

TOWARD COMPREHENSIVE REFUGEE LEGISLATION IN HONG KONG? REFLECTIONS ON REFORM OF THE “TORTURE SCREENING” PROCEDURES

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Introduction

This comment reflects on the Hong Kong government’s announcement that it plans to reform its “torture screening” mechanism and provide a statutory framework for the consideration of claims under Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention). I argue that the new mechanism should go beyond the requirements of the Torture Convention and also examine claims for protection from *non-refoulement* (non-return) based on other standards in customary international law and the International Covenant on Civil and Political Rights (ICCPR).

Background

As a result of the Court of Final Appeal’s (CFA) judgment in *Secretary for Security v Sakthevel Prabakar (Prabakar)*¹ in 2004, the Hong Kong Government established an administrative screening procedure to prevent the *refoulement* (return or expulsion) of individuals to states where they would be in danger of torture. The Government had articulated its policy to respect its obligation under Article 3 of the Torture Convention, which prohibits *refoulement*,² in its report to the United Nations Com-

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¹ [2005] 1 HKLRD 289; [2004] HKEC 678.

² Article 3(1) of the Torture Convention provides that “No State Party shall expel, return (‘refoul’) 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”. Article 3(2) states that “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 in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights”.

mittee against Torture in 1999.³ The court cited common law principles of procedural fairness and held that high standards of fairness are required when considering torture claims since “[a] determination under the [non-refoulement] policy was plainly of momentous importance to the individual concerned” and that “[l]ife, limb and [the claimant’s] fundamental right not to be subjected to torture was involved ...”.⁴

The CFA, however, concluded that the Hong Kong Government’s sole reliance on determinations of refugee status made by the Hong Kong Sub-office of the United Nations High Commissioner for Refugees (UNHCR) was insufficient. The UNHCR’s refugee status determination procedures are designed to prevent the *refoulement* of refugees as defined by article 1(A) (2) of the Refugee Convention.⁵ Article 33 of the Convention prohibits the expulsion or return of refugees to the frontiers of territories where their lives or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion (the Convention grounds). Although valid claims under the Torture Convention may also fall within the refugee framework, this is not always the case. While torture would certainly amount to “persecution”, it may not be based on one of the Convention grounds and the Torture Convention does not require this nexus. After the establishment of the government’s torture screening procedures, the UNHCR’s refugee status determination process has continued to operate separately and in parallel. Many claimants have accessed both mechanisms, either simultaneously or sequentially, and this overlap has created delays and duplication of resources, and has been blamed for encouraging disingenuous claims.

In December 2008, the Court of First Instance, in a strongly worded judgment, held that the Immigration Department’s torture screening procedures did not conform to the fairness requirements set out in the *Prabakar* judgment.⁶ Saunders J ruled that a number of procedural limitations, including the lack of publicly funded legal assistance, were unlawful. In response, the government halted further screening of claims and announced in February 2009 that it would consider developing a legislative framework governing the processing of torture claims.⁷ In July 2009, the Security

³ See China’s third periodic report under the Torture Convention, UN doc. CAT/C/39/Add.2, 4 May 1999, para 122, submitted pursuant to Art 19 of the Torture Convention. The Committee against Torture is the body which monitors the implementation of states’ obligations under the Convention.

⁴ See n 1 above.

⁵ According to Art 1(A)(2) of the Refugee Convention, a “refugee” must have a well-founded fear of persecution based on one of five grounds (race, religion, religion, nationality, membership of a particular social group or political opinion).

⁶ *FB v Director of Immigration* [2008] HKEC 2072.

⁷ Security Bureau, Hong Kong SAR Government, Paper for discussion by the Legislative Council Panel on Security on 3 February 2009, LC Paper No CB(2)737/08-09(03), January 2009, Annex B.

Bureau further indicated that it would implement “enhanced screening procedures” by September or October 2009 and would brief the Legislative Council’s panel on security on its plans to introduce legislation by the end of 2009.⁸ At the same time, the government reiterated its position that it is not bound by the Refugee Convention and has no obligations to handle refugee status determination.⁹ This position has been challenged, however, in *C v Director of immigration*.¹⁰ In that case, the applicants argued that Hong Kong has an obligation under customary international law to refrain from the *refoulement* of refugees and must therefore establish refugee status determination procedures. Although the applicants lost at first instance, their appeal was considered.

