the police.[98]

72. The above unreasonable constraints aside, for asylum seekers and refugees who do manage to get government support, the support received is simply inadequate to maintain their basic level of subsistence. In April 2006, the SWD contracted International Social Services ('ISS') to provide for the basic needs of destitute asylum seekers and torture claimants.[99] The project launched, however, was only sufficient to cater a small proportion of the over 1600 asylum seekers and 250 CAT claimants in Hong Kong.[100] On top of that, the trial programme was intended to run at $1800 - $1900 per person

See also Society for Community Organization and Voices of the Rights of Asylum Seekers and Refugees ('VORAR'), '12 Letters from asylum seekers in Hong Kong' submission to the Panel on Welfare Services and Panel on Security', LC Paper No. CB(2)2761/05-06(01).

[97] See SOCO, 'Denial of Asylum Seekers' Rights', 7. Mark Daly, 'Note on the Situation of Asylum Seekers', para 5. According to Daly, the system was only set up as a result of litigation – the cases are presently adjourned.

[98] SOCO, 'Denial of Asylum Seekers' Rights', 7.

[99] See International Social Service Hong Kong Branch, 'Submission to the Joint meeting of the Legislative Council's Security and Social Welfare Panel', 18th July 2006, LC Paper No. CB(2)2788/05-06(02).

[100] RCN, 'RCN submission to the Government'. Note that statistics vary with different sources, SOCO notes that there are 1800 asylum seekers in Hong Kong. See SOCO, 'Denial of Asylum Seekers' Rights', 2.

per month, which is insufficient provided the high living costs in Hong Kong.[101]

73. Those who are outside the above programme suffer even worse. In terms of housing, they receive as little as HKD $1000 maximum per month, which is simply not sufficient to match the high rentals in Hong Kong. The amount, moreover, does not cover electricity, water and gas costs, nor is transportation subsidized. Housing becomes a luxury be it "temporary, unsanitary and crowded."[102] Many sleep on the streets relying on the clothing and blankets that were handed to them by the NGOs or the locals. Other Government run shelters (in Yuen Long) currently accommodate less than 20 people.[103] These shelters are cramped and poorly managed, where men, women and children are all mixed in the same shelter. Women and children are thus prone to sexual abuse.[104] For children, the place is also far from school.

74. In terms of food, the SWD distributes food for the asylum seekers to pick up once every 10 days. However, they are not provided with adequate refrigeration and the food is left to rot. At times, they are given expired food.[105] At times they are given a bag of rice, without having a place, or the means, to cook it.[106] In most occasions, they are provided with dried noodles, powdered milk and canned foods which do not meet daily nutrition requirement.[107] While children and infants could not acquire the necessary nutrition for healthy growth and mothers could not obtain the nutrition to breast feed their babies.[108] Those who are not entitled to SWD schemes are forced to beg on the streets.

75. In terms of medical care, infants and children have not been getting adequate vaccination.[109] On top of that, ill-health that persists includes common cold and fever, digestive problems (lack of fibre) and thyroid disorder (iodine deficiency).[110] For government hospitals, medical fees distinguish between eligible and non-eligible persons, the former pays $100 while the latter, $570; asylum seekers and refugees belong to the latter group.[111] Medical fee waivers could only be applied where there is an accompanying recognized social worker. Therefore emergency medical assistance outside working

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[101] SOCO, 'Denial of Asylum Seekers' Rights', 7.
[102] Ibid.
[103] RCN, 'RCN submission to the Government'., 4.
[104] SOCO, 'Denial of Asylum Seekers' Rights', 5-6.
[105] Ibid., 7.
[106] Mark Daly, ''Note on the Situation of Asylum Seekers', para.5.
[107] RCN, 'RCN submission to the Government'., 4.
[108] Ibid.
[109] Ibid., 8.
[110] Ibid.
[111] Ibid., 9.

hours is thus not available outside the working hours of social workers.[112] Medical fee waivers, in addition, have to be applied for each re-visits, which is impractical, while waivers for local residents who receive Comprehensive Social Security Assistance (local social security) are waived on a one-off period for 6 months.[113] Accordingly, asylum seekers and refugees receive bills for medical services that they are not able to pay.[114] NGOs also note examples of people "who have been told by doctors that operations could not be provided because it would be too expensive."[115] Information as to health is not disseminated.[116]

76. Children are not provided with education.[117] The Education Bureau (former the Education and Manpower Bureau) erects an administrative hurdle for asylum seeking children: it will not offer school placements to these children unless those who are on recognizance with the Director of Immigration;[118] which is without legal basis and is contrary to international human rights which provides that school age children should have access to basic education irrespective of their legal status.[119] Due to the lack of a coherent policy, applications to schooling are considered on a case-by-case basis. For those who are eligible, they are not provided with the financial aid necessary, such as for transportation, books and stationeries. There is currently no policy as to the education of asylum seeking children, the Student Financial Assistance Agency subsidies, which local residents are eligible to apply, are only provided to asylum seeking children on a discretionary basis.[120]

77. In terms of social security and employment, asylum seekers and refugees do not enjoy the right to work as well as the right to welfare. This leaves them in a desperate position. They are essentially deprived of their means of survival - they are being "cornered" by the Government.

78. As is clear from the foregoing, a number of rights under the ICESCR and CRC are infringed: the right to education

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[112] Ibid., 8.
[113] Ibid.
[114] SOCO, 'Denial of Asylum Seekers' Rights', 9. SOCO notes that a "pregnant asylum seeker was presented a bill of $20000, because she was going to deliver her baby."
[115] Ibid.
[116] See CESCR General Comment No.14 on the right to the highest attainable standard of health, E/C.12/2000/4, "[t]he Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and <u>access to health-related education and information</u>, including on sexual and reproductive health…"
[117] As of July 2006, there are 31 asylum seeking children and 31 refugee children. See SOCO, 'Denial of Asylum Seekers' Rights', 18.
[118] Ibid.
[119] Ibid.
[120] Ibid.

(Art.13 ICESCR, Art.28 CRC), the right to adequate standard of living (Art.11 ICESCR, Art.27 CRC), the right to highest attainable standard of physical and mental health (Art. 12 ICESCR, Art.25 CRC), the right to work (Art.6 ICESCR) and the right to be freed from inhumane and degrading treatment (Art.7 ICCPR, Art.16 CAT).[121] Moreover, since Art.26 of the ICCPR, Art.2 of the ICESCR embodies the principle of non-discrimination and provides that rights should be enjoyed irrespective of their country of origin, rights afforded to residents should also be extended to refugee and asylum seekers (save for rights that could be justified differential treatment on the basis of nationality, such as the right to vote).

79. Currently, a substantial proportion of the group is destitute, among them children. Their human dignity has been trampled upon by these government policies. The situation becomes even more ironic when the Government chooses to recognize a person on the basis of his/her claimed refugee status; the Government is simply not protecting them as a refugee,[122] but placing them in an extremely difficult position. As academics suggested, "the real point is that a state cannot claim to be protecting refugees unless it accords to that person all of the rights to which they are entitled under the Refugees Convention."[123]

80. It is arguable that the depriving of social and economic rights could amount to constructive *refoulement*, "not only might lack of social and economic rights in a particular destination country threaten to deter individuals from seeking asylum from persecution there, but it may act as a push factor in which refugees and/or asylum-seekers, out of pure economic necessity, are forced to return to a country in which their life or freedom could be threatened."[124] Fredriksson notes that, "[i]t is unreasonable to deny both the right to work and the right to access social security: this policy threatens to <u>deter</u> *bona fide* asylees with a well-founded fear of persecution from seeking protection."[125]

81. In any event, the Government should be liable under Art.16 of the CAT for the inhumane and degrading treatment of the asylum seekers.

[121] Both the ICESCR and the CRC are applicable to Hong Kong.
[122] Note that the UNHCR had ceased its support to vulnerable asylum seekers from May 2006. See 'Minutes of July 2006 Meeting', *supra,* para 2.
[123] Savitri Taylor, 'Protection elsewhere/nowhere' (2006) I.J.R.L 283, 286-287.
[124] Alice Edwards, *supra*, 343.
[125] J. Fredriksson, 'Bridging the Gap between rights and responsibilities: Policy changes affecting refugees and immigrants in the United States since 1996', (Spring 2002) 14 *Georgetown Immig. L.J.* 757, 778, quoted in Alice Edwards, *supra,* 326.

4.1.4.) Short Conclusion – in search of a fair and coherent asylum policy

82. As mentioned above, the Government repeatedly argues that an asylum policy if implemented in Hong Kong would likely be vulnerable to abuses. However, the very fact that there would be possible abuses is simply not a good reason for not implementing proper procedures for the assessment of refugee claims. In fact, there are possible abuses in all systems; this is true not only in Hong Kong. [126] If administrations were to be allowed to claim "possible abuses" to alleviate the burden of their international obligations, the international system of refugee safeguards would be reduced to mere rhetoric.

83. The relevant question is thus always to find ways to minimize abuses and at the same time offer sufficient safeguards to genuine refugee and torture claimants. Therefore, at issue here is not the substantive granting of refugee status in particular cases, but the implementation of procedures and the ensuring of the standards of fairness of such procedures so that claims of torture and other claims for refugee status can be properly assessed. Abuse could be prevented by placing legislative safeguards, for example, requiring asylum seekers to make prompt refugee or torture applications.

84. Moreover, a coherent asylum policy would also see the social and economic rights of the asylum seeker guaranteed. While it is true that local resources would have to be spent, the Government should not be allowed to avoid its international obligation.[127]

85. The fact that the Hong Kong Government is turning a blind-eye to the issue is shown by its continued indifference to international criticism. Such criticism includes the 1999 and 2006 Concluding Observations of the HRC,[128] the 2005

[126] Alice Edwards, *supra,* at 293, "governments are implementing hard-line or restrictive asylum policies and practices in order to deter and to prevent asylum-seekers from seeking refuge on their territory, including by interception and interdiction measures, visa controls, carrier sanctions, 'safe third country' arrangements, administrative detention, and/or restrictive interpretations of the refugee definition."

[127] Preamble of the 1951 Convention recognized that the "granting of asylum might place unduly heavy burdens on certain countries, and… a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international cooperation." The principle of solidarity is repeated in EXCOM conclusions.

[128] See Concluding Observations of the Human Rights Committee – Hong Kong Special Administrative Region (2006), CCPR/C/HKG/CO/2. ("HRC's Concluding Observation on Hong Kong 2006")
Concluding Observations of the Human Rights Committee – Hong Kong Special Administrative Region (1999), CCPR/C/79/Add.117.

Concluding Observations of the ICESCR and CRC,[129] and the 2000 Concluding Observations of your Committee.[130] It is reasonably foreseeable that after *A.K. v. Director of Immigration*, i.e. the decision that customary international law principle of *non-refoulement* does not apply to Hong Kong, the situation of refugees in Hong Kong will deteriorate. The Monitor appeals to the Committee that urgent measures should be taken to prevent this happening.

List of questions

86. The Monitor recommends the Committee to ask the Government:
    - to provide the Committee with any written requirements in the form of law, Immigration Rules, and internal guidelines on the need to refer a case to the UNHCR and to clarify its division of roles and the extent of its co-operation with the UNHCR (SOHK);
    - to clarify the legal status of asylum seekers in Hong Kong, especially whether in the eyes of the Government, their presence in Hong Kong is lawful or unlawful;
    - whether the Government would consider granting a temporary legal status to asylum seekers (especially those whose traveling visas expire while their application is being processed and those who claim asylum at the port of entry) so that they would not be subject to arrest and detention and would be afforded freedom of movement;
    - to provide the Committee with statistics of asylum seekers arrested and detained;
    - to provide the Committee with statistics of the number of asylum claimants who are denied leave to enter;
    - to provide the Committee with the prosecution policies in relation to asylum seekers and to provide the Committee with the statistics of asylum seekers being prosecuted;
    - to provide the most up-to-date statistics of asylum seekers, torture claimants and refugees in Hong Kong;
    - to provide the Committee with details of the asylum-related cases litigated in the Hong Kong courts for (at least) the past 4 years and those that the Government is currently litigating, as well as to provide the Government

[129] Concluding Observations of the Committee on Social, Economic and Cultural Rights – People's Republic of China (including Hong Kong and Macao) (2005), E/C.12/1/Add.107, para 92, "The Committee recommends that HKSAR reconsider its position regarding the extension of the Convention relating to the Status of Refugees and its Protocol to its territorial jurisdiction, and that it strengthen its cooperation with UNHCR, in particular in the formulation of a clear and coherent asylum policy based on the principle of non-discrimination."; Concluding Observations: China (including Hong Kong and Macau Special Administrative Regions) (2005), CRC/C/15/Add.271, para 31.

[130] 2000 CAT Concluding Observation, *supra,* para 36, "[t]he Committee recommends that laws and practices relating to refugees be brought into full conformity with article 3 of the Convention."

counsel's written submissions presented to the court in each case;

- to clarify the inconsistency between the situation as described above and statements in the Government's Report;
- to provide an assessment as to the resources spent into litigating these cases;
- to provide an assessment as to the resources which have to be spent to put into place a proper RSD procedure; and
- to provide details and relevant figures as to the current policies in relation to the material assistance tendered to asylum seekers and refugees;

Recommendations

87. The Monitor recommends the Committee to:

- consider whether it is an obligation on the part of the Government, under Art.3 of the CAT, to set up government administered refugee RSD procedures;
- consider whether it is an obligation under Art.3 of the CAT, to give reasons for the refusal of refugee status (at least with respect to torture claimants);
- consider and clarify, in the context of the reservation on Art.13 of the ICCPR, whether an asylum seeker or torture claimant has a right to have their applications processed under a fair RSD procedure (as a part of their right to seek and enjoy asylum);
- consider and clarify, in the context of the reservation on Art.13 of the ICCPR, whether it is a right of any torture claimants, under Art.3 of the CAT, to appeal to the findings of the administration;
- urge the Government to legislate with regards to Art.3 of CAT, including the incorporation of statutory screening procedures and the fair and speedy assessment of refugee and torture claims;
- consider and clarify whether the customary international law rule of *non-refoulement* applies to Hong Kong;[131]
- urge the extension of the 1951 Refugee Convention to Hong Kong;
- clarify whether an asylum seeker pending determination is entitled to the protection of Art.13 of the ICCPR;
- call for the removal of the reservation to Art.13 of the ICCPR;
- to clarify whether the deprivation of social and economic rights constitutes constructive *refoulement*;
- clarify whether the deprivation of social and economic rights constitutes a degrading treatment under CAT;

[131] In particular, consider whether customary international law rule of *non-refoulement* which is binding on China should apply to Hong Kong.

- urge the UNHCR to renew efforts with local NGO's to advocate for the implementation of a RSD and coherent policies with respect to asylum seekers and torture claimants;
- urge the Government to formulate coherent asylum and refugee policies including: the implementation of administrative means to cater for the social and economic rights of asylum seekers and refugees, to afford temporary legal status to asylum seekers.

4.2.) The Fugitive Offenders Ordinance

88. The Fugitive Offenders Ordinance (CAP 503) ('FOO') provides for a legislative framework for the entering into of extradition agreements. S.3(1) provides that ,

    "[s]ubject to subsection (9), the Chief Executive in Council may, in relation to any arrangements for the surrender of fugitive offenders, by order- (a) reciting or embodying the terms of the arrangements; (b) specifying the extent, if any, to which any relevant enactment specified in the order is to be repealed or amended, direct that the procedures in this Ordinance shall apply as between Hong Kong and the place outside Hong Kong to which the arrangements relate, subject to the limitations, restrictions, exceptions and qualifications, if any, contained in the order."

