

An outline of the topics to be covered in the second report on the Hong Kong Special Administrative Region under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

Introduction: the present report

1. The United Nations Committee Against Torture (the Committee) examined China's third periodic report under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention) at its 414th, 417th and 421st meetings on 4, 5 and 9 May 2000 and issued its conclusions and recommendations of 9 May 2000. The initial report of the Hong Kong Special Administrative Region (HKSAR) formed part of that report. Inter alia, Article 19.1 of the Convention requires States Parties to submit periodic reports on the measures they have taken to give effect to their undertakings under the Convention "every four years on any new measures taken". Thus, China's next periodic report – the combined fourth and fifth – is now due and the HKSAR's second report will form part of it.

2. The present outline is preparatory to the drafting of that report. It sets out the broad subject headings and individual topics that we envisage covering in the report. It invites all members of the public to submit their views on the implementation of the Convention in respect of those topics. It also invites the public to suggest (and comment on) any additional topics that they consider we ought to include.

3. We will carefully consider all the comments that we receive by or before the close of **18 June 2004**. We do not guarantee to address every one of them in full in the report. But we undertake to send every submission received to the Committee's Secretariat under separate cover. This will ensure that the Committee has access to the full, original texts.

4. The text of the Convention is available at the Home Affairs Bureau's web site: http://www.hab.gov.hk/file_manager/en/documents/policy_responsibilities/cat.doc.

5. References to 'the initial report' are to the report on the HKSAR submitted by the Central People's Government in May 1999 and heard by the Committee in May 2000.

6. The report will also respond - in the relevant sections - to the concerns and recommendations in the Committee's conclusions and recommendations on the initial report (reproduced at **Annex**). In drafting it, we will adhere to the requirements prescribed by the Committee in the UN Manual on Human Rights Reporting: copies of the section relating to the Convention are available on request as are copies of our initial report under the Convention (telephone: 2835 2106 or 2835 2165). The initial report is also available on the Internet –

http://www.hab.gov.hk/en/policy_responsibilities/the_rights_of_the_individuals/human1.htm

Part I: General Profile of the Hong Kong Special Administrative Region (HKSAR)

7. The 'profiles' follow a standard format, form and content being prescribed in the UN Manual on Human Rights Reporting. Part I of the present report will be essentially the same as Part I of our second report under the International Covenant on Economic, Social and Cultural Rights (ICESCR), updated as may be necessary.

Part II: Information in relation to each of the Articles in the Convention

8. The initial report contained detailed information on the laws, policies, and practices that are in place to ensure Hong Kong's compliance with the Convention. Many of those are of long standing and, by nature, tend to remain unchanged – or to change very little – over time. We do not propose repeating descriptions/explanations of such matters in this report and we will frequently state that "there have been no significant developments in regard to [the topic in question] and the situation remains essentially as explained in paragraphs [x to y] of the initial report". This approach, the purpose of which is to avoid repetition and excessive length, conforms to the guidance in the UN Manual on Human Rights Reporting (1997 Edition, page 67, final paragraph). It is also consistent with Article 19.1 of the Convention as cited in paragraph 1 above. For these reasons,

we expect the second report to be shorter than the initial one.

9. The report will chiefly comprise –
- (a) information/explanations about any significant developments since the hearing of the initial report. Our preliminary views as to the areas in which there may have been developments that qualify as 'significant' are indicated in the topic headings below. As indicated in paragraph 2 above, respondents are welcome to propose additional topics that they consider ought to so qualify. We ask that, in proposing additional topics, they state why they consider the issue/development to be significant (and relevant to the application of the Convention in Hong Kong), and to set out their views on the Government's performance in handling the issue;
 - (b) updates of any developments that were ongoing at the time of the 2000 hearing and in respect of which we undertook to inform the Committee of future progress/outcomes; and
 - (c) responses to the concerns and recommendations in the Committee's conclusions and recommendations of 9 May 2000.