Hong Kong’s Non-Refoulement Obligations

Although Hong Kong has consistently resisted application of the Refugee Convention to its territory, it nevertheless has international and domestic human rights obligations which provide considerable protection from *refoulement* for claimants. Indeed, Hong Kong’s legal obligations extend beyond Article 3 of the Torture Convention and are also based on broader standards reflected in the ICCPR and customary international law. The new statutory screening procedures in Hong Kong should incorporate these more comprehensive standards. They should be designed to prevent the return of individuals to territories where they could face a range of human rights violations, including torture, arbitrary deprivation of life, cruel, inhuman, and degrading treatment or punishment, and other forms of persecution.

The ICCPR, the Basic Law and the Bill of Rights

The Human Rights Committee, the body which monitors states’ implementation of their obligations under the ICCPR, has interpreted the Covenant to include an implicit right to *non-refoulement* when “there is a real risk that [an individual’s] rights under the Covenant will be violated in another jurisdiction”.¹¹ Articles 6 and 7 are particularly relevant. Article 6 provides for a right to be free from arbitrary deprivation of life and Article 7 prohibits torture or cruel, inhuman, or degrading treatment or punish-

⁸ The Security Bureau provided a further update on the development of new screening procedures on 29 September 2009. See Security Bureau, Hong Kong SAR Government, “Torture Claim Screening Mechanism: Latest Progress,” 29 September 2009, LC Paper No. CB(2)2514/08-09(01).

⁹ *Ibid.*

¹⁰ *C v Director of Immigration* [2008] HKCU 256.

¹¹ Human Rights Committee, *A.R.J v Australia*, Communication No 692/1996, UN doc CCPR/C/60/D/692/1996, 11 August 1997, para 6.8.

ment. The Committee's jurisprudence clarifies that both of these provisions contain an implied right to *non-refoulement*. For example, in one of its General Comments, the Committee indicates that "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*" and that they "should indicate in their reports what measures they have adopted to that end".¹²

Articles 6 and 7 have been incorporated into Hong Kong law by Article 39 of the Basic Law and are duplicated in Articles 2 and 3 of the Hong Kong Bill of Rights Ordinance. Article 28 of the Basic Law contains similar articulations of fundamental human rights and also arguably provides for implicit protection for individuals fearing serious human rights violations upon return to their countries.¹³ In *Ubamaka Edward Wilson v Secretary for Security*, Reyes J recognised that the implicit right to *non-refoulement* in Hong Kong law includes a right not to be returned to inhuman treatment of a severity proscribed by the [Bill of Rights], the ICCPR and [the Torture Convention].¹⁴

Customary International Law

There is general consensus that a principle of *non-refoulement* exists in customary international law.¹⁵ While it reflects, in part, the obligation expressed in Article 33 of the Refugee Convention its content goes beyond this more narrow formulation. According to a comprehensive analysis by Lauterpacht and Bethlehem, this rule obligates states to ensure that "No person shall be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment..."¹⁶ In addition, "no person seeking asylum may be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or to return to a territory where he or she may face a threat of persecution or a threat to life, physical integrity, or liberty".¹⁷

¹² Human Rights Committee, General Comment 20, 1992, para 9.

¹³ Article 28 provides the right to inviolability of the freedom of the person and prohibits arbitrary or unlawful arrest, detention or imprisonment, arbitrary or unlawful search of the body, deprivation or restriction of the freedom of the person, torture, and arbitrary or unlawful deprivation of life.

¹⁴ [2009] HKEC 710 at [111].

¹⁵ Although a minority of scholars have argued otherwise.

¹⁶ Sir Elihu Lauterpacht and Daniel Bethlehem, "The scope and content of the principle of *non-refoulement*: Opinion", para 253(a). This analysis was cited favourably by Hartmann J in *C v Director of Immigration* (see n 10 above), at [103].

¹⁷ See Lauterpacht and Bethlehem (cited above, n 16), para 253(b).

Hong Kong's Court of First Instance held that rules of customary international law which do not conflict with domestic law are automatically incorporated into Hong Kong law.¹⁸ Although the court concluded that Hong Kong law is inconsistent with a rule of *non-refoulement* specific to the Refugee Convention, it did not consider the implications of the broader obligations discussed above which reflect human rights standards clearly applicable to Hong Kong.