89. S.9 provides that "[t]he Chief Executive in Council shall not make an order under subsection (1) unless the arrangements for the surrender of fugitive offenders to which the order relates are substantially in conformity with the provisions of this Ordinance." S.4 of the FOO provides for the type of persons to be extradited; S.5 stipulates the general restrictions for surrender (with deviations from general accepted human rights principles). At present, there are 14 extradition agreements in force in Hong Kong and incorporated into domestic legislation.[132]

90. The Monitor considers that s.5 of the FOO offered insufficient protection to requested persons in cases where:
    - there are substantial grounds for believing that the person to be surrendered would be at real risk of facing an unfair trial;
    - there are substantial grounds for believing that the person to be surrendered would be at real risk of facing the death penalty.

[132] These include extradition agreements concluded between, Canada, Netherlands, USA, Australia, Malaysia, Philippines, Indonesia, India, Singapore, New Zealand, Sri Lanka, Portugal, UK and the Republic of Korea.

4.2.1.) Unfair trial as ground for refusing extradition

91. At present, the Government does not agree that Art.14 of the ICCPR is relevant to extradition. The Government explains that although Art.14 of the ICCPR "sets out a number of requirements which aim at ensuring that accused persons receive a fair trial, the ICCPR, however, makes no reference to extradition and is directed towards imposing obligations on the jurisdiction where the trial is in fact conducted."[133] Moreover, the Government has highlighted that after entering into an agreement with another jurisdiction; only in exceptional cases would refusal of surrender of a person occur: "when there is clear evidence of a flagrant denial of the right to fair trial in the territory of requesting party."[134]

92. The jurisprudence is unclear as to whether an extradition which would expose the requested person to a real risk of an unfair trial would amount to *refoulement*. In *Soering v. United Kingdom,* the European Court held that it would be a violation of Art. 3 of the ECHR, if the extradition of a person would expose him to a real risk of treatment going beyond the threshold set by the Article. [135] The Court expressed that "[t]he right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society. The court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or at risk of suffering a flagrant denial of a fair trial in the requesting country."

93. In *Drozd and Janousek v. France and Spain*; the Court stated that the ECHR "does not require a Contracting State to enforce the Convention's provisions on non-contracting parties before co-operating with such states. To require otherwise would thwart the current trend towards the strengthening of international co-operation in the administration of justice…."[136] In *The Commission of the European Communities v. Denmark,* the Court suggested that where the requesting party is not a party to the ECHR, Art.3

[133] See Legislative Council Secretariat, 'Paper for the House Committee meeting on 16 November 2001 – Report of the Subcommittee on Fugitive Offenders (Sri Lanka) Order and Fugitive Offenders (Portugal) Order', LC Paper No. CB(2)391/01-02.

[134] Administration's response to the submissions received, LC Paper No. CB(2)391/01-02, 7 November 2001.

[135] See *Soering v. United Kingdom*, the ECtHR considered whether the extradition of a person to United States where he would face death penalty and a possibility of death row amounts to a violation of Art.3 of the ECHR which writes "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." *Soering v. United Kingdom,* (1989) 11 EHRR 439.

[136] *Drozd and Janousek v France and Spain (1992) 14 E.H.R.R. 745.*

becomes relevant when there is a perceived risk of a flagrant denial of a fair trial .[137]

94. However, a different approach was taken by the HRC. In *Kindler v. Canada,* the HRC was of the view that:

> "If a State Party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State Party may be in violation of the Covenant…States parties to the [ICCPR] will often also be party to various bilateral obligations, including those under extradition treaties. A State party to the Covenant is required to ensure that it carries out all its other legal commitments in a manner consistent with the Covenant. The starting point for an examination of this issue must be the obligation of the State party under article 2, paragraph 1, of the Covenant, namely, to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant..."[138]

Although the case concerned the right to life, the principle stated would seem applicable also to fair trial rights under Art. 14 of the ICCPR.[139]

95. The minimum safeguards for a fair trial are incorporated into the United Nations Model Treaty on Extradition (UNMTE).[140] Art.3(f) of the UNMTE stipulates that it should be a mandatory ground for refusal of extradition:

> "If the person whose extradition is requested has been or would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14."

96. The Monitor therefore submits that the FOO, by failing to incorporate protections under Art.14 of the ICCPR, falls below international standards.

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[137] In *The Commission of the European Communities v Denmark,* the ECtHR considered whether the extradition of a person to a country where there is a perceived risk that he would face an unfair trial amounts to a breach of Art.3 of the ECHR (freedom from torture), in the context where the requesting State is not a party to the ECHR. See *The Commission of the European Communities v Denmark,* (C150/04) [2007] S.T.C. 1392 (ECJ), para 175-188.

[138] *Kindler v. Canada,* CCPR/C/48/D/470/1991 (1993), para 13.1. Under consideration was whether by extraditing Mr. Kindler to the United States, Canada exposed him to a real risk of a violation of his rights under the Covenant.

[139] Human rights safeguards as contained in Art.14 of the ICCPR includes: equality before the law, Art.14(1); entitlement to fair and public hearing by a competent, independent and impartial tribunal establish by law, Art.14(1); presumption of innocence, Art.14(2); promptly informed of the charge laid against him, Art.14(3)(a); adequate time to communicate with counsel of own choosing, Art.14(3)(b); tried without due delay Art.14(3)(c); tried in presence, Art.14(3)(d); right to exam witnesses, Art.14(3)(e); right to free interpretation, Art.14(3)(f); right not to be compelled to testify against himself or to confess guilt, Art.14(3)(g); procedures to suit juvenile persons, Art.14(4); right to have decision reviewed Art.14(5); right to compensation for miscarriage, Art.14(6); protection from double jeopardy, Art.14(7).

[140] United Nations Model Treaty on Extradition ('UNMTE'), U.N. Doc. A/RES/52/88.

4.2.2.) Death penalty as ground for refusing extradition

97. The extradition of persons to places where there are substantial grounds for believing that death penalty would be imposed on the persons must be examined with the utmost prudence. In the 1999 Concluding Observations issued by the HRC in relation to Hong Kong, the Committee observed that:

> "In the light of the fact that the Covenant is applied in HKSAR subject to a reservation that seriously affects the application of article 13 in relation to decision-making procedures in deportation cases, the Committee remains concerned that persons facing a risk of imposition of the death penalty or of torture, or inhuman, cruel or degrading treatment as a consequence of their deportation from HKSAR may not enjoy effective protection.
>
> In order to secure compliance with articles 6 and 7 in deportation cases, the HKSAR should ensure that their deportation procedures provide effective protection against the risk of imposition of the death penalty or of torture or inhuman, cruel or degrading treatment."[141]

At present, out of the 14 extradition agreements in force in Hong Kong, two do not contain any provisions as to death penalty (Malaysia and Singapore), while two contain provisions for mandatory refusal, and the others oblige the Government to seek assurances that death penalty if imposed should not be carried out.

98. Although the right to be free from torture "cannot be interpreted as generally prohibiting death penalty,"[142] and therefore the substantial risk of being exposed to death penalty alone might not itself become a sufficient ground for non-surrender, "[a] the manner in which the death penalty is imposed or executed, [b] the personal circumstances of the condemned person and [c] a disproportionality to the gravity of the crime committed, as well as the [d] conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3 [of the ECHR]."[143] Furthermore, it has been suggested that

[141] See Concluding Observations of the Human Rights Committee – Hong Kong Special Administrative Region (1999), CCPR/C/79/Add.117.
[142] HRC, General Comments No.6 on Art.6 ICCPR, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994).
[143] *Soering v. United Kingdom, supra.* para.1(h).

drawing upon the wording of Art.6 of the ICCPR alone, parties to the ICCPR "were given two broad categories within which to test a proposed extradition's compliance with the right to life: the restrictions category and the arbitrary conduct category."[144] The former (a) restricts death penalty only to the "most serious crimes",[145] (b) requires anyone sentenced to death to have a right to seek pardon or commutation,[146] and (c) prohibits death penalty for persons aged under eighteen and for pregnant women.[147] The latter "derived from the express words of Art.6(1): '[n]o one shall be arbitrarily deprived of his life'."[148]

99. At present Singapore still retains the death penalty for the trafficking of drugs. The Singaporean Misuse of Drug Act presumes an accused in possession of over a certain amount of drugs to possess such drugs for the purpose of trafficking, subject to mandatory capital punishment.[149] Similar provisions exist in Malaysian law.[150]

100. The Monitor is of the view that, firstly, the imposition of capital punishment in drug-related offences is an unjustifiable disproportionate penalty. HRC General Comment No.6 reiterates that death penalty could not be justifiably imposed for ordinary offences, but only for the most serious crimes in accordance with ICCPR Art.6(2).[151] This position was reaffirmed in *A.R.J. v. Australia*.[152] The Report of the Secretary General to the UN Economic and Social Council (ECOSOC) Commission on Crime Prevention and Criminal Justice on "Capital punishment and implementation of the

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[144] Joanna Harrington, 'The Absent Dialogue: Extradition and the International Covenant on Civil and Political Rights' 32 Queen's L.J. 82, 119-120.

[145] Art.6(2) of the ICCPR writes "sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide."

[146] Art.6(4) writes "[a]nyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases."

[147] Art.6(5) writes "[s]entence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women."

[148] Joanna Harrington, *supra*, 122.

[149] See Singaporean Misuse of Drug Act (last revised 1998), s.17 "Trafficking in controlled drugs" on the presumption of trafficking on possession of different type of drugs with varying quantities; s.18 titled "Presumption of possession and knowledge of controlled drugs" presumes the possession of drug in certain circumstances where the accused does not have physical possession of the drug as well as the knowledge of the nature of that drug on possession.

[150] See Malaysian Misuse of Drug Act.

[151] See HRC, General Comments No.6 on Art.6 ICCPR, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994), para 6.

[152] "Art.6(1) must be read in light of art.6(2) which did not prohibit the imposition of death penalty for the most serious crimes. The Committee notes that article 6, paragraph 1, of the Covenant must be read together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes. Australia has not charged the author with a capital offence but intends to deport him to Iran, a State which retains capital punishment. If the author is exposed to a real risk of a violation of article 6, paragraph 2, in Iran, this would entail a violation by Australia of its obligations under article 6, paragraph 1." See *A.R.J. v. Australia* , Communication No. 692/1996, U.N. Doc. CCPR/C/60/D/692/1996 (1997).

safeguards guaranteeing protection of rights of those facing the death penalty," records that in the opinion of States which have tendered their views as to the nature of capital offences, [153] drug-related offences were considered an ordinary offence.[154]

101. Secondly, by making the penalty mandatory, it "eliminat[es] the discretion of the court… mak[ing] it impossible to take into account mitigating or extenuating circumstances and eliminates any individual determination of an appropriate sentence in a particular case." [155] Furthermore, statutes which "partially shifts the burden of proof to the accused, do not provide sufficient guarantees for the presumption of innocence and may lead to violations of the right to life when the crime of drug trafficking carries a mandatory death sentence."[156] In the present context, both Singapore and Malaysian law presume the guilt of the accused person's possession of drugs for the purpose of trafficking.

102. Therefore, the Monitor submits that the protection offered under Fugitive Offenders (Singapore) Order and the Fugitive Offenders (Malaysia) Order falls below international standards.

Recommendations

103. The Monitor recommends the Committee to:

- urge the Government to revise extradition agreements paying special heeds to the UNMTE;[157]
- urge the Government to consider amending the FOO so as to include death penalty as a ground for the mandatory refusal of extradition.

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[153] Report of the Special Rapporteur, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Resolution 1996/74, E/CN.4/1997/60/Add.1. ('Report of the Special Rapporteur, Mr. Bacre Waly Ndiaye')

[154] Ibid.

[155] Quoting the words of Special Rapporteur on extrajudicial, summary or arbitrary executions of the UN Commission on Human Rights, Philip Alston. He went on to add, "[t]he adoption of such a black and white approach is entirely inappropriate where the life of the accused is at stake. Once the sentence has been carried out it is irreversible," reported in the newspaper article, 'UN rights expert calls on Singapore not to execute convicted drug trafficker,' 15th November 2005, available at http://www.un.org/apps/news/storyAr.asp?NewsID=16561&Cr=Singapore&Cr1 =.

[156] See 'Report of the Special Rapporteur, Mr. Bacre Waly Ndiaye', *supra.*

[157] Art.3 of the UNMTE, on mandatory grounds for refusal, states that, "[e]xtradition shall not be granted in any of the following circumstances". Art.3(f) writes, "[i]f the person whose extradition is requested has been or would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14."

5.) Article 5: establishment of jurisdiction

5.1.) Narrowing Jurisdiction

104. S.3(5) of the CTO limits the government's responsibility to prosecute extraterritorial acts of torture.[158] Similar to s.134(5) of the 1988 Act, s.3(5) CTO operates to extend the "lawful authority, justification or excuse" defence to acts of torture that are lawful under foreign law (although unlawful under the laws of HK if not for the presence of this sub-section), thereby limiting the government's responsibility to prosecute such offences. Therefore when an official committed acts of torture within the definition of the CAT but where the law of the place falls below international standards, he would be able to invoke "lawful authority, justifications or excuse" under the foreign law to avoid legal sanction in Hong Kong.

105. This is hardly consistent with the quasi-universal jurisdiction of the CAT. The Monitor respectfully refers the Committee to the case *Congo v. Belgium* before the International Court of Justice ('ICJ'), [159] where Judges Higgins, Kooijmans and Buergenthal are of the view that under the CAT, parties have undertaken an "obligatory territorial jurisdiction over persons"[160] (i.e. an obligatory territorial jurisdiction for extra-territorial acts).[161] In other words, parties are obliged to establish jurisdiction to prosecute (or extradite) in accordance with Art.5(2);[162] the failure to do so would create a safe haven for torturers abroad. The provision of a defence for perpetrators abroad in s.3(5) CTO is therefore inconsistent with Art.5(2) of the CAT.[163] In this respect, your Committee had already expressed similar concerns about the 1988 Act (on which the CTO is modeled)

[158] See text under heading 2.1 above.

[159] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (2002) ICJ Rep. 3.

[160] Ibid., para 41-44.

[161] Antonio Cassese, 'When may Senior State Officials be tried for International Crimes? Some comments on the Congo v. Belgium case' 13 Eur.J.Int'L. 853, 856-857.

[162] Art.5(2) of the CAT writes, "[e]ach State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article" (emphasis added).

[163] The reason behind the principle of *aut dedere aut iudicare* (either you extradite or you prosecute) is highlighted in the British case *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet,* where the House of Lords noted and agreed that "Burgers and Danelius (respectively the chairman of the United Nations Working Group on the 1984 Torture Convention and the draftsmen of its first draft) say… that it was 'an essential purpose [of the Convention] to ensure that a torturer does not escape the consequences of his act by going to another country.'"

in your concluding observations to the report submitted by the UK in 2004.[164]

Recommendations

106. The Monitor recommends the Committee to:
- urge the Government to amend the wording of s.3(5) to cover the prosecution of acts which although lawful under foreign law amount to torture in accordance with international standards, by bringing the relevant provision in line with the CAT;
- urge the Government to repeal s.3(4) (the defence of lawful authority, justification and excuse) and s.3(5) altogether or to amend the two sections in light of the CAT.

6.) Article 11: review of interrogation rules, instructions, methods and practices of custody and treatment of persons arrested or detained

6.1) In relation to sex workers

[164] Conclusions and recommendations of the Committee against Torture, United Kingdom of Great Britain and Northern Ireland, U.N. Doc. CAT/C/CR/33/3 (2004), para 4(a)(ii).