Proposed content

Article 1: defining “torture”

10. We will advise the Committee that the position is as explained in paragraphs 1 to 6 of the initial report, where we discussed the definition of ‘torture’ in section 3 of the Crimes (Torture) Ordinance (Chapter 427)¹.

11. Additionally, we will need to address a question arising from paragraphs 4 to 6 of that report, where we advised the Committee that section 3(4) of the Crimes (Torture) Ordinance (Chapter 427) provided that

¹ Chapter 427 gives effect in domestic law to the relevant provisions of the Convention.

it shall be a defence for a person charged with the offence of torture to prove that he had lawful authority, justification or excuse for that conduct. For the purpose of the Ordinance (section 3(5)), “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;
- (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.

12. We went on to explain that commentators had queried whether these defences were compatible with Article 1.1 of the Convention. Our view was that they were so consistent as they were simply an attempt to give effect to the second sentence of Article 1.1: “[Torture] does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”. That is, they were intended to cover matters such as the reasonable use of force to restrain a violent prisoner. It was not intended to cover – nor would the courts be asked to interpret them as authorising – conduct intrinsically equivalent to torture as defined in Article 1.1².

13. However, in paragraph 33 of its conclusions and recommendations of 9 May 2000, the Committee expressed the concern that “the reference to ‘lawful authority, justification or excuse’ as a defence for a person charged with torture, as well as the definition of a public official in the Crimes (Torture) Ordinance, (Chapter 427), are not in full

² We reiterated this explanation in paragraph 12 (in relation to Article 2 of the Convention), adding that neither “exceptional circumstances” nor “superior orders” could be invoked in the law of Hong Kong as a justification for torture.

conformity with article 1 of the Convention”. And, in paragraph 37, the Committee recommended that “the necessary steps be taken to ensure that torture, as defined in article 1 of the Convention, is effectively prosecuted and appropriately sanctioned”. We will respond to the concern and recommendation in this section of the report.

Article 2: legislative, administrative, judicial or other measures to prevent acts of torture

14. We shall advise the Committee that the legal/constitutional position is as explained in paragraphs 7 to 18 of the initial report, where we discussed –

- the constitutional protections in Articles 18 and 39 of the Basic Law;
- the legal protections in Article 3 of the Bill of Rights (which gives effect in domestic law to Article 7 of the International Covenant on Civil and Political Rights (ICCPR) in regard to the prohibition of Torture), the Geneva Conventions, and the common law;
- the position in regard to the making of regulations in emergencies (under the Emergency Regulations Ordinance (Chapter 241));
- instances of alleged use of torture; and
- court challenges against cautioned statements and assertions that such statements were obtained as a result of impropriety on the part of the authorities.

15. In paragraph 34 of the 2000 conclusions and recommendations, the Committee expressed the concern that –

“...there are as yet no prosecutions under the Crimes (Torture) Ordinance, despite circumstances brought to the attention of the Committee justifying such prosecutions.”

We will address that concern in this section of the report. We will also advise the Committee of any instances where the use of torture has been alleged since the May 2000 hearing. Contributors are invited to bring to our attention any cases that they consider we should discuss in this context.

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

16. We shall inform the Committee that the position is broadly as explained in paragraphs 19 to 37 of the initial report, updating as necessary. Those paragraphs discussed –

- extradition (application of the Fugitive Offenders Ordinance (Chapter 503)) and the Chief Executive’s discretion to refuse the surrender of persons to other jurisdictions;
- removal and deportation;
- the assertion that the removal of Mainland children who did not qualify under the Certificate of Entitlement Scheme constituted cruel and inhuman treatment; and
- the position of Vietnamese migrants, including illegal immigrants and ‘ex-China Vietnamese’.

17. In paragraph 36 of the 2000 conclusions and recommendations, the Committee noted with concern that “the practices in the Hong Kong Special Administrative Region relating to refugees may not be in full conformity with article 3 of the Convention”. In paragraph 40, it recommended that “laws and practices relating to refugees be brought into full conformity with article 3 of the Convention”. We shall respond to the concern and recommendation in this section of the report.

