

**TORTURE IN HONG KONG:**

**THE UNITED NATIONS CONVENTION**  
**AGAINST TORTURE AND**  
**OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT**

PREPARED FOR PRESENTATION TO THE

*UNITED NATIONS COMMITTEE AGAINST TORTURE*

ON THE OCCASION OF ITS CONSIDERATION OF

THE INITIAL REPORT BY HONG KONG UNDER ARTICLE 19 OF THE  
CONVENTION AGAINST TORTURE AND  
OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

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## **Front Cover:**

*Vietnamese girl. Chi Ma Wan Vietnamese Refugee Detention Centre.  
Hong Kong. Mid-1990s.*

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\* MR HODSON'S SUBMISSION WAS MADE AFTER THE CONCLUSION OF THE SEMINAR IN RESPONSE  
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**TORTURE IN HONG KONG:  
IMPLEMENTATION OF THE UNITED NATIONS CONVENTION  
AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR  
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# **THE CONVENTION AGAINST TORTURE AND THE WORK OF THE TORTURE COMMITTEE**

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## THE CONVENTION AGAINST TORTURE AND THE WORK OF THE TORTURE COMMITTEE

BY PROFESSOR PETER BURNS QC<sup>1</sup>

I should make a declaration before I begin. That is, I am here at the invitation of the Faculty of Law, and not in any official capacity as a Member of the United Nations Committee Against Torture. I have been busier in the last couple of days I think than I can recall for the last 15 years. The schedule arranged for me was the fullest one I can recall ever since I was a young man. I am very happy to have met with numerous public officials and with large numbers of NGOs. I appreciate the trouble everyone has gone to on my behalf to ensure that I see the different types of institutions or activities that might be pertinent.

As the Committee Against Torture examines the Hong Kong report next month in Geneva, I do not object to being lobbied. That goes with the territory. As long as everybody understands that I will not be co-opted, whether it be from the NGO side or from the Government side. I will keep my counsel about what the relationship between the conditions in Hong Kong and the terms of the Convention are, at least for the moment. Next month I will be willing to speak on that particular subject.

What I am going to deal with today are the substantive provisions of the Convention Against Torture and the practices of the Committee, which I think may be of some interest, particularly to those of you who are engaged in producing information for this Committee and perhaps for Committees like it in the United Nations system.

Our Committee finds the materials supplied to it by NGOs to be of the most vital significance. We get material from the governments in the form of reports. We get material which the Secretariat itself gathers: sometimes it is in the form of articles; sometimes it is in the form of newspaper clippings; often it is NGO material, but it is never comprehensive. What we have found in the past eight years is that specifically directed NGO material related to the particular country that we are dealing with has provided us with the most useful check against the information contained in the government report. Without that, I suspect we just could not function effectively at all.

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### **The Prohibition Against Torture in International Law**

Everybody knows that torture has been a part of the human condition probably from the beginning of mankind, when man as a social animal first formed the basic organizational structures that were tribal, then societal and eventually came to form nation-states. Torture has always been applied as a device for overbearing the will of others, for effectively implementing authority upon others whether it be in the name of religion, national sovereignty, political dominance, sexual dominance, etc. It is just one of those disgraceful aspects of human interrelationships.

In 1948, the Universal Declaration of Human Rights outlawed torture and cruel, inhuman or degrading punishment. Between 1973 and 1988, the United Nations General Assembly debated the matter, which ultimately led to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. I might add that most people, including members of the Committee themselves, tend to forget the second limb of the Convention. They tend to focus on torture itself. But it is equally important to appreciate that the Committee, through the Convention, has the jurisdiction to deal with other cruel, inhuman or degrading treatment and punishment.

Torture has also been prohibited in a number of regional multilateral treaties and has been prohibited by the International Covenant on Civil and Political Rights.

Turning to the range of the problem, it is very difficult to determine accurately the extent and degree to which torture is practised throughout the world. By its very nature it is covert, except in a very few brutal regimes. Furthermore, it is not subject to the same scrutiny that other phenomena are. One eminent commentator, Jean Gauthier, who was an original member of the Swiss Torture Committee and one of those individuals that inspired the Convention, expressed the view that all states can be broken down into three categories.

The first comprises about 40% of all states. States in this category are spared the ravages of torture, although ad hoc occurrences may sometimes eventuate, but are properly dealt with by the state itself. (How empirically he is able to claim that 40% fall into that category I do not know, but I am willing to accept it as a starting point.) Gauthier claims that about 40% of states have the rule of law, and that it works relatively well. This does not mean that torture does not occur, but it does mean that when instances of torture are brought to the notice of the authorities, the authorities respond in the proper way, prosecute the officers concerned, and compensate and rehabilitate the victims of torture.

The second category, also consisting of about 40% of all states, is made up of those states in which torture is applied, particularly by subordinate authorities. Tolerated or ignored to a greater or lesser degree by the governments concerned, torture in this category of states occurs more or less sporadically. The governments of these states officially disapprove of torture, and torture is resorted to not as a formal instrument of state policy, but on an *ad hoc* basis by subordinate agents whose acts usually do not result in sanctions when they come to light. This is a situation where senior administrators and executive officers turn a blind eye when instances of torture or cruel and inhuman or degrading punishment are brought to their attention. There is no official policy in support of the practise of torture, but no effective sanction is brought to bear against those officers who engage in it. Of course, states can, by democratizing and by implementing reforms, shift very easily out of the second category and into the first.

The third category of states provides the weeping sore on the side of the international body politic. It is in the remaining 20% of all states that torture constitutes a systematic instrument of government perpetrated with the aid of the most terrifying technological sophistication. It has been frequently pointed out that such regimes are often also the most fragile. Torture is carried out by agents of the state to brutalize the population in order to ensure that it remains docile. Thus the use of torture enables them to remain in power by terror. Gauthier claims that even today 20% of states use torture as an instrument of state policy. Of course, it will not be overtly, but rather covertly applied.

That gives you a sort of background. It is a very rough and ready rule of thumb type of background to the problem of torture extant today. The two primary questions are: "How has the Convention Against Torture attempted to deal with this problem?", and ultimately, "Is it effective?" I can't answer that last question. If I were to answer it I probably would have to answer in the negative, and I do not think I want to do that at this stage. The Convention and the actions of the Committee have not yet had an opportunity to change things in any perceptible way. Time has been too short. However, I remain a realistic optimist: I hope that things will change.

### **The Convention Against Torture**

The Convention was finally opened for ratification in 1987. It required 27 ratifications before it came into effect, and those 27 came very quickly. They came from the same states that you usually see whenever human rights instruments are opened for ratification. It has been an

extremely difficult task since 1987 to get additional states to adhere to the Convention. The total number of states that currently have ratified it is, according to information I received only last week, 91. So you can see that over an 8 year period only 64 additional states have adhered to the Convention. This means that something like half the states that belong to the United Nations do not adhere to the Convention Against Torture. I think that is an extraordinarily telling comment.

If you look at the Convention Against Torture, you will see that the primary operative article is Article 1. This is the article that defines the actual content of the Convention and the content of the functions of the Committee Against Torture. Let us carefully consider the meaning of this article.

Article 1(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 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. It does not include pain or suffering arising only from, inherent or incidental to lawful sanctions."*

First let us consider the term "such", which appears in the third line. I take this word to be illustrative rather than exclusive or exhaustive. The four categories that follow, in my view, are not the only categories possible.

The first category, ie "obtaining from him or a third person information or a confession," refers to the standard situation in which a police officer uses excessive force<sup>2</sup> during an interrogation. More broadly stated, it refers to a situation in which an agent of the state uses force that causes severe pain or suffering in order to extract information or a confession. That clearly constitutes torture for the purposes of the definition in Article 1. This is also the case for the second category, that is if the objective of torture is to punish.

Now let us consider the words "or a third person" which appear several times in Article 1(1). This means that the torture does not have to relate to the conduct of the person

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<sup>2</sup> I use the term "excessive force" advisedly in light of the Israeli application of the Landau Rules of Interrogation to suspected Arab terrorists. These rules of interrogation allow so-called minimum physical pressure to be used. The Committee rejected this entirely and took the view that such rules of interrogation were in clear breach of Israel's obligations under the Convention.

being interrogated. It could relate to the conduct of a third person. This came up under the first UK report when we were dealing with interrogation procedures in Northern Ireland. In that case, it was alleged that the objective of many of the detentions was to extract information about the conduct of third persons rather than the conduct of the detainees themselves.

The third category is "intimidating or coercing him or a third person". This extends to the use of torture in order to intimidate or coerce, to direct conduct, to force someone to do something against his or her will.

The final category is "for any reason based on discrimination of any kind". If severe pain or suffering is inflicted on a person just because that person belongs to a particular class -- ethnic or religious -- then the infliction of that severe pain or suffering would fall within the definition of torture.

Note that the conduct we are talking about under all of these categories has to be conduct by an agent of the state or the acquiescence of an agent of the state. The Committee has no jurisdiction to deal with the same sort of conduct if it is not state sanctioned, whether expressly or implicitly.

Notice also that the suffering or pain must be "severe". This is open-textured and heavily fact-driven. It means that if a police officer loses his temper and slaps someone across the face, even though the individual may suffer pain and humiliation, that probably is excluded from the definition of torture in Article 1. It may amount to assault or even aggravated assault, but it will be excluded from the definition of torture for the purpose of giving jurisdiction to the Committee.

The pain or suffering does not have to be long-lasting, so long as it is severe. It can be transitory. From the point of view of evidence, medical evidence is going to be very important. The best evidence is of non-transitory pain or suffering, ie if you have photographic evidence or if somebody has been hospitalized. One of the extraordinary things to me is how often, particularly in the most brutal regimes, torturers keep meticulous records of their actions, including photographic evidence. It is "bureaucracy run mad" in those circumstances. But of course what this does is create a record. If the record can be accessed, then that is excellent evidence of torture.

The final sentence in Article 1(1) is a very slippery one. Happily, the Committee has not yet had to grapple with it. When we do, I think we will get into real trouble. This is because this sentence raises the issue of what "lawful sanction" means. At the very least, it

means it must be lawful according to the domestic law. But in my eyes it clearly means more than that. It is not enough merely to demonstrate that the sanction that has been applied complies with the positive law of the country itself. As we all know, there is also international law, and it may well be that certain domestic sanctions do not comport to minimum standards laid down in international law. I think the Committee will eventually have to confront this when we deal with such things as, for example, the amputation of limbs in some states. This has not happened yet because the states that engage in that practice still have not ratified the Convention.

Now that the United States has ratified the Convention, we are going to have to confront the issue of "lawful sanction" with regard to the death penalty. We will also have to deal with it in reference to what is commonly known as the "death row phenomenon" in which a person who is condemned to death, but as a result of the appeal process is not executed for many years. This phenomenon may itself cause extreme mental suffering. This argument has been put before the Human Rights Committee many times, and I know that many members of that Committee adhere to the view that if such suffering occurs, it constitutes torture. I am certain that you can think of other illustrations as well. Limb amputations and the death penalty are not the only two possibilities. I am only saying that the test is not going to be one of domestic legitimacy alone. There are other standards that go beyond domestic legitimacy that we are going to examine.

Article 1(2):

*"This Article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."*

Indeed that is true. Our definition of torture is relatively narrow when you look at it. Some states domestically have created crimes of torture and outlawed it, and their definitions are more expansive than the definition contained in this instrument.

Let us now move on to Article 2 and the obligations of states.

Article 2(1):

*"Each State party shall take effective legislation, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."*

The most crucial term here is "effective". It is not enough for a state merely to enact, either legislatively or administratively, statutes or ordinances or to issue policies if they are ineffective. Ineffective measures do not meet the obligation contained in 2(1).

Article 2(2):

*"No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."*

I suspect that most of you are familiar with the provisions in the International Covenant of Civil and Political Rights. Under the ICCPR, a number of provisions in fact are not effected even during state emergency. The obligation to observe them remains. One of those provisions in the ICCPR that maintains itself in this way is Article 7, which is the prohibition against torture in that particular instrument. It is simply restated in the Torture Convention. One can never justify the use of torture by reference to a public emergency.

Article 2(3):

*"An order from a superior officer or a public authority may not be invoked as a justification of torture."*

I am happy to say that I have reexamined the report of the Hong Kong Government, and I see that in fact their provision effectively implements this obligation. This question of superior orders is one that gave me as a common lawyer a bit of a jolt when I got to Geneva. But one must recall that different legal systems derive from different cultures. Those legal systems derived from peninsular Europe, ie Portugal and Spain, particularly in South and Central America, have incorporated to a greater or lesser degree the defence of superior orders in their domestic law. It probably reflects the historical origins of the legal system itself, but it probably also reflects the instabilities that over the last 250 years have existed in the region.

The Argentine Republic is a classic illustration. There was the Dirty War in the 1970s, the national reconciliation in the mid-1980s, and the subsequent return of democracy. However, as part of the return of democracy, a *Punto Final* was issued whereby the new government agreed not to prosecute any person who had been engaged in what we would call breaches of the laws of war and inhuman acts. There are moral arguments on both sides of this, of course. But the pragmatic reality is that there would not have been a peace in the region without that *Punto Final*.

Countries like the Argentine Republic are in breach of their obligation under the Convention. In the case of the Argentine Republic, I might add the government waited until the *Punto Final* was enacted before ratifying the Convention, so they are technically not in breach of the Convention. For a common law jurisdiction such as Hong Kong, there is no defence of superior orders. The common law does not itself recognise a defence of superior

orders.

However, customary international law recognises a defence of superior orders. It is very narrow, but it exists. Under customary international law, if two elements are present, then a person accused of a breach of an international crime can raise it. The two elements are: first, there must have been an immediate threat directed at the actor so that the actor did not believe that he had a choice; and second, the actor must have believed that the conduct was lawful. One can see immediately how narrow this defence is. One could, because customary international law is a part of the domestic law of all common law jurisdictions, bring this defence in. I suspect it is virtually impossible to raise it.

Article 3 has become extremely important, maybe not to Hong Kong, but certainly to countries such as Canada, which receives large numbers of immigrants for resettlement.

Article 3:

*"1. No state Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*

*2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence on the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."*

There have been a number of countries, such as Switzerland, Canada and Italy, that receive all sorts of persons who claim to be refugees. The customs and immigration officials have to make very quick determinations on their refugee status. Very often, these officials say: "No, you are not a Convention Refugee. We are going to send you back to wherever it is you came from." Then the person goes through the domestic appeal processes and continues to argue that he is a refugee. At some point the person claims that he is not only a refugee, but will be tortured if he is returned. There is a problem of proof in this circumstance.

The Committee is not a Court of Appeal. It certainly does not behave in a judicial manner. It does not hear evidence. It does not hear argument. It does not give reasons for its decisions. The Committee exercises a judgement, a considered but a consensus driven judgement, on the basis of the record. One of the questions that first arose before the Committee was the following: When a person claims pursuant to Article 3 that there are substantial grounds for believing that he or she may be tortured if they are returned to the country from whence they came, is there any obligation on them to establish it? Is it enough

simply to claim it?

This matter has not been resolved in our Committee. The traditional notions of burden do not weigh very heavily with some members of the Committee as long as there is some evidence and a claim. The position of some Committee members is that we should err on the side of a mistake in favour of the applicant. I think that is going to lead us into real difficulty. We are going to have to resolve our practice in this area and do it in such a way that both the organizations that deal with immigrants and states themselves can anticipate in any given circumstance what our decision is going to be. At the moment, in my view, we are just acting in an ad hoc manner, and some of our ad hoc decisions appear to be extraordinarily arbitrary.

We have acknowledged that mass or flagrant violations of human rights take place in Zaire and Pakistan. This creates a presumption in favour of applicants from these countries, assuming the applicants have been political activists and there is some evidence of it.

Article 4:

*"1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.*

*2. Each State Party shall make these offenses punishable by appropriate penalties which take into account their grave nature."*

I must say I am really impressed with the penalty that attaches to the crime of torture in Hong Kong. Life imprisonment is a clear indication of how seriously the Government of Hong Kong takes the matter. That is certainly not true of many other governments. Sometimes torture attracts penalties not exceeding three years, which I think is an outrageously low tariff for that type of crime. I was somewhat shocked, however, talking to some government officials, to discover that this high penalty may be one of the reasons why there have not been any prosecutions under the Torture provision. The Government still prosecutes under aggravated assault. This penalty may very well have a deterring effect in initiating prosecutions because there is a fear that judges may not convict if life imprisonment is the penalty that has to be attached to it. I do not know whether this is the case, but I do hope that you start prosecuting under the Torture Ordinance.

As an arid academic and as a member of the Committee it is statistics that are important. I want statistics on torture and I want to know how many acts of torture have, according to the evidence in front of the state concerned, been carried out in a territory.

Secondly, I want to know whether the state has prosecuted officials for torture. I do not want figures for aggravated or common assault, because I do not know when these should be treated as torture. It is only when the state prosecutes for torture that I am able to look at the data and draw conclusions from it.

Article 5 relates to the jurisdiction of domestic tribunals and the obligations of each state to give its own tribunals authority to do certain things.

Article 5:

*"1. Each state party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 4 in the following cases:*

- (a) When the offences are committed in the territory under its jurisdiction or on board a ship or aircraft registered in that State;*
- (b) When the alleged offender is a national of that State;*
- (c) When the victim is a national of that State if that State considers it appropriate."*

Article 5(1)(a) refers to the standard territorial jurisdiction that every common law jurisdiction has. Article 5(1)(b) is what we call the "act of personality jurisdiction". Article 5(1)(c) is the "passive personality jurisdiction".