6.1.1) Condoning sexual abuse against sex workers

107. Police abuse against sex workers in Hong Kong is widespread and is an issue of grave concern for local sex worker groups like Zi Teng and Action for Reach Out. In 2004-2005, Zi Teng, noted over 70 cases of complaints from sex workers about police officers obtaining free sexual service by abusing their position.[165]

108. As of today, members of the Hong Kong Police Force still act as undercover agents in the investigation of prostitution-related offences.[166] The receiving of sexual services are often

[165] Zi Teng, *Report on the Convention on the Elimination of All Forms of Discrimination against Women - Sex workers in Hong Kong (2006) (NGO report to the CEDAW committee's 36th session)*, 2. ('Zi Teng's submission to CEDAW 2006')

[166] Prostitution is not, *prima facie,* illegal in Hong Kong. However, there are considerable activities associated with prostitution which are criminalized under the laws of HK. These include:

Massage Establishments Ordinance (Cap 266)
- ss.4(1) and 13(1) Operating or assisting in the operation of a massage establishment without a licence/ not in accordance with the conditions of the licence

Crimes Ordinance (Cap 200)
- s.137(1) Living off earnings of prostitute
- s.139(1) Keeping a vice establishment
- s.143(1) Letting premise for use of a vice establishment
- s.144(1) Tenant permitting premises or vessels kept as a vice establishment
- s.145(1) Permitting premises to be used for purposes of habitual prostitution
- s.148(1) Soliciting in a public place for any immoral purpose

done under the auspices of the Police Force during the course of these operations. As an example, in January 2006, in a case before the Magistrates Court, a police officer unashamedly admitted that a female sex worker "touched my chest, thigh and penis. She asked me if I feel good and I answer 'yes'. She put some oil on my penis and stroke my penis for one minute. She cleaned for me after my ejaculation."[167]

109. According to a research, a proportion of the cases involve police officers receiving "hand jobs" many times before they actually arrest the sex worker.[168] A judge even criticized a police officer for receiving hand job services 12 times before arresting the sex workers.[169] Another situation is where the police officer accepts oral sex or full sexual service during the operation but claims that they only had a hand job with the prostitute. In these circumstances, evidence incriminating the police officers involved (such as used condoms) would usually be disposed by their colleagues who are in charge of gathering evidence after the police action.[170]

110. Some police officers also took advantage of their position to acquire free sexual services while not in the course of an undercover operation, often by threatening prostitutes with false charges, or other retaliation.

111. It seems that little has been done to prevent these practices, despite it being clear that such acts by the police could themselves amount to criminal offences – the procuring of sex services is through false pretences or misrepresentations (since in the end, the sex worker is often left unpaid) or by threats (cases not involving undercover operations; threatened arrest or detention, retaliation to herself or her

See Simon Young, 'Memorandum prepared for Zi Teng concerning "Police undercover operations for vice activities"', dated 3rd April, 2006. ('Memorandum on undercover operations').
Moreover, if the alleged is not a Hong Kong resident, acts of prostitution is illegal if it breaches his/her imposed condition of stay (in Hong Kong) under the Immigration Ordinance (Cap 115) ('ImmO'). S.11 of the Ordinance provides for the power of the Director of Immigration and immigration officers to impose any condition of stay as he/she deems fit. S.41 writes: "[a]ny person who contravenes a condition of stay in force in respect of him shall be guilty of an offence and shall be liable on conviction to a fine at level 5 and to imprisonment for 2 years." In usual cases, as a condition of stay, non-residents are not allowed to work and prostitution is considered as a kind of work.

[167] Magistrate case (unreported), ESCC 6546/2005, on file with Zi Teng, referred to in Zi Teng's submission to CEDAW 2006; See also *HKSAR v. Chan Ching Keung and Yu Yim Kuen,* HCMA314/2006, where the Court is satisfied that the hostesses touched the police's penis under an undercover operation.

[168] Ibid.

[169] Ibid.

[170] This also reflects the harboring of misconducts by superiors, since undercover operations followed by raids are usually directed by an officer higher up the rank.

family or threatening the harassing of her customers),[171] if involving vaginal intercourse could easily amount to rape.[172] The receiving of sexual services by officers would also amount to severe forms of inhumane and degrading treatment[173] directed at a socially vulnerable group.[174]

112. The Government is well aware of these practices and defends them. In its submission to the Legislative Council Panel on Security,[175] the Security Bureau states that there might be instances where there is a "strong operational need for the Police officer posing as customer to receive some form of sexual service from a prostitute so as to maintain his cover to collect the necessary evidence to secure successful prosecution against the offenders."[176]

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[171] S.120 Crimes Ordinance (Cap. 200) writes "(1) A person who procures another person, by false pretences or false representations, to do an unlawful sexual act in Hong Kong or elsewhere shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 5 years."
S.119 Crimes Ordinance (Cap. 200) writes "(1) A person who procures another person, by threats or intimidation, to do an unlawful sexual act in Hong Kong or elsewhere shall be guilty of an offence and shall be able on conviction on indictment to imprisonment for 14 years."

[172] When these sexual services involve vaginal intercourse, the sexual act itself might amount to rape. Note in the case *R v. Olugboja,* a girl raped by the Defendant's friend a moment ago requested the girl to have sexual intercourse with him. The girl out of fear submitted to the Defendant's demand, in the course of which she did not struggle nor resist. The Court held that a mere submission did not amount to consent and for the offence of rape, the crucial question is the absence of consent. The Court held that even though the girl submitted to the Defendant's demands, it nevertheless amounts to rape. *R. v. Stephen Olubumni Olugboja* (1981) 73 Cr. App. R. 344.

[173] In *Wieser v. Austria,* the ECtHR notes "[t]reatment has been held to be 'inhuman' because it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering." Therefore the Court is of the view that the duration and cumulative intensity is relevant to whether a treatment could be said to be 'inhuman'. *Wieser v. Austria,* (2007) 45 E.H.R.R. 44, para 36.
Moreover, the cumulative intensity of cases which involves repeated sexual abuses must also be taken into account in assessing the mental state of the victim. In *Van der Ven v. Netherlands,* before the ECtHR, the Court ruled "[w]hen assessing [whether conditions of detention could amount to inhumane or degrading treatment], account must be taken of their cumulative effects as well as of the applicant's specific allegations." See *Van der Ven v. Netherlands,* (2004) 38 E.H.R.R. 46.

[174] Sex workers constitute a socially vulnerable group in Hong Kong. One of the reasons is that prostitution is in general against traditional moral values and that triad groups often exploit prostitutes/prostitution as their source of income. Therefore sex workers are unlikely to receive support from the general public and the media. Due to the lack of support, it is unlikely that they could fight for their own cause. The situation is worse for foreign or mainland Chinese sex workers who would choose to avoid complaining for the fear that they might be prosecuted or subject themselves to removal for breaching their condition of stay.

[175] Security Bureau, 'Supplementary information on Police's undercover operations against vice activities', submission to legislative council panel on security, September 2006, LC Paper No. CB(2)3021/05-06(01). ('Government submission on undercover operations')

[176] Ibid., para 4. In fact, the defending of such acts has become a total absurdity. Reported in the local news in 2003, the "Chief Superintendent Tang How-kong, of the public relations branch [in a radio programme] revealed that undercover rules allow officers to receive masturbation services from prostitutes before they arrest them. Mr. Tang said his colleagues, especially those with families, regarded such duties with distaste. 'It is not an enjoyment. I'm sure if you ask my colleagues, they won't use this term. I must say, it is actually repulsive...'," See Chloe Lai, "Vice officers allowed to get 'physical'", S.C.M.P., 2003-11-11.
Legally speaking, the very fact that the government condones and defends such acts might amount to a government policy to commit those acts. In *Prosecutor v Tadic,* ICTY IT-94-1-T, para 653-655, it was held that "…such a policy need not be formalized and can be deduced from the way in which acts occur."

113. The Government's arguments are unconvincing. Firstly, "none of the prostitution-related offences include as an essential element the commission of a sexual act."[177] Nor is evidence of a sexual act necessary in practice to secure a conviction. Other suitable evidence was considered in the case *HKSAR v. Lai Tze Kai and others,* in the context of the offence of "keeping a vice establishment" (s.139 of Cap 200), to include, for example, the higher price structure for sexual services (i.e. evidence to point that the premises were not merely a licensed bathhouse and massage establishment), the presence of condoms,[178] the presence of tissues stained with semen, [179] advertisements of sexual services on telephone corroborated by the presence of equipment in the form of bondage equipment and other devices,[180] evidence by police officers of conversations with women on the premises out of the hearing of the defendant in the course of which extra services of an sexual nature were offered.[181] In that case all the accused were successfully convicted although the undercover officers were instructed not to take the initiative to ask for sexual services and when offered sexual services, to stop such services once they started.[182]

114. A "massage establishment" is defined as "any place used or intended to be used or represented as being used for the reception or treatment of persons requiring massage or other similar service or treatment".[183] In the case of *HKSAR v. Fok Wai Man*, the Independent Commission Against Corruption (ICAC) tried to prove the licensee was in breach of her massage establishment licence which imposed a condition that "no vice or immoral activities shall take place in the premises" [184] by covertly recorded communications. Mr. Justice Jackson in the case expressed his doubts if there was sufficient evidence that vice or immoral activities had in fact taken place in the premises, because the conversation itself was not a vice or immoral activity.[185]

[177] See 'Memorandum on undercover operations'. The proving of the offences could be done by adducing circumstantial evidence or confession evidence; the proving of the commission of a sexual act is but one of the choices of circumstantial evidences available.

[178] *HKSAR v. Lai Tze Kai and others*, HCMA 434/2006; although, as will be seen below, the presence of condoms are sometimes employed to frame girls whom are not sex workers to have committed prostitution-related offences, such as the managing of a vice establishment and the breach of condition of stay.

[179] *Kelly v. Purvis* [1983] 2 W.L.R. 299, (quoted by Mr. Simon Young in his 'Memorandum on undercover operations').

[180] *R v. Julie Martin* [1988] 10 Cr App R (S) 339. (quoted by Mr. Simon Young in his 'Memorandum on undercover operations').

[181] *Woodhouse v. Hall* [1981] 72 Cr App R 39 (CA). (quoted by Mr. Simon Young in his 'Memorandum on undercover operations').

[182] *HKSAR v. Lai Tze Kai and others*, HCMA 434/2006.

[183] Massage Establishments Ordinance (Cap 266), s 2..

[184] *HKSAR v. Fok Wai Man* [2003] HKEC 639 (CFI).

[185] Ibid., paras 14 and 21.

115. It is thus possible to regard *Fok Wai Man* as "legitimizing the practice of receiving sexual services in order to prove that the licensed premises was being used for a vice or immoral activity."[186]

116. However, it should be noted that the above state of affair is not created by law. The Commission of Police has an absolute discretion as to whether and what conditions are to be imposed on a massage establishment licensee.[187] Therefore it is suggested to draft the condition more carefully to avoid undercover agents engaging in sexual conduct before there can be sufficient evidence of a breach in the license condition. The imposed condition should be broadened, e.g. by providing that "no vice or immoral activities shall *be conducted or attempted* in the premises".[188]

117. While the Government submission states that "sexual intercourse and oral sex are strictly forbidden and this is clearly stated in the Police internal guidelines governing anti-vice operations,"[189] these acts are not in fact strictly forbidden in the police daily operations.

118. Lastly, it is nevertheless important to also note that the Government should be responsible for acts that were done by police officers outside their duties and/or contrary to standing directions.[190] The continual existence of unlawful acts, moreover, only reflects that affirmative measures, if present, are properly administered.

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[186] Simon Young, "Memorandum on undercover operations".

[187] Massage Establishment Ordinance (Cap 266), s 6(2) & Schedule.

[188] Simon Young, "Memorandum on undercover operations". Furthermore, in an interview with personnel from the Zi Teng, it was expressed that these guidelines encouraged sexual abuse against sex workers for ill-intended officers would always claim that they had services falling short of oral sex or full sex even though it was not the case. <u>Had the rule prohibited all kinds of services including the receiving of hand jobs, there would not be any excuse for officers to engage in any sexual conducts in the first place</u>

[189] See 'Government submission on undercover operations'.

[190] In *Mosse,* it was held that even if officials had acted outside their statutory limits, responsibility could be imputed to the state were those acts "performed by officials within the apparent limits of their functions, in accordance with a line of conduct which was not entirely contrary to the instructions received." See the *Mosse Case,* UNRIAA, (1953) vol.XIII, 486. Therefore, the Government should be responsible for *ultra vires* acts during anti-vice operations carried out by the police.
In *Caire Claim (France v. Mexico)* (1929) 5 RIAA 516, Mexico was held to be liable for the killing of a French national by its soldiers despite such acts were contravening directions which were in place. It was held that responsibility is attributable to the State if the officer concerned has "acted at least to all appearances as competent officials or organs." Therefore, the Government should also be responsible for Police misconducts which have taken place, although not during undercover operations, but while they were on duty.
See also International Law Commission, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts', Report of the ILC on the Work of its Fifty-third Session, UN GAOR, 56th Sess, Supp No 10, p 43, UN Doc A/56/10 (2001). Art.4 writes "1. The conduct of any State organ shall be considered an act of that State under international law… 2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

List of questions

119. The Monitor urges the Committee ask the Government:

- to explain why sexual contact must be engaged during investigations into prostitution-related offences;
- to produce the relevant guidelines as to anti-vice operations;
- to produce statistics and details of cases where undercover agents are engaged in anti-vice operations and masturbation services are received. If these cases were not documented, to ask the Government to explain why such information is not properly documented and recorded;
- to clarify the reason why the receiving of masturbation services are necessary in those cases; and
- whether the Government would take any measures to prevent the undercover agents from engaging in any sexual contact.

Recommendations

120. The Monitor recommends the Committee to:

- suggest that the Government prohibit the undercover agents from engaging in any sexual contact;
- call for the revision of the rules of evidence, to render evidences procured through such degrading treatment inadmissible,[191] except as against the police official who engaged in such sexual activities.[192]

6.1.2) Framing, entrapment and mistreatment of sex workers

121. In 2004, a mainland woman who came to Hong Kong for a visit was arrested by the police for having allegedly worked as a prostitute.[193] She was handcuffed and taken to the police station where she was asked to sign a statement to the effect that she had engaged in sex work which she refused.[194] She found that she was among 50 other mainland women having been arrested similarly after a police raid,[195] and who were

[191] Even if these evidences are rendered inadmissible, it is submitted that there would be sufficient circumstantial evidence to bring perpetuators of vice-related offences into justice.

[192] If these evidences are inadmissible, then the Police would not have any excuse to insist on the engaging of sexual activities during undercover operations.

[193] 'Zi Teng's submission to CEDAW 2006', 5.

[194] Ibid.

[195] Ibid. At around that time, the police have conducted a raid, namely, Operation "Flame Wood", where, according to figures from a newspaper article, a total of 213 people were arrested including 113 suspected prostitutes, mainly from mainland. Dennis Ng, 'Woman, 72, among 13 still held over raids,' The Standard, 2004-03-27.

later repatriated without a trial.[196] She refused to sign the confession statement alleging that she had been soliciting a police officer for sex. She claimed that the Police subsequently put condoms and lubricants in her personal belongings, in order to frame her.[197] She was sent to court and was eventually sentenced to one month's imprisonment during the course in which she attempted suicide twice.[198] As of 2005, Zi Teng received another 10 cases in which migrant sex workers were alleged to have been framed.[199]

122. In 2005, in an undercover operation, a police officer had oral sex with Li Yuen Yee, a sex worker. It was claimed that after refusing to pay the money offered for the service, Li was intimidated by the police, threatening to charge Li with blackmail, assaulting a police officer and theft. Having been officially charged the above offences, on 10th October, 2005, Li committed suicide while on bail in protest against the inhumane and humiliating treatment by the police.[200] A year has passed since the event. Despite the Police being repeatedly pressured by local concern groups and legislators, the Police refuse to revise its rules (Police General Orders and Force Procedures Manual) or to apologize.[201] According to Zi Teng's information, after the police officer refused to pay; Li was beaten up and arrested. The condom that the police officer used was disposed by a fellow policewoman.[202] Moreover, it was claimed that Li's family was being threatened by the police to remain silent in front of the media. Her family filed a complaint but the complaint was not pursued by the CAPO. As of today, the Police have not given a full and satisfactory explanation of the event, despite the severity of the matter, the wide media coverage and the continued efforts in demanding accountability.

