

## QUICK SUMMARY ON THE LAW ON TORTURE, AND CRUEL, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT

### 1) APPLICATION IN HONG KONG

Hong Kong is a signatory to the *Convention Against Torture* (“CAT”)<sup>1</sup> and the 1966 *International Covenant on Civil and Political Rights* (“ICCPR”)<sup>2</sup>. CAT sets out a prohibition against torture, and ICCPR prohibits torture or cruel, inhuman and degrading treatment or punishment (“CIDTP”).

The ICCPR prohibition is incorporated into Hong Kong law through Article 3 of section 8 of the Hong Kong Bill of Rights Ordinance<sup>3</sup> which mirrors the ICCPR formulation that “*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*” In contrast, the prohibition on torture as formulated in CAT is implemented in Hong Kong only by way of a policy to comply<sup>4</sup>.

In the Court of Final Appeal (CFA) decision in *Prabakar*, the court held that the government’s policy of not returning a person to a place where the person may be at risk of torture must be implemented with high standards of fairness; this led to the creation of the torture screening mechanism and implementation of the prohibition on return to torture as formulated in CAT through Part VII of the Immigration Ordinance<sup>5</sup>. In the subsequent CFA case of *Ubamaka*, the court further held that there is an obligation on the government to independently assess claims in relation to risk of CIDTP. This led to an expansion of the screening mechanism to cover risk of CIDTP as well as torture.

The prohibition of torture and CIDTP is an **absolute and non-derogable** right<sup>6</sup>. Unlike refugee status, in relation to the prohibition on torture and CIDTP, there is no balancing of interests involving exclusion.

### 2) NON-REFOULEMENT

States having ratified either the ICCPR or the CAT are bound to not remove a person to a country where he/she might face a real risk of being subject to torture or cruel, inhuman or degrading treatment or punishment. This has been reaffirmed by the Human Rights Committee<sup>7</sup>.

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<sup>1</sup> <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>

For background to CAT see <http://legal.un.org/avl/ha/catcidtp/catcidtp.html>.

<sup>2</sup> <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

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[http://www.legislation.gov.hk/blis\\_pdf.nsf/6799165D2FEE3FA94825755E0033E532/AE5E078A7CF8E845482575EE007916D8?OpenDocument&bt=0](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/AE5E078A7CF8E845482575EE007916D8?OpenDocument&bt=0)

<sup>4</sup> Expressed in the HKSAR government’s report to the UN Committee Against Torture in 1999, (Part 1) available at <http://www.cmab.gov.hk/en/issues/human1.htm>

<sup>5</sup> [http://www.legislation.gov.hk/blis\\_ind.nsf/WebView?OpenAgent&vwpg=CURALLENGDOC\\*115\\*100\\*115.1](http://www.legislation.gov.hk/blis_ind.nsf/WebView?OpenAgent&vwpg=CURALLENGDOC*115*100*115.1)

<sup>6</sup> *Secretary for Security v. Sakthevel Prabakar*, FAVC 16 of 2003, Hong Kong: Court of Final Appeal, 8 June 2004, available at: <http://www.refworld.org/docid/413da4754.html>

However, the risk of torture/CIDTP must be objectively assessed. In Hong Kong, the Court of Appeal has held that there must be a “**substantial grounds**” for the risk of torture/CIDTP; this is “more than a mere possibility”<sup>8</sup>.

### 3) TORTURE UNDER THE CAT

Article 1 of CAT and section 37U of the Immigration Ordinance contain a definition of torture, which states that:

“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.” (emphasis added)

Thus, elements to be taken into account for qualifying an act as torture are the following:

- 1) Nature of the act - encompasses both acts and omissions that inflict severe pain or suffering (see below re severity).
- 2) Intention of the perpetrator - for the time being, negligence is not sufficient to qualify an act as torture under international law, whereas recklessness might suffice.
- 3) Purpose - the list established according to CAT may be viewed as indicative rather than exhaustive<sup>9</sup>.
- 4) Involvement of public officials - note:
  - The Committee against Torture recognizes as “*person acting in an official capacity*” de facto authorities whose authority is comparable to governmental authority.
  - The European Court of Human Rights (ECtHR) has considered that States’ responsibility has both a *procedural* and a *substantial* aspect - States have the obligation to refrain from committing any act of torture or CIDTP, but also to protect persons under its jurisdiction from being subject to these acts by State or non-State actors<sup>10</sup>. Also a State has the obligation to investigate any act of torture or CIDTP inflicted either by its agents or non-State actors. As a consequence, States have been found responsible for acts of torture or CIDTP committed by private actors.

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<sup>7</sup> Soering v United Kingdom 161 Eur. Ct. H.R. (ser. A) (1989), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57619>; and Human Rights Committee, General Comment No. 20 on Art 7 of the ICCPR at Art 9 see <http://www1.umn.edu/humanrts/gencomm/hrcom20.htm>.

<sup>8</sup> *TK v. Michael C Jenkins, ESQ and another*, HCAL 126/2010, Hong Kong: High Court, 21 October 2011 available at <http://www.refworld.org/docid/4f14316e2.html>

<sup>9</sup> M Novak, *UN Convention against Torture, A commentary, Oxford Commentaries on International Law*, Oxford University Press, p 75

<sup>10</sup> See for example, *A v UK*, [1998] 2 F.L.R. 959 (ECHR) 23 September 1998, at <http://hudoc.echr.coe.int/hudoc/>

For the purposes of ascertaining whether there are such grounds, the authorities must take into account all relevant considerations including, where applicable, the existence in the risk State of a consistent pattern of gross, flagrant or mass violations of human rights<sup>11</sup>.