Article 4: making acts of torture offences under the criminal law

18. We shall inform the Committee that the position is essentially as explained in paragraphs 38 and 39 of the initial report, which reaffirmed the prohibition of torture under the Crimes (Torture) Ordinance (Chapter 427) and advised the Committee of the prohibition of aiding and abetting in section 89 of the Criminal Procedure Ordinance (Chapter 221). We will add that attempts to commit torture are prohibited under section 159G of the Crimes Ordinance (Chapter 200).

Article 5: establishment of jurisdiction

19. We shall inform the Committee that the position is as explained in paragraph 40 of the initial report (provisions of section 3 of the Crimes

(Torture) Ordinance (Chapter 427)).

Article 6: powers of detention

20. We shall inform the Committee that the position is as explained in paragraphs 41 to 44 of the initial report. Those paragraphs discussed –

- the powers of arrest under the Police Force Ordinance (Chapter 232), section 50(1) of which empowers the police to arrest without warrant persons reasonably suspected of having participated in acts of torture;
- the application of those provisions to all persons in the territory of the HKSAR, regardless of their nationality or origin;
- the power under the Fugitive Offenders Ordinance (Chapter 503) and the Fugitive Offenders (Torture) Order (Chapter 503I) to surrender persons to parties to the Convention; and
- the protections afforded to persons arrested or detained under Article 5 of the Bill of Rights, which gives effect in domestic law to Article 9 of the ICCPR.

Article 7: prosecution of offenders who are not to be extradited

21. We shall inform the Committee that the position is as explained in paragraph 45 of the initial report (provisions in the Bill of Rights and the common law).

Article 8: extradition arrangements

22. We shall inform the Committee that the position is essentially as explained in paragraphs 46 to 48 of the initial report (bilateral agreements to the surrender of fugitive offenders and the Fugitive Offenders (Torture) Order (Chapter 503I)).

Article 9: mutual assistance in relation to crimes of torture

23. We shall inform the Committee that the position is essentially as explained in paragraphs 49 to 51 of the initial report (provisions of the Evidence Ordinance (Chapter 8) and the Mutual Legal Assistance in Criminal Matters Ordinance (Chapter 525), agreements with overseas

jurisdictions, and liaison between the HKSAR and Mainland Authorities).

Article 10: education and information on the prohibition of torture

24. Paragraphs 52 to 58 of the initial report explained the training and publicity measures of the disciplined services and health professionals. In this section of the report, we shall advise the Committee of any developments in those areas such as the guidelines on procedures for handling elderly and child abuse cases.

25. In paragraph 39 of the 2000 conclusions and recommendations, the Committee recommended “the continuation and intensification of preventive measures, including training for law enforcement officials”. We will address that recommendation in this section of the report.

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

26. In paragraphs 59 to 84 of the initial report, we advised the Committee of our intention to improve existing practices and legislation relating to the powers of the law enforcement agencies to stop and search, arrest, and detain a person. We discussed the rules and practices of the disciplined services, including the measures taken to detect signs of physical abuse/torture and to prevent suicides by persons in custody, and the protections afforded to persons detained in mental hospitals. We explained the controlled circumstances in which health professionals administered electro-convulsive therapy to patients with severe depressive illness and as an adjunct to neuroleptic treatment when response to medication had been unsatisfactory. In this section of the report, we shall update the statistics for electro-convulsive therapy and shall advise the Committee of developments in those areas, such as administrative arrangement before compulsory detention in a mental hospital, delegation of the Chief Executive's power under section 52B of the Mental Health Ordinance (Chapter 136) to the Secretary for Health, Welfare and Food, and the enactment (in May 2001) of the Rehabilitation Centres Ordinance (Chapter 567).