123. According to the concerned NGOs, the above were not isolated events.[203] It was claimed that the framing in association to prostitution-related offences often takes the form where:

- the police stuff condoms and lubricants into girls' bag, and accusing the girl (usually a migrant) of engaging in sex work in breach of their condition of stay;

[196] 'Zi Teng's submission to CEDAW 2006', 5.
[197] Ibid.
[198] Ibid.
[199] Ibid.
[200] Anita Lam, 'Suicide was "to show what constable did" ', S.C.M.P., 2006-05-09.

[201] Mimi Lau, 'Group urges end to police sex `favors,' The Standard, 2006-05-03.
[202] See 'Zi Teng's submission to CEDAW 2006', 6.
[203] Action for Reach Out, 'A Survey on Hong Kong Police's Attitudes towards Female Sex Workers', 16, available at http://www.afro.org.hk/research2.php.

- coercing or inducing the signing of confession statements;[204]
- in collaboration with third parties, for example, asking other tenants in the premise to testify to the effect that the whole premise was run by one tenant (who is a sex worker) for the purpose of obtaining evidence that it was a vice establishment;
- to ask the sex worker to massage the undercover agent and accuse the sex worker of running a massage parlor without licence.

Entrapment usually takes place where:

- the police officer tries to make the offer for sex, however, the sex worker was being charged for soliciting for an immoral purpose;
- the police officer procured a sexual service but migrant sex workers were being charged for breaching their condition of stay.

124. The concerned NGOs are also deeply concerned about mistreatment of sex workers in custody by the police. The detainees' rights (such as their right to remain silent, right to legal representation and their right to request an interpreter) were not being respected.[205] In serious cases, sex workers are allegedly beaten up in police stations.[206]

<u>*Recommendations*</u>

125. The Monitor recommends the Committee to:

- improve police training in order to enhance police awareness and sensitivity as well as the fostering of respect towards social vulnerable groups (in accordance with Art.10), with the participation of NGOs;[207]
- urge the Hong Kong Government to set up an independent police investigation authority (see section 7 below).

6.1.3) Sex workers caged in the open for 13 hours of public shaming

126. It is a general principle that persons deprived of their liberty must be treated with humanity.[208] However, this principle has not been observed.

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[204] Ibid., 14. In 2005, Action for Reach Out conducted in-dept interviews with 10 sex workers who have been arrested. All of the interviewees expressed that they were not being told of their right not to sign caution statements.

[205] Ibid.

[206] Ibid. 18.

[207] The Monitor notes that NGOs such as the Unison has been invited to give lectures and sharing sessions with officers. While the Monitor welcomes this policy, the Monitor notes that more NGOs and concern groups could be included to provide for such training.

[208] Art.10(1) ICCPR; See also HRC, General Comment No.9 on Article 10,

127. On 14th June 2005, the Police Force launched a large-scale anti-vice action. 80 mainland women suspected of prostitution were kept in a 200 square-feet open-air steel cage for 13 hours under immense heat and fierce sunshine.[209] It appears that during the process, the detainees were not allowed to use the toilet and the hygiene level inside the cage was unacceptable.[210] The Government justifies the action by saying that there was insufficient room in the police station to accommodate the detainees. However it was clear, from the fact that they prepared a cage, that the police action was intentional.[211] No explanation was given as to why detainees were not brought to other police stations. The matter was widely reported in the local press.

128. The Monitor would like to refer the Committee specifically to the communication *Campos v. Peru* before the Human Rights Committee, whereby it found that displaying a prisoner to the press in a cage constitutes degrading treatment.[212] Note also *Weiser v. Austria* before the ECtHR, where it expressed that "in considering whether treatment is 'degrading' within the meaning of Article 3, one of the factors which the Court will take into account is the question whether its object was to humiliate and debase the person concerned, although the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3"[213] citing *Raninen v. Finland,* where it was held that handcuffing, if coupled with a prolonged public exposure, could amount to a violation of Art.3 of the ECHR (freedom from torture, cruel, inhumane and degrading treatment).

129. The Police Force apologized to the public, yet when a detainee filed a complaint to the Complaints against Police Office (CAPO), the complaint was not investigated. The Monitor understands that Zi Teng also filed a complaint to CAPO, but the complaint was rejected since Zi Teng was considered as a third party, and not eligible to lodge a

U.N. Doc. HRI/GEN/1/Rev.1 at 9 (1994).

[209] Clifford Lo, 'Crackdown on triads sees 500 arrested', S.C.M.P., 2005-06-15.

[210] The information was provided by Zi Teng during an interview with their staff.

[211] Felix Chan, 'We did our best with Cage Arrests, says Police Chief', S.C.M.P., 2005-06-17.

[212] See *Víctor Alfredo Polay Campos, cónyuge de la autora v. Perú, Comunicación*, 577/1994, U.N. Doc. CCPR/C/61/D/577/1994 (1998), para 8.5.; Moreover, the detainees in the present case are not prisoners; they should be presumed innocent and should not be portrayed as prisoners.

[213] *Wieser v. Australia, supra,* para 36-37.

complaint on the detainee's behalf.[214] The Government's sincerity in its apology is highly doubtful.

Recommendations

130. The Monitor recommends the Committee to:
- call for the eradication of inhuman and degrading treatment of sex workers by the police.

6.2.) Arbitrary strip searching in Hong Kong

131. Arbitrary strip searching in Hong Kong has become a matter of grave concern. There are insufficient procedural guidelines governing performance of strip searches, leading to substantial numbers of unjustified strip searches. These searches are frequently done in an inappropriate manner and often coupled with irrelevant and humiliating demands. The following paragraphs seek to highlight instances of unjustified strip searching as well as the lack of laws and guidelines as to the performance of strip searches.

[214] The complaint was not "made by a relative/guardian of the complainant or a properly authorized representative" as provided for under clause 14, see section 7.1 below.

6.2.1.) The strip searching of cultural preservation activists on 5th October, 2007

132. On 5th October, 2007, 15 environmental protesters who demanded a halt to demolition work at Lee Tung Street were arrested for obstruction of a public place and obstructing a police officer in the due execution of duty and were detained overnight at North Point Police Station. They were strip searched at the station. According to the reports by the detainees on file with the Monitor, the detainees were required to perform unnecessary gestures during the search in which they found to be humiliating. One male protester reported that he was strip searched twice and ordered to lift up his genitals.[215] Furthermore, it was alleged that one male officer entered into the detention area where one of the female detainees was being strip searched and made sexual remarks.[216]

[215] 'Police Strip-Search Slammed,' Sing Tao Daily 2007-11-07, "[w]omen's concern groups lodged protests after the activists said they were strip-searched while being held overnight after their arrest on October 5. One of the women alleged she was sexually harassed by a male officer who, besides strip-searching her in the presence of other male officers, made leering sexual remarks. A male protester said he was strip-searched twice and ordered to lift up his genitals."
[216] Ibid.

133. These searches were highly objectionable and arbitrary as the circumstances did not warrant any reasonable suspicion as to the possession of weapons or drugs. Quoting the words of local legislator James To who is also the Vice-Chairman of the LegCo Panel on Security, "[i]t is nonsense… [t]hese were all very enthusiastic teachers, environmentalists, volunteers… they are not big, threatening robbers."[217]

134. The searches not only violated the victims' constitutional rights under Art.28 (freedom of person and the right to be free from arbitrary and unlawful search) of the Basic Law,[218] and rights as recognized in the ICCPR,[219] it also amounts to degrading treatment under the CAT. In *Valasinas v. Lithuania*, the ECtHR held that Art.3 of the ECHR had been violated when a male prisoner was obliged to strip in the presence of a female officer with the intent to humiliate while his sexual organ was touched with bare hands.[220]

[217] Jane Moir, 'Strong arm of the law', S.C.M.P., 2007-12-03.
[218] See Basic Law, Art.28(1) freedom of person, and Art.28(2) right to be free from arbitrary and unlawful search.
[219] See ICCPR, Art.9(1) right to liberty and security, Art.7 right to be free from torture, inhumane and degrading treatment, Art.10(1) right to be treated with humanity when deprived of liberty.
[220] *Valasinas v. Lithuania*, 12 B.H.R.C. 266.

135. The presence of an officer of the opposite gender during a strip search, the sexual remarks, and the demand that the person stripped perform unnecessary gestures clearly fall within the definition of "degrading" in the CAT, as these searches were done in a way "such as to arouse in the victims feeling of fear, anguish and inferiority capable of humiliating and debasing"[221] and "exceed[ed] unavoidable suffering inherent in the detention."[222]

6.2.2.) The arbitrary strip searching of sex workers

136. According to Zi Teng, arbitrary strip searching of sex workers remains widespread. It was alleged that in March 2004, 2 policemen, after receiving hand jobs, called a policewomen to strip search the victim.[223] The victim claimed that she was stripped naked by force in front of the policemen and was initially denied contact with a lawyer. She was arrested, beaten, and falsely charged with running a massage parlour without license.[224] She was only allowed to contact her lawyer through Zi Teng over midnight, and was warned by the officers not to lodge any complaint.[225] In

[221] *Wieser v. Austria, supra,* para.36.
[222] Ibid.
[223] See 'Zi Teng's submission to CEDAW 2006,' 6.
[224] Ibid.
[225] Ibid.

another case, a victim was arrested by the police officer on charges of running a massage parlour without a licence.[226] During custody, she was denied bail, verbally and physically abused, and strip searched four times in 24 hours.[227]

137. Zi Teng notes that the number of complaints against arbitrary strip searching is rapidly rising. During 2004-2005, Zi Teng recorded 19 complaints of strip searching,[228] while during the first 11 months of 2007, the number of complaints rose to 92 (of which 22 complained of being strip searched 3 times in 24 hours, and 3 complainants, 4 times during 12 hours).[229]

6.2.3) Inadequate rules with respect to strip searches

138. There are inadequate rules, guidelines or policies within the police force to safeguard the rights of persons who may be strip searched. [230]

139. The Police Force Ordinance (Cap. 232) confers upon police officers the power to conduct searches:

- if the police officer finds any person acting in a suspicious manner, if then he thinks it necessary to search the person for anything that may present a danger to the him;[231] or
- if the police officer finds any person whom he reasonably suspects of having committed or is about to or is intending to commit any offence, to search the person for anything that is likely to be of value to the investigation of such offence.[232]

Chapter 44-05 of the Police General Order provides that:

> "A search of any suspect, which involves the removal of clothing worn next to the skin, the removal of which may cause embarrassment, shall only be carried out in the privacy of a police station, a police launch or a location providing equal privacy to the suspect. This type of search shall be conducted only upon the direction of an officer of or above the rank of Sergeant who shall record the incident in the CIS or his police notebook."

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[226] Ibid.
[227] Ibid.
[228] Statistics provided by Zi Teng to the Monitor.
[229] Zi Teng's open statement to the public, dated 5th December, 2007, available at http://www.ziteng.org.hk/events/2007DEC11_01_c.php (in Chinese).
[230] Joshua But, 'Panel urged to probe protest strip-search,' S.C.M.P. 31-10-2007, "The duty officer of a police station is authorized to determine the extent of body search for persons in custody according to the prevailing circumstances,' acting Assistant Police Commissioner Wendy Choi Wong Fung-yee said yesterday. 'There were no guidelines concerning the appropriate circumstances for a strip-search,' she said."
[231] S.54(1)(c)(i) Police Force Ordinance (Cap.232).
[232] S.54(2)(c) Police Force Ordinance (Cap.232).

Chapter 44-05 of the Force Procedures Manual further provides that:

> "when a search is deemed necessary, officers conducting the search should always bear in mind… the need to conduct the search in a proper and discreet manner.
> …
> A search, and particularly a wall search is often objectionable to many people, who regard it as an affront to their dignity. Although there is no legal requirement to inform the person why he is being searched, this may be desirable in order to seek the public's co-operation in the prevention and detection of crime. An officer, having searched someone and found nothing, should politely regret the inconvenience and point out that the exercise is protecting him as well as other members of the public.
> …
> [A] male officer shall not conduct either a frisk or wall search of a female…"[233]

There are no standing guidelines with respect to the performing of strip searches.

140. The incidents of strip searches described above were brought to the attention of the LegCo, which demanded the Security Bureau account for police practice.[234] In a hearing, the Security Bureau explained that the reason for the performance of searches on a detainee is to "ensure that individuals does not escape or assist others to escape, injure himself or others, destroy or dispose of evidence or commit further crime,"[235] and that the "extent to which the search is conducted is to be determined by the prevailing circumstances…[i]n particular, the Duty Officer needs to satisfy himself that the detainee does not have [in possession]:

- …weapons…;
- …evidence which is material to the offence with which he is charged (drugs for example); or
- …any article with which he could commit a further crime…"[236]

141. The Bureau explained that rules specially governing the performance of strip searches include that such searches:[237]

- will only be carried out in the privacy of a police station, a police launch or a location providing equal privacy to the suspect;

[233] Chapter 44-05 Police Force Procedures Manual, on file with the Monitor. (not open to the general public)

[234] See Security Bureau, *Legislative Council Panel on Security – Police's Practices Regarding Handling of Searches of Detainees,* LC Paper No. CB(2)167/07-08(03), October 2007.('Security Bureau's responses on the handling of searches').

[235] Ibid.

[236] Ibid. See also a letter to the Panel on Security on the searching of detainees by the Police dated 18th February 2008 submitted by the Government, LC Paper No. CB(2)1124/07-08(01), 2. ('Letter to the Panel on Security on Searching')

[237] See Security Bureau's responses on the handling of searches, *supra*.

- will be conducted only upon the direction of an officer of or above the rank of Sergeant who must properly record the incident;
- will not be conducted by the opposite gender;
- as a Police Force policy,[238] will be conducted in the presence of a woman police officer in cases where a female is to be detained;
- the Duty Officer must be prepared to justify the level of search.

142. In another submission by the Government to the LegCo, the Government further stated that according to the current practice:[239]

- a search requiring removal of clothing worn next to the skin would not be ordered as a matter of routine;
- it will only be authorized in cases where it is considered necessary and proportionate to achieve the purpose of a search under PGO 49-04;[240]
- a search would not be an unlawful or arbitrary interference with the detainee's privacy or personal integrity as the purpose of the search is legitimate – namely to ensure that the individual does not escape or assist others to escape, does not injure himself or others, does not destroy or dispose of evidence and does not commit further crime.

143. In the same document, the Government further agreed to add the following section into the present Police General Order:

> "The Duty Officer, or a designated deputy in his absence, in authorizing searches will ensure the following:
>
> (a) No search will be conducted before or in the sight of another officer or person of the opposite sex to the person to be detained; and
>
> (b) Only persons whose presence is necessary for the proper conduct of the search are permitted to be present during the search."[241]

144. The Monitor welcomes the Police's efforts in revising the relevant guidelines. However, since no provision deal specifically with the matter of strip searches, the guidelines

[238] A Police Force policy might not even be an internal rule within the Force which would attract disciplinary penalties.

