

Submission by the Centre for Comparative and Public Law¹

Faculty of Law

The University of Hong Kong

**Hong Kong's International Legal Obligations toward Refugees and
Asylum Seekers**

**For Consideration at the Joint Meeting of the Legislative Council Panels on
Welfare Services and Security on the situation of asylum seekers, refugees
and claimants against torture in Hong Kong**

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¹ The Centre for Comparative and Public Law (CCPL) was established in 1995 as a virtual centre within the Faculty of Law. Its purposes are to encourage and facilitate collaborative work within the Faculty, the University, and the broader Hong Kong community in the fields of comparative and public law. The Director is Dr Fu Hualing and the Acting Director is Associate Professor Simon NM Young.

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Overview

1. This submission outlines Hong Kong's international legal obligations toward refugees and argues that Hong Kong's current domestic law and policy do not comply with these requirements.
2. In order to adequately fulfill its obligations, the government should formulate explicit domestic policies and legal provisions that ensure protection of the rights of refugees including the right to *non-refoulement*, the right not to be arbitrarily detained, and economic, social and cultural rights such as the right to an adequate standard of living, the right to work, the right to education, etc.
3. In particular, the Government should establish a refugee status determination procedure based on international standards to ensure that no one is returned to a location where he or she faces persecution.
4. In addition, this submission urges the Hong Kong government to request extension by the Central People's Government of the 1951 Convention on the Status and Treatment of Refugees and its 1967 Protocol ("Refugee Convention and Protocol") to the SAR.

Background

5. The Refugee Convention and Protocol are the key international legal documents that set out the definition of a refugee and the rights of refugees to adequate protection. These instruments have not been extended to the Hong Kong SAR, although they apply to the People's Republic of China and the Macau SAR.
6. In addition, a protected status for refugees or asylum seekers does not exist in Hong Kong law or policy. The SAR government's current approach is to treat all arrivals in accordance with the Immigration Ordinance (Cap. 115) and immigration

guidelines which do not mention or require different treatment for asylum seekers or refugees. Apart from a non-statutory mechanism to assess torture claims under Article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), the Hong Kong government has not established refugee status determination procedures.

7. The Hong Kong government “has a firm policy of not granting asylum and do[es] not have any obligation to admit individuals seeking refugee status under the 1951 Convention”.³ The government has stated that it does not intend to request extension of the Refugee Convention to the SAR, that it believes extension is undesirable, and that it does not plan to implement a refugee status determination mechanism. Instead it relies on the UNHCR’s Hong Kong sub-office to process asylum seekers’ applications in Hong Kong.
8. There is no formal system for directing asylum seekers to the UNHCR, however, and access to the UNHCR depends on individual initiative and knowledge or on the discretion of immigration officials who may or may not contact the UNHCR sub-office when approached by someone claiming asylum.

International Legal Obligations

9. Although the Refugee Convention and Protocol do not apply in Hong Kong and Hong Kong lacks domestic refugee legislation, the SAR still has obligations under international law to protect the rights of refugees. Hong Kong is bound by the principle of *non-refoulement* at customary international law (“CIL”) and by international and municipal human rights standards related to the rights of refugees. These include provisions in key international human rights treaties applicable to Hong Kong including the CAT, the 1966 International Covenant on Civil and Political Rights (“ICCPR”), the 1966 International Covenant on Economic, Social and Cultural Rights (“ICESCR”), the Convention on the Rights of the Child

³ Security Bureau, “Policy on Refugees, Asylum Seekers and Torture Claimants”, July 2006.

(“CRC”), and the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”). The requirements of these provisions go beyond those of Article 3(1) of CAT, and thus the government’s new CAT screening procedures are inadequate to fully implement Hong Kong’s international obligations.

Customary International Law

10. The principle of *non-refoulement* is generally considered to be part of CIL which is binding on all States regardless of treaty obligations.⁴ CIL arises from consistent state practice and *opinion juris* (the belief that the practice is compulsory).⁵
11. Article 33(1) of the Refugee Convention defines *non-refoulement* as the prohibition against expulsion or return (“refouler”) of a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. The principle is generally interpreted as including non-refusal at the borders and implies a responsibility to provide temporary asylum. *Non-refoulement* is also required by other multi-lateral treaties such as the ICCPR and CAT.
12. Principles of CIL apply directly in Hong Kong through the common law.⁶ Although Hong Kong courts have not commented on the application of CIL in Hong Kong, Hong Kong’s CIL obligation to respect the principle of *non-refoulement* provides a strong legal basis for granting temporary asylum and

⁴ For a detailed explanation of the sources and content of the principle of *non-refoulement* in CIL, see Sir Elihu Lauterpacht and Daniel Bethlehem, “The Scope and Content of the Principle of Non-refoulement”, 20 June 2001, pp 61-87, available at www.unhcr.ch. See also Guy S. Goodwin Gill, *The Refugee in International Law* (Oxford: Clarendon Press, 1996), pp 117-171 for a detailed discussion of the principle of *non-refoulement*.