Overlap Between Refugees and “Human Rights” Claimants

Although Hong Kong is not bound by the Refugee Convention, the explicit and implicit rights to non-refoulement in the Torture Convention and the ICCPR overlap considerably with the protection offered by Article 33 of the Refugee Convention. The Convention does not define the term “persecution” but recent state practice indicates that it amounts to serious human rights violations. James Hathaway’s suggestion that persecution is “the sustained or systemic violation of basic human rights demonstrative of a failure of state protection” has been accepted by a number of domestic courts.¹⁹ The UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status states that serious violations of human rights constitute persecution.²⁰ As a result, claims made under the Refugee Convention are often determined with reference to international human rights standards.

International and Comparative Resources

In addition to the scope of the *non-refoulement* obligations implemented by the new screening system, a number of other substantive and procedural issues need to be resolved during the legislative process. A few of these issues include: (1) the evidence necessary to establish the claim; (2) methods of assessing a claimant’s credibility; (3) the role of legal representatives and the training and qualifications necessary to ensure that the representation

¹⁸ *C v Director of Immigration* (cited at n 10 above) at [80] and [82]. The court relied on *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 529.

¹⁹ James C. Hathaway, *The Law of Refugee Status* (Butterworths: 1991), pp 104–105.

²⁰ UNHCR, “Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees”, HCR/IP/4/Eng/REV.1, 1979, re-edited January 1992.

meets the required high standards of procedural fairness;²¹ (4) the necessary burden and standard of proof; and (5) determining the necessary degree of risk facing the individual.

The jurisprudence of the UN Committee against Torture, the Human Rights Committee, and domestic courts, as well as procedural guidelines produced by the UNHCR could usefully inform Hong Kong's approach to these and other issues.

For example, the Committee against Torture, the monitoring body for states' implementation of the Torture Convention, has published views on communications it has received by individuals alleging state violations of Article 3. In several cases, the Committee has provided guidance on the evidence necessary to establish a torture claim. It has clarified that "[t]he existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient grounds for determining whether the particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk". At the same time, however, "the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances".²²

The Committee's jurisprudence also assists when determining how to approach the assessment of a claimant's credibility and indicates that decision makers must bear in mind the difficulties and trauma faced by torture victims. Although there may be contradictions and inconsistencies in the claimant's story "complete accuracy is seldom to be expected by victims of torture and that such inconsistencies as may exist in the author's presentation of facts are not material and do not raise doubts about the general veracity of the author's claims".²³

Conclusion: Toward a Comprehensive Framework

When developing the new statutory determination mechanism, the Hong Kong government should implement its broader obligations of *non-refoulement* in addition to the explicit obligation in Article 3 of the Torture

²¹ This issue will be the subject of a comparative study of legal representation for asylum seekers in other jurisdictions conducted by the author and co-investigator Simon N.M. Young. The study is funded by a Public Policy Research Grant awarded by the Research Grants Council in 2009.

²² See, for example, Committee against Torture, *Sadiq Shek Elmi v Australia*, Communication No 120/1998, May 1999, para 6.4 and *R. K. et al v Sweden*, Communication No 309/2006, para 8.2.

²³ CAT Communication No. 21/1995, para 11.3.

Convention. Specifically, the new legislation should provide protection for claimants based on the full range of applicable standards found in customary international law (including the *non-refoulement* of refugees), Article 3 of the Torture Convention, Articles 6 and 7 of the ICCPR, Articles 28 and 39 of the Basic Law, and Articles 2 and 3 of the Bill of Rights.

The upcoming legislative process provides an opportunity for Hong Kong to develop a fair, efficient screening procedure to ensure the protection of individuals who risk a range of serious human rights violations in their countries of origin. To achieve these objectives, the Hong Kong government should conduct regular consultation with – and facilitate participation by – non-governmental organizations and legal representatives working with asylum seekers and torture claimants. It also needs to establish a single mechanism which combines all of its *non-refoulement* obligations.²⁴ The continuing existence of separate refugee and torture screening procedures implemented by different decision-making bodies wastes resources and generally impedes the interests of justice and procedural fairness. Incorporating broader *non-refoulement* standards into the screening procedures at the start could also avoid potential judicial review challenges grounded in constitutional rights and the ICCPR. It would also prevent inequality of treatment since those relying upon ICCPR grounds currently need to apply for judicial review, which can be costly and time-consuming, while those making a torture claim can access a process of administrative remedies before going to the court as a last resort.

²⁴ There has been a trend toward combining refugee and human rights standards in one status determination procedure in a number of jurisdictions including New Zealand and Canada.