[239] Security Bureau, 'Report on Stage One of the Review on the Police's Practices regarding the Search of Detainees', dated February 2008, LC Paper No. CB(2)1209/07-08(03), para 9. ('Report on Stage One of the Review on Police's Practices')

[240] As shown above, strip searches presently conducted are not proportionate to the purpose of the search.

[241] See, Report on Stage One of the Review on Police's Practices, *supra,* para 14. See also paragraphs 15, 16, 17 and Annex B for other improvements recommended to be done by the Police,

remain unclear and ambiguous in several ways. Firstly, since the extent to which the search is conducted is to be determined by the officer with reference to the prevailing circumstances, the policy simply endows upon the police officer absolute discretion to decide the extend and manner of the search. Although a degree of flexibility must be afforded to the authorities in order to assist the execution of their duties, certain conditions should be specifically prescribed in relation to a strip search, which would include, for example:

- that the purpose of the strip search must be reasonably related to the interest in maintaining security or to the offence that the person is suspected of committing (usually upon a reasonable suspicion of being in possession of drugs or weapons) and must, under the circumstances, be justified on these ground (legitimate purpose);[242] and
- since strip search could be said to be the most offensive type of body searches, strip searches should be carried out only if the seriousness and the urgency of the situation so requires (necessity and proportionality).[243]

The second point above requires:

- the need to inform the person to be searched of the extent to which clothing will be removed and why, and to request cooperation,[244] ; and
- that a search must not involve the removal of more clothes than believed on reasonable grounds to be necessary for the purpose of the search;[245]
- that strip search must be "for small objects which might not be discerned by a simple body search without undressing the applicant completely."[246]

[242] See *Noelle Way v. County of Ventura,* 445 F.3d 1157 (9th Cir. 2006). The case involves Noelle Way who was being booked into jail on a misdemeanor drug charge. She was arrested after an officer noted that she had dilated pupils, a nervous attitude, a rapid pulse rate and rapid speech. The officer suspected that Way was under the influence certain drugs, which would amount to a violation of the laws of California. The Court held that the police of strip search must be reasonably related to the interest in maintaining security and that a blanket policy of strip searching every persons detained for the purpose of drug offences could not be justified for it does not necessarily pose a threat of concealing additional drugs in jail during the limited time between booking and bail, or booking and placement in the general population.

[243] See s.31 Law Enforcement (Power and responsibilities) Act 2002 ('LEPRA') of New South Wales, Australia, "[a] police officer or other person who is authorized to search a person may conduct a strip search of the person if the police officer or other person suspects on reasonable grounds that it is necessary to conduct a strip search of the person for the purposes of the search and that the seriousness and urgency of the circumstances require the strip search to be carried out."

[244] According to the paragraph 8, 44-05 Force Procedures Manual, the officer is under no legal requirement to inform the person why he is being searched; it is only desirable that the officer would do so. The Monitor submits that when it comes to strip search, it should be required that the officer must inform the person to be searched prior to the search and the reason why. Reasons provided after the search must be regarded as an "after-the-fact" justification.

[245] If the person to be searched is willing to cooperate, it might not be necessary for a strip search to be conducted.

[246] *Wieser v. Austria, supra,* para 40. For example, if the purpose of the search is to search for weapons, the officer must be able to demonstrate how such a purpose could not be achieved by a pat search.

145. Secondly, there is no distinction as to the level of justification required between persons who are arrested and detained in the police cell only for a limited period and those who will be housed with the jail population. The Canadian case *R. v. Golden* is relevant to the present situation. While the Court held that there must be a reasonable and probable reason for strip search, the Court went on to state that:

> "whereas strip searching could be justified when introducing an individual into the prison population to prevent the individual from bringing contraband or weapons into prison, different considerations arise where the individual is only being held for a short time in police cells and will not be mingling with the general prison population. While we recognize that police officers have legitimate concerns that short term detainees may conceal weapons that they could use to harm themselves or police officers, these concerns must be addressed on a case by case basis and cannot justify routine strip searches of all arrestees."[247]

In that case, Golden was suspected of drug trafficking. After a pat down search, a strip search was conducted and drugs were found. Despite having found drugs, the strip search was nevertheless held unlawful. Note that under 49-04 of the Police General Orders, the police are permitted to conduct a "body cavity" or "intimate" search under s.52(1A) of the Dangerous Drugs Ordinance (Cap.134).[248]

146. A similar conclusion was reached in the US case *Noelle Way v. County of Ventura,* where a County Sheriff conducted a strip search with a visual cavity inspection on the plaintiff (including her genitalia and anus) during the booking process at a pre-trial detention facility on a misdemeanor charge of being under the influence of cocaine or methamphetamine.[249] The Court affirmed that individualized suspicion is required in respect of arrestees who are not admitted to the general jail population, and that the policy of strip search must be reasonably related to the interest in maintaining security.

147. Thirdly, the present policy does not impose requirement as to the manner in which the strip search is performed. These should include that:

- such searches must not involve touching;[250]

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[247] *R v. Golden,* 2001 SCC 83, para 93.

[248] S.52(1A) of the Dangerous Drugs Ordinance writes: "(1A) For the purposes of enabling a person to be searched under subsection (1)(f)(i), a police officer of or above the rank of inspector or a member of the Customs and Excise Service of or above the rank of inspector may request a registered medical practitioner or nurse registered or enrolled or deemed to be registered or enrolled under the Nurses Registration Ordinance (Cap.164), to examine the body cavities of that person."

[249] See *Noelle Way v. County of Ventura, supra*.

[250] *Valasinas v. Lithuania,* Application no.4455/98 (unreported), where it was held that Art.3 of the ECHR has been violated when a male prisoner was

- such searches must be performed as quickly as reasonably practicable.[251]

148. Fourthly, the present policy does not include the prohibition of strip searches of children below a certain age and or provide for special arrangements for the strip searching of the mentally impaired; this would, for example, include performing a strip search in the presence of the person's parent or their guardian of the same gender.[252]

149. Finally, the present policy does not include reasonable procedural safeguards such as the provision of proof of the police officer's identity, a written record of the search, which should be provided to the person being searched (properly translated into a language the person being searched understands), and the provision of the name of the officer who performed the search.[253]

obliged to strip in the presence of a female officer with the intent to humiliate while his sexual organ was touched with bare hands. See also s.33 LEPRA.

[251] S.32 LEPRA.

[252] This measure is crucial and is necessary to bring such practices in line with the general principle concerning inhumane and degrading treatment which has been elaborated in various occasions by the ECtHR, i.e. "[t]he assessment of the minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and health of the victim." *Wainwright v. United Kingdom,* (2007) 44 E.H.R.R. 40.

[253] See Chapter 44-05 of the Police General Orders quoted above.

150. The Monitor submits that the provision of proper protection is paramount to prevent the relevant authorities from acting illegally or arbitrarily;[254] "only searches carried out in an appropriate manner with due respect for human dignity and for a legitimate purpose may be compatible with Article 3 [of the ECHR]."[255]

List of questions

151. The Monitor recommends the Committee ask the Government:

- to provide the Committee with the entire Police General Order and Force Procedures Manual (not available to the public);
- to provide records and statistics of persons who have been strip searched in previous years;[256]

[254] *Atici v. Turkey*, para 32, "where the manner in which a search is carried out has debasing elements which significantly aggravate the humiliation inevitably caused by such a procedure, the protection of Article 3 comes into play: for example, where a search has been conducted in front of four guards who derided and verbally abused the prisoner."

[255] *Atici v. Turkey*, para 31. See also *Wainwright v. United Kingdom,* para 47-48, where the Court ruled that strip searches must also be conducted in a way proportional to the legitimate aim.

[256] Note that the Government was unable to provide information on the number of cases of, and the reasons for, conducting strip searches of detainees involving the removal of clothing worn next to the skin in 2006 or the prior three years [what about 2007 and 2008]upon the request of the LegCo despite

- to explain why a strip search was necessary in these cases;
- to provide details as to the disciplinary measures, if any, taken against police officers who perform arbitrary or inappropriate strip searches;
- to provide a timetable for the revision of the relevant rules; and
- to explain why specific provisions governing the performance of strip searches are not incorporated into relevant guidelines[257];

Recommendations

152. The Monitor recommends the Committee to:
- urge the Government to provide for specific provisions to protect persons being strip searched;
- urge the Government to make the Police General Order and Force Procedures Manual available for public inspection;
- follow up the Government's progress on the revision of police guidance on strip-searches.

6.3.) Compulsory rectal search with finger for the admission of prisoners

153. Rule 9 of the Hong Kong Prison Rules provides that:

(1) Every prisoner shall be searched on admission and at such times subsequently as the Superintendent or other officer in charge may direct, and all articles for the possession of which no authority has been given shall be taken from him.

(1A) The Medical Officer, or a Chief Officer, Principal Officer, Officer or Nurse, authorized by the Medical Officer, may, for the purpose of paragraph (1), search the rectum, nostrils, ears and any other external orifice of a prisoner.[258]

it is made a requirement under Chapter 44-05 of the Police General Orders that "[t]his type of search shall be conducted only upon the direction of an officer of or above the rank of Sergeant who shall record the incident in the CIS or his police notebook". See Letter to the Panel on Security on Searching, *supra,* 2.

[257] In 1992, the Law Reform Commission conducted a Report on Arrest to study the then police rules with respect to stop, search, arrest, and detain and to recommend improvements which could be made to minimize the possibility of the abuse of police power. It was stated in the Report that "[t]he PACE provisions lay down clear guidelines as to the circumstances in which strip searches or intimate searches may be carried out" and recommended that Hong Kong should follow this guideline.

[258] Prison Rules - Rule 9 (Cap. 234A) writes:
(3) General Treatment
(a) Admission and Discharge
(1) Every prisoner shall be searched on admission and at such times subsequently as the Superintendent or other officer in charge may direct, and

154. Although the provision provides for the power or discretion for a rectal search, the Correctional and Sentence Department in Hong Kong retains the policy of conducting compulsory rectal searches with a finger during the admission of all prisoners into prison.[259] Being compulsory, it implies that:

- the prisoner subject to search could not raise a refusal of being rectally searched with finger on reasonable grounds such as fear or privacy, in particular, the prisoner could not raise objections on religious or cultural grounds.[260] It seems that at present the only case where there is an exception to the compulsory rectal search is where "individual prisoners are diagnosed or assessed by doctors or clinical psychologists to be physically or psychologically unfit to undergo rectal searches, CSD will make appropriate arrangements (e.g. isolating the prisoners concerned for observation) based on professional advice and individual circumstances."[261]
- the officer on duty does not have discretion to consider in individual cases whether there is a necessity for a rectal search, for example where:
    - the person raised reasonable grounds for objection or;
        - where the offence for which the prisoner is convicted is wholly irrelevant to drugs or weapons;[262]

all articles for the possession of which no authority has been given shall be taken from him.
(1A) The Medical Officer, or a Chief Officer, Principal Officer, Officer or Nurse, authorized by the Medical Officer, may, for the purpose of paragraph (1), search the rectum, nostrils, ears and any other external orifice of a prisoner.
(2) The searching of a prisoner shall be conducted with due regard to decency and self-respect, and in as seemly a manner as is consistent with the necessity of discovering any concealed articles.
(3) No prisoner shall be stripped and searched in the sight of another prisoner unless a senior officer considers it necessary in the interests of the security of a prison or the safety of any person.

[259] See information available at http://www.info.gov.hk/gia/general/200512/21/P200512210147_print.htm.

[260] Basic Principles for the Treatment of Prisoners, Basic Principles for the Treatment of Prisoners, G.A. res. 45/111, annex, 45 U.N. GAOR Supp. (No. 49A) at 200, U.N. Doc. A/45/49 (1990), Art.3, "It is… desirable to respect the religious beliefs and cultural precepts of the group to which prisoners belong, whenever local conditions so require." Similar words appeared in the Standard Minimum Rules for the Treatment of Prisoners.

[261] Refusal to undergo searching without any reasonable grounds may constitute an offence against penal discipline and the offender may be subject to disciplinary action.

[262] Contrast the Chapter 49-04 of the Police General Orders concerning the searching of detained persons which writes:

> "A DO (duty officer), or an officer detailed by him, will search a detained person prior to his being secured in a Temporary Holding Area (THA) or cell block, the extent of which shall be determined by the prevailing circumstances, to satisfy himself that the detained person does not have:-
>
> (a) …weapon…;
>
> (b)… possession of evidence which is material to the offence with which he is charged; or
>
> (c)… in his possession any article with which he could commit a further crime e.g. malicious damage to property, or consumption or distribution of dangerous drugs.
>
> 2. A search involving any removal of clothing worn next to the skin, the removal of which may cause embarrassment, shall be conducted in accordance with PGO 44-05.
>
> …

- the officer on duty does not have a discretion to consider, in individual cases, other means to replace a rectal search with finger, these means for example includes:
  - o the using of a visual cavity search;
  - o the using of mild laxatives;
  - o the isolation of prisoner for observation over a reasonable period of time.[263]

155. In 2005, the Government promised to study other means of inspecting prisoners on their admission; however, no progress has been made.[264] The Monitor recalls the rectal search with finger as an outdated legacy, the purpose of which is to demonstrate the exercising of authority and thus inherently humiliating and debasing in nature. It must be recognized that "such invasive search procedures are a serious assault on a person's privacy and dignity, and also carry some risk of physical and psychological injury.[265] According to the Statement on Body Searches of Prisoners, "to the extent feasible without compromising public security,

- alternate methods [should] be used for routine screening of prisoners, and body cavity searches be resorted to only as a last resort;
- if a body cavity search must be conducted, the responsible public official [should] ensure that the search is conducted by personnel with sufficient medical knowledge and skills to perform the search safely;
- the same responsible authority [should] ensure that due regard for the individual's privacy and dignity be guaranteed."[266]

Recommendations

156. The Monitor recommends the Committee to:
- urge the Government to abolish routine manual rectal search, using instead, a visual cavity search.

6.4.) Concerning mistreatment of Korean farmers – the WTO incident

4. Under no circumstances will an officer search a detained person of the opposite gender.

…

8. A "body cavity" or "intimate" search may only be performed under s.52(1A) of the Dangerous Drugs Ordinance, Cap.134."

[263] During the period of isolation, if the offender is a drug addict, then he/she would have consumed the drugs if hidden inside him/her. During the observation moreover, the offender would have to use the toilet and therefore drugs could not have been hidden inside his/her body.

[264] See Government's response to LegCo, available at http://www.info.gov.hk/gia/general/200512/21/P200512210147_print.htm.

[265] World Medical Association, Statement on Body Searches of Prisoners (1993), available at http://www1.umn.edu/humanrts/instree/bodysearches.html.

[266] Ibid.