27. We will also advise the Committee of the introduction – in

March 2004 – of the Criminal Procedure (Amendment) Bill 2004. The Bill proposes a revised scheme applicable to prisoners who have been serving certain sentences³. Within six months of its commencement, the proposed amendment, if enacted, will require the Secretary for Justice to apply to the court for a determination by a judge in respect of each prescribed prisoner. The judge hearing such an application must determine the minimum term that the prescribed prisoner must serve for the relevant offence. Where prisoners are serving sentences for murder committed when they were under 18 years old, the judge will have discretion as to whether –

- (a) to make a determination of the minimum terms as above mentioned; or
- (b) to determine instead that the relevant sentence be quashed, and be substituted by a sentence of imprisonment for a fixed term of such duration as the judge considers appropriate.

Article 12: prompt and impartial investigation of acts of torture

28. Paragraphs 85 to 101 of the initial report explained the investigation mechanisms and procedures of the disciplined services. In this section of the report, we shall advise the Committee of any developments in those areas, such as the numbers of complaints since the period covered by the initial report.

29. In paragraph 38 of the 2000 conclusions and recommendations, the Committee recommended that “continued efforts be made to ensure that the Independent Police Complaints Council becomes a statutory body, with increased competence”. We will address that recommendation in this section of the report.

Article 13: right of complaint

30. In paragraphs 102 to 128 of the initial report, we explained the complaints mechanisms and procedures of the disciplined services. We

³ Being discretionary life sentences, mandatory life sentences served in respect of the conviction of murder committed under 18 years of age, or detention at Executive discretion, within the meaning of Long-term Prison Sentences Review Ordinance (Chapter 524).

also explained the role of The Ombudsman and the avenues available to mental patients. In this section of the report, we shall advise the Committee of any developments in those areas, including the latest statistics on complaints against officers of the ICAC and complaints received from mental patients by the Hospital Authority.

Article 14: legal redress for victims of torture and an enforceable right to fair and adequate compensation

31. In paragraphs 129 to 134 of the initial report, we explained the statutory remedies under the Crown Proceedings Ordinance (Chapter 300), the Criminal Procedure Ordinance (Chapter 221), and section 12 of the Costs in Criminal Cases Ordinance (Chapter 492). We also explained the Criminal and Law Enforcement Injuries Compensation Scheme. In this section of the report, we shall advise the Committee that the position remains as explained in the initial report.

Article 15: statements made as a result of torture shall not be invoked as evidence

32. In paragraphs 135 to 139 of the initial report, we explained the protections afforded in the common law and the requirements imposed on the disciplined services by the 'Rules and Directions for the Questioning of Suspects and the Taking of Statements'. We also explained the measures that those services were taking to improve their procedures and facilities for interviewing suspects and taking statements. And, in paragraphs 138 and 139, we discussed the review of the *voir dire* procedure ('trial within a trial') then being undertaken by the Law Reform Commission. In this section of the report, we will advise the Committee of the progress that has been made in those areas.

Article 16: prevention of other acts of cruel, inhuman or degrading treatment or punishment

33. In paragraphs 140 to 158 of the initial report, we advised the Committee that, to a large extent, the legislative and administrative provisions discussed in the earlier parts of the report in relation to torture applied equally to conduct that fell short of torture but might constitute cruel, inhuman or degrading treatment or punishment. We explained that all persons acting in a public capacity had to act in accordance with the

rule of law and, to that end, measures were in place to ensure that any cruel, inhuman or degrading treatment or punishment committed by, at the instigation of, or with the consent or acquiescence of, any public official – or by anyone acting in an official capacity – would be subject to criminal or disciplinary sanctions. We went on to explain the Police disciplinary procedures, and the statutory and administrative measures against the ill-treatment of children, with special attention to the position of children in institutional care and of young offenders in custody. In this section of the report, we shall advise the Committee of any developments in those areas.

34. In paragraph 35 of the 2000 conclusions and recommendations, the Committee expressed concern that “not all instances of torture and other cruel, inhuman or degrading treatment or punishment are covered by the Crimes (Torture) Ordinance”. And, in paragraph 37, the Committee recommended that “efforts be made to prevent other acts of cruel, inhuman or degrading treatment or punishment, in accordance with the provisions of the Convention”. We shall respond to the concern and recommendation in this section of the report.