In Article 5(2) we see that a universal jurisdiction is required to be arrogated by each State Party:

Article 5(2):

*"Each 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."*

That is a very important provision. It means that a state must assume a universal jurisdiction over torturers that are in its territory. The state has the traditional choice: extradite or prosecute. Assuming universal jurisdiction means, for example, that a state's courts have the competence to try a suspected torturer even if the acts took place two years ago in a foreign country. If the state chooses to send the torturer back to the country where the torture took place, there is no need for an extradition treaty. This Convention provides the legal basis for extradition and imposes the obligation on the state to assume this.

Take Canada and Haiti, for example. A lot of Haitians fled to Canada after the Duvalier regime collapsed. Many of them were former torturers. They all claimed refugee status and got through the process. Canada could not send them back at that time, because under Article 3 there was a very good likelihood they would be tortured themselves if they were sent back. So these Haitians could not be extradited. That meant that under the

Convention, Canada was under an obligation to assume universal jurisdiction and prosecute them in Canada. Despite the fact that I drew this to the attention of the Department of Justice and the Department of External Affairs on several occasions, we have yet to see a prosecution exercising universal jurisdiction over a torturer in those circumstances. But the legal obligation remains.

Under Article 9, there is an obligation to cooperate with states even if there is no mutual cooperation agreement between states. By way of this Article, the Convention provides the formal legal basis for that cooperation.

Article 10 is rather important and if I were an NGO I would consistently draw it to the attention of my government.

Article 10(1):

*“Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.”*

There is an obligation on the State to ensure that every recruit and every existing member of the police, the army, the security forces, and correctional officers are properly educated about the obligations of the State under the Convention and the personal liability of each individual officer pursuant to the domestic law.

Under Article 11, the rules of interrogation must be systematically reviewed. Every time a state appears before the Committee it is asked when it last reviewed its rules of interrogation, what the nature of the review was, and what changes were made as a result. The members of the Committee get consistently agitated when they discover that states claim to review rules of interrogation but fail to illustrate the changes that were made in order to bring the rules into conformity with the Convention. We tend to be a wee bit cynical about that.

According to Articles 12 and 13 of the Convention, there must be a complaint, investigation and implementation mechanism. In other words, the state must set up a mechanism that works, whereby persons who claim that they are the victims of torture or cruel and inhuman punishment can have their claims investigated and dealt with in a proper manner pursuant to the terms of the Convention itself. In Hong Kong there is a complaints procedure but this procedure suffers from the same defect as do similar procedures in 90% of the countries that come before us: the police investigate the police.

This raises the issue once again of effective regimes. What sort of regulatory or legislative regime has been implemented? Is it effective? We will be guided by the statistics. How many complaints have been made? How have they been investigated? Have they been resolved satisfactorily? Have they resulted in prosecutions of individual officers? Have they resulted in compensation or rehabilitation of the applicants. If there is a review authority, how has the review authority operated?

Under Article 15, no confession is permitted to be admissible if it is extorted by torture or threats of torture. In fact, in common law jurisdictions the common law itself excludes the admissibility of such confessions. I have not found any country with a legal regime that tolerates extorted confessions admitted as evidence, at least formally.

Article 16 is the article I indicated earlier should be very important but tends to be secondary in the eyes of the Committee.

Article 16(1):

*"Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12, and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment."*

There are clear indications of what "inhuman punishment" relates to. It relates to prisons. We will measure that against what is humane and what is inhumane. It is the term "treatment" that is so ambiguous. It is not clear what treatment means. It certainly relates to circumstances that existed in the Soviet Union but not in modern Russia, whereby mental institutions were used as a form of suppressing political dissent. I would personally, and I cannot speak for other members of the Committee, probably be prepared to extend it to involuntary forms of treatment in public institutions, even if the state is arguing that such treatment is for the good of the subject. By this I mean, for example, that involuntary electroshock therapy would not resound well with me if I were still on the Committee and complaints were issued about that. I do not, however, see it extending, as it has been suggested, to the economic or social treatment of persons in a society. I do not think this was intended to be part of the jurisdiction of the Convention and the Committee. However, there are others on the Committee who take a different view.

## **The Work of the Committee Against Torture**

The Committee itself consists of 10 experts and is established under Articles 17 of the Convention. These are ten very discrete persons coming from different legal and political cultures. The Committee operates on a consensus basis. The way in which we structure our activities is very largely modelled on the senior Committee, the Human Rights Committee. Thus, a state presents its report to the Committee Against Torture, and the theory is that by requiring a state to appear in an international public forum and indicate to the world what it has done to implement the terms of the Convention, the state will either demonstrate proudly that it has met the terms of the Convention, or it will be embarrassed into meeting those terms. Whether or not that sort of system works I will leave to the political scientists and the empiricists. I have absolutely no idea. I can only say that there is a wide diversity in terms of the preparation and content of the reports that the Committee get.

The Committee assigns the role of rapporteur and associate rapporteur to two members, and they are responsible for taking the lead in cross-examining the state representatives. At the end of the day, every member of the Committee gets an opportunity to cross-examine, particularly if they feel that something has not been dealt with by the other two. Ultimately, after response by the state party, criticism or approbation is made, and recommendations are forthcoming.

There are two additional provisions of the Convention to which I want to draw your attention. Article 20 is crucial in that it gives us our only investigative power. Under this article, if there is a well founded indication that torture is being systematically practised in a state, we can investigate, with the cooperation of the state, and write a report that ultimately goes to the General Assembly. Article 20 functions only if at the time of ratification a state has not declared against it. At the present moment, over 30 states have given us jurisdiction under Article 20. The fact that Turkey is one of these states is a matter of chance, because the Turkish Government simply forgot to make the necessary declaration. That gave us the opportunity to make an investigation in Turkey. I do not think any state will make that mistake again if it does not want us to have investigative authority.

The other crucial provision is Article 22. Article 22 under this Convention is the equivalent to the Optional Protocol to the ICCPR. It gives individuals direct access to the Committee. This branch of our work is increasing quite dramatically. A state must to opt in to Article 22. Now, I think only 20 states out of 91 have opted in.

There is a strong move to create a subsidiary organ of the Committee Against Torture

with investigative authority. A number of states are putting together an optional protocol to the Convention which would enable this subcommittee to investigate complaints of individual forms of torture or cruel, inhuman or degrading treatment or punishment. We do not have this capacity at the moment. It is currently held by another creature in the United Nations operation called the Special Rapporteur on Torture. The Special Rapporteur has a roving mandate. When he is made aware that torture or cruel, inhuman or degrading treatment or punishment is being committed in a country, he has the authority to contact the minister of justice or premier and investigate. Our Committee does not have that jurisdiction, and the optional protocol being developed is designed to add that element to the Committee. The optional protocol is being pressed by the states you would think would press for it. If the optional protocol becomes a reality, I suspect about 25 states will adhere to it initially. They will not, of course, be the states where torture or cruel inhuman or degrading treatment or punishment is actually occurring. Over time, the hope is that other states, where such acts do occur, will join in.

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# **HONG KONG AND THE CONVENTION AGAINST TORTURE: SOME LEGAL ISSUES**

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# HONG KONG AND THE CONVENTION AGAINST TORTURE: SOME LEGAL ISSUES

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## 1. THE OBLIGATIONS TO BE ASSUMED BY THE PRC WITH RESPECT TO HONG KONG AFTER 1997

### *Background*

Hong Kong will be restored to China by the United Kingdom as of 1 July 1997 and China will resume the exercise of sovereignty over Hong Kong from that date. Both the United Kingdom and China are parties to the Convention against Torture and have agreed in the Sino-British Joint Liaison Group that the Convention will continue to apply to Hong Kong after 1997.

However, when the United Kingdom ratified the Convention, it accepted the jurisdiction of the Committee under article 21 to receive inter-State complaints and did not opt out of the jurisdiction of the Committee under article 20. China accepted neither the individual nor inter-State complaint procedures and opted out of the article 20 procedure. Thus the procedures presently applicable to Hong Kong by virtue of UK ratification are more extensive than those which presently apply in respect of China:

<i>Procedure</i>	<i>UK</i>	<i>Hong Kong</i>		<i>China</i>
		<i>Before 1997</i>	<i>After 1997</i>	
Article 19 (reporting)	Yes	Yes	<i>[Yes]</i>	Yes
Article 20 (inquiry)	Yes	Yes	<i>[??]</i>	No
Article 21 (inter-State)	Yes	Yes	<i>[??]</i>	No
Article 22 (individual)	No	No	<i>[No]</i>	No

### *Issue*

The exact extent of the obligations that will be assumed by China in respect of Hong Kong is unclear insofar as the implementation procedures under articles 20 and 21 of the Convention are concerned. The *Initial Report in respect of Hong Kong* does not clarify these issues.

## 2. THE PREPARATION AND PUBLIC DISCUSSION OF THE HONG KONG REPORT UNDER THE CONVENTION

### *Background*

The initial report in respect of Hong Kong was due to be submitted in early 1994. The draft report, prepared by the Hong Kong government, was in fact prepared and sent to London in January 1994. It was not submitted to the United Nations until over a year later, the principal reason for the delay being the need to wait for reports from other UK dependent territories to be prepared, so that all the reports could be submitted together. A similar procedure has been followed with reports under other human rights treaties, occasioning delays of many months between completion of the draft report in Hong Kong and the submission of the final version to the United Nations.

On various occasions non-governmental organisations have requested both the Hong Kong and United Kingdom governments to make available to the community in Hong Kong the “draft” Hong Kong report, so that public discussion of the matters raised in the report could take place. The Hong Kong government refused to do so (including a refusal to release the draft in response to a request under its Code of Access to Information), on the ground that it was a matter for the United Kingdom government. The United Kingdom government has also refused to do so. At the hearing on Hong Kong before the Committee on Economic, Social and Cultural Rights on November 1995, the Solicitor General of Hong Kong explicitly undertook that draft reports on Hong Kong would be circulated before their submission.<sup>1</sup> The Hong Kong government almost immediately reneged on that promise, reinterpreting that undertaking to mean that draft outlines of reports (containing lists of the topic proposed for inclusion in reports) would be circulated. That has been done for the recent ICCPR and Children’s Convention reports.

It is difficult to see why the two governments have adopted this approach. While no doubt there may be changes made to the Hong Kong “draft”, these do not seem to be major and it is clear that the Hong Kong report has lain in London, unamended, for some time; the Hong Kong report has not been updated to the time of submission, so does not contain material about recent developments of some importance to the Convention. The other objection is one of protocol, that the community should not have access to the report until it has been formally submitted to the United Nations. However, as one of the important functions of the reporting process is to stimulate public awareness and discussion, it seems difficult to accept that a treaty body would object to the “early” dissemination of reports in this manner.

The matter is of some concern in view of the fact that after 1997 a similar process of preparation of reports in respect of Hong Kong will presumably be followed, that is, preparation of a draft report in Hong Kong, its submission to Beijing, and then submission by Beijing of the finalised version to the United Nations (presumably in Chinese). The problems of lack of early public discussion and the staleness of reports may be repeated. Furthermore, it

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<sup>1</sup> See Byrnes, “Will the Government Put Its Money Where its Mouth Is? The Verdict of the UN Committee on Economic, Social and Cultural Rights on Hong Kong’s Human Rights Record” (1995) 25 *Hong Kong Law Journal* 156, 161 (based on personal observations of the author).

is not yet entirely clear that Hong Kong will play the role in preparing these reports that it has to date.

### ***Issue***

It is important to clarify whether after 1997 it is envisaged that the Hong Kong SAR government will play a similarly substantial role in the preparation of reports on Hong Kong that it does now. (According to statements made by UK officials before other UN human rights treaty bodies, the modalities of the preparation of reports have been discussed between the UK and PRC governments in the Sino-British Joint Liaison Group). Secondly, clarification should be sought of the reasons for the UK and Hong Kong government's refusal to release reports once they have been more or less finalised, and why the explicit undertaking given by the Solicitor General to the Committee on Economic, Social and Cultural Rights in relation to the circulation of reports has not been given effect to.

### **3. LACK OF CONGRUENCE BETWEEN OBLIGATIONS UNDER DIFFERENT HUMAN RIGHTS TREATIES AND THE FAILURE FULLY TO INCORPORATE THE CONVENTION IN HONG KONG LAW**

#### ***Background***

Both the Torture Convention and the International Covenant on Civil and Political Rights have been extended to Hong Kong by the United Kingdom government. The Torture Convention is implemented, at least in part, through the Crimes (Torture) Ordinance, certain sections of the Hong Kong Bill of Rights Ordinance, and the general criminal and civil law of Hong Kong. However, there are a number of significant gaps.

However, Hong Kong law fails to give effect to the requirements of the Convention, in particular the obligation under article 16 relating to cruel, inhuman or degrading treatment. This is especially so in the field of immigration law, where the separation of young children from their parents or of family members from one another is a commonplace of Hong Kong immigration law and practice. Such separation, held by the Committee on Economic, Social and Cultural Rights in late 1994 to be a violation of the obligation to protect the family under article 10 of the International Covenant on Economic, Social and Cultural Rights, also arguably constitutes cruel, inhuman or degrading treatment, especially in cases where young children are concerned.<sup>2</sup>

***There is no remedy for such treatment under the law of Hong Kong.*** Challenges by way of judicial review have generally been unsuccessful. The Hong Kong Bill of Rights -- which specifically reproduces the ICCPR's guarantee of freedom from torture and other cruel, inhuman or degrading treatment in its article 3 -- cannot be relied on to impugn such treatment because section 11 of the Hong Kong Bill of Rights Ordinance<sup>3</sup> provides that nothing in the

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<sup>2</sup> *Concluding observations of the Committee on Economic, Social and Cultural Rights*, adopted on 7 December 1994, UN Doc E/C 12/1994/22, para 26, reproduced in *Bill of Rights Bulletin*, v 3, n 3, at Appendix C.

<sup>3</sup> This section reflects a reservation made by the United Kingdom on ratification of the ICCPR in similar terms.

Ordinance affects “any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation.”<sup>4</sup>

The same section means that there is similarly a lack of legal redress for the alleged maltreatment of Vietnamese asylum-seekers both in the fact of their continued detention (which in some cases may be “arbitrary” under international law standards), the conditions of their detention, and the manner and use of force against them on various occasions. There is no effective avenue for enforcing the obligations under article 16, insofar as the Bill of Rights guarantee cannot be relied on and the provisions of this Convention are not implemented in Hong Kong law in this respect.

#### *Issue*

The United Kingdom has failed to give effect to its obligations under the Convention to ensure that there are accessible and effective remedies available in relation to torture or other ill treatment that may result from immigration legislation or action taken lawfully under them. The limitations contained in the Bill of Rights Ordinance are justified by reference to reservations made by the UK government when it ratified the ICCPR. The UK government made no such reservations when it ratified the Torture Convention. Accordingly, the United Kingdom government is under a clear international obligation to give effect to the relevant provisions of the Convention by providing remedies under domestic law.

## **4. THE DEFINITION OF PUBLIC OFFICIAL**

#### *Background*

The offence of torture is defined in subsection 3(1) of the Crimes (Torture) Ordinance as involving acts by “a public official or person acting in an official capacity” “in the performance or purported performance of his official duties.” Together with subsection 3(2) of the Ordinance, which extends the definition to persons who are not officials, but who act at the instigation or with the consent or acquiescence of a public official, these definitions appear to cover the terrain covered in article 1 of the Convention.

However, section 2 of the Ordinance defines “public official” as meaning a person who holds an office in one of five specified services (police, customs and excise, correctional services, the anti-corruption commission and the immigration authorities). The term “public official” accordingly appears to have no meaning in relation to acts of torture committed outside Hong Kong. Any other official who commits an alleged act of torture, whether in Hong Kong or abroad, must come within the definition of a “person acting in an official capacity . . . in the performance or purported performance of his duties”.

#### *Issue*

It is not entirely clear whether the definitions in the Crimes (Torture) Ordinance are effective to cover all the acts which would constitute torture for the purposes of the Convention. Clarification of this issue would be desirable.

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<sup>4</sup> See the decisions in *R v Director of Immigration, ex parte Wong King-lung* (1993) 3 HKPLR 253, [1993] 1 HKC 461 (HCt); *R v Director of Immigration, ex parte Hai Ho-tak* (1994) 4 HKPLR 324 (CA).

## 5. THE DEFENCE OF LAWFULNESS IN RELATION TO THE OFFENCE OF TORTURE

### *Background*

Section 3 of the Crimes (Torture) Ordinance (Cap 427) defines the offence of torture, whether occurring in Hong Kong or abroad, for the purposes of the Ordinance, which include creating an offence triable by the Hong Kong courts and permitting extradition of a person accused or convicted of torture to another country.

Subsection 3(4) provides a defence based on the second sentence of article 1 of the Convention (definition of torture does not include pain or suffering arising only from, or inherent in or incidental to lawful sanctions". It is well-established that the "lawfulness" of the sanctions referred to must be tested not merely by reference to national law but also to an international standard.

The terms of subsection 3(4) insofar as they apply to acts in Hong Kong may be interpreted as embodying an international standard against which any such act is to be judged. However, this does not appear to be the case with respect to acts of torture alleged to have been committed outside Hong Kong, since a defence can be established under subsection 3(5)(b)(ii) if it can be shown that the relevant act can be justified by "an authority, justification or excuse which is lawful under the law of the place where it is inflicted."