157. The Sixth Ministerial Conference of the WTO was held in Hong Kong on 13th to 18th December 2005. Thousands of people took part in the rallies as well as assemblies organized at that period of time. On 17th December, 2005, at around 4:00pm, not more than 10 protestors attacked a police barricade . Pepper spray and water cannon were employed by the police. At around 5:30 p.m. approximately 100 demonstrators, most of them Korean peasants, began to charge police lines at another junction. Among them, about 50 aggressive protestors confronted the police; a few of them attempted to grab fire extinguishers that were used against them from the police. The situation soon turned into chaos. Protestors who were singing and dancing while waiting to proceed with the march were chased and beaten by the police with batons. At around 7:30 p.m., about 30 protestors pushed back the iron fences imposed by the police. A moment later, at another front, about 30 protestors attacked the police with long bamboo poles, some of them managed to break into the barricade. The police started to shoot beanbag rounds and deployed teargas. At around 10 p.m. about 1200 protestors (both male and female) were being surrounded by the Police.[267]

158. After being encircled, the crowds were not allowed to leave the scene. They were detained on the spot until arrests took place between around 3:30 a.m. and 1 p.m. on 18th December, 2005. The protestors were transported in police vans and buses to 17 police stations and the Kwun Tong Magistrates' Court. At around 1:00 a.m. the next day, the Police started releasing approximately 190 female arrested persons including a Korean 11-year-old child who was also arrested along with the crowd, "there being no indication that any females had engaged in violence."[268] At around late evening, on the 19th December, 2005, the police released the remaining detainees (around 990 people) except 14 detainees who were kept for further investigation. According to the Government statistics, "1153 demonstrators had been arrested for the alleged offence of 'taking part in an unlawful assembly.' A holding charge of 'taking part in an unlawful assembly' was

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[267] See Hong Kong People's Alliance on WTO and Asian Human Rights Commission, 'Human Rights Violations during the Policing, Arrests, and Detentions during the WTO Protests in Hong Kong, December 2005', LC Paper No. CB(2)1521/05-06(01) ('Human Rights Violations during the WTO Protest').

[268] Legislative Council Secretariat, 'Panel on Security, Minutes of meeting held on Tuesday, 4 July 2006, at 2:30 pm in Conference Room A of the Legislative Council Building', LC Paper No.CB(2)189.06-07, para 19. ('July 2006 Minutes').

brought against 14 identified arrested persons on 19th December, 2005."[269]

159. The Monitor had observers at the demonstrations and considers that in the circumstances of a number of violent attacks on police barricades the police use of force in response was justifiable. However the Monitor strongly objects to the serious human rights violation: (1) during the overnight detention of the 1153 detainees and (2) during the arrest and subsequent detentions at police stations.

6.4.1.) During the overnight detention of the 1153 detainees (10 p.m. 17th December, 2005 to 3:30 a.m. 18th December, 2005)

160. As described above, protestors were detained overnight in the open road for at least 5.5 hours. According to records, the temperature that day dropped to 13 degrees Celsius, and most of the detainees had inadequate clothing. However, neither clothing nor blankets were offered to them. Moreover, they were denied food and water, as well as access to toilet facilities. It is recorded that when some protestors requested the use of toilet, they were being told to urinate on the streets.[270] This is a breach of Art.10(1) of the ICCPR (persons deprived of liberty shall be treated with humanity) and amounts also to inhuman or degrading treatment. Alongside with those detained was an 11 year-old boy, despite repeated efforts by NGO workers lobbying for his release.[271] He was subsequently arrested along with the protestors. His rights as a child were seriously violated.

[269] Ibid., para 9.

6.4.2.) The arrest and the subsequent detention (3:30 a.m. 18th December, 2005 to 1:00 a.m. 19th December (for female demonstrators and a child) and until late evening 19th December for others except the 14 who were eventually charged)

161. Because of the large number of the detainees arrested, the detainees were then brought to different areas of various police stations in Hong Kong. Even though the police decided to arrest this number of people, it appears that they were unprepared, having expected the number of arrested people to be 200 to 300).[272] There were not enough temporary holding areas for the detainees. It was noted that "8 coaches with female demonstrators on board were forced

[270] 'Human Rights Violations during the WTO Protest,' para 62.
[271] Ibid., para 59-60.
[272] Paper provided by Hon Martin Lee Chu-ming on "Complaints against the Police's handling of the WTO", LC Paper No.CB(2)2669/05-06(01). ('Complaints against the Police's handling of the WTO')

to cruise for some hours without stopping because of the lack of detention spaces.”[273] Some were left in open parking areas for three to four hours. Others were detained in overcrowded detention cells. According to the records of a NGO, a group of approximately 30 people were detained in a cell with an area of 12 to 15 square meters, and only 5 blankets were distributed.[274] No food was provided. Their rights to contact their family and lawyer were denied. According to an account given by one of the female detainees, they were made to go to the toilet handcuffed, assisted (stripped) by female officers.[275] Some alleged being beaten while detained.[276] It was also reported that some police officers asked female detainees to lift their bra and pull down their underpants for inspection.[277] They were thus made to strip in the presence of male detainees.[278] Hon. Mr. Lee Chu-Ming who subsequent to the charges laid against the 14 arrested, became their legal representative noted that the Defendants were held in cells where the basic hygiene situation was unacceptable and that no towels and blankets were provided to the Defendants.[279] Needless to say, the arrestees were faced with inhuman and degrading treatment.[280]

162. Moreover, it was very doubtful whether the arrests were lawful in the first place. The Police claimed that they arrested 1153 persons for the alleged offence of “taking part in an unlawful assembly”.[281] However, as a legislator queried, it was doubtful whether it was reasonable to suspect each and every one of the 1153 persons to have taken part in an unlawful assembly.[282] It was clear that only a small proportion of the protestors took part in the riot. The Government claimed that there it was necessary to “collect evidence and verify the role played by each individual before

[273] ‘July 2006 Minutes’, para 18.
[274] In *Ramón B. Martínez Portorreal v. Dominican Republic,* Communication No. 188/1984, U.N. Doc. CCPR/C/OP/2 at 214 (1990). the Human Rights Committee is of the view that keeping a person in a cell measuring 20 by 5 meters, where approximately 125 accused persons are being held, and where, owing to a lack of space, some detainees have to sit on excrement constitute a violation of Art.7 of the ICCPR.
[275] ‘Human Rights Violations during the WTO Protest,’ para 84.
[276] Ibid., para 85-86.
[277] Ibid., para 83.
[278] Ibid.

[279] See ‘Complaints against the Police’s handling of the WTO’.
[280] “Treatment has been held to be ‘inhuman’ because it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering.” See *Wieser v. Australia*, *supra*.
[281] S.18 Public Order Ordinance (Cap. 245) writes that a person commits the offence of “taking part in an unlawful assembly”:
(1) When 3 or more persons, assembled together, conduct themselves in a disorderly, intimidating, insulting or provocative manner intended or likely to cause any person reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such conduct provoke other persons to commit a breach of the peace, they are an unlawful assembly.
(2) It is immaterial that the original assembly was lawful if being assembled, they conduct themselves in such a manner as aforesaid.
[282] ‘July 2006 Minutes’, para 17.

charges could be instituted against."[283] However, it should have been clear that it was beyond its capability to verify the identities of all these people within a reasonable period.[284] This was later reflected in the fact that only 14 people were prosecuted (meaning that the Police were only able to identify 14 people among the one hundred or so who took part in the riot at the frontline). It was also clear that the position of the Government was self-contradictory when they released all women protestors for the reason that there were "no indications that they were involved that they had participated in an unlawful assembly or attacked the Police officers"[285] which indicates either they were acting in a discriminatory manner in considering who to release or that they failed to realize only males took part in the riot, something that should have been apparent. In addition, had the Police genuinely thought of laying charges against the 11 year old minor? It is clear that the mass arrest was disproportionate to any legitimate objective and so unlawful and arbitrary.[286]

[283] Ibid., para 19.
[284] Ibid., para 17.
[285] Ibid., para 19.
[286] Art.9, ICCPR.

163. The WTO episode reflects the lack of human rights awareness among the Police Force concerning search, arrest and detention. .

List of questions

164. The Monitor recommends the Committee to ask the Government:

- to explain their decision on the arrest of 1153 persons; and
- to explain measures taken, if any, to protect the arrestees rights in the course of their detention.

Recommendations

165. The Monitor recommends the Committee to:

- urge the Government to put into place safeguards for the protection of detainees;
- urge the Government to invite international observers if a similar event were to take place in Hong Kong in the future.

6.5) Implementation of recommendations in the Report of Arrest

166. In 1992 the Law Reform Commission of Hong Kong published the Report on Arrest. Having considered the provisions of the English Police and Criminal Evidence Act 1984 ('PACE') and the Codes of Practice promulgated under PACE, it recommended consideration "whether the Codes and the provisions of the Act should be brought into force in Hong Kong, and if so, with what, if any modifications,"[287] with a view to strike a proper balance between ensuring sufficient police powers to bring offenders to justice and at the same time affording adequate safeguards to the arrested person.

167. In 1993, the Government set up an inter-departmental Working Group to consider the recommendations in the report. In 1996, the Working Group confirmed the majority of the recommendations and made proposals to implement the report. However, the implementation of the recommendations in the report is long delayed. Over 15 years, only a few recommendations have been adopted by way of legislation. Few improvements have been made in key areas such as the powers to stop and search, powers of entry, search and seizure, powers of arrest and detention. Over the years, the Government has not provided any reasons for the delay.

168. In paragraphs 76 and 77 of the Government Report, the Government wrote:

> "commentators have called on us to implement recommendations made… in the Report of Arrest… The position is that, in 1998-99, the Police, the Immigration Department, the Customs and Excise Department and the Independent Commission against Corruption instituted a system whereby designated Custody Officers and Review Officers ensure the proper treatment of persons in detention and keep the need for their further detention under continuous review."

However, it is unclear what the above-mentioned system is; the contents of the relevant administrative procedures are unknown. Other issues pertaining the Report on Arrest concerning powers to stop and search, powers of entry, search and seizure, and the power of arrest also remains unaddressed.

List of questions

169. The Monitor recommends the Committee to ask the Government:

[287] The Law Reform Commission of Hong Kong, *Report on Arrest*, para 1.9

- to provide the details on the "system" that is currently in place;
- to provide the details on the administrative rules of the system;
- to explain how the administrative rules reflect suggestions in the Report on Arrest; and
- to provide other details on the implementation of the recommendations in the Report on Arrest;

Recommendations

170. The Monitor recommends the Committee to:
- urge the Government to implement the recommendations in the Report on Arrest;
- urge the Government to make public the administrative rules concerning the detention of arrested persons.

6.6) Conditions of detention in Juvenile Homes

6.6.1) Bullying in Juvenile Homes

171. In recent years a number of bullying cases in the Juvenile Homes were reported:
- in September 2006, a resident aged 14 was hit and kicked by his mathematics teacher in Shatin Boys' Home;
- in December 2006, one resident aged 16 was beaten in O Pui Shan Boys' Home. However, the bully was not punished.
- in January 2007, two residents aged 17 in Pui Chi Boys' Home beaten, intimidated and sexually harassed four other residents. However, those who committed bullying were not punished.

172. The Social Welfare Department claimed that these instances of bullying were exceptional, and that bullies are punished according the established mechanism. However, it should be noted that bullying can be easy to hide. Not all bullying will leave a physical mark, and it can take the form of non-physical harassment and intimidation.

173. The Monitor considers that more intensive investigation should be conducted to prevent bullying. Bullies, whether the residents or staff in the Juvenile Homes, should be subject to appropriate penalties in all cases so as to deter bullying from happening.

6.6.2) Segregation of juvenile in custody

174. The Tuen Mun Children and Juvenile Home provides temporary custody and residential training to children and juvenile offenders according to the following ordinance:

- Immigration Ordinance (Cap 115);
- Protection of Children and Juveniles Ordinance (Cap 213);
- Reformatory Schools Ordinance (Cap 225);
- Juvenile Offenders Ordinance (Cap 226);
- Probation of Offenders Ordinance (Cap 298).

175. Under Rule 12 of the Reformatory School Rules under the Reformatory Schools Ordinance (Cap 225), segregation may be imposed for a period not exceeding 7 days during all or any of the following times: (I) the time between retiring at night and rising the following morning; (II) the time allowed for recreation; (III) the time allowed for meals. Under Rule 12(3) of the same Rule, only the superintendent is responsible for imposing segregation or other punishments.

176. However, Rule 8(1) of the Remand Home Rules under the Juvenile Offenders Ordinance (Cap 226) states, under the heading of "Segregation" that "A juvenile who, in the operation of the superintendent, is likely to exercise a bad influence, shall so far as practicable, be separated from other juveniles." This is highly unsatisfactory for there is no legal limit on the duration of segregation.

177. In the research conducted in 2001 by the Monitor, it was found that the Departmental Instructions provide that "the maximum period of segregation on any one occasion should not be more than 7 days, but exceptions are envisaged, as the Instructions ask Superintendents to 'notify' (not 'seek approval from') headquarters if any exception to this rule is considered necessary. The same Instructions state that the duration of segregation should normally be not more than one or two days." This should be considered as an outdated instruction since it provided an administrative basis for segregation inconsistent with the Reformatory School Ordinance.

178. Rule 67 of the UN Rules for the Protection of Juveniles Deprived of their Liberty expressly prohibits the use of solitary confinement, and also prohibits cruel, inhuman and degrading treatment. Some segregation may fall short of constituting solitary confinement as juveniles are still permitted to associate during classes and work activities. However, any segregation beyond a short period of a few hours is in our view cruel, inhuman, and degrading, and so

does not comply with Rule 67 and of Article 16 of the Convention against Torture.

List of Questions

179. The Monitor recommends the Committee to ask the Government:
- to produce statistics and details on the bullying cases in various Juvenile Homes;
- to clarify the established punishment mechanism;
- to explain the follow-up actions towards the boys who bully the others;
- to explain the measures taken to prevent bullying in the Juvenile Homes; and
- to produce statistics and details on the implementation of segregation.

Recommendations

180. The Monitor recommends the Committee to:
- urge the Government to take affirmative measures to prevent bullying, e.g. conduct intensive investigation on bullying cases and effectively punish bullies;
- revise its rules on segregation.

7.) Article 12: prompt and impartial investigation of torture (para 104 of the Government Report)

7.1) The lack of independence of the Complaint against Police Office and the lack of competence of the Independent Police Complaint Commission

7.1.1.) The background

181. The lack of an independent police complaints procedure is not a new issue (as shown below, the issue has been addressed by the HRC and your Committee for over the past 13 years). All complaints against the police in Hong Kong, irrespective of origin, are referred to the Complaints against Police Office ('CAPO'), which is a police department composed of officers entrusted with the responsibility of investigation. CAPO alone investigates the complaint, or oversees the handling of complaints by other fellow officers. The category of complaints reportable to the CAPO are restricted to those that "relates to the conduct of a member of the police force while on duty or in the execution or purported execution of his duties; relates to the conduct of a member of the police force who identified himself as such a

member while off duty; or relates to any practice or procedure adopted by the police force."[288]

182. The CAPO is also obliged to submit a complete investigation report to the Independent Police Complaints Council ('IPCC') for endorsement.[289] The investigation report would classify the complaints received by CAPO into different categories.[290] Disciplinary action will only proceed where a complaint is found to be substantiated and the officer at issue is at fault.[291]

183. The terms of reference of the IPCC are:

(a) to monitor and, where it considers appropriate, to review the handling by the Police of complaints by the public;

(b) to keep under review statistics of the types of conduct by police officers which lead to complaints by members of the public;

(c) to identify any faults in Police procedures which lead or might lead to complaints; and

(d) where and when it considers appropriate, to make recommendations to the Commissioner of Police ('CP') or, if necessary, to the Chief Executive.

184. However, IPCC's powers are limited. It is only empowered to review the classification of investigations and where appropriate, advise the CAPO to re-consider complaint classifications. And even with this already narrow mandate, the IPCC's monitoring and reviewing role is crippled in the following ways:

- the IPCC is not empowered to conduct investigations on its own;
- without the power to conduct investigations, the IPCC can only rely on reports prepared by CAPO;
- since the IPCC relies on the CAPO report, the IPCC does not have knowledge of complaints classified by CAPO as non-reportable;[292]

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[288] Clause 10 of the Independent Police Complaints Council Bill ('IPCC Bill').

[289] The IPCC is a non-statutory civilian review body composed of 18 members appointed by the Chief Executive, most of whom are Justices of Peace and/or Legislative Councilors.