⁵ See Discussion of CIL in Martin Dixon & Robert McCorquodale, *Cases and Materials on International Law* (Oxford: Oxford University Press, 2003), pp 28-37.

⁶ See Roda Mushkat, “International law in the HKSAR Courts”, (1998) 28 *California Western International Law Journal* 353 and *Trendex Trading v Bank of Nigeria* [1977] 1 QB 529.

properly assessing asylum claims in order to prevent inadvertent *refoulement*.⁷ The current system, based on the Immigration Ordinance, is inadequate to ensure respect for *non-refoulement* since asylum seekers and refugees have no special status under Hong Kong law or policy.

13. The Immigration Ordinance allows immigration officers absolute discretion in deciding whether to permit entry to those not having the right to land in Hong Kong. Although Section 13 of the Ordinance allows the Director of Immigration to “authorize a person who landed in Hong Kong unlawfully to remain in Hong Kong”, nothing in the Ordinance requires immigration officials to allow asylum seekers or refugees into Hong Kong.
14. In order to determine whether someone is a refugee, and therefore entitled to protection based on the *non-refoulement* principle, a refugee status determination mechanism must be implemented and, at the very least, guidelines provided for immigration officers on appropriate procedures, taking international standards into consideration, when approached by someone seeking asylum. It is important to bear in mind, however, that a person becomes a refugee as soon as he or she satisfies the requirements of the definition in the Refugee Convention and not by virtue of a determination process. Such a process is merely declaratory. As such, asylum seekers must also receive protection from *refoulement* until it is determined fairly and in accordance with international standards that they do not meet the criteria.
15. Certain principles of CIL help reinforce Hong Kong’s ICCPR obligations toward refugees. Although application of the ICCPR to Hong Kong is restricted by reservations related to immigration legislation, the Human Rights Committee has clarified in General Comment 24, that:

⁷ For a discussion of Hong Kong’s duty at customary international law to respect the principle of *non-refoulement*, see Roda Mushkat, *One Country, Two International Legal Personalities: The Case of Hong Kong* (Hong Kong: Hong Kong University Press, 1997), pp 86-89.

[P]rovisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons ...

This Comment disallows any reservation regarding immigration legislation with respect to Article 6 of the ICCPR which guarantees the right to life, Article 7 of the ICCPR which prohibits torture and its corresponding right to *non-refoulement* (see the discussion of ICCPR Articles 6 and 7, below) as well as the right not to be arbitrarily detained (see ICCPR Article 9, below).

CAT

16. Article 3 of the CAT prohibits *refoulement* in cases of torture. It provides that “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”. There are no exceptions to this provision.
17. In its initial report to the Committee against Torture in 1999, the SAR government stated that the Crimes (Torture) Ordinance (Chapter 427) (“Torture Ordinance”) “was enacted to give effect in Hong Kong to [CAT].”
18. Despite implementing elements of CAT’s definition of torture (Article 1), the Torture Ordinance does not explicitly incorporate the principle of *non-refoulement* and the definition of “torture” in the Ordinance contains exceptions that do not conform to the CAT provisions. In 2000, the Committee against Torture, in its Concluding Observations on Hong Kong’s report, expressed concern that “the reference to ‘lawful authority, justification or excuse’ as a defence for a person charged with torture, as well as the definition of a public official in the [Torture Ordinance] are not in full conformity with Article 1 of the Convention” and “that

not all instances of torture and other cruel, inhuman or degrading treatment or punishment are covered by the [Torture Ordinance]”.

19. Despite these criticisms, the government subsequently claimed, in its case against Prabakar, that it “has not introduced and has no intention in future of proposing in the legislature the incorporation of [CAT] into domestic law”.⁸

20. With respect to the principle of *non-refoulement*, the Committee against Torture “noted with concern that practices in the Hong Kong Special Administrative Region relating to refugees may not be in full conformity with Article 3 of the Convention” and recommended “that laws and practices relating to refugees be brought into full conformity with Article 3 of the Convention”.

21. The establishment of a screening mechanism in response to the *Prabakar* judgment in 2004 is a step forward in implementing and fulfilling Hong Kong’s responsibilities under the CAT. This mechanism, however, does not fully implement Hong Kong’s *non-refoulement* obligations at CIL. According to some estimates, approximately 20-30% of the world’s refugees are victims of torture⁹ and thus many refugees arriving in Hong Kong who may not be victims of torture would not fall within the CAT protections.