Home Affairs Bureau

7 May 2004

[Extracts of Paragraphs Concerning the Hong Kong Special
Administrative Region]

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COMMITTEE AGAINST TORTURE

24th Session

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CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES
UNDER ARTICLE 19 OF THE CONVENTION

Conclusions and recommendations of the Committee against Torture

China

1. The Committee considered the third periodic report of China (CAT/C/39/Add.2) at its 414th, 417th and 421st meetings on 4, 5 and 9 May 2000 (CAT/C/SR.414, 417 and 421), and adopted the following conclusions and recommendations:

I. Introduction

2. The third periodic report of China consists of two parts. Part I covers the whole of China, with the exception of the Hong Kong Special Administrative Region, and Part II covers the Hong Kong Special Administrative Region only.

3. The Committee welcomes the third periodic report of China, which

conforms with the general guidelines for the preparation of State party reports. The Committee expresses its appreciation for the additional information and replies provided by the State party and the continued and constructive co-operation of China with the Committee.

PART I - CHINA, EXCLUDING THE HONG KONG SPECIAL ADMINISTRATIVE REGION

V. Recommendations

19. The State party is invited to consider, in respect of both its mainland part and the Hong Kong Special Administrative Region, declaring in favour of articles 21 and 22 of the Convention and withdrawing its reservation under article 20, and to ensure, the continued applicability of article 20 in the Hong Kong Special Administrative Region.

PART II - HONG KONG SPECIAL ADMINISTRATIVE REGION

VI. Factors and difficulties impeding the application of the provisions of the Convention

26. The Committee notes that the reintegration of the Hong Kong Special Administrative Region into China created no factors and difficulties impeding the application of the Convention.

VII. Positive aspects

27. The Committee expresses its appreciation to the Government of China for the steps taken to ensure the continued application of the Convention in the Hong Kong Special Administrative Region, the authorities of which have prepared parts of the report.

28. The Committee welcomes the release of all Vietnamese refugees and migrants and the closure of the Pillar Point detention centre.

29. The Committee welcomes the adoption of legislation to facilitate the extradition of persons suspected of having committed acts of torture.

30. The Committee notes as positive the strengthening of the independence of the Independent Police Complaints Council.

31. The Committee welcomes the increase of the maximum sentence for certain sexual crimes such as incest and the abolition of the requirement of corroboration in respect of sexual offences.

32. The Committee welcomes the introduction of training courses and other educational measures targeting law enforcement personnel, and the fact that interviews of detainees are videotaped.

VIII. Subjects of concern

33. The Committee is concerned that the reference to “lawful authority, justification or excuse” as a defence for a person charged with torture, as well as the definition of a public official in the Crimes (Torture) Ordinance, Chapter 427, are not in full conformity with article 1 of the Convention.

34. The Committee is concerned about the fact that there are as yet no prosecutions under the Crimes (Torture) Ordinance, despite circumstances brought to the attention of the Committee justifying such prosecutions.

35. Concern is expressed that not all instances of torture and other cruel, inhuman or degrading treatment or punishment are covered by the Crimes (Torture) Ordinance.

36. It is noted with concern that the practices in the Hong Kong Special Administrative Region relating to refugees may not be in full conformity with article 3 of the Convention.

IX. Recommendations

37. The Committee recommends that the necessary steps be taken to

ensure that torture, as defined in article 1 of the Convention, is effectively prosecuted and appropriately sanctioned and that efforts be made to prevent other acts of cruel, inhuman or degrading treatment or punishment, in accordance with the provisions of the Convention.

38. The Committee recommends that continued efforts be made to ensure that the Independent Police Complaints Council becomes a statutory body, with increased competence.

39. The Committee recommends the continuation and intensification of preventive measures, including training for law enforcement officials.

40. The Committee recommends that laws and practices relating to refugees be brought into full conformity with article 3 of the Convention.