[290] These categories are "substantiated, substantiated other than reported, not fully substantiated, unsubstantiated, false, no fault, withdrawn, not pursuable, curtailed, informally resolved and sub-judice."

[291] See Report of the IPCC 2006, para 5.12., "[c]riminal/disciplinary proceedings or internal action were taken against 114 police officers on 'Substantiated', 'Substantiated Other Than Reported', and 'Not Fully Substantiated' cases in 2006, subsequent to the endorsement of the results of investigations by the IPCC." The report is available at http://www.ipcc.gov.hk/en/publication_01.htm.

[292] This is indeed a major defect in the system, for it leaves largely a discretion on the part of the CAPO to consider whether complaints are reportable while the decision is not subject to any scrutiny.

- even when the IPCC disagrees with the way a complaint is investigated or the conclusion of a CAPO investigation, the IPCC can only recommend further investigation or reclassification;
- if agreement cannot be reached between the IPCC and CAPO as to the classification of a complaint, CAPO is not obliged to concede;[293]
- although the IPCC could then appeal to the CP or the Chief Executive, neither the CAPO nor the CP is obliged to act upon IPCC's suggestions and recommendations, and the Chief Executive is not under a legal obligation to even consider IPCC's recommendations;

The result is that the system is far from effective in combating police misconduct; (1) it is a reactive system and not a preventive one and (2) it is a reactive system depending upon the Police "turning themselves in."[294]

185. At times, the IPCC engage in witness interviewing and the deployment of lay observers in monitoring CAPO investigations. The IPCC Interviewing Witnesses Scheme was introduced in 1994. Under the Scheme, "IPCC Members may interview witnesses to clarify doubtful points in the course of examining CAPO's investigation reports."[295] However, it seems that the Scheme is far from effective, reflected in the fact that no witness interviewing sessions were conducted in the years 2004, 2005 and 2006.[296]

186. Another procedure introduced in 1996 was the IPCC Observers Scheme. As explained by the administration, "the role of IPCC observers is to assist the IPCC to observe the manner in which the Police handle or investigate complaints. Observers may attend any interviews conducted by the Police or observe the collection of evidence undertaken by the Police. They report to the IPCC on whether they consider that the interviews or collection of evidence have been conducted or undertaken fairly and impartially, and the particulars of any irregularities detected in respect of the interviews or collection of evidence." Although the Scheme was intended to enable IPCC members to make scheduled or

[293] Any reasonable man would question whether in such situations, suggestions for re-classifications have been compromised to avoid embarrassment. This would be discussed later.

[294] Human Rights Committee in its 1999 Concluding Observations comments that the investigations of police misconduct are in the hands of the police.

[295] Report of the IPCC 2006, para 1.9

[296] Ibid., see, under Chapter 1, headlined "Major activities of the Year." In 2003, "three witnesses involved in a complaint case were invited to attend an interview under the Scheme during the year but they all declined the invitation. Therefore, no witness was interviewed by the IPCC under the Scheme in 2003." Therefore only 1 witness interviewing session was initiated by the IPCC during the 4 years. See Report of the IPCC 2003.

surprise visits to observe investigations conducted by CAPO, a member of the IPCC revealed to us that they were only able to make scheduled visits during the past years therefore rendering it ineffective in monitoring police abuses or irregularities during the process.

187. On occasions the IPCC has suggested ways of improving police procedures. In 2006, such suggestions included:

- publishing lessons drawn from the mishandling of civilian personal data in the CAPO monthly report;
- suggesting the Police Force to look for ways in which to avoid miscommunications between the police officer and the supervisor of the General Registry;
- asking the Police to consider issuing guidelines concerning "how to receive complaints from members of the public";
- asking the Police to explore possibilities in improving existing procedures in handling ID card lost and found cases;
- suggesting the Police look into the possibility of standardizing the procedure of issuing notices to the registered owners of impounded vehicles.[297]

The above suggestions are mere suggestions; their adoption is entirely up to the Police to consider, although all of the above suggestions have been accepted in 2006. However, the relatively minor nature of most of the suggestions gives rise to a suspicion that other "suggestions" have been "compromised" to avoid embarrassment whenever there is a possibility that they would not be adopted. This is an inevitable problem if the IPCC is not endowed with sufficient powers to have its views enforced.

188. By way of example to illustrate the second point above, the IPCC suggested in 2005 that "CAPO to explore the feasibility of recording statements in simplified Chinese characters or using video-recorded interview, as appropriate, when the interviewee was unable to read traditional Chinese characters." The Police replied that they had reviewed the procedures to be followed when Mainlanders and foreign nationals are interviewed under caution."[298] From the passage above, it seems that the Police did not inform the IPCC what sorts of procedures were presently adopted under its "revised procedures" and whether the latter's suggestion of using video-recorded interview is feasible or even considered. It appears that the IPCC has not pressed the

[297] See Report of the IPCC 2006, para 5.15.

[298] Report of the IPCC 2005, para 4.15,

issue further. Regrettably, the issue of inadequate and under-qualified translators is still a serious issue in Hong Kong. .

7.1.2.) The functioning of the CAPO – statistics from the IPCC

189. The results of investigations endorsed by the IPCC in 2004, 2005, and 2006 are as follows:

2004 (%)	2005 (%)	2006(%)
Total no. of allegations		
5837 (100.0)	4695 (100.0)	3518 (100.0)
Substantiated/ Substantiated Other than Reported		
253 (4.3)	145 (3.1)	100 (2.8)
Unsubstantiated		
1070 (18.3)	854 (18.2)	610 (17.3)
Withdrawn/ Not Pursuable		
2570 (44.0)	2246 (47.8)	1719 (48.9)

190. As can be seen, only a small proportion of the complaints are deemed to be substantiated.

191. It is important also to note that the figures have not taken into account cases which have not reached CAPO. The Monitor is aware that in many cases, the prospective complainant has been discouraged from making complaints. The tactics employed by the CAPO include:

- trying to dissuade the potential complainant from lodging a complaint;
- negotiating with the potential complainant by offering to drop or not to lay charges against him, his family members or friends;
- ‘explaining’ to the potential complainant of the ‘misunderstandings’ involved in the complaints procedure and how inconvenient and complex such complaint and investigation processes are;
- threatening the potential complainant with possible charges or other retaliation, including the threatening of relatives and friends of the potential complainant of the police officer who witnessed the incident on the spot with possible charges of ‘obstruction of police officer in the execution of his duties’
- in order to justify their use of violence against the potential complainant, threatening the potential complainant with charges of ‘assaulting a police officer’ or ‘resisting arrest.’ [299]

[299] See Hong Kong Human Rights Monitor, ‘Submissions to the United Nations Human Rights Committee regarding the SAR Government's Report to the CAT 2000’.

A proportion of the public has also lost confidence in the complaints procedure; potential complainants have been deterred from the possibility of backlash or the fear of "inviting troubles." In short, the figures do not accurately reflect the number of cases where a complaint could or should have been lodged.

192. Even when a complaint has been filed, CAPO officers employ the following strategies to discourage the pursuance of a complaint:

- "by scheduling appointments at inconvenient times for the victim(s) and/or witnesses;
- by making subjects wait for long periods of time even though they have appointments;
- by canceling an appointment, especially an identification parade, at the last minute."[300]

The inconveniences that these "unconventional procedures" create are intended to complicate the complaints procedure and to further frustrate the complainant. The result is that these complaints will not be pursued by the complainant and the CAPO would simply brand these complainants as uncooperative. This account for the high percentage of the cases categorized as "withdrawn/ not pursuable."

[300] Ibid.

193. Only if there is an independent complaints procedure can the malpractices described above be reduced

194. The Monitor observes that the lack of independence of CAPO has led to much disappointment; prospective complainants are just not convinced that their complaints would be properly pursued. Paragraphs under the subheading 7.1.3 show instances where the CAPO has openly and blatantly ignored their duties. When the CAPO is defunct, Hong Kong residents are basically deprived of their means to seek redress for police wrongdoings. As highlighted in our previous shadow report:

> "[Although the] victim may also bring a private prosecution against the police officers and/or the Commissioner of Police, or he may elect to bring a civil action for civil remedies. However, normally the only channel for redress for most people is CAPO. Without substantiation or other faults recognized by CAPO, the HKSAR Government will not prosecute the police complained of nor will they be disciplined. While other channels such as private prosecutions or civil litigation may be available, CAPO is the only channel that has the power to investigate and requires little financial resources on the part of the complainant. A victim's right to a remedy therefore depends very much on the work of CAPO."[301]

[301] Ibid.

7.1.3.) Misconduct of the CAPO (causes and implications)

7.1.3.1.) Tipping off of police officers

195. Under the present system, complaints against the police should be made to a CAPO officer who posted at a local police station, where the officer would record their statement. According to Zi Teng's experience, CAPO officers are usually informed that they are going to lodge a complaint even before their staffs and the complainant have arrived at the station. Sometimes, tipping off works the other way round: where the subject of complaint is being informed by the CAPO that they are being complained against. This reflects that the complaints are not kept confidential and the complaints system is not impartial.

196. In January 2008, the organization complained about the intimidation by police of sex workers to the Honorable Ms. Emily Lau, local legislator, who then wrote a letter to the CP asking for a formal reply. The CP referred the matter to CAPO whom asked for the information of the complainants. Zi Teng refused. CAPO then asked the staff of Zi Teng and the complainant to provide for a statement at the local police station. To their surprise, the police squad who were assigned to record the complaint was not the CAPO but the subjects of complaint themselves.[302]

197. The incident reflects just how insensitive the Police is as to the importance of confidentiality of complainants and how complaints are taken lightly on the part of the Police. Most importantly, since such cases of tipping-off are disciplinary actions,[303] it reflects just how administrative measures, even if put into place, have not been properly implemented and observed. Unless these internal rules acquire the status of law, thus making "tipping off" a criminal offence, it is difficult to see how such "rules" are to be observed.

7.1.4.) Current developments of the IPCC

198. With regard to the present police complaint procedures, the Human Rights Committee has expressed concerns over such a system. In its 1999 Concluding Observation, it was noted that the IPCC:

[302] A special unit (no.3) of the Tsim Sha Tsui District which is responsible primarily for anti vice operations.

[303] See First Report of the HKSAR of the People's Republic of China in the light of the International Covenant on Civil and Political Rights (ICCPR) ('HKSAR report to the HRC 1999') para 51, " 'tipping-off' outlawed: it has been made a disciplinary offence to 'tip-off' an officer who is the subject of a complaint";

"has not the power to ensure proper and effective investigation of complaints against the police. The Committee remains concerned that the investigations of police misconduct are still in the hands of police themselves, which undermines the credibility of these investigations."[304]

Similarly, in the Committee's 2000 concluding observation, the Committee recommended "continued efforts be made to ensure that the Independent Police Complaints Council becomes a statutory body, with increased competence."[305]

199. Some progress has been made on the initiative of the government. In March 2002, the government issued a public consultation document with regards to a revised IPCC Bill. In 2006, the Legislative Council was briefed by the administration on its refined legislative proposals to establish the IPCC as a statutory body. Recommendations have been adopted in the amendment Bill.[306] In July 2007, a new bill was proposed by the IPCC which, according to the administration, "codifies a wide range of powers now available to the IPCC to enable it to closely scrutinize the process and manner in which CAPO handles complaints for the purpose of discharging its monitoring and review functions."[307]According to the Government, such powers are:

"(a) to require the Police to provide explanations to support the categorization of complaints as 'non-reportable complaints', and to require the Police to re-consider such categorization (Clause 15);
(b) to advice the Police of the IPCC's recommendations on the police investigation reports, classification of complaints, the Police's handling or investigation of complaints, any faults or deficiencies in any police practices or procedures, and to advice the Police of the IPCC's opinions on the police's disciplinary actions taken or to be taken in respect of members of the police force (Clause 18);
(c) to interview any persons who are or may be able to provide information or other assistance to the IPCC in relation to the investigation reports or interim investigation reports submitted by the Police (Clause 19);
(d) to require the Police to provide any information or materials or clarify any facts or discrepancies relating to 'reportable complaints' (Clause 20);
(e) to require the Police to investigate or re-investigate 'reportable complaints' (Clause 21);
(f) to require the Police to inform complainants or representatives of complainants of the classification of 'reportable complaints' and the reasons for the classification (Clause 22);

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[304] Concluding Observations of the Human Rights Committee on the Hong Kong Special Administrative Region (1999), CCPR/C/79/Add.117., para 11.
[305] Conclusions and recommendations of the Committee against Torture (2000), CAT/C/24/Concl.3.
[306] See Legislative Council Secretariat, 'Bills Committee on Independent Police Complaints Council Bill – Background brief prepared by the Legislative Council Secretariat', LC Paper No. CB(2)87/07-08(03), 9-10 ('Background Brief'); A thorough comparison of the IPCC Bill 1996 and the IPCC Bill 2007 could be found in the Security Bureau's submission to the LegCo Bills Committee, "Comparison between the Independent Police Complaints Council (IPCC) Bill introduced in 2007 and the IPCC Bill introduced in 1996," LC Paper No. CB(2)243/07-08(02).
[307] Security Bureau, 'Bills Committee on Independent Police Complaints Council Bill', LC Paper No.CB(2)243/07-08(03), para.8.

(g) to observe the Police's interviews and collection of evidence for investigating 'reportable complaints' (Clause 23);
(h) to require the police to provide explanations in relation to the Police's disciplinary actions taken to or to be taken in respect of members of the police force (Clause 24);
(i) to require the Police to submit statistics of the types of conduct of members of the police force that have led to 'reportable complaints', and reports on actions taken or to be taken pursuant to the IPCC's recommendations (Clause 25);
(j) to require the Police to consult the IPCC on any proposed new police orders or manuals, or significant amendments to existing police orders or manuals, relating to the handling or investigation of 'reportable complaints' (Clause 26); and
(k) to report to the Chief Executive as the IPCC thinks necessary (Clause 28)."[308]

200. The above list is certainly an exaggeration on the powers of the IPCC. For example, in relation to (a) (Clause 15: power to require re-consideration of classifications), although it is said that the Council is given the power to require the CP to re-classify a non-reportable complaint, the Council is not provided with the full and unrestricted access to all information material for such purposes. With regards to (b) (Clause 18: power to advice the Police on its practices) and (j) (Clause 26: power to require the Police to consult the IPCC on new police orders) above, these clauses do not provide the Council with the power to override CP classifications, or to have the Council's advices binding on the Police.[309] Furthermore, with respect to (c), Clause 19 provides the CP with the power to refuse or halt any interviewing sessions with witnesses if he were of the opinion that such interview would likely prejudice the investigation of any crime or complaint.[310]

201. Moreover, substantial defects within the system have not been rectified. Clause 10 of the Bill (on reportable/non-reportable cases) excludes cases which are clearly actionable or at least pursuable by barring all third party complaints. The jurisdiction of the IPCC is effectively barred in situations where:

- persons are unaware of their rights or are not capable to lodge complaints (mentally disabled, minors or the elders);
- persons did not choose to lodge a complain due to the fear of consequences;

[308] Ibid.

[309] IPCC, 'Submission of the Independent Police Complaints Council to the Legislative Council Bills Committee on Independent Police Complaints Council Bill', LC Paper No.CB(2)563/07-08', para 7(b).

[310] Ibid., para 5(iii): "The IPCC hopes that the Bill would not hamper the IPCC's access to information pertaining to any complaint, would allow the IPCC to give recommendations and opinions, and would require the CP to respond adequately to such recommendations and opinions."

- persons who died or are seriously injured out of gross Police misconduct and would not be able to lodge a complaint.