ICCPR

22. Although China has not yet ratified the ICCPR, the Covenant applies to Hong Kong and has been implemented in domestic law by virtue of Article 39 of the Basic Law (“BL”) and the Hong Kong Bill of Rights Ordinance (“BRO”). BRO Part I(2)(iii), in its original form, clearly provides that the Ordinance is intended to implement the ICCPR:

In interpreting and applying this Ordinance, regard shall be had to the fact that the purpose of this Ordinance is to provide for the incorporation into

⁸ Case for the Appellant, *Sakthevel Prabakar and Secretary for Security*, FACV No. 16/2003, p 20.

⁹ See Amnesty International, “Take a Step to Stamp out Torture”, 28 October 2000.

the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong, and for ancillary and connected matters.

23. General comments, concluding observations and other statements by the Human Rights Committee, the body responsible for enforcing the ICCPR, should therefore be considered when interpreting ICCPR and BRO provisions in Hong Kong.

Immigration reservation

24. As mentioned above, the United Kingdom made a general reservation with respect to immigration legislation which continues to apply in Hong Kong and has been implemented by Section 11 of the BRO which reads: “As regards persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation.”
25. These reservations, however, would not apply to those ICCPR provisions which have the status of peremptory norms or are applicable as CIL such as the prohibition against torture in Article 7 of the ICCPR and its implied right to *non-refoulement* (see discussion of the Human Rights Committee’s General Comment 20 in paragraph 28 below). By virtue of the Human Rights Committee’s General Comment 24 (discussed in paragraph 15 above), immigration legislation must conform to Articles 6 (right to life), 7 (right not to be tortured), and 9 (right to be free from arbitrary detention) of the ICCPR and the corresponding Articles 2, 3, and 5 of the BRO. These rights are generally considered peremptory norms of international law which are “accepted and recognized by the international community of States as a whole as norm[s] from which no derogation is permitted”.¹⁰

¹⁰ The 1969 Vienna Convention on the Law of Treaties, Article 53.

26. Although several Hong Kong judgments have upheld the immigration exceptions in the ICCPR and BRO (as well as the CRC and have interpreted the ICESCR as “promotional” and therefore not applicable to immigration issues¹¹), these cases have dealt mainly with Covenant protections for the family and not with principles of CIL or peremptory norms. The judgment in *Chan To Foon* acknowledges this difference:

... what must be remembered in respect of immigration matters is that Hong Kong’s reservations to the three conventions (and the exception to the Bill of Rights) do not offend peremptory norms. No reservation is made similar to a right to reserve child labour or torture ...¹²

Articles 6 and 7: Right to life and Right not to be tortured

27. Article 6 of the ICCPR guarantees the right to life and Article 7 provides that “no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”. These Articles are replicated in Articles 2 and 3 of the BRO.

28. The Human Rights Committee has interpreted Article 7 to include a right to *non-refoulement* in General Comment 20:

In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*. States parties should indicate in their reports what measures they have adopted to that end.

29. Basic Law Article 28 prohibits the “torture of any resident or arbitrary or unlawful deprivation of the life of any resident” and Article 41 extends this protection to persons in the Hong Kong SAR “other than Hong Kong residents”.

¹¹ See *Mok Chi Hung v Director of Immigration* [2001] 1 HKC 281 and *Chan To Foon & Others v The Director of Immigration and the Secretary for Security* [2001] HKCU 1. See also discussion in paragraph 46 below.

¹² *Ibid.*, [*Chan To Foon*]

30. In relation to Hong Kong the Human Rights Committee has stated, in its concluding observations on China's state report in 1999 that:

In order to secure compliance with articles 6 and 7 in deportation cases, the HKSAR should ensure that their deportation procedures provide effective protection against the risk of imposition of the death penalty or of torture or inhuman, cruel or degrading treatment.

31. In April 2006, the Committee stated in its Concluding Observations on China's most recent state report that it "remains concerned at the absence of adequate legal protection [in Hong Kong] of individuals against deportation to locations where they might be subjected to grave human rights violations, such as those contrary to articles 6 [right to life] and 7 of the Covenant" and that "the HKSAR should establish an appropriate mechanism to assess the risk faced by individuals expressing fears of being victims of grave human rights violations in the locations to which they may be returned".

32. These statements imply a broader obligation to ensure that individuals are not deported to places where they also face "grave human rights violations" including violation of the right to life as well as the right not to be tortured.

Article 9: Arbitrary Detention