### *Issue*

There is a need to clarify both whether the international standard of "lawfulness" has been effectively incorporated in the Hong Kong Ordinance, both in relation to acts committed in Hong Kong, as well as in relation to acts committed outside Hong Kong.<sup>5</sup>

## 6. PROTECTION AGAINST ARBITRARY DEPRIVATION OF LIBERTY -- THE LEGAL STANDARD ADVOCATED BY THE HONG KONG GOVERNMENT

### *Background*

Article 5(1) of the Hong Kong Bill of Rights is in identical terms to article 9(1) of the International Covenant on Civil and Political Rights. It provides:

"5.(1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."

The Hong Kong government has argued before the courts that art 5(1)/art 9(1) provides only procedural protection of liberty of the person, i.e. so long as deprivation of liberty occurs in accordance with the terms of a properly adopted domestic statute, it is

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<sup>5</sup> Compare the corresponding provision in the Australian Crimes (Torture) Act 1988. The definition of torture contained in subsection 3(1) of that Act provides that torture does not include acts "arising from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the International Covenant on Civil and Political Rights".

consistent with the international guarantees. Accordingly, on the Hong Kong government's view, there can be no substantive review of the "arbitrariness" (reasonableness, proportionality) of the law itself. This view has been accepted by the courts in two cases in which the judgments of the court were in almost identical terms to each other and to the submissions put by the Crown,<sup>6</sup> thus showing that the arguments put by the Crown were of particular importance in influencing the courts' approach to the issue. (In two other cases the courts have rejected this interpretation, in the face of the Hong Kong government's advocacy of it.<sup>7</sup>)

### ***Issue***

The interpretation of art 5(1)/art 9(1) is at odds with the view taken by the United Kingdom of the meaning of the guarantee during the drafting of the ICCPR. This meaning is the generally accepted meaning and has been endorsed by the Human Rights Committee in its case law.<sup>8</sup>

The Hong Kong government has given no explanation as to why it has argued a position which it knows is inconsistent with the international meaning of the ICCPR (to which the Hong Kong Bill of Rights Ordinance expressly gives effect). To advance a position that seeks to restrict the extent to which an internationally guaranteed right is enjoyed appears inconsistent with the international obligations binding on the government.

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<sup>6</sup> *R v Hui Lan-chak* (1992) 2 HKPLR 423 (DCt) in which the court held that there is nothing in the Bill of Rights, in particular in article 5(1), which empowers the courts to determine generally whether a law creating and offence and authorising a person to be imprisoned for that offence is "fair", "reasonable" or "equitable". The Court made no reference to the relevant *travaux préparatoires* or relevant international jurisprudence. Similar conclusions were reached in *R v Hui Kwok-fai* (1993) 3 HKPLR 752 (DCt) and *R v Chong Ka-man* (1993) 3 HKPLR 789 (Mag).

<sup>7</sup> *R v Wong Lai-shing* (1993) 3 HKPLR 766 (Mag) (citation to *travaux* of European Convention and European case law, as well a decision of the Human Rights Committee in *Van Alphen v Netherlands*); *R v Lau Kwok-hing and others* (1993) DCt, DC Case No 1225 of 1991, 12 March 1993, Judge Beeson (only note of ruling available) (court appeared to accept that imprisonment for an offence which did not require fault to be shown might conflict with article 5(1)). Bokhary JA (for the court) in *Attorney General v Fong Chin Yue* (1994) 4 HKPLR 430 at 440, [1995] 1 HKC 21 appears perhaps to have accepted that article 5(1) may permit substantive review of laws, when he remarks that "[this is not to say that a law which involved the express wholesale abolition of each and every mental element in our criminal law would be consistent with the Bill of Rights. If effective, such a measure would leave no one with liberty or security of person.] However, the comment is made in passing and is not developed.

<sup>8</sup> In *Van Alphen v Netherlands*, Communication No 305/1988 the Human Rights Committee commented (at para 5.8): "The drafting history of article 9, paragraph 1, confirms that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime . . .".

## 7. OBLIGATIONS IN RELATION TO EXTRADITION

### *Background*

As the government's report itself concedes (para 42), sections 5 and 6 of the Crimes(Torture) Ordinance -- which are intended to give effect to the obligations relating to extradition contained in article 8 of the Convention -- are extremely complex. It is indeed difficult to determine whether they give full effect to the obligations under the Convention (it may be that they do).

### *Issue*

The government should be asked to identify the areas of concern they have about the inadequacies of sections 5 and 6 of the Ordinance and detail the steps that they intend to take to remedy any deficiencies.



# **POLICE POWER AND POLICE BRUTALITY IN HONG KONG**

**BY: Ms Mary Yuen  
Justice and Peace Commission of the  
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# POLICE POWER AND POLICE BRUTALITY IN HONG KONG

MARY YUEN<sup>1</sup>

Hong Kong has one of the highest police ratios in the world, with about 30,000 police officers in a city of six million people. They are vested with enormous power to maintain law and order. Specifically, they have excessive power to stop people to ask to see their identity cards (identity card checks), to detain people, to search their persons and their premises, and to seize property. The police are also empowered by existing laws to control public assembly and associations. Abusive use of such power can amount to torture, and can affect other rights of people.

Every year, about 1,600 cases of alleged police assault are reported to the Complaint Against Police Office ("CAPO"). The mere quantity of complaints is not alarming if we consider that the police force has nearly 30,000 officers. But, generally, the potential victims of police torture and power abuse are not evenly distributed among the population. Judging from the experiences of social workers, most of torture victims are in the lower class and in marginal groups.

## VULNERABLE GROUPS MOST EASILY DISTURBED BY THE POLICE

### 1. STREET-SLEEPERS

Street sleepers or homeless people are the most vulnerable victims. There are about 2,000 street sleepers in Hong Kong, scattered around the urban slum areas in Mongkok, Yaumatei and Wanchai. These districts are also the breeding-bed of vice and drug problems. Many street-sleepers are drug addicts. Given this background, it is not surprising to find that the street-sleepers and drug addicts are the most heavily policed group of people.

Street-sleepers are frequently checked, searched and interrogated on the street by police. They are usually presumed guilty by the police because of their vice-related background or network. The police show no respect to these people at all.

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<sup>1</sup> Justice and Peace Commission, Catholic Diocese of Hong Kong. For a response to this presentation, see *Letter from David Hodson to Mary Yuen, 9 November 1995*, at pp 37 - 42 infra.

It was reported a few years ago that the police in Yaumatei enjoyed ransacking the home for street-sleepers at midnight, humiliating the temporary inhabitants inside, and squeezing them for potential information about street crimes. Sometimes quarrels and fights took place. These resulted in the arrest of some trouble-makers on charges like possession of drugs, trafficking, and loitering.

These unhappy interactions lead some street-sleepers (who may be drug addicts and ex-offenders) to become more and more cynical. They feel hurt (sometimes really hurt) and lose confidence in society at large. They dare not complain because they know that officers at the CAPO will not believe them, and their complaints may invite more harassment and intimidation by the police. The police style of law-enforcement agencies not only generates immediate torture of the victims, but also it keeps the marginal people marginal and provokes the ex-offenders to become new-offenders. These victims do not enjoy the right to say "leave us alone".

## **2. YOUNGSTERS**

Youngsters from lower classes are another group of people frequently subjected to torture and police abuse. New satellite districts like Yuen Long and Tuen Mun, because of faulty urban planning, are the most stressful districts in Hong Kong. The inhabitants do not have enough community support. Their family intimacy is cut by the remoteness of these districts. The phenomenon of "gangsters" takes place, and the rate of juvenile delinquency is the highest in these districts. Gangs of deviant youngsters are therefore the most obvious targets for police to stop and question. Youngsters are, by definition, more anti-authority and provocative, and this invites police to respond in a more aggressive way.

Deviant youngsters are less likely to be charged than street-sleepers, but they are exposed to unnecessary police interrogation, humiliation and sometimes slight violence. A survey conducted in 1994 by outreaching social workers reveals that more than 80% of the responding youngsters who had been victims of police abuse dared not complain for fear of possible revenge.

## **3. OTHER GROUPS OF THE COMMUNITY**

Sometimes one does not have to be a street-sleeper or deviant youngster to experience police abuse. Some police officers assume absolute conformity from the subject citizens and cannot

tolerate even oral challenge. The Hong Kong police conduct over one million ID checks per year. In 1994, it escalated to over three millions checks. It is a folk wisdom in Hong Kong that you should never question the checks however unreasonable you feel. A student of Chinese University of Hong Kong did not take this advice at heart in 1994. This student refused to show his ID card to the police officers who had stopped him to check his ID. These officers apprehended the student to quiet area, bought a 5-inch long knife from a nearby store, and put the knife in the pocket of the student. The student was then beaten up and was told that he would be accused of possessing an offensive weapon. The student was later released with a new understanding of police power that he could never have learned from books.

Occasionally you will come across a story in the newspaper that a teacher was beaten up, a dentist singing in karaoke was beaten up, a young cook with the same name as a criminal was beaten up in the police station, a surveyor walking along a road in Tsimshatsui during lunch hour was beaten up, a worker who had come home late was beaten up, a hawker living alone was beaten up in his flat, and even two off-duty Custom and Excise officers were beaten up in 1993. All were beaten up by the one who is entitled to enforce law -- the police!

Indeed, complaints against the police are increasing. In the statistics released a few days ago, 892 cases are recorded in the third quarter of this year. Among them, 463 relate to police assault and 319 relate to police using foul language, misbehaving and engaging in misconduct.

#### **UNNECESSARY USE OF FIREARMS LED TO DEATH OF HOSTAGE**

Humiliation and a few blows are no big deal, compared to death. A Korean visitor was shot dead by the police during a gun battle in January 1994. This Korean was one of three hostages held by a gunman who had hijacked a taxi. It was discovered afterward that the Korean was killed by two bullets that were emitted from a constable's gun from a short distance. That constable admitted at the Coroner hearing that he did not know how many hostages were kept by the gunman. He also declared before the Judge that he had never received any training on how to take care of hostages' safety in such circumstance.

Another taxi-driver who was hijacked by a gunman in 1990 in Taikoktsui was more fortunate. He was simply dragged out from the taxi and seriously injured by the police who

had paid deaf ears to the drivers' continuous claim that he was the poor innocent driver. Anyway, he kept his life. It seems that the police are trained to reduce crimes only, but not to reduce suffering.

#### **NO INDEPENDENT MECHANISM TO INVESTIGATE POLICE ASSAULT**

If one suffers from police abuse of power, the only door one can knock on is the Complaints Against Police Office. CAPO is not an independent department, but a part of the police system. Officers working in CAPO come from the police force, and will return to their posts in future. Thus, their independence and fairness are questionable.

Even if the investigators try to be fair and just to the complainants, they inevitably have to face the pressure that originates from the possible conflict between them and their rank-and-file colleagues.

Since most complaints involve only the complainant and the police officer, and usually without corroboration from a third party, the complaints are often dropped due to lack of evidence. Indeed, when one makes a complaint to CAPO, the officers usually dissuade the victims from lodging the complaints while the victims are in the hospitals or their home. It is generally believed that the officers at CAPO are always biased against civil liberty and are in favour of exercising effective control of the society by the colonial regime.

In each of the past few years, there has been an excess of 3,000 complaints filed in CAPO, but police officers whose allegations were found substantiated were just a handful. It is estimated that the number of unreported cases is three or four times more because the complainants were threatened and intimidated by the police once they filed the complaints. The following figures present the percentage of complaints found substantiated by CAPO: 1993 (2.7%); 1992 (2.0%); 1991 (2.3%); and, 1990 (3.6%). Among those cases relating to police assault, only 0.1% to 0.3% were found substantiated. Others are classified as withdrawn, unsubstantiated, false, no fault or not proved.

During the years, groups from various backgrounds have requested an independent CAPO. The Legislative Council also passed a motion in April 1993 asking the government to separate CAPO from the police force. However, the police force and the Security Branch of the administration just ignored these demands. They even claimed that an independent CAPO would be harmful to police morale.

An amateur body, the Independent Police Complaints Council (IPCC)<sup>2</sup>-- composed of Justices of Peace and Legislative Councillors -- is responsible for reviewing the work of CAPO. Although IPCC was made a statutory body and is independent of the Police Force, it is not empowered to conduct investigations on its own. It has to rely heavily on the reports prepared by CAPO to pass judgment on the cases investigated.

CAPO will notify the complainant of the outcome or the result of the investigation. But, CAPO will only provide the complainant with a few lines stating the category in which the complaint falls. Sometimes, CAPO officers explain briefly how the result was arrived at, but only when the complainant is persistent in asking. Irrespective of the outcome, or the way in which the outcome was determined, the case report should be open to the complainant for inspection. If the complainant is still unsatisfied with the result, there is no formal channel of appeal. It is nearly impossible for the Independent Police Complaints Committee to overrule CAPO.

In July 1992, the IPCC secretary submitted to the Committee an internal document evaluating the work of CAPO. The document highlighted that:

- (a) The investigators of CAPO usually frame questions favourable to the complainant when taking statements;
- (b) The investigators are not critical enough when handling evidence given by police; and
- (c) The investigators usually adopt a defensive rather than an investigative perspective in analyzing evidence.

In the 1993 Annual Report, the chairman of the IPCC explicitly turned down the option of an independent CAPO, and proposed a moderate change to it. A non-police investigator was proposed to participate in investigating those serious complaints received by CAPO. The police force can at least accept a non-police observer, who would not be able to investigate cases, who would be sent from the IPCC to CAPO. The police force is trying hard to prevent any outsiders -- that is non-police -- from touching CAPO. This unreasonable reluctance to open up CAPO keeps CAPO as an incompetent and partial body. This violates article 12 of the Convention, which requires the state to ensure that its competent authorities proceed to a prompt and impartial investigation of torture. This also violates article 13 of the Convention which obliges the state to ensure access of the torture victims to such authorities.

As it is unlikely that one can receive justice through either CAPO or the IPCC, can

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<sup>2</sup> The IPCC was previously known as the Police Complaints Committee.

one file a civil suit to seek at least some monetary remedy? Unfortunately, this option is not available to most of the torture victims who are within the poorest stratum of our society. Few of them can manage to get legal aid for such purposes because legal aid is not granted at the District Court level in civil cases concerning battery. Without an effective remedy, not only does justice for victims remain eclipsed, but also the abusive police are not deterred from repeating their torturous acts.

### **THE PROBLEMS OF THE POLICE FORCE ORDINANCE**

It has been mentioned that the police force is vested with excessive power. The Police Force Ordinance defines the general power of the police officers. In 1992, Police Force Ordinance was amended to fulfil the requirement of the Bill of Rights Ordinance. However, the amendments are not satisfactory.

Under article 54 of the Police Force Ordinance, police officers can stop, search and arrest any person if the officers find them "acting in a suspicious manner". The words "acting in a suspicious manner" have long been the excuse of the police to perform unnecessary checks and searches. No objective criteria are built in the amended Police Force Ordinance to guide the police offices in this respect.

Moreover, article 54 also allowed the police officers to demand identity cards from anyone. The system of ID checks was originally built in the Immigration Ordinance to prevent illegal immigrants from Mainland China from flooding to Hong Kong. The amended Police Force Ordinance expands such power as part of the general power of police officers and therefore implies a much larger scope of social control. In 1992, 2,590,000 ID checks were executed. This is where a total number of citizens who were required to carry ID cards amounted to only 4,200,000 in that year. ID checks are no longer used to prevent illegal immigrants, but to prevent crime or merely to satisfy the interest of the police if such powers are being abused. In certain cases, ID checks resulted in police assault because the person stopped refused to show his ID card to the police officers because of the police officers' rude manner.

Apart from the Police Force Ordinance, there are dozens of ordinances that give the police enormous power. These ordinance need to be reviewed so as to cope with the Bill of Rights Ordinance.

### THE CRIMES (TORTURE) ORDINANCE<sup>3</sup>

The Crime (Torture) Ordinance of Hong Kong was introduced in 1993. However, the crime of "torture" is defined narrowly as only those acts that "inflict[] severe pain or suffering on another", but not other cruel, inhuman and degrading treatment or punishment. Thus, this legislation is much more limited than the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Although the government claimed that not a single case has been recorded under the Crime (Torture) Ordinance, it does not mean that no torture takes place in Hong Kong. The victims may be ignored by the Officers in charge of the complaint office for there is no independent body to investigate the complaints. Even if some officers are proven to have used unreasonable force to inflict severe pain on others, they will not be charged with crimes under this Ordinance, but with common assault only.

To conclude, without effective legislation to prevent torture and inhuman treatment, and without effective remedial measure, it is extremely difficult for people, especially the grassroots people, to have protection and justice.

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<sup>3</sup> Chapter 427 of the Laws of Hong Kong.



# **LETTER TO MARY YUEN IN RESPONSE TO “POLICE POWER AND POLICE BRUTALITY IN HONG KONG”**

**BY: Mr. David Hodson  
Assistant Commissioner of Police,  
Royal Hong Kong Police Force**



皇家香港警察總部  
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ROYAL HONG KONG POLICE  
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本署檔號 OUR REF.: (15) in CID/CON/135/57

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內線 EXTENSION

TELEX NO.: 65367 HX

9 November, 1995

General Secretary,  
(Attn: Ms. Mary YUEN)  
Justice and Peace Commission of the  
Hong Kong Catholic Diocese,  
Room 302,  
Bishop Peter Lei Laity Formation Centre,  
1, Tai Shek Street,  
Sai Wan Ho,  
Shaukeiwan,  
Hong Kong

Dear Ms. YUEN,

The University of Hong Kong  
Faculty of Law Seminar  
on Saturday, 28th October, 1995

I refer to your paper titled "Police Power and Police Brutality in Hong Kong" presented at the seminar on 28th October, 1995.

I have read your paper with interest and whilst not entirely agreeing with your sentiments, I respect your right to express your opinions. However there are one or two areas where the contents of your paper are factually inaccurate and I feel it would be remiss of me if I did not put the record straight. The areas in question concern Identity Card checks and Police powers derived from Section 54 of the Police Force Ordinance, Cap. 232. I will comment on Identity Card checks first.

The Police power to conduct an Identity Card check stems from Section 17C(2)(a) of the Immigration Ordinance, Cap. 115, not Section 54 of the Police Force Ordinance, Cap. 232 as stated by you. The power has been judicially held to be absolute, *Regina v FUNG Chi-wood* being the case in question.

Identity cards are subjected to checks for a variety of reasons. These include checks conducted as part

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of criminal investigations where no arrest has yet been effected, where arrests have been made and a person(s) is in Police custody, as part of routine anti-crime measures such as at a Police road-block, as part of anti-crime operations inside premises or on the street and where a person is stopped by a patrolling Police officer in the street.

Your paper tends to convey the impression that in 1992 some two and a half million people were stopped and subjected to an Identity Card check by a patrolling Police officer in the street. This figure is way off the mark. In 1992, a total of 1,135,963 Identity Card checks were conducted as part of Police stop and search operations including persons stopped on the street by a patrolling Police officer. In 1994, the corresponding figure was 1,284,077 such checks, not in excess of three million as contended by you.

The second point I wish to stress is that Section 54 of the Police Force Ordinance, Cap. 232 does not confer the power of arrest. This section of the law empowers a Police officer to stop, detain and search where suspicion is present. The "stop" element facilitates the Identity Card check and is therefore not an additional power to Section 17C(2)(a) of the Immigration Ordinance, Cap. 115. Furthermore, unlike the latter, the power under Section 54 is qualified and is not absolute. For your ease of reference, Section 54 in its entirety is reproduced hereunder : -

**"54. Power to stop, detain and search**

(1) If a police officer finds any person in any street or other public place, or on board any vessel, or in any conveyance, at any hour of the day or night, who acts in a suspicious manner, it shall be lawful for the police officer -

- (a) to stop the person for the purpose of demanding that he produce proof of his identity for inspection by the police officer;
- (b) to detain the person for a reasonable period while the police officer enquires whether or not the person is suspected of having committed any offence at any time; and
- (c) if the police officer considers it necessary to do so -

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(i) to search the person for anything that may present a danger to the police officer; and

(ii) to detain the person during such period as is reasonably required for the purpose of such a search.

(2) If a police officer finds any person in any street or other public place, or on board any vessel, or in any conveyance, at any hour of the day or night, whom he reasonably suspects of having committed or of being about to commit or of intending to commit any offence, it shall be lawful for the police officer -

(a) to stop the person for the purpose of demanding that he produce proof of his identity for inspection by the police officer;

(b) to detain the person for a reasonable period while the police officer enquires whether or not the person is suspected of having committed any offence at any time;

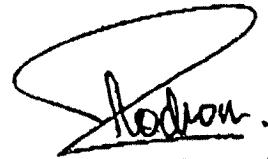
(c) to search the person for anything that is likely to be of value (whether by itself or together with anything else) to the investigation of any offence that the person has committed, or is reasonably suspected of having committed or of being about to commit or of intending to commit; and

(d) to detain the person during such period as is reasonably required for the purpose of such a search.

(3) In this section, "proof of identity" has the same meaning as in section 17B of the Immigration Ordinance (Cap. 115)."

I trust this information imparts a greater degree of clarity to the situation but am quite willing to provide further information should you so require.

Yours faithfully,



( D.M. Hodson )  
for Commissioner of Police

c.c. Mr. George Edwards,  
Faculty of Law, University of Hong Kong

Secretary for Security

Secretary for Home Affairs  
(Attn: Mr. Jeremy C. Croft)

Hon. Ms. Emily LAU Wai-hing, Legislative Councillor

Hon. Mr. James TO Kun-sun, Legislative Councillor

# **THE HONG KONG PENAL SYSTEM AND THE CONVENTION AGAINST TORTURE AND RELATED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS**

**BY: Dr R G Broadhurst  
Department of Sociology,  
University of Hong Kong**



# THE HONG KONG PENAL SYSTEM AND THE CONVENTION AGAINST TORTURE AND RELATED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

DR R G BROADHURST<sup>1</sup>

## INTRODUCTION

My main aim in this paper is to address *some* of the issues and concerns arising from the status of the various United Nations (and Council of Europe) human rights instruments and conventions regarding the protection of prisoners and detainees in the Hong Kong penal system.<sup>2</sup> Such a task cannot be comprehensively undertaken in the short time allocated and I do not raise all the relevant issues or concerns about penal conditions in Hong Kong. I wish to focus on two areas where potential and actual problems arise from the general philosophy or ideology of the Hong Kong Correctional Service Department ("CSD"). Firstly, I review the extent to which the CSD complies with the various conventions, declarations, rules and principles governing the management of detainees or prisoners undergoing punishment or treatment. Secondly, I focus on the excessive use and nature of imprisonment for juvenile or young offenders. I will not address the application of human rights standards to the situation of Vietnamese asylum seekers or the plight of the mentally ill or the "criminally insane", as these matters are dealt with by other speakers. Thirdly and in conclusion, I offer some

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<sup>1</sup> Department of Sociology, University of Hong Kong

<sup>2</sup> The many United Nations instruments related to prisons and the protection of prisoners include, in order of adoption: "Standard Minimum Rules for the Treatment of Prisoners" (1955); "Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (1975); "Code of Conduct for Law Enforcement Officials" (1979); "Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (1982); "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (1984); "Safeguards guaranteeing protection of the rights of those facing the death penalty" (1984); "Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules")" (1985); "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment" (1988); "Basic Principles for the Treatment of Prisoners" (1990); "Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)" (1990); "Rules for the Protection of Juveniles Deprived of their Liberty" (1990); Article 40 of the Convention on the Rights of the Child (1990) and; the "Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)" (1990) especially articles 52-59.

comment on the status of prisoners' rights after the transfer of sovereignty.

Although United Nations human rights instruments are symbolically important, they are not always assumed to provide protection for criminals undergoing punishment and it is important to recognise that their scope is often limited by definitional problems and customary practices. Nevertheless, a generally unremarked product of the development of international human rights instruments has been the promulgation and evolution of a common code of standards for prisons. A common code based on the concept of minimum conditions for prisoners has become widely accepted by many prison authorities. It is also clear that the United Nations "Standard Minimum Rules for the Treatment of Prisoners" (1955) drafted so long ago and focusing on basic material needs and the rudiments of natural justice sets a standard well below that now aspired to by many contemporary penal administrations.

#### **PROBLEMS OF DEFINITION AND SCOPE**

There are several definitional problems relating to the standard which is to be applied in assessing the compliance of the Hong Kong penal system with international requirements for the protection of prisoners' human rights. However, three problems arise in relation to the application of general supra-national standards for the purpose of judging the Hong Penal system.

Firstly, there is the distinction between *legally* binding covenants or conventions (if ratified or acceded to by a member state) and *morally* binding declarations, guidelines, principles or standard rules adopted by the General Assembly of the United Nations particularly those recently adopted in relation to juvenile offenders.

Secondly, there is the problematic status of the Standard Minimum Rules for the Treatment of Prisoners (1955) ("SMRTP"), given their specific exclusion from the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and omission from the local Crime (Torture) Ordinance, but inclusion in the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975) and the Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules") (1985).<sup>3</sup>

Thirdly, in regard to the status of the parallel conventions (for example the European Convention on Human Rights "ECHR") and standards adopted by the Council of Europe, the

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<sup>3</sup> Hereafter referred to as the Convention on Torture and Declaration respectively.

question arises as to what obligations the United Kingdom assumes in respect of Hong Kong under these Council of Europe laws. Especially relevant in this context is the Council of Europe's adoption of the SMRTP in 1973 (superseded by the European Prison Rules or EPR in 1987) and the important inspection powers provided for by the 1989 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("ECPT").<sup>4</sup>

In the Declaration the caveat to the definition of torture and other cruel, inhuman or degrading punishment (Article 1<sup>5</sup>) exempts "...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", while a less specific exception is found in the otherwise nearly identical Article 1 of the Convention, which exempts "...pain or suffering arising only from, inherent in or incidental to lawful sanctions". Consequently, in relation to the morally binding Declaration, "torture and other cruel, inhuman or degrading punishment" could reasonably be assumed to potentially occur in those penal systems or regimes whose conditions were inconsistent with the SMRTP. However, in the legally binding Convention, no 'objective' standard, such as the SMRTP, of what constitutes "lawful sanctions" is applied. Thus, application of the Convention would not, it seems, generally exclude penal practices that might otherwise constitute "torture and other cruel, inhuman and degrading treatment and punishment" so long as they were "lawful" or "inherent" or "incidental" to the ordinary operation of the penal system.

Thus a literal interpretation of the Torture Convention alone would apparently render many of the essential features of the penal enterprise outside or invisible to its scope, and only

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<sup>4</sup> See generally Beddard R 1993 *Human Rights and Europe*, Grotius, Cambridge 3rd ed, Chapter 6 and Alston, P (ed) (1991) *The United Nations and Human Rights: A Critical Appraisal*, Clarendon, Oxford especially Byrnes, A "The Committee against Torture" in P Alston.

<sup>5</sup> The definition in full is 1. "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. 2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."

exceptional acts of torture or cruel, inhuman and degrading punishment or treatment would fall under the legal and moral protection such standards impose. Nevertheless, Article 16 of the Convention, which extends the scope of the Convention to cruel, inhuman and degrading treatment or punishment (but without defining such) suggests, at least in the cases of the training of personnel, the laying of complaints, and the investigation and prevention of such cases, that standards of custodial treatment and punishment at least equivalent to the SMRTP are expected. Moreover, the United Kingdom's obligations (reluctantly endorsed<sup>6</sup>) under the EPR would suggest that the SMRTP or its equivalent applies to Hong Kong's custodial environment and legitimately forms the basis of the necessary objective standard of custodial care below which it can be presumed that potential or de-facto breaches of the Convention might occur.

As is typical of many broadly defined conventions and laws, numerous problems of interpretation occur. This is no less a problem in relation to the large number of inter-related instruments relevant to imprisonment. Essentially, these definitional problems enable wide latitude in the assessment of compliance, such that it is possible for precisely the same behaviour or conditions to be described as in accordance with or in breach of the relevant international instruments. I have resolved this 'problem' for the purposes of this paper by applying the SMRTP (rather than the more demanding ERP) to my assessment of the Hong Kong adult penal system, and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules"<sup>7</sup>) (1985) to the juvenile detention and training regimes. This would be at least *partly* in accord with the approach to Article 10 of the ICCPR taken by the Hong Kong government, which, as stated in the Fourth Periodic Report under the ICCPR, is that Hong Kong's prison regulation and management "take full account" of the SMRTP<sup>8</sup> but make no mention of the Beijing Rules or other instruments

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<sup>6</sup> See Wilson, C. R. M. 1993 "'Going to Europe': Prisoners' Rights and the Effectiveness of European Standards', *International Journal of the Sociology of Law*, 21:245-264 for a concise summary of the effectiveness of the Council of Europe's SMRTP and the United Kingdom's response to adverse ECPT reports about its penal system.

<sup>7</sup> The Beijing Rules incorporate wholly the SMRTP in regard to the treatment of juveniles but impose additional standards by restricting the resort to imprisonment.

<sup>8</sup> Under the heading Article 10 at page 90 of the Fourth Periodic Report by Hong Kong under Article 40 of the International Covenant on civil and Political Rights, November 1994, Government Printer, Hong Kong.

relevant to the status of juvenile prisoners.

## GENERAL IMPRESSIONS

My own background as a criminologist specializing in penology has given me the opportunity to visit a number of penal establishments of the Correctional Services Department (CSD)<sup>9</sup> in Hong Kong -- including Drug Addiction Treatment Centres (DATCs), Local Prisons, Detention Centres and Training Centres. I have not visited all 28 institutions (six are detention centres for Vietnamese illegal immigrants) run by the CSD, including the Sui Lam Psychiatric Centre for the "criminally insane"<sup>10</sup>, but I may be able to draw some tentative, albeit impressionistic personal conclusions.<sup>11</sup> In addition, these impressions are made in the context of comparisons with penal institutions in other jurisdictions.<sup>12</sup> Because my knowledge of CSD prisons is mostly impressionistic, I choose to stress the problems arising from the philosophical under-pinning of the Hong Kong penal system rather than focus on conditions in detail, since it is the former that sets the tone for penal regimes and the all important attitudes of staff.<sup>13</sup>

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<sup>9</sup> Also not included are those essentially closed institutions such as residential care Centres, probation homes, reformatory schools and detention Centres run by the Hong Kong Social Welfare Department. Such institutions, however fall under the scope of the SM RTP, the Beijing Rules and the Convention.

<sup>10</sup> Nevertheless I have heard questionable views expressed by prison medical staff on the efficacy of "chemical castration" (hormone suppression medication for sex offenders) and electric shock therapy. In such custodial environments I would be concerned about adequate safeguards for ensuring voluntary consent to such controversial "treatments".

<sup>11</sup> For a short summary of CSD institutions, regimes and organisation see Vagg, J 1994 "The Correctional Services Department" in Gaylord, M, and Traver, H. editors Introduction to The Hong Kong Criminal Justice System, Hong Kong University Press, Hong Kong and The Hong Kong government report to the Human Rights Committee in November 1994 under article 40 of the ICCPR of the Fourth Periodic Report by Hong Kong under Article 40 of the International Covenant on civil and Political Rights, Government Printer, Hong Kong at pp 90-95.

<sup>12</sup> I have visited prisons in United Kingdom, New Zealand, Australia, Singapore, USA, Philippines, Indonesia, Malaysia, Netherlands and Canada.

<sup>13</sup> Many of my post-graduate students are serving officers of the Royal Hong Kong Police Force (RHKPF) and CSD and this has enabled me also to see and hear first hand about many of the institutions and border-control practices.

As already noted, the detention of Vietnamese illegal immigrants ("IIs") will not be dealt with here. Suffice it to say that the impact on the Hong Kong Correctional Services Department (CSD) has been detrimental. A consequence of the government's response to the IIs<sup>14</sup> has been serious over-crowding in many prisons and the deflection of resources away from the implementation of much needed reforms in standard penal accommodation, training and research. (However, important reforms in the management of staff have been undertaken and these are often an important precursor to improvements in prisoner management). Moreover, the uncustomary demands of camp supervision and control gravely tax the capacity of the service. The diversion of resources and the increasing demands on the custodial staff in the several detention camps<sup>15</sup> for policing an a-typical "non-criminal" mixed population of II detainees has severely affected morale, with many unsatisfactory consequences including the "militarization" of the CSD.

The impact of the refugee problem on the Hong Kong Correctional Service and the unfortunate (and largely accepted) stigmatisation of the remaining "screened out" Vietnamese IIs as a criminal or dangerous class remains a serious problem. This "demonization" of the IIs is a process that appears to have preceded and characterized the changes in administrative practices associated with the withdrawal, restriction or down-grading of services in efforts to reinforce the deterrent value of the camps and to encourage voluntary repatriation. Thus the withdrawal of compensatory "normalization" activities or strategies normally associated with sound custodial practices have further complicated the task of the CSD. Recently it has been foreshadowed that security will be passed increasingly to private contractors who are already involved in the 'open' camps.

#### THE SM RTP AND BEIJING RULES AND THE HONG KONG CSD

Firstly, it is my impression that Hong Kong adult and juvenile prisons *generally* achieve a

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<sup>14</sup> Including the impact of II's from the Peoples Republic of China (PRC) especially through the 1980s as government policies progressively relied on deterrence (especially the introduction in 1988 of mandatory terms of incarceration for second time IIs) rather than repatriation as a means of controlling illegal cross-border movement. For further discussion see Chung-Tong Wu and Christine Inglis, 1992 "Illegal Immigration to Honk Kong", *Asian and Pacific Migration Journal*, Vol.1:601-621.

<sup>15</sup> Chi Ma Wan, Green Island, High Island, Nei Kwu Chu and Whitehead detention and reception centres.

satisfactory or in some cases very high standard in respect to many conditions covered by the SMRTP<sup>16</sup>. CSD institutions are austere, highly structured regimes demanding 'military' style conduct from both staff and inmates. Staff are generally trained and competent in the prudent use of physical restraints and show widespread acceptance of the principle that prisoners are in prison *as* punishment, not *for* punishment. In terms of good order, safety, diet and sanitary conditions the CSD achieves high standards, despite over-crowding, relative to other jurisdictions I have observed. Adequate measures are provided in accord with the SMRTP for medical services (although somewhat perfunctory in the reception institutions), religious expression, the safeguarding of personal property, record keeping, appropriate separation of the various classes of prisoners, movement and transfer of prisoners, outside communications or contact, and the provision of reading materials. Adequate opportunities for work and pay are provided<sup>17</sup>, although under-employment in some institutions is a serious problem. In other institutions, especially those with government or private contracts, there is a tendency for work output to interfere with or take precedence over recreational and educational opportunities. Education is not treated as equivalent to work in adult prisons, and although actively encouraged, educational services are limited.

Extensive complaint procedures without overt penalty for "vexatious" complaints are available and inmates are informed of the avenues of complaint procedures on reception. Notices specifying complaint procedures or avenues are clearly displayed in quarters, workshops and punishment units. The prisons are open to regular external inspection, visits by appointed prison visitors are frequent and serious breaches of prison discipline are speedily dealt with by visiting magistrates or outside courts. Thus in some respects the CSD exceed the general conditions laid out in the SMRTP for adult prisoners.

I have no evidence of especially cruel or inhuman treatment or the use of torture in Hong Kong prisons 'authorised' by staff and certainly none on any systematic basis, as for example occurred in Bathurst prison New South Wales, Australia in the 1970s (cf. Nagel

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<sup>16</sup> I exclude police holding cells from my general comments -- most of these are highly unsatisfactory and do not meet the standards set out in the SMRTP even allowing for the usual short periods of stay required before remand or sentence to a CSD institution.

<sup>17</sup> Gratuities of up to \$HK80.00 per six day week may be earned by prisoners.

Royal Commission into NSW Prison 1978).<sup>18</sup> Although "in the past" a number of "degrading" practices of a systematic kind were commonplace in the over-zealous administration of the "short, sharp, shock" juvenile detention centres, I am assured such practices have ceased.

Generally, Hong Kong prisons, DATCs, Training & Detention Centres, are clean, safe and well managed, with a cadre of competent and professional staff (often highly educated and well trained) in all grades. It is important not to diminish the importance of these achievements -- a safe prison for inmates and staff is highly laudable and not easily achieved -- an enviable position compared to many other jurisdictions. In addition, there have been tentative trends towards greater transparency through nascent attempts to educate the judiciary, public and schools. However, unlike other jurisdictions, the Hong Kong CSD has not developed a strong policy or research arm and appears to have a smaller capacity to influence the government's criminal justice policy than other players<sup>19</sup>.

The lack of integration and co-ordination is evident in the treatment and incarceration of juvenile offenders. Awareness of international standards in relation to the treatment of juveniles appears rudimentary. The treatment of juveniles is seemingly uninformed by the fundamental principle that the *least possible use of institutionalization* is the principle requirement of juvenile offender management (Beijing Rules Part III Rule 19). In fact, the recent report commissioned by the Secretary for Security (via the Standing Committee on Young Offenders of the Fight Crime Committee) on the The Social Causes of Juvenile Crime<sup>20</sup> demonstrates that excessive numbers of juvenile (defined in Hong Kong as those under 16 years of age) and young offenders (those aged 16 but under 21 years of age) are institutionalized in indeterminate regimes without the benefit of recourse to diversion or

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<sup>18</sup> At Bathurst prison newly received prisoners on transfer where systematically beaten by prison officers.

<sup>19</sup> Correctional elites have played an important role in penal reforms elsewhere and can be the only consistent and powerful advocate of prisoner rights. The CSD represents an untapped resource in this respect.

<sup>20</sup> Prepared by Vagg, J, Bacon-Shone, J., Gray, P. and D. Lam of the University of Hong Kong and released in May 1995.

alternative means of punishment or supervision in the community.<sup>21</sup>

Given the relatively trivial offences (about 53% of juvenile offences were for shoplifting) generally committed by juveniles, this recent report found that of the offenders in the sample only 35% had received a caution at first arrest, and some 22% had received a custodial sentence on first conviction. Citing an unpublished 1992 Social Welfare Department document titled Recidivism Study of Young Offenders, the report also noted that the majority of young offenders on probation (79.6%), in probation homes (59.4%) and in reformatory schools (57.5%) had never received a caution prior to their first appearance in court. Consequently, the authors of The Social Causes of Juvenile Crime argue at page 122 that "the majority of young offenders who receive residential care or custody have rather short track records of offending . . . and the kinds of offences which lead to residential care or custody are in the majority of cases comparatively minor." Rule 11.1 of the Beijing Rules state that "Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial". The available research provides *prima facie* evidence to suggest that insufficient attention is given to the diversion of young offenders from court. Ample support therefore exists for extending the juvenile cautioning scheme (known as the Superintendent's Discretion Scheme) beyond its present level, subject to proper safeguards.<sup>22</sup>

In short, sentencing standards do not appear to conform to the Beijing Rules in relation to Part III, Rules 17 (Guiding principles in adjudication and disposition) and 18 (Various disposition measures), which require a flexible and diverse range of measures to be employed in lieu of institutionalization. In particular, Rule 17.1 (c) states that "Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or persistence in committing other serious offences and unless there is no other appropriate response". Moreover, Hong Kong has not created a special juvenile court or specialist police units (per Rule 12 and 14), as have many other jurisdictions. This has hampered the development of adequate and coordinated policies as well as the adoption of wider variety of alternatives to institutionalization via community supervision.

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<sup>21</sup> Arrest rates for young offenders although typically much higher than adults are, however, relatively low compared to the USA, UK and Australian jurisdictions at around 115 per 100,000 population for those under 16 years of age and 150 per 100,000 population for those 16-20 years of age.

<sup>22</sup> The Tokyo Rules other provide for a wide range non-custodial measures both at the sentencing and post sentencing stage.

## **PROBLEMS AND ABUSES**

From the point of view of the SMTRP, contemporary penal standards and the Beijing Rules, some problems persist and lay the CSD and the SWD open to potential and actual abuses of human rights. Some of these problems, such as over-crowding, excessive internal disciplinary punishments, limited outside contact, inappropriate classification systems, and an over-reliance on institutionalization in the treatment of young offenders, are outlined below.

### ***1. Over-crowding and its associated problems are far too common.***

Many of the institutions (including juvenile institutions) I have seen suffer from acute to critical accommodation shortages. Over-crowding in some places is well short of the standards set out in the SMRTP (Rules 9-13). Despite suggestions that such crowding is "tolerable" to Chinese used to the cramped living conditions of Hong Kong, over-reliance on dormitory facilities and the total lack of privacy constitutes degrading punishment and falls short of what is envisaged by the SMRTP and contemporary penal standards. In some institutions, facilities and opportunities for physical exercise are limited, medical services are perfunctory and over-taxed, and virtually none of the cultural or work activities desirable in a modern prison is available.

For example, the main short stay remand/reception prison at Li Chi Kok is persistently 20-50% (or worse) over-capacity, frequently short of staff (double shifts are common), required to rotate highly limited exercise time, and without the capacity to employ or occupy more than 10% of the daily average prison population. Such prison conditions verge on the ungovernable and create a stressful environment prone to breaches of human rights, especially with respect to confinement in degrading and inhuman conditions. Part of the over-crowding problem arises because the CSD has far too many costly "closed" institutions and insufficient "open" prisons given the risks posed by the majority of prisoners (see Article 63 SMRTP).

### ***2. Internal discipline and punishment is harsh and open to misuse.***

Internal disciplinary practices are harsh and new disciplinary procedures allowing for the hearing of offences by an external visitor are not yet in place. Given that aggravated offences against the prison rules may result in 2 or 3 months loss of remission and the imposition of additional loss of freedom, it is critical that such hearings be conducted according to principles of natural justice. The punishment awarded by a Superintendent for breaches of prison rules is open to arbitrary or venal use and appears not to be subject to principles of proportionality.

In addition, it is also at the discretion of the authorities to award punishment of close confinement or solitary confinement.

For example, 28 days continuous solitary confinement (or 28 days loss of privileges in the case of juveniles or young offenders ) are often awarded at the 'discretion' of the Chief Superintendent for breach of prison rules. Article 7 of the United Nations Basic Principles for the Treatment of Prisoners (1990) seeks restrictions on or the abolition of solitary confinement because of the detrimental effects on the mental and physical health of prisoners. Consequently, such punishment may be regarded as cruel or inhuman. It is unusual in most modern penal systems to require 28 days continuous solitary confinement, and where this practice persists, it has become commonplace to provide for a 24-48 hour breaks from the punishment regime for every 7 days of such punishment.

### **3. *Excessive restrictions on outside contact are imposed.***

Especially onerous in the case of juvenile prisoners is that contact with family is restricted to one visit on one or restricted days in the week<sup>23</sup>. In some cases, this imposes undue hardship and pain on both visitors and prisoners because some institutions such as those on Lantau and Hei Ling Chau are remote from the family. In addition, restrictions are imposed on other forms of contact, including limited telephone contact, non-essential censorship of mail and communications with family, especially in detention and training centres for juvenile or young offenders.

For example, restrictions on correspondence to *one* out-going letter per week, no access to telephones and restricted contact visits are especially unwarranted and impose essentially collective "punishments" under the guise of security. Restrictions on external relations are certainly contrary to Rule 30 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990).<sup>24</sup> The Hong Kong government has stated in its

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<sup>23</sup> Contrary to the General Principles laid on Part I (1.3) of the Beijing Rules of encouraging "full mobilization" of the family others in promoting the "well being" of the juvenile offender.

<sup>24</sup> Rule 30 in part states that juvenile detention facilities should be "decentralized . . . to facilitate access and contact between the juveniles and their families . . . and integrated into the social, economic and cultural environment of the community. A function Training Centres attempt to achieve through the Scout Movement and other community activities as well as attempting to promote re-integration through various de-stigmatizing rituals.

Fourth Periodic Report that it plans generally to relax the limitation on the number of letters prisoners may send out (see p 93 at paragraph 132). At the time of writing, no such "relaxation" has taken place nor are "amendments" technically necessary.<sup>25</sup>

#### ***4. Inappropriate classification systems used by the CSD***

The CSD relies on a classification system based on an assessment of the offenders risk of recidivism or danger to the community. Classification is important in helping to decide institutional placement (level of security) as well as conditions and level of supervision upon release. Risk assessment instruments currently do not conform to modern standard methods of risk assessment and rely on out-dated, faulty and invalidated data. Moreover, their employment in the selection of prisoners for detention, training centre or other regimes relies on suspect analytical categories likely to increase the risk of false positives and/or false negatives. In other words, the risk assessment method increases the likelihood that persons will be placed in regimes unsuitable to their actual (as distinct from their predicted) risks.

Therefore, such an unreliable classification system may *arbitrarily* impose harsher conditions and breach the principle of proportionately. Such a system may also *de facto* impose longer periods of custody or higher levels of supervision for preventative purposes unsanctioned by judicial officers. Since the method of assessment is relevant in the assignment of prisoners and consequently the nature of the punishment they may endure, the unreliability of such classification system is a matter of concern. Although perhaps not necessarily in breach of the spirit of Articles 67-69 of the SM RTP given the enthusiasm for positive classification systems in 1955, application of classification systems which yield substantive material inequalities in the treatment of prisoners would not conform to the SM RTP or the EPR.

#### ***5. Excessive use of institutionalization in the treatment and punishment of juvenile and young offenders and offenders classed as drug addicts***

An essential feature of CSD operations (and following the previous point) is the utilisation of different regimes to manage and reform different classes of offenders. These different regimes are thought *a priori* to reduce the recidivism of inmates through training,

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<sup>25</sup> I have been informed that the correspondence restrictions have been informally relaxed for individuals prisoner upon their specific request.

rehabilitation or discipline. Critical to such a model of penal administration is the use of indeterminate or, in the case of Hong Kong, partially indeterminate sentences. Thus on the basis of the prisoner's performance or compliance with the penal regime, release of the prisoner can be timed to maximise the chances of reform. Consequently, there is always the risk that the prisoner can be subjected to longer periods of imprisonment or treatment than would not otherwise be justified in order to achieve retributive or 'just desert' goals. In such circumstances, wide discretion is afforded prison staff to determine the amount of punishment/treatment to be served. Thus juvenile/young offender detention and training centres indeterminate regimes appear contrary to Rule 19 of the Beijing Rules and Rule 28 in relation to the use of conditional release to the "greatest possible extent" and at the "earliest possible time".

For example, Juvenile Detention Centre<sup>26</sup> (Ordinance Cap. 239) inmates are often first offenders undergoing periods of 1 to 6 months of "Short, Sharp Shock" detention for juveniles (sometimes as young as 14 years of age) or 3 to 12 months for young adults (21-24 years of age), followed by 12 months close or "intensive" community supervision. This form of detention is endorsed in the belief that these regimes instill respect for the law and create self-discipline, thereby reducing recidivism. In relation to Training Centres (Ordinance 280)<sup>27</sup>, indeterminate sentences in the range 6 months to 3 years are imposed (on average about 15 months are served), followed by excessively long periods (3 years) of mandatory community supervision. Training Centres combine education and vocational training without the strict "drill" style regimes imposed in Detention Centres in the hope of re-integrating inmates through employment in the community. A grade system of progressively increased access to "privileges" subject to compliance assist in the management of the Training Centres. Drug Addiction Training Centre (Ordinance Cap 244)<sup>28</sup> inmates serve treatment sentences of between 2 and 12 months (most serve 7 to 8 months) followed by 12 months community

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<sup>26</sup> Sha Tsui Detention Centre separately houses juvenile and young offenders. Lai Sun and Pik Uk are prisons for young inmates aged 14-20 (or in the case of Pik Uk young adults sentenced to detention orders) and they appears to be run on similar lines to the Sha Tsui Detention Centre.

<sup>27</sup> Training Centres are located at Lai King, Cape Collinson and Tai Tam (for female young offenders and also female addicts under the age 21 serving Drug Addiction Treatment orders).

<sup>28</sup> Most "addicts" are confined to the "open" DATC at Hei Ling Chau.

supervision. Although work is provided, the principle aim is to provide de-toxification (although many would have begun this process at Li Chi Kok) and reduction of psychological dependence. Release is actually determined by recommendation to the Commissioner of the CSD by a Board of Review, comprising prison staff, medical personnel and 'after-care' staff.

There are no "open" facilities for juveniles *per se* and generally existing institutions are, although smaller than adult facilities, large and crowded, inhibiting individual attention<sup>29</sup>. In the case of those released from Training Centres, there is no provision for early termination of the excessively lengthy mandatory post-release supervision if an ex-inmate has responded appropriately (per Rule 11.2 of the Tokyo Rules). Excessive use of long post-release supervision orders and "after-care" for prisoners released from Training Centres may constitute disproportionate punishment for juvenile and young offenders. Generally, insufficient attention to the Tokyo Rules has been given to mandatory post-release supervision of prisoners under the auspices of the recently introduced Post Release Supervision of Prisoners Ordinance. In particular, rules governing the recall and the selection of prisoners have not been promulgated but are likely to impose restrictions on the freedom of ex-prisoners.

The efficacy of these regimes for juveniles and young offenders in reducing recidivism is discussed below.

## DISCUSSION

I have noticed on many visits to institutions the extremely positive attitude of CSD staff to reformative goals, without the cynicism encountered in other penal jurisdictions. In my opinion, this attachment to positive ideals is far too uncritical and naive, but it ensures that morale is maintained and positive humane goals are pursued. These positive attitudes and ideals can be an important antidote to the common problem that "aimless" penal institutions too frequently fall into "the routine brutalization of all the participants" (Justice May: 1979: 67<sup>30</sup>). Moreover, this sense of mission linked with a thorough commitment to international standards of humane custodial practices may be the most important factor in preserving the standards of custody in the post 1997 environment. Like most "strengths", however, this

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<sup>29</sup> Lai King for example has a daily average population in excess of 300 inmates.

<sup>30</sup> United Kingdom 1979 Committee of Inquiry into the United Kingdom Prison Services, HMSO, London, Cmnd. 7963.

reliance on reformatory values is also the fundamental weakness of the Hong Kong penal system.

Much of the problem stems from an uncritical acceptance of the efficacy of different penal regimes in the prevention of recidivism. Virtually no reliable evidence exists to demonstrate that certain regimes do better than others in reducing recidivism.<sup>31</sup> Thus so called treatment regimes or special detention regimes cannot be justified on preventative grounds. The CSD has not produced reliable or rigorous research to demonstrate their faith in such regimes. In fact, the most competent data available suggest "Short Sharp Shock" regimes and training centres perform far worse than official published recidivism data suggest. For example, an unpublished preliminary recidivism study<sup>32</sup> found that within three years of release, 26% of those released from Training Centres, 41% of those released from Detention Centres, 64% of DATC inmates and 49% of those released from Youth prisons had been re-convicted.

Although current research in Hong Kong is well short of a satisfactory evaluation of these regimes, it does challenge current assumptions about the efficacy of Detention, DATC and Training regimes. Detention Centre treatment of inmates borders on "cruel, inhuman and degrading" punishment and it is probable that much less intrusive means would achieve similar results. Such findings illustrate a failure to adopt international standards which require consistent research and review of programmes for juveniles, the prevention of juvenile crime, and the effectiveness of non-custodial measures (per Rule 30 of the Beijing Rules, Rule 60 of the Riyadh Guidelines and Rules 20 and 21 of the Tokyo Rules). The absence of a dedicated criminal justice statistics and criminology research centre in Hong Kong has meant *ad hoc* research initiatives tend to have little impact on policy and do not lead to improved knowledge and co-ordination between the diverse government and non-government organisations involved in juvenile criminal justice.

Essentially, my argument is that the Hong Kong Criminal Justice System and Correctional Services excessive reliance on or belief in reductionist goals may ironically

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<sup>31</sup> A short concise summary of efficacy research can be found in Walker, N (1983) "Side-effects of Incarceration", *British Journal of Criminology*, 23:61-71 and in relation to Detention Centre type regimes MacKenzie, D.L. et al. (1995) "Boot Camps and Recidivism in Eight States", *Criminology* 33:327-357.

<sup>32</sup> Personal communication CSD.

produce or serious threats to the humane treatment of prisoners, particularly or especially in respect of young offenders. While laudable, rehabilitative (and less so deterrent) goals, unless constrained by the classical principles of proportionate punishment, violate parsimony (that is, imprisonment as a last resort and humane confinement based on the least restrictive environment conducive to good order and governance of the prison) and readily lend themselves to degrading treatment and punishment. These traditional and controversial goals of western punishment coupled with a substratum of Confucianist principles<sup>33</sup> tend to combine and produce demanding penal regimes -- especially a tendency to tolerate collective and exemplary punishment. "Cruel or degrading treatment or punishment", broadly defined, can result just as easily from good as from evil intentions.

This may seem to be a provocative position, but if interpreted in the light of the general or dare-say universal practices of penal authority and management, it is easy to see that even in orthodox circumstances the potential for brutalization of prisoners is always present -- even in the best run institutions. In fact, the whole process of punishment has been described as an elaborate "degradation ceremony" signifying the citizen's change of status from free man to prisoner. In this process, elaborate rituals including the issue of new uniform clothing, shaving of the head, cleaning, diet, security and medical inspections, assignment of work, and regulation of eating, sleeping, association etc follow. This process, unless closely guided and supervised by competent professional correctional staff with a good understanding of the rights of the accused or prisoners, lends itself to numerous abuses. Thus to ensure satisfactory minimum standards of custodial care it is necessary to recognise and manage the universal or 'natural' tendency of prison authorities to seek total control at the expense of individual rights. Some of the inherent dysfunctions of penal management may be summarised as follows:

1. Ultimately, institutional good order and security subsume all other duties, including important duties of individual care. Consequently, in a perceived crisis there is often too ready resort to emergency powers and deployment of excessive force.
2. The application of the "lesser eligibility" principle that prisoners should obtain no more than that afforded the poorest free man as the 'true' administrative standard of the prison. Consequently this so-called objective standard is evoked (rather than the

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<sup>33</sup> As found in the five key concepts of *Li*: for example, deference for superiors, collective responsibility, obedience.

SM RTP or other international or domestic rules protecting the rights of prisoners) in order to justify removal of services, further deprivation or loss of privileges and impose harsh punishment.

3. That inmate culture, manifested generally and specifically in the collective actions of inmates, no matter how peaceful or warranted by circumstances, should be suppressed at all times if necessary by summary means, harassment or the liberal use of transfer or disciplinary powers.
4. Discretion, preferably absolute discretion, is essential for the smooth running of the prison. Oversight, especially by lay persons (or courts), is unwelcome and should be subverted in the interests of collective good order. Informal pressures can be applied to complainants by numerous means to suppress legitimate complaints and control inmate communication with the external world.
5. That inmates contribute as far as possible to their own maintenance by reducing the burden of their cost of confinement to the state. That prisons and prisoners should be self-sufficient. Consequently, the penal authority may over rely on work as a means of control or sustenance such that work is servitude rather than reflecting training or vocational needs or to provide the dignity of useful work.

Traditionally, the best of the penal administrative imagination aims to consume time, that is to make time go faster in order to relieve the pains of imprisonment. Effective penal administrations will not only consume time but also resist the tendency to dysfunction by establishing well understood standards of custodial care and control. Thus the best of the penal imagination embraces the certainty and consistency provided by instruments such as the SM RTP and the ERP, since through such standards penal time can more safely be consumed.

#### **PRISON CONDITIONS IN THE SPECIAL ADMINISTRATIVE REGION**

Generally, local or domestic laws such as the Hong Kong Bill of Rights Ordinance (1991) and the Crime (Torture) Ordinance (1993) which endorse the general principles of the International Covenant on Civil and Political Rights 1966 (ICCPR)<sup>34</sup> and the Convention on

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<sup>34</sup> See also the provisions of the Independent Commission Against Corruption (Treatment of Detained Persons) Order (1976).

Torture, as well as various local prison ordinances<sup>35</sup> appear to provide for the basic legal protection of the rights of prisoner<sup>36</sup>. However, because the People's Republic China has not ratified the ICCPR, considerable uncertainty arises on transfer of sovereignty in regard to the status of these legal protections under the Sino-British Joint Declaration establishing the Special Administrative Region and governed by the Basic Law.

With the pending transfer of sovereignty, there has been increased contact with PRC Public Security personnel and several visits by PRC prison officials to CSD facilities. It has been generally reported that these PRC officials have commented on the "soft" conditions found in Hong Kong and the high costs of running prisons. Typically, PRC penal establishments are self-supporting (and often run on a profit basis) and receive few state funds. 'Reform through labour' and 're-education through labour' prisons are generally described even in official accounts as draconian establishments with high moral purposes.<sup>37</sup> In addition, these officials have been surprised both by the 'liberal' nature of CSD prisons and the high degree of accountability. Given these contacts, CSD officers have been concerned that considerable formal and informal pressures may be exerted upon them to follow PRC practices. However, since the passage of the new PRC prison laws the gap between CSD standards and new PRC legal standards have significantly shortened. Nevertheless, the great gulf between the practices and customs of the two systems remains vast as even a cursory examination of the content of each system's formal rules will show.

The passage of the People's Republic of China Prison Law at the 11th Meeting of the 8th National Peoples Congress Standing Committee on December 29 1994 after several years

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<sup>35</sup> Summarised by Samson Chan "Prison Administration" in Fong, W, Byrnes A & Edwards G, (eds) Hong Kong's Bill of Rights: Two Years On (Faculty of Law, Hong Kong University 1994) and the "Initial Report by Hong Kong under Article 19 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", Government Printer, Hong Kong, 1995.

<sup>36</sup> Legal action under the Bill of Rights (albeit of a trivial nature) by prisoners has met with some success as in the recent case of the Correctional Services Departments practice of removing the racing guide from newspapers distributed to prisoners in order to curb gambling in prison was found to be breach of the Bill of Rights, see *South China Morning Post* 4 November 1995.

<sup>37</sup> Critics such as AsiaWatch and Amnesty International describe extremely bleak and strict regimes -- see also Hongda Harry Wu, 1992 Laogai -- The Chinese Gulag, Westview Press, Boulder.

of negotiation brought into force for the first time national standards for prison management in some aspects comparable with international standards.<sup>38</sup> Although drafted with some of the international standards in mind, the new Prison Law provides protections with "Chinese characteristics" in some 77 Articles covering six general chapters including sections dealing with juveniles, internal discipline, administration and control methods, release and re-settlement, sentencing and complaints. The prison law, according the Minister for Justice, sets out the principles of prison work as: "combing punishment and remolding, combing education and labor, protecting prisoners' legal rights and interests according to law, dealing with prisoners on a case by case basis, and organizing social forces to participate in the education of prisoners". The new law is designed to meet the "new situation and new tasks" arising from the "tremendous changes . . . in the country's political and economic life". The law sets more formally in place the PRC's attempt to achieve prevention and reduction of crime through the "normalization and legalization of prison work", without diluting traditional policies of "education remolding and redemption" and "combining punishment and control with ideological remolding, and labor and production with political indoctrination", governed by principles such as "reform first, production second".<sup>39</sup>

Although there is insufficient space to examine the new law, a sample of some of its contents should indicate the tenor and scope of the reforms intended. For example: Article 7 provides for the right to personal safety and to make complaints; Articles 8-9 require the state to ensure the funding of prisons and the "remolding" of prisoners and production facilities and expenses needed for prison labor as well as protecting the natural resources and property of prisons from damage or seizure; Articles 6 and 10 place prisons under the supervision of the people's procuratorate and State Council judicial administration; Article 14 provides for the protection of prisoners (and their relatives) from torture or corporal punishment, beating, use of labor for personal profit, loss of personal property, and humiliations; Article 17 allows for temporary medical exemption of imprisonment; Article 18 provides for female prisoners to be examined by female people's police; Article 19 prohibits prisoners from taking their

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<sup>38</sup> The new law replaces the 1954 'Labour Reform Regulations' and the 1982 Ministry of Public Security 'Detailed Regulations on Prison and Labor Brigade Control and Education Work'.

<sup>39</sup> Cited from an article by the Minister of Justice Xiao Yang introducing the draft law at 11th Meeting of the 8th National People's Congress *Bulletin* No. 8, 31 December 1994:16-19;FBIS-CHI-95-87, 5 May 1995.

children into prison with them and Article 20 requires the prisoners family to be notified within 5 days of reception. Articles 21-24 provide avenues for complaints and Articles 25-28 provide rules for serving sentences outside prison.

The terms of and passage of the Prison Law reflects the growing consciousness within the PRC Public Security services of the importance of human rights from both practical and ideological perspectives.<sup>40</sup> Although in any jurisdiction prison reforms and statements of intentions are not by themselves sufficient to eradicate abuses or ensure that torture and other cruel, inhuman and degrading punishment or treatment are rare exceptions, it is possible to contemplate a less traumatic transition for the Special Administrative Region's CSD as a result of these new national laws. On a less positive note, however, it is also possible to see that the new PRC prison laws emphasis on punishment and re-molding (or reform), education and labor could also be readily accommodated by existing philosophies and practices of the CSD, especially in the case of young offenders. Consequently, the existing tendency to over-use imprisonment as a means of control and reform is likely to continue unless concerted action is taken to rapidly develop alternatives and to pursue the principle of imprisonment as the penalty of last resort. Vigilance in safeguarding the rights of prisoners is always essential and is best achieved by restricting the use of imprisonment to the very small proportion of offenders for whom it is absolutely necessary. Imprisonment has never been a successful or effective method for reforming or remolding wayward citizens.

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<sup>40</sup> See for example Mao Zhibin and Cheng Liangwen 1995 "Guaranteeing Human Rights is a Cardinal Principle for Chinese Public Security Departments", Trial Issue *China Policing Studies* published by the China Police Science Society.

# **CONFESSiON EVIDENCE AND TORTURE:**

## **SUMMARY**

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## CONFESSTION EVIDENCE AND TORTURE: SUMMARY

BY JANICE BRABYN<sup>1</sup>

### (a) Confessions in Hong Kong

A confession is an out of court incriminating statement by an accused to a person in authority. If the prosecution wants to introduce in evidence a confession to prove its truth, the prosecution must show, beyond a reasonable doubt, that the confession was voluntary.

A confession is voluntary if it is made by the accused without fear of prejudice or hope of advantage held out by a person in authority, or without oppression or deception. If a statement is not voluntary, it is not admissible for any purpose.

In Hong Kong, a confession obtained as a result of torture or cruel, inhuman or degrading treatment or punishment is not voluntary. It is not admissible for any purpose. Thus, the legal rules governing admissibility of confessions in Hong Kong implement the obligations imposed by article 15 of the Convention.

### (b) Complaints against the Police/ICAC

#### (1) Reported by the Government

Contests regarding the admissibility of confessions are frequent in Hong Kong criminal proceedings. Defendants commonly allege police brutality.

Government statistics on police brutality are compiled by the Complaints and Internal Investigation Branch ("CIIB") and the Independent Police Complaints Council ("IPCC"), which periodically prepare statistics on:

- (a) complaints of maltreatment by police of suspects;
- (b) investigation/substantiation of such claims; and
- (c) disciplinary action/criminal prosecution of officers arising out of their conduct towards suspects.

The CIIB prepares reports for internal use only.

The IPCC 1994 Annual Report stated that 1,826 complaints of assault were endorsed by the IPCC in that year; 6 (0.3%) were classified "substantiated"/"substantiated other than reported"; and 8 were classified as "not proven". These rates are extremely low.

In 1993, 204 police officers were subject to "corrective action"; 17 were disciplined; and, 2 were charged with criminal offences (none of which was the offence of torture). There were

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6 substantiated complaints of unnecessary force, threat and maltreatment made against Correctional Services officers: All of these were minor. None of the 14 complaints against immigration officers was substantiated. Neither were 6 of the 7 complaints against Customs and Excise, nor the single complaint of ICAC assault.

#### **(ii) Reported by Non-Governmental Entities**

A number of reports have appeared in the Hong Kong press alleging that police abused suspects or defendants by hooding and beating them, denying them access to legal advice and medical attention, and perpetrating other physical and mental abuses against them. Some of the alleged abuses led to confessions. Many of the cases were one-on-one encounters, in which the court or the Complaints Against Police Office ("CAPO") must weigh the word of the suspect against the word of the police officer.

#### **(c) Combatting Police Abuse**

The first line of defence against police abuse of power is police training, integrity and attitudes.

The second line of defence is a carefully devised, practical procedure to minimise unexplained periods of police time, unsupervised arrest/detention of suspects, and incommunicado detention. Such procedures must include: mandatory, detailed record-keeping; electronic surveillance of transport, interview, reporting and detention areas; separation of investigation and custodial functions; and an enforceable right of access to legal advice/independent third parties before and during the interrogation process; ensuring suspects are aware of that right at the earliest opportunity.

Police officers often fail to comply with Police General Orders that require officers to keep accurate records. In this respect, two recent developments are encouraging: promulgation of the Rules and Directions for the Questioning of Suspects and the Taking of Statements 1992 (which spell out the rights of the suspect in custody); and introduction of video equipment in interview rooms in police stations (which will become more common if funds are appropriated for it.)

Since 1990, there have been expressions of concern about the impartiality of CAPO in dealing with complaints. Triggers for the concern were the consistently low levels of substantiated complaints, and the insistence by the police that investigation of police abuse is a police affair. These concerns must be addressed urgently. It is important that the investigative process be clearly seen to be fair and impartial.

CAPO is reluctant to determine the guilt or innocence of police officers when only the complainant and the officer were present when an alleged incident occurred. This contrasts with the willingness of magistrates to convict defendants of serious crimes in similar circumstances.

(d) Conclusion

There is no evidence of systematic torture or cruel, inhuman or degrading treatment by Hong Kong police or ICAC officers to extract information or confessions.

There is evidence of isolated assault and intimidation to extract confessions or obtain information, amounting to cruel, inhuman or degrading treatment, and occasionally amounting to torture. There is also evidence that low level assaults and intimidation to extract confessions or obtain information is not uncommon.

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# **MENTAL HEALTH IN HONG KONG AND THE CONVENTION AGAINST TORTURE**

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## MENTAL HEALTH AND TORTURE IN HONG KONG

DR VERONICA PEARSON<sup>1</sup>

Paragraphs 63-69 of the Government Report<sup>2</sup> refer specifically to mental health matters. I have been asked to focus specifically on detention, although issues about informed consent and hazardous and irreversible treatments also raise grounds for concern.

### PARAGRAPH 63 OF THE GOVERNMENT REPORT: DETENTION AND VOLUNTARY PATIENTS

Paragraph 63 states that the Hong Kong Mental Health Ordinance "defines and protects the rights of detained patients" and that "the power to detain is not invoked except in cases where all other means of providing care and treatment have been fully considered". This statement avoids the anomalous position of the category of "voluntary" patients. The new Shorter Oxford English Dictionary defines "voluntary" as "an action performed or done of one's own free will, impulse or choice, not constrained prompted or suggested by another". What does voluntary mean in the context of the Hong Kong Mental Health Ordinance? It means that a patient has to apply for admission, using the prescribed form, to a gazetted psychiatric hospital (Castle Peak Hospital and two wards in Kwai Chung Hospital, the two largest psychiatric hospitals providing about 4,000 beds between them). More importantly, if the patient wishes to leave they have to apply to the Medical Superintendent for permission to be discharged. The Medical Superintendent then has a 7 day grace period to decide whether he will permit the person to leave. If he does not agree and if the patient insists on leaving, the patient may then be legally committed (compulsorily detained) under Section 36. In effect, this means that all "voluntary" patients live under the threat of compulsory detention if they attempt to leave. This hardly meets the dictionary definition quoted above. Indeed one is more reminded of the Queen in Alice in Wonderland who declared that words "mean what I want them to mean". How did this anomalous position arise?

The category of voluntary patient was introduced into British law in the 1930 Mental

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<sup>2</sup> I refer to the *Initial Report by Hong Kong under Article 19 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which was recently submitted to the United Nations Committee Against Torture.

Treatment Act and at the time was seen as a great advance in comparison with the overly-legalistic 1890 Lunacy Act which was based on the belief that all admissions to a psychiatric hospital would be through a legal process. The category of voluntary patient was adopted into the 1960 Mental Health Ordinance in Hong Kong, which more or less ignored the revolutionary changes that had occurred in British mental health law with the introduction of the 1959 Mental Health Act. The 1959 Act emphasized that the majority of admissions to psychiatric hospitals should be informal and that treatment should be in the least restrictive situation possible. In practice, this meant that wards were unlocked, patients ceased to be treated like prisoners, and except in the most serious of cases, patients could discharge themselves. The category of "voluntary" patient was abolished as being incompatible with the underlying philosophy of the new law and its approach to the treatment and care of psychiatric patients that was to bring psychiatric hospitals as much into line with general hospitals as possible. We will return to the anomalous position of the "voluntary" patients in a moment when discussing the Mental Health Review Tribunal.

The second point that is raised by paragraph 63 concerns alternative facilities to compulsory in-patient care. The options are very restricted, other than attendance at a out-patient clinic. One has to bear in mind that the options of being able to treat a psychiatric patient without recourse to compulsion are much greater when the illness or relapse is detected early, rather than when the situation has reached a crisis point and is no longer containable in the home. Although there are day hospitals, these tend to be used for the maintenance of long-term patients, rather than for the early detection and treatment of new or relapsing cases in non-custodial conditions. Despite many pleas from various professionals and a recommendation in a Government report, the health authorities (ie, the Government) have never established a crisis intervention service that would provide domiciliary visits, among other services. Families are left to cope alone at home, unless they can persuade the patient to attend the out-patient clinic. If they cannot cope, their only recourse is to call the police who provide, by default and without training, the only crisis domiciliary service available to psychiatric patients and their families.

#### **PARAGRAPH 69(B): THE MENTAL HEALTH REVIEW TRIBUNAL**

It should never be forgotten that psychiatric patients are the only groups of people in our society who can be legally detained for extremely long periods of time without having

committed a crime. This detention occurs with none of the benefits that are lavished on criminals; no presumption of innocence, no court appearance, no legal aid, no examination of the evidence, no trial by jury, no appeal, no determinate sentence. In order to redress some of this inequity the Government introduced the Mental Health Review Tribunal in the 1989 amended Mental Health Ordinance. The Tribunal consists of a chairman (who is always a judge), a qualified psychiatrist, a social worker and an interested lay member. Amongst other things, they are empowered to discharge, absolutely or conditionally, patients detained under the Mental Health ordinance. The Government, in its Report, makes much of the Tribunal as the major protection of detained patients' rights. There is no time here to discuss in this proposition, but I would like to draw some of the major issues to your attention.

1. As the Government states in paragraph 69(b) of the Report, legal aid is not granted to people wishing to be represented by a lawyer at a Mental Health Review Tribunal. The Government is well aware that the majority of people appearing before the Tribunal are from the lower socio-economic classes, most of whom would be unable to afford a lawyer. Thus the Government can congratulate itself on its protection of human rights (representation is permitted) safe in the knowledge that such rights are most unlikely ever to be invoked. Attempts by a non-governmental organization (the Richmond Fellowship of Hong Kong) to establish a free representation system (involving social workers knowledgeable about mental and trained in advocacy, rather than lawyers) met with very little support and was eventually abandoned. Representation for patients seems to be viewed with deep suspicion by many of those involved in the Tribunal.

2. In approximately the first three years of its operation, the Tribunal discharged about 8% of the cases that it heard. This includes both those with and without a criminal history. It is hard to make a comparison, but as a rough guide, research that was done on the British Mental Health Review Tribunal found that about 11% of criminal patients and upwards of 40% of compulsorily detained but non-criminal patients were discharged by the Tribunal. Thus the figures in Hong Kong seem comparatively low. On one hand it might be possible to argue that this demonstrates that few people are unnecessarily detained in Hong Kong. I don't personally find this explanation very convincing. On the other, it could be said that other factors militate against discharge. Tribunal members in Hong Kong may be more conservative than their counterparts in the UK. The range of community facilities in Hong Kong may be less than in the UK so that there are fewer options when it comes to considering discharge. Families in Hong Kong may be less willing, or not have the resources

(for instance, housing), to offer to care for psychiatrically ill family members. The general population may be much less willing to absorb psychiatric patients back into the community. Such external factors affect the ability of Tribunal members to carry out their task of discharging those who do not need custodial care. And they undermine the Government's argument that the Tribunal provides "an important safeguard".

3. "Voluntary" patients have no rights of appeal to the Tribunal because they are not categorized as compulsorily detained. Yet they may remain in hospital many years in this anomalous position of being neither truly compulsory nor truly voluntary, but subject always to the threat of being detained if they try to leave, so feeling that such a move is hopeless. In addition, concern has been expressed by the judge who set up the Tribunal that sometimes the status of compulsory patients is changed to "voluntary" status by hospital doctors shortly before the Tribunal hearing so that they will lose their right to have their case considered by the Tribunal.

#### **PARAGRAPH 69(A): GIVING PATIENTS INFORMATION ABOUT THEIR RIGHTS**

Paragraph 69(a) of the Government Report claims that: "All detained patients must be given an explanation of their rights under the Mental Health Ordinance. The matters covered must include the procedures for securing their discharge, the conduct of their treatment, how they can make a complaint and their rights in relation to the Mental Health Review Tribunals". Such a statement, without evidence to back it up, should not be taken at face value. The statement includes no details of who is responsible, whether the information is presented in written or oral form, if it is publicly on permanent display, and so on. There is nothing in the Ordinance that makes such information compulsory. So, it is a matter of good practice and therefore at the whim of staff concerned. Compare this with the detailed information given in paragraph 128 (of the Government Report) on children's homes, where it is stated that notices concerning rights and complaints procedures must be prominently displayed, including the names and telephone numbers of the supervisor and the Commissioner for Administrative Complaints! Why should different standards apply for psychiatric patients?

What makes me particularly doubtful as to whether the claims in paragraph 69(a) are carried out concerns personal experience over an issue that arose concerning the Tribunal. It is mandatory that all patients must be given copies of the medical and social work reports concerning them that are presented to the Tribunal. However, these reports are in English and the vast majority of the patients cannot understand them. This is another example of a

right the Government appears to give with one hand, but ensures is useless with the other. Initially, the Richmond Fellowship (an NGO) employed a social worker (with funding sponsored by the Keswick Foundation) to offer advice to patients appearing before the Tribunal. One of the worker's duties was to translate the reports for them. However, when the funding ended and the Government refused to subvent the service the Richmond Fellowship entered into a protracted correspondence with the hospital and Government departments about who would be responsible for translating the reports. Over months of correspondence, we never received a satisfactory reply. A satisfactory reply would have consisted of saying which profession would take up this task (nurse, social worker or doctor) and that it would be carried out in every case without exception. If a right which is supported by the law cannot be guaranteed, what chance is there for other rights?

#### **PARAGRAPHS 92 AND 93: ABUSE, COMPLAINTS AND REDRESS**

In paragraphs 92 and 93 of the Government Report, the Government mentions that patients who are ill-treated can lodge a complaint with family or friends, with the Medical Superintendent or a visiting Justice of the Peace (two visit each gazetted hospital each month). They also have recourse to the courts for civil redress. It is virtually inconceivable that a psychiatric patient who has been incarcerated for many years would have the courage or ability to pursue any of these courses of action. Even where they have a family who still cares enough to visit, it is unlikely that they would take up a case against the hospital unless it was of the most blatant sort. The JPs can hardly see 2,000 patients a month. And, how is a patient on a locked ward supposed to get in touch with one? Or, indeed, how is a patient supposed to get in touch with the Medical Superintendent? If through a staff member, their attempt may be subverted. And would they be believed, even if they did?

What are the mechanisms to pursue complaints fairly for all (including the staff) concerned? This is not to suggest that either of the two large psychiatric hospitals has major problems with the abuse of patients. There is no evidence that this is the case. But when very vulnerable people are locked up with no access to the outside world, many abandoned by their families, it is only proper that the Government sees that procedures are in place that truly safeguard them from abuse and give them channels of complaint that are accessible, affordable and independent. What is described in paragraphs 92 and 93 does not meet those criteria.

## **SUMMARY**

The main points raised here are:

1. The anomalous position of "voluntary" patients.
2. The lack of community facilities for treatment and aftercare that almost certainly contribute to the lengthy detention of some patients.
3. Mental Health Tribunal issues:
  - (a) Legal aid is not granted for representing patients at their hearing or helping them to prepare their case.
  - (b) The Tribunal has a low discharge rate and the reasons for this need to be examined and action taken.
  - (c) Is there a need to extend rights of appeal to voluntary patients?
4. There are grounds for concern about whether and how patients are being informed of their rights.
5. There is a need to ensure that procedures for pursuing complaints by patients are accessible, affordable and independent.

## **RECOMMENDATIONS**

There are, of course, many recommendations that could be made. Those given here are chosen because they are achievable in a reasonable length of time.

1. Extend legal aid to cover the preparation for and appearance to represent patients at Mental Health Review Tribunals.
2. Extend rights to a tribunal hearing to voluntary patients who have been detained for three or more years.
3. Expend more effort and organization to ensure that patients are truly informed of their rights at all stages of the detention and appeal process.
4. Devise a patients' complaints procedure that is accessible, independent and affordable, and that ensures that recommendations are followed up.

## **CONCLUSIONS**

Whenever I am asked to give a paper at a Seminar of this sort, it is inevitable that the paper is critical. It is not meant to imply personal criticism of the people who spend their lives, as I used to, in the direct care of psychiatric patients. Theirs is a difficult and demanding job that does not receive the recognition it deserves. Most of the time they are working in under-

resourced environments, turning the philosophy of "make do and mend" into an art form. Thus when I make critical comments, it is not only in support of the patients whose lives are marred doubly; first by the illness and secondly by long-term institutionalization. It is also in recognition of the staff who, on the whole, deserve much better than they get from the bureaucracies in which they work.

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# **THE TORTURE CONVENTION AND VIETNAMESE REFUGEES IN HONG KONG**

**BY: Ms Pam Baker  
Refugee Concern**



## THE TORTURE CONVENTION AND VIETNAMESE REFUGEES IN HONG KONG

PAM BAKER<sup>1</sup>

### TORTURE

**THE DICTIONARY DEFINITION OF TORTURE.** The dictionary definition of "torture" is the infliction of severe bodily pain especially as a punishment or as a means of persuasion. In our minds the word conjures up a horrific picture of deliberate cruelty in a one-on-one situation, in a hidden place, the hooded figure with the gruesome instruments prepared to commit atrocities upon another human being.

**THE CONVENTION<sup>2</sup> DEFINITION IS WIDER.** Torture is any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person by or at the instigation of, or with the consent and acquiescence of, a public official for such purposes as persuasion, punishment, discrimination, etc. It is therefore not characterised as one-on-one, and can indeed be inflicted by remote control.

***HONG KONG CRIMES (TORTURE) ORDINANCE<sup>3</sup>*** defines the offence as a public official intentionally inflicting severe pain or suffering on another in the performance or purported performance of his official duties, or any other person inflicting such severe pain intentionally with the consent or acquiescence or at the instigation of a public official. The statutory defence is for the person charged to prove that he had lawful authority, justification or excuse.

Implicit in all the definitions is that the torturer has power over the tortured.

The Hong Kong Government feels able to state categorically several times over, in

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<sup>1</sup> Refugee Concern

<sup>2</sup> The Convention referred to is the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>3</sup> Chapter 427 of the Laws of Hong Kong

its Initial Report<sup>4</sup> -- "There has not been any reported case of torture in Hong Kong as defined in the Ordinance." Furthermore the Government confidently states that no reports show that illegal immigrants returned to China have been tortured, and no Vietnamese forced back to Vietnam has been persecuted. This statement attempts to justify their expulsion by force, and to satisfy Article 3 of the Convention. The self satisfied balloon of the Government Report cries out to be punctured.

We beg to differ from the Government's assessment of its own performance.

#### THE VIETNAMESE ASYLUM SEEKERS

What picture does the Initial Report by Hong Kong (under Article 19 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) paint of the situation with respect to the asylum-seekers?

#### ARTICLE 3. NON-REFOULEMENT OF REFUGEES

The Government Report<sup>5</sup> dumps responsibility for determination of refugee status of Vietnamese asylum seekers fair and square on UNHCR and their Comprehensive Plan of Action. Despite ample evidence to the contrary, the Government is determined to find that all was well with Hong Kong's screening process. This is neither the time nor the place to go into or to controvert their justifications in detail. Suffice it to say that over the years there have been authoritative reports of the flaws in the system, and that Congressional hearings in Washington in July this year demonstrated that the results were, to say the least, unsatisfactory, in every country in South East Asia which had taken in boat people. The Government Report concludes with the observation that there has not been a single substantiated case of persecution or discrimination against any returnee. I may just observe that those who are forced back are not "monitored" by U.N.H.C.R. The British embassy in Vietnam has responsibility for them. In one celebrated case two public trials of a well known activist from the camps in Hong Kong are said to have taken place, while the embassy was assuring us that they had been denied access to the prisoner or to the warrant issued for his

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<sup>4</sup> I refer to the *Initial Report by Hong Kong under Article 19 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, (the "Government Report" which was submitted recently to the United Nations Committee Against Torture.

<sup>5</sup> Paragraph 24, Page 30.

arrest. They saw him in prison eventually, after he was sentenced to life imprisonment, when of course he expressed remorse for his crimes. What kind of protection is that?

The fact remains that no one can say with their hand on their heart that no refugee has been or will be returned to Vietnam.

#### **ARTICLE 1: PAIN AND SUFFERING.**

It is unfortunate that the videos which so conscientiously record the actions of the PTU, Police and Correctional Services Officers during operations in Vietnamese detention centres are not available to the public. We all hear a lot about them, but they are for internal use only. It would have been a graphic start to this submission to show an example of torture carried out here by these public officials against Vietnamese refugees. Assaults and beatings are captured on those videos, officers firing teargas canisters directly at refugees, filling huts with noxious fumes when they know there are families in those confined spaces seeking refuge from the violence outside.

Those videos were available to the two Justices of the Peace who conducted an enquiry following a notorious operation in Section 7 of Whitehead Detention Centre on 7 April 1994. Their painstaking Report catalogued violent incidents, and they were critical of failure to alert the Vietnamese to the authorities' intention to use mace and teargas. They found attempts to do so were inadequate, that risk of injury was underestimated, that a request for an independent monitor was dismissed, and that no negotiations took place. The Jps found that the quantity of tear gas fired was excessive. They found that there was widespread assault by CSD officers of certain people in one block. In short they found the Government inept.

These mild finger wagging criticisms failed to address the issue of torture. The treatment meted out to Vietnamese on that occasion and on others before and after it qualifies as torture within the meaning of the Convention.

On 7 April 1994 510 tear gas canisters were fired, and that was found to be excessive by the Jps who had been appointed by the government to report. Some changes were made, and monitors were appointed to watch future operations. They were well meaning amateurs without proper briefing and with no powers, and the upshot of their involvement was, unwittingly, to give credibility to future operations. They have benefitted the Vietnamese not at all. If 510 canisters of CS tear gas were excessive in April 1994, *a fortiori* how excessive were the 3,250 teargas canisters fired at and around Vietnamese in Section 1 of Whitehead

on 20 May 1995? This, however, did not merit an enquiry despite repeated calls. This was a violation of Article 12 of the Convention. Instead of complying with the Convention, the Governor was heard exhorting his troops during the day of the operation, just like Maggie Thatcher in the Falklands. By then everyone had lost sight of the fact that these are innocent families, and had them firmly painted as enemies of the Hong Kong forces, and fit subjects for violence.

I turn now to one or two specific examples of torture from the Jps Report on 7 April 1994 operation, and the follow up report by Refugee Concern:

Refugee Concern Report taken from eyewitness accounts of Vietnamese and the Jps Report -- "With the water supply turned off, those suffering from the effects of tear gas, including tear gas canister burns, were not able to flush their injuries. People suffering from burns and from the effects of tear gas and mace were forced to use saliva to rinse their faces."<sup>6</sup>

Numerous other assaults took place. "The assaults usually involved 2 officers who punched, elbow punched, chopped, kicked and stepped upon some of the people transferred to Chi Ma Wan."<sup>7</sup>

Children were burned. A 2 year-old boy suffered two first degree burns to his right upper arm, each covering 2% of his body. He also suffered a third degree burn to the back of his right thigh which covered 1% of his body. This thigh burn required skin grafts. The same boy was not allowed to have his mother stay with him in hospital. "Neither of these children understand Cantonese and could not communicate with staff while they were alone in hospital."<sup>8</sup>

On 20 May 1995 an elderly woman, who already suffered from chest complaints following previous subjection to teargas, was severely beaten about the arms and body by an officer or officers who presumably perceived that she stood in their way. Her fear and distress were palpable.

On that same date, a baby girl was inside one of the huts in Section 3. While she was being held by her aunt, Police surrounded the hut and threw hand grenades into it to force the occupants to come out. When they emerged the baby was unconscious and seemed to have stopped breathing. One of the policemen took the child from the aunt and ran towards the clinic -- en route there is a water tank. The officer held the child's head under the tap and turned it on. He did not know that this was boiling water. Of course that was not

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<sup>6</sup> p 45, Refugee Concern, Whitehead Report (7 April 1994)

<sup>7</sup> p 66, Refugee Concern, Whitehead Report (7 April 1994)

<sup>8</sup> p 91, Refugee Concern, Whitehead Report (7 April 1994)

intentional, no doubt the officer was horrified. The burns have resulted in scarring, and they are a direct result of the torture inflicted by firing teargas into confined spaces. There is ample authority for the proposition that this dangerous.

Consider also the instructions on each teargas canister which include the warning that they must not be fired directly at persons as "Death or Injury" may result. There are numerous instances in which the launchers of teargas canisters were used as rifles, fired directly at the Vietnamese.

"The information gathered from the camps strongly suggests that the police were firing tear gas canisters directly at the Vietnamese, particularly those fleeing from one section to another. This has been denied, but it is admitted that "tear smoke was fired in the direction of the Vietnamese fleeing from Section 1 to prevent their escape."<sup>9</sup>

Intimidation is specifically enumerated in the United Nations definition of torture. The Refugee Concern Report re April 7 concluded that the paramilitary operation and the extreme show of force was meant to intimidate all asylum seekers to cease their peaceful hunger strike and demonstrations because they were considered counter productive to enrolment in the UNHCR's voluntary repatriation programme.<sup>10</sup> It would be very difficult for the Government to show that such treatment was justified.

#### MENTAL SUFFERING

So far I have only looked at physical torture.

The torture definition in the Convention and in the Ordinance states that it is immaterial whether pain or suffering is physical or mental and whether it is caused by an act or omission. Cruel, inhuman or degrading treatment is meted out to Vietnamese very single day that they remain in the detention centres, causing mental as well as physical suffering. What constitutes cruel, inhuman or degrading treatment? I have attached to this submission a letter written by Michael Darwyne, human rights lawyer, to the Committee against Torture on 29 April 1995. This is a clear exposition of the treatment suffered by detainees.

It is my submission that lengthy detention *per se* of innocent people with no end in sight constitutes inhuman treatment. It flouts every Human Rights Convention, every rule of protection of refugees, and in particular the children. Children must watch their parents

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<sup>9</sup> p 31, Refugee Concern, Report (20 May 1995)

<sup>10</sup> pp 111, 115 Refugee Concern Whitehead Report (7 April 1994)

debase themselves to the guards or the medical orderlies to achieve their most basic needs. No respect is shown to the people in the camps. They are clamped in handcuffs to go to Hospital, or to Court. They are pushed and shoved and shouted at on a regular basis. They have no control over their own lives. They are bereft of privacy. The longest period of detention to date is now seven years and four months. The damage that is being done is incalculable, though there will be plenty of theses and dissertations on the subject in future. The detention is for specific purposes by law, i.e. screening and thereafter removal. If these purposes cannot be completed in a reasonable time the detention becomes unacceptable to a civilized society.

#### **CAN THE STATUTORY DEFENCE OF LAWFUL AUTHORITY, JUSTIFICATION OR EXCUSE BE USED BY THE GOVERNMENT?**

Taking specific violent incidents first:

Those CSD Officers who were charged with assault following the 7 April incident certainly thought so. In the old phrase "they were following orders." Article 2(3) of the Torture Convention states that an order from a superior officer may not be invoked as a justification of torture.

The officers who fired their launchers directly at Vietnamese attempting to escape them could not have used that defence. Unfortunately they never had to try.

More generally, as to the overall treatment of the Vietnamese, the Convention is specific that exceptional circumstances or public emergencies cannot be invoked as a justification of torture. If indefinite arbitrary detention can be described as torture the Government cannot justify it by pleading the huge numbers arriving, nor that it was done as a deterrent.

What about the children in the camps? Now that Hong Kong has had the Convention on the Rights of the Child extended to it, there is an even stronger incentive for the Hong Kong government to protect the children within its jurisdiction. There is a reservation to the extension of that Convention relating to detention of the children of Asylum seekers. We would argue that any necessity there ever was to detain children has passed.

Confrontations such as those which occurred on the 7 April 1994 and 20 May 1995 will lead to post-traumatic stress disorder, a syndrome with which children have greater difficulty in coping than adults. Such experiences are piled on a mental state already damaged as a result of lengthy detention.

In a Refugee Concern Report<sup>11</sup> it is reported that "detention places children defenceless in the dangerous circumstances of detention. Unable to escape to safety, children are witnesses to gang activity, murder and rapes."

A quote from a 17 year-old boy is indicative of a tortured mind:

"I run, but there is nowhere to hide when people start fighting. I am scared; I want somebody to stop it, but who? . . . If only I weren't locked up I would feel safe. I would be able to get away from the problems.. But here I can't, not even for a little while."

Who could justify leaving a child in such a situation? Severe and continuing suffering is being inflicted on innocent people living in Hong Kong. They now total around 8,000 families. The deterrent purpose, never a justification, can no longer be used to justify detention. The number of arrivals has decreased to a trickle. There must be a change of direction if Hong Kong seeks to live up to its obligations under this and other Conventions.

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<sup>11</sup> 12 June 1991



## APPENDIX TO PAPER OF PAM BAKER



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Mr. Alessio Bruni  
Secretary  
Committee Against Torture  
International Instruments Section  
UN Centre for Human Rights  
8-14 Ave de la Pais  
1211 Geneva 10  
Switzerland

Saturday 29 April, 1995 19:32pm

Dear Mr. Bruni:

## re: Initial Report by Hong Kong under Art. 19

Please allow me to highlight three matters which are, in my view, relevant to be considered in relation to the Initial Report by Hong Kong under Article 19 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, published in 1995.

### (1) Treatment of Vietnamese Asylum Seekers in Detention

First, there is the question of the extent of severe pain and suffering, both physical and mental, being intentionally inflicted on Vietnamese asylum seekers incarcerated in concentration camps (called "Detention Centres") in Hong Kong apparently, (for there is no legislative sanction for it), for the purpose either of punishing them for coming to Hong Kong without travel documents, and/or for the purpose of intimidating them to "volunteer" to return to Vietnam, and/or by way of discrimination against them, when such pain and suffering are inflicted by or at the instigation of or with the consent or acquiescence of public officials or other persons acting in an official capacity, and otherwise than from or incidental to lawful sanctions.

Specifically, Vietnamese asylum seekers (who, it needs to be noted, have not been charged with or convicted of any crime) are:

1. locked up in a state of total deprivation of liberty in concrete and barbed wire enclosures which are extremely hot in summer and cold in winter; with cramped accommodation in uninsulated tin huts with small cubicles piled three on top of each other; which have no dining rooms; no privacy; primitive toilet and washing facilities; few recreational facilities; no telephones to which the detainees have access;(in spite of an offer by the Hong Kong Telecom to install them); which are guarded night and day by prison guards ("Correctional Services Officers" are the Hong Kong Prison Service guards) in sentry boxes, with three levels of 18 feet high barbed topped wire fences; lit up at night by search lights; with small tin huts as punishment blocks for administrative punitive measures administered without judicial process; and to which ordinary people, the press and lawyers have no access.

The only people allowed into the Detention Centres are UNHCR workers and agency workers approved by UNHCR and Justices of the Peace on periodic visits. (Even lawyers are restricted to dead-man zones between the Detention Centre first fences and the second and third fences.) There is a legislative system for other people to be made Visitors, but I am not aware of any who have been appointed and I have been repeatedly refused permission to be such a Visitor, and so have other people who are respectable and responsible. (Please see my attached letter EXHIBIT 1 dated 12 March 1993 to Mr. F.S. McCosh, the Commissioner of Correctional services.)

Whitehead Detention Centre, for example, is a purpose built detention centre which has the capacity to accommodate approximately 24,000 detainees; it has for some considerable time and until recently comprised 10 sections; it is surrounded by two perimeter steel mesh wire fences approximately 18 feet high, each with four rolls of barbed wire along the top. There are guard-boxes positioned at regular intervals around the Centre. Each section is cordoned off by its own 18 feet high steel mesh wire fence. Sheet metal plates cover the lower half of the section fences.

The pain suffered by the inmates occurs on two levels:

- a) personally, in the case of adults and children;
- b) vicariously, in the case of parents out of concern for the well-

being of children.

The injury takes two forms:-

**A) MENTAL - arising from :**

- 1) the actual imprisonment
- 2) general depression
- 3) fears of violence from the authorities
- 4) fears of mandatory repatriation
- 5) fears of violence from inmates
- 6) fears for health
- 7) family life stresses
- 8) child care stresses
- 9) inadequate and limited educational facilities
- 10) lack of privacy
- 11) sanitation concerns
- 12) physical safety concerns
- 13) lack of employment
- 14) screening worries
- 15) lack of recreation facilities

**B) PHYSICAL -in relation to**

- 1) daily living
- 2) eating
- 3) washing
- 4) toilet functions
- 5) sleeping

I refer the Committee to the Reports compiled on the inhumane, disgusting, deprived conditions of these Detention Centres, such as **DEFENCELESS IN DETENTION** (by Suzie Comerford) and other studies - which may possibly be available from Refugee Concern, Hong Kong, (fax 852-2780-7433) and to the transcript and judgment of the proceedings of the High Court in Pham Van Ngo v AG of Hong Kong, (available from the Attorney General of Hong Kong, 4/Floor Queensway Government Buildings, 66 Queensway, Hong Kong - fax 852-2877-3978). (The transcript runs to several hundred pages and is especially revealing.) Please also see

my letter EXHIBIT 2 to the Governor dated 20 August 1992 attached.

2. subjected to periodic attacks by Correctional Services Officers and Police officers using tear gas, mustard gas and truncheons; (the most horrific example was the attack on Whitehead Section 7 in April 1994 - A copy of the Government Report may be obtained from Attorney General of Hong Kong, 4/Floor Queensway Government Buildings, 66 Queensway, Hong Kong - fax 852-2877-3978). A copy of the Refugee Concern response to that Report (which is in many ways more interesting) may be obtained from Refugee Concern, Hong Kong, (fax 852-2780-7433).

3. subjected to intimidation and attacks by lawless elements in their own community who can operate freely because of a total lack of any Police Force presence in the Detention Centres (police to combat crime as opposed to Prison Guards to keep the residents locked up) and the withdrawal of all Prison Guards to the outer perimeters at night. The failure to provide proper policing (ie. law enforcement officers whose job is to protect the members of the community from crime, as opposed to being their captors; officers who would be recognised by the inmates as their protectors) inside the camps adds enormously to the stress and suffering of the inmates, who become victims to be preyed upon by bad elements, (of whom there are bound to be some in a community of 20,000). It is like taking all the police out of a town, and surrounding it with barbed wire, so that no one could escape from the criminals. It becomes a criminal's paradise.

4. subjected to prolonged and indefinite arbitrary detention, without having committed or being charged with any crime. In many cases the detention has lasted for more than FIVE YEARS.

To say the Vietnamese are free to volunteer to return to Vietnam appears not to be an answer since as recent litigation in the High Court has shown, many inmates can not return even after they volunteer because Vietnam will not accept them.

5. subjected to a screening system which has left many asylum seekers feeling they did not receive a fair and compassionate hearing.

As a result, many do still fear persecution in Vietnam. UNHCR assurances that not a single case of persecution has been reported do not seem to allay these fears and must be seen in the light of the lack of access to detainees in Vietnam - apart from the presence of a handful of UNHCR personnel who sometimes perform "monitoring" by a public, open visit to a detainee in his place of residence - which may be a less than sure indicator of a lack of persecution.

6. denied the minimum protection and facilities afforded to convicted criminals under the Prison Rules, (which do not apply to Vietnamese in concentration camps, who only have the Detention Centre Rules, which in many respects afford less guarantees of decent treatment.) (Copies of the Prison Rules and the Detention Centre Rules may be obtained from the Attorney General of Hong Kong, 4/Floor Queensway Government Buildings, 66 Queensway, Hong Kong - fax 852-2877-3978)

The scale and nature of the suffering inside Hong Kong's infamous Detention Centres will one day be "revealed", and - no doubt from a safe distance in time - people will ask "How could it ever have happened within such a modern, technological, civilised society?" Perhaps a senior official will publish his memoirs and tell us how he saw it was wrong at the time, but felt unable to do anything about it.

It can be stopped. It must be stopped.

The Detention Centres can be opened and the detainees allowed recognizances to enable them to work in Hong Kong until they make alternative arrangements for their future. (Having gone to so much trouble and at such personal risk to escape from communist Vietnam, they are not likely to want to stay in Hong Kong after communist China takes over anyway.)

Society will not collapse. There are precedents. Before detention was introduced, thousands of refugees were accommodated in open camps. More recently, and much to its credit, in my view, the Security Branch has granted release on recognizance to over 200 Vietnamese detainees in two groups. The first was a group who had volunteered to return to Vietnam but were required to remain in Hong Kong as witnesses. After being held in detention for over two years and challenging the legality of that detention in Court, the Security Branch allowed them to be released and provided

accommodation for them.

More recently, the Government released about 100 detainees who had volunteered to return to Vietnam but had been refused access to Vietnam. They are accommodated in an open camp and are allowed to work. Although on a limited scale, both releases hark back to the pre-detention days when all asylum seekers were accommodated in open camps. This system works perfectly well, and there has been no break-down in society. It provides a far more caring and civilised face to the treatment of asylum seekers and makes one feel proud to be a part of this society. Alas, the suffering caused by the incarceration of the majority of the detainees is presently continuing.

## (2) Imprisoned Witnesses

Second, there is the question of the extent of severe pain and suffering, both physical and mental, being intentionally inflicted on persons arrested as illegal immigrants in Hong Kong, apparently for the purpose of punishing them for coming to Hong Kong without travel documents, and/or for the purpose of intimidating them to be witnesses against those who helped them come to Hong Kong and/or by way of discrimination against them, when such pain and suffering are inflicted by or at the instigation of or with the consent or acquiescence of public officials or other persons acting in an official capacity, and otherwise than from or incidental to lawful sanctions.

Specifically, under section 32(4) of the Immigration Ordinance Cap. 115 an illegal immigrant may be locked up in prison under the authority of the Secretary for Security for up to 28 days, and then by order of a court for an indefinite number of 21 day periods. Prolonged and indefinite detention under this section is contrary to the spirit of the Bill of Rights, but can not be challenged under it, because of a special immunity put into the Bill of Rights for immigration matters.

Noneetheless, in so far as the Ordinance fails to give a Court any guidance on the criteria to be applied in considering whether to grant a detention order, it means that a Court is almost bound to grant renewed applications (and experience shows the Courts do so) so that it results in arbitrary detention which is protected by "lawful sanction" only in the most formal sense, with little substantive consideration for or protection of the rights

of the individual affected.

In practise what was (until a recent exposure) happening routinely was that young women from China who were arrested as illegal immigrants were locked up in Victoria Prison for up to one year, supposedly on a 28 days plus further 21 days renewals, in order to keep them in Hong Kong to serve as witnesses against the people who were suspected of having brought them into Hong Kong.

A scandal erupted when a law lecturer discovered two young girls one of whom had been locked up in Victoria Prison for over a year - cut off from her family in China, from friends and denied legal aid (which could not begin to apply since she had been charged with no crime.) The Governor felt obliged to intervene and after a lot of coming and going, during which time they were transferred to successively less barbarous regimes of custody, they were eventually released and allowed to return to China.

I enclose a copy of my submissions to a Legislative Council Panel later formed to consider the repeal of this draconian law. It has not been repealed to date.

Locking up young girls in prison, when they have no inkling of how long they will be imprisoned and without charging them with any offence, and without providing them with access to legal advice, causes mental anguish and possibly long term psychological harm.

A host of excuses about the difficulty of holding witnesses against evil snake-heads has been offered. The fact of the matter is that it runs contrary to every tenet of a civilised legal system to imprison foreign visitors for an indefinite period without charge because they have illegally entered your country just so that they can testify in court against someone at some far uncertain future date. We are told that in future every effort will be made to issue recognizances. The question then is: has anyone been detained under s. 32 at all since this case? The potential for this to be repeated remains while s. 32 remains on the statute book.

### (3) Split Families

Third, there is the question of the extent of pain and suffering being inflicted when the Immigration Department splits up families through

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deportation and removal orders, separating young children from one or both of their parents, because one or both of them is not a lawful resident of Hong Kong.

The case of Hai Ho Tak is the most recent example. A little boy who had lived all his life in Hong Kong was "deported" (read exiled) to the Peoples Republic of China because he could not prove he had been born in Hong Kong. (Please see my attached letter EXHIBIT 3 to the Governor's wife, Mrs. Patten, dated 17 May 1994, and EXHIBIT 4 to the Governor dated 21 May 1994.) Eventually, after a long and miserable separation, (during which time the case was raised in Geneva) he was allowed to come back to Hong Kong.

Every country has sad and tough "immigration" cases to handle, but Hong Kong's "tough" line is indefensible since most of the people affected are Chinese living and working across the border, and more and more of them (especially those with relatives) will soon be allowed to Hong Kong anyway.

The problem is not however limited to Chinese families. (Please see my attached letter EXHIBIT 5 to the Governor dated 27 August 1992.)

Each of these three issues has been made the subject of contemporaneous complaint to the authorities. The pain and suffering caused by each of them, (with the possible exception of imprisoned witnesses) continues to this day.

Yours sincerely

*Michael Darwyne*  
Michael T. Darwyne

cc.(without enclosures)

Mr. J. Assadi, Chief of Mission, UNHCR

Mrs. Pamela Baker & Mr. Rob Brook, Messrs Pam Baker & Company.

Ms. Moira Holden, The Hong Kong Standard

Mr. Lai Ming Kei, Commissioner of Correctional Services

Mr. Peter Lai, Secretary for Security.

Mr. L.M.Y. Leung Director of Immigration

Ms. Gladys Li Q.C., Chairman, Hong Kong Bar Association.  
Mr. K.H. Li, Commissioner of Police  
Hon. Christine Loh, Legislative Councillor.  
Mr. J. Mathews, The Hon. Attorney General of Hong Kong  
Mr. Peter Nguyen Q.C., Director of Public Prosecutions.  
Mr. Chris Patten, The Governor of Hong Kong  
Mr. James Rice, Lingnan College, Hong Kong.

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