In all the cases above, there might be reliable witnesses, relatives of the victim or staff of NGOs who might have also been present at the event and might otherwise be able to lodge a complain on the victim's behalf.[311] Even where there are no complaints being lodged in person, the Council might consider it in the public's interest to take on a monitoring role at times were allegations were made by the media.[312]

202. In short, although the present Bill has widened and clarified the IPCC's powers, any genuine amendments giving IPCC real and effective powers has not been made.

203. Furthermore, the issue as to the conferring of investigative powers remains unresolved. The Government notes that there is a discrepancy among public views as to the conferring of investigative power upon the IPCC. It was also said that present IPCC members prefer a monitoring and reviewing role over an investigative role.[313] However, the extent of an "investigative role" has not been properly defined in consultation documents. There is a significant difference between the competence to conduct primary investigations (which might have the effect of the overlapping of roles or the replacing of CAPO with the IPCC) and the power to conduct secondary investigations or re-investigations. The former would shed resource implications and might be unfeasible given the existing structure of the IPCC and its limited manpower (and therefore not preferred by the public). Communications between the staff of the Monitor and members of the IPCC also reveal that the issue of investigative powers is not pressed because the members do not want the IPCC to retain its status quo given that improvements to the system have been unduly delayed for years.

204. Nonetheless, the core issues relating to the impartiality and competence of the police complaints procedure remains that the:

- "IPCC was not empowered to conduct primary or secondary investigation on complaints even if IPCC was not satisfied with the results of the investigation of CAPO;

[311] See Hong Kong Human Rights Monitor, 'Submission of the Hong Kong Human Rights Monitor on Independent Police Complaints Council Bill' LC Paper No. CB(2)499/07-08(02), para 38-46. ('The Monitor's submission on IPCC')

[312] Ibid.

[313] See Background Brief, para 59.

- IPCC was not empowered to investigate a complaint from a third party;
- IPCC was not empowered to determine whether the complaints were substantiated;
- power to determine the penalty for a valid complaint vested with the CP. IPCC did not even have the power to recommend penalty for a substantiated complaint."[314]

205. Opposing changes to endow IPCC with investigative power, the Government argues (repeatedly) that:

- "the IPCC does not have investigative powers similar to those available to the Police (e.g. the search and seizure powers) or the necessary expertise and knowledge for investigating complaints which often involve allegations of breaches of Police discipline or procedures or of criminal law. This would adversely affect the quality of the IPCC's investigations;[315]
- the IPCC would need to have its own investigation team, in addition to the investigation complement in CAPO. This would result in an overlapping of resource requirement and duplication of efforts. The cost effectiveness of the suggestion is in doubt;[316] and
- by empowering the IPCC to investigate complaints lodged with the CAPO would confuse the IPCC's role as an oversight body. The arrangement might create two different sets of findings and results in respect of a complaint, and hence cause confusion. In contrast, under the established practice, the IPCC and CAPO will seek to reach a consensus on the classification of a reportable complaint through discussions."[317]
- the CAPO, although a department within the Police Force, it operates independently of all operational and support formations of the police.[318]

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[314] See Background Brief, para 64.

[315] Ibid. See also IPCC Question and Answer Brief, "In principle, public confidence in the police complaint system will be enhanced if investigation is conducted by an independent body. There will be less allegation of partiality. However, consideration should be given to the proposal's cost-effectiveness. The existing police complaints system allows the investigating officers to obtain evidence form the complainees readily as the latter are obliged to co-operate under Police (Discipline) Regulations. If the complaints were to be investigated by an independent organization, greater resources will be required and it may take longer for the investigators to obtain evidence. Moreover, it may be difficult for a layman to investigate into police conduct…. This is reasonable because personnel of the same profession should have a better understanding of the work of the complainee and should therefore be in a better position to determine whether the action of the complainee is justified in the circumstances of a case."

[316] Ibid.

[317] See also 'IPCC Question and Answer Brief', "if IPCC would be given investigative power, it might distort the delineation in the roles of CAPO and the IPCC to investigate and review complaints respectively."

[318] Note paragraph 107 of the Government Report, "CAPO was an independent unit of the Police separate from other formations, and it would abide by the principles of fairness and impartiality in handling and investigating complaint cases."; See also Background Brief, para 65.
"Complaints against the Police are handled by the complaints Against Police Office (CAPO). The CAPO is under a separate chain of command from the other frontline and operational unites with the Force. This has organizationally ensured that investigations into complaints are conducted in an independent and impartial manner." Secretary for Security, 'Letter to the

206. The Monitor is of the view that the Government is taking the issue too far. As argued earlier, "[t]he 'lack of expertise argument' is proved to be unfounded by the successful establishment of the Independent Commission against Corruption ('ICAC') and its effective investigation of police and other corruption cases. In contrast, the [then] Anti-Corruption Office of the [P]olice was known to harbour police corruption and was widely criticized as the most corrupt office in the police force."[319] An analogy could properly be extended to the present situation. The CAPO is too convenient a place for the Police and the Government to dismiss complaints.

207. Moreover, whether or not the IPCC would "have investigative powers similar to those available to the Police" is up to the Government.[320] The Monitor notes that in the United Kingdom, the Independent Police Complaints Commission, endowed with investigative powers, have replaced the former Police Complaints Authority in England and Wales (without investigative powers) in 2004. Similarly the Police Ombudsman for Northern Ireland has replaced the Independent Police Complaints Commission in 1998; the former has investigative powers, the latter did not.

208. As to the second point, for example, by endowing IPCC with the ability to conduct parallel independent investigation where serious misconduct is spotted would not have raised a question as to cost effectiveness and the overlapping of resources. Moreover, the argument of an overlapping role or confusion in roles is not an issue if their respective mandate is clearly articulated. To keep IPCC's power of investigation within a reasonable scope - where there is reliable evidence of serious misconduct and where there is reliable evidence of CAPO negligence – the IPCC's role of oversight body would not have altered. By making the findings of the IPCC binding upon CAPO, the argument that confusion would be caused is inconceivable.[321]

LegCo panel on security' dated 4th December 2007, LC Paper No.CB(2)508.07-08(02).

[319] See The Monitor's submission on the IPCC, *supra*.

[320] Ibid.

[321] The latter is reflected in the HRC's 2006 concluding observation where it reiterated that "[t]he Committee remains concerned that investigations of police misconduct are still carried out by the police themselves through the Complaints Against Police Office (CAPO), and that the Independent Police Complaints Council (IPCC) does not have the power to ensure proper and effective investigation of complaints or for the effective implementation of its recommendations … The HKSAR should ensure that the investigation of complaints against the police is carried out by an independent body, the decisions of which are binding on relevant authorities." See HRC's Concluding Observation on Hong Kong 2006, *supra*.

209. Lastly, it appears that the Government is unable to appreciate the meaning of an "independent mechanism." Not only does the notion include a system that would ensure substantive impartiality, the mechanism itself must also appear to be fair and independent. In this respect the Human Rights Committee writes in 1995 that:

> "in light of the high proportion of complaints against police officers which are found by the investigating police to be unsubstantiated, the Committee expresses concern about the credibility of the investigation process and takes the view that investigation into complaints of abuse of authority by members of the Police Force must be, and must appear to be, fair and independent and must therefore be entrusted to an independent mechanism."[322]

210. One could conclude that the Government stresses administrative convenience over accountability. The reason for having an independent police complaints mechanism, however, is to allow for civilian oversight. While it is true that the effectiveness of police operations should not be undermined,[323] it is equally important for the Police Force to introduce transparency and to ensure that their actions are legitimate and within due process; strong but accountable.

211. In brief, even if a two-tier system is insisted, an independent police complaints procedure should be set up to encompass the following elements:

- an independent role; the IPCC should be established upon a mechanism which would ensure its impartiality both in effect and in perception;
- adequate statutory support; which would ensure the cooperation and the compliance of the Police Force;
- accountability to the general public; which would foster public confidence both towards the complaint mechanism and the Police Force;
- a preventive role; the IPCC should be mandated and empowered to function to prevent complaints, rather than merely taking on only a reactive role.

The issue has dragged on for more than 12 years. In this shadow report, the Monitor calls for the establishment of a competent and independent police complaints procedure as a priority. Once such a procedure is established, misconducts would be effectively deterred. A coherent body of principles

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[322] See Concluding Observations of the Human Rights Committee, Hong Kong, U.N. Doc. A/50/40, paras. 408-435 (1995). United Kingdom of Great Britain and Northern Ireland (Hong Kong), para 11.

[323] Although, it is unclear whether the effectiveness of police operation would necessarily be undermined, we could safely assume that it would not. The Monitor is not aware of any occasion where the Government claims that police operations would be rendered ineffective because of civilian oversight, although the Government did seemed to have claimed that the morale of the Police Force would be affected if such a body is ever formed. This, however, is more of an excuse than an argument.

would also be allowed to develop in which a culture of respect for human rights could be fostered,

List of Questions

212. The Monitor recommends the Committee to ask the Government:

- whether the Government agrees with the previous Concluding Observations issued by HRC and the Committee on various occasions as to the comment that the police complaints procedure must be fair and appear to be fair and that police complaints should not be dealt with by the police themselves, and if not, why;
- whether the Government is willing to endow the IPCC with investigative powers, if not, why; and
- to provide the Committee with the legislative timetable of the IPCC Bill.

Recommendations

213. The Monitor recommends the Committee to:

- reiterate your demands in your 2000 Concluding Observation; stressing once again the importance of the IPCC to be transformed into a independent and effective police monitoring body;
- reiterate the importance that such an independent body should adhere to the Paris Principles;
- follow up on the issue in subsequently procedures;
- urge the Government to make substantive improvements to the Bill.

Appendix I: List of Questions

Article 1: Defining Torture

1. What is the precise meaning of the words "lawful authority, justification and excuse" in s.3(4) of the Crimes (Torture) Ordinance ('CTO')?
2. What is the context in which such a defence could be invoked?
3. Is "the reasonable use of force to restrain a violent prisoner" referred to in the HKSAR Government's initial report the only circumstance envisaged by the Government under s.3(4)?
4. If so, what is the reason behind the Government's reluctance to bring s.3(4) in line with Art.1 of the CAT?
5. If the Government maintains its position on the meaning of s.3(4) of the CTO, is the Government willing to replace the present defence clause in s.3(4) of the CTO with a new provision which would simply stipulate that "for the purpose of the offence of torture under this ordinance, torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions" or alternatively, is the Government is willing to adopt the wording of s.3 Crimes (Torture) Act 1988 of Australia?

Article 2: Preventing Torture

1. Is the Government aware of the allegations of torture towards ethnic minorities?
2. What has the Government done to investigate allegations of torture as described in paragraphs 26-30?
3. If investigation has been conducted what are the findings of the Government?
4. If investigations have not been conducted, is the Government is willing to initiate investigations (with the assistance of Unison) and keep the Committee updated as to the progress of the investigation?
5. Is the Government willing to provide the video taping of the interrogation with the victim described in paragraphs 26-30?
6. What is the current situation regarding the usage of video recording devices during interrogations and in temporary holding areas?
7. What kind of training is currently provided to frontline police officers in relation to enhancing cultural awareness and respect to ethnic minorities?
8. Is the Government willing to provide the Committee with the relevant sections of the Police Force Procedures Manual, and Police General Orders in relation to stop, search, arrest, detention and interrogation?
9. Are there any statistics on the reporting of police misconduct by ethnic minorities?

10. Can the Government clarify the measures taken to ensure the rights of suspects in custody?
11. What are the "relevant national laws" at times of public emergency?

Article 3: Torture as a ground for refusal to expel, return or extradite

1. What are the written requirements in the form of law, Immigration Rules, and internal guidelines regarding the need to refer a case to the UNHCR?
2. What are the division of roles and the extent of the Government's co-operation with the UNHCR (SOHK)?
3. What is the legal status of asylum seekers in Hong Kong, especially, whether, in the eyes of the Government, their presence in Hong Kong is lawful or unlawful?
4. Is the Government willing to provide a temporary legal status to asylum seekers (especially those whose traveling visas expire while their application is being processed and those who claim asylum at the port of entry) so that they would not be subject to arrest and detention and would be afforded freedom of movement?
5. What are the statistics on asylum seekers arrested and detained?
6. What are the statistics on the number of asylum claimants who are denied permission to enter?
7. What is the prosecution policy in relation to asylum seekers?
8. What are the statistics on asylum seekers being prosecuted?
9. What are the most up-to-date statistics on asylum seekers, torture claimants and refugees in Hong Kong?
10. Is the Government willing to provide the Committee with details of the asylum-related cases litigated in the Hong Kong courts for (at least) the past 4 years and those that the Government is currently litigating, as well as to provide the Government counsel's written submissions presented to the court in each case?
11. Could the Government account for the differences between the situations as described above in paragraphs 41-54 and paragraphs 65-66 of the Government Report?
12. Could the Government provide an assessment as to the resources spent into litigating these cases?
13. Has the Government conducted any assessments with regards to the resources which would need to be spent in order to put into place a proper RSD procedure?
14. What are the details and relevant figures as to the current policies in relation to the material assistance tendered to asylum seekers and refugees?

Article 5: Establishment of jurisdiction

1. Why is the Government unwilling to amend s.3(5) of the CTO?

Article 11: Review of interrogation rules, instructions, methods and practices of custody and treatment of persons arrested or detained

1. Why must sexual contact be engaged during investigations into prostitution-related offences?
2. What are the relevant guidelines with regard to anti-vice operations?
3. What are the statistics and details of cases where undercover agents are engaged in anti-vice operations and masturbation services are received? (If these cases were not documented, why is such information not properly documented and recorded?) Why was the receiving of masturbation services necessary in those cases?
4. Is the Government willing to take any measures to prevent undercover agents from engaging in any related sexual contact?
5. Is the Government willing to provide the Committee with the entire Police General Order and Force Procedures Manual (not available to the public)?
6. Why are the Force Procedures Manual and parts of the Police General Order withheld from the public?
7. What are the records and statistics on persons who have been strip searched in previous years? Why was strip search necessary in those cases?
8. What are the details of the disciplinary measures, if any, taken against police officers who perform arbitrary or inappropriate strip searches?
9. Is the Government willing to revise its rules on strip searching?
10. Could the Government provide a timetable for the revision of the relevant rules?
11. Why are specific provisions governing the performance of strip searches not incorporated into relevant guidelines?
12. What is the Government's explanation regarding their decision to arrest 1153 persons during the WTO episode?
13. Did the Government taken any measures to protect the arrestees' rights in the course of their detention?
14. What is the "system" described in paragraphs 76-77 of the Government Report that is currently in place to ensure the proper treatment of persons in detention and keep the need for their further detention under continuous review?
15. What are the administrative rules of the "system"?
16. How do these administrative rules reflect suggestions in the Report on Arrest?
17. What is the Government's plan regarding the implementation of the recommendations in the Report on Arrest?
18. Can the Government produce statistics and details on the bullying cases in various Juvenile Homes?

19. What is the established punishment mechanism in Juvenile Homes?
20. What are the follow-up actions taken toward the boys who bully the others, as described in paragraphs 171-173?
21. What are the measures taken to prevent bullying in the Juvenile Homes?
22. What are the statistics and details on the implementation of segregation?

Article 12: Prompt and impartial investigation of torture

1. Does the Government agree with the previous Concluding Observations issued by the HRC and the Committee on various occasions as to the comment that the police complaints procedure must be fair and appear to be fair and that police complaints should not be dealt with by the Police themselves?
2. Is the Government willing to endow the IPCC with investigative powers? If not, why?
3. Is the Government willing to provide the Committee with the legislative timetable of the IPCC Bill?