#### 4) TORTURE UNDER THE ICCPR

The ICCPR does not provide a legal definition of torture or CIDTP. In fact, the Human Rights Committee considered that the ICCPR does not contain any definition of the concepts covered by article 7 nor does the Committee consider it necessary to draw up a list of prohibited acts<sup>12</sup>.

This factual approach enables the Committee to encompass within the scope of this prohibition, acts that would not necessarily fall within the concept of torture at the time if a strict legal definition would have been adopted.

#### 5) CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Acts which meet a certain threshold of severity but which fall short of the definition of “torture” as defined in CAT (or as understood under ICCPR) may be considered CIDTP. CIDTP is prohibited under Article 7 ICCPR; and under Article 16 of CAT, States must take action to prevent it.

##### a) Distinguishing Torture and CIDTP

The Human Rights Committee has said that it considers it unnecessary to draw sharp distinctions between the forms of treatment, and that the distinctions between torture and CIDTP depend on the nature, purpose and the severity of treatment.<sup>13</sup>

International jurisprudence has generally regarded “torture”:

1. as a severe or aggravated form of CIDTP
2. with a purpose (in line with CAT)
3. in a context in which the victim is powerless.

The ECtHR (dealing with the European Convention of Human Rights, which contains the same prohibition as Article 7 ICCPR in that it prohibits but does not define torture or CIDTP) saw that the distinction derived from a difference in the **intensity of the suffering** inflicted; which allows the special stigma of torture to attach only to deliberate inhuman treatment causing very serious and cruel suffering.

However the jurisprudence of the ECtHR has moved away from relying on intensity of pain as a sole determinative factor in classifying treatment as “torture” over CIDTP; it depends on the **purpose for which force is employed**. And other observers have noted that the distinction between torture and

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<sup>11</sup> CAT Article 3(2)

<sup>12</sup> Human Rights Committee, General Comment No. 20 on Art 7 of the ICCPR at Art 4 – see <http://www1.umn.edu/humanrts/gencomm/hrcom20.htm>

<sup>13</sup> Supra at note 12.

CIDTP lies not in the *level of intensity of pain or suffering* but in the purpose of the torture (under CAT) and the sense of powerlessness which is inherent in torture<sup>14</sup>.

The distinction between torture and CIDTP under CAT (though not ICCPR) is important because CAT requires states to prohibit *refoulement* to torture and to establish judicial remedies and provide extra remedies for torture victims; but these do not apply to CIDTP.

### **b) Proportionality in CIDTP**

Even “severe suffering” might be justifiable in some circumstances (e.g. law enforcement) but it could never be justified in torture because torture contains the additional purposive element (e.g. extracting a confession). So, inherent in the concept of CIDTP, but not torture, is the question of proportionality of the exercise of use of force. Since law enforcement may legitimately require the use of force, only if such use of force is **disproportionate** in relation to the purpose to be achieved and results in pain or suffering meeting a certain threshold, will it amount to CIDTP.

The principle of proportionality in CIDTP only applies in situations in where the victim is in a position to resist the use of force - i.e. the principle of proportionality ceases to apply if he/she is under the control of a law enforcement official and becomes powerless (e.g. in detention), and the prohibition on CIDTP becomes absolute<sup>15</sup>.

### **c) Is Treatment Cruel, Inhuman or Degrading?**

In order for a punishment or treatment associated with it to be ‘*inhuman*’ or ‘*degrading*’, the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.

Acts aimed at humiliating the victim constitute degrading treatment or punishment even where severe pain has not been inflicted.

## **6) SEVERITY OF HARM**

An act of ill-treatment, whether it is torture or CIDTP, must attain a **minimum level of severity**. The assessment of this threshold of severity is made in regard of the specific circumstances of the case and the Courts have considered the following:

- 1) duration of treatment;
- 2) physical effects of treatment;
- 3) mental effects of treatment; and
- 4) sex, age and state of health of the victim.

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<sup>14</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. E/CN.4/2006.6 at para 39 available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/168/09/PDF/G0516809.pdf?OpenElement>

<sup>15</sup> Supra at note 14, para 40.

In *Ubamaka*, the Court of Final Appeal stated that a person must establish that, once expelled, he faces a real risk of being subjected to torture or to CIDTP and the treatment shall attain "a minimum level of severity"<sup>16</sup>.

## 7) TYPES OF ACTS THAT MAY AMOUNT TO TORTURE AND/OR CIDTP

The following acts, depending on severity, are some examples of treatment which may amount to torture or CIDTP:

- Inhuman conditions of detention - incommunicado detention and solitary confinement. For example, complete sensory and social isolation destroys the personality and constitutes a form of CIDTP. (Nonetheless, certain forms of solitary confinement will be tolerated because of the necessity of the situation and proportionality).
- Domestic violence often entails extreme physical and psychological suffering. However, the issue of "state involvement" is challenging since they are often considered to be "a private matter between spouses rather than a state problem". But States have a duty to prevent harm being inflicted upon women, including harm which occurs in a domestic context<sup>17</sup>.
- Psychological torture - threats of torture; forcing persons to watch others being tortured.
- Forced disappearances.

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<sup>16</sup> *Ubamaka Edward Wilson v. The Secretary for Security and another*, CACV138/2009, Hong Kong: High Court, 19 November 2010, available at: <http://www.refworld.org/docid/4f14507d2.html> (ss 172, 173)

<sup>17</sup> For example see *A v UK*, supra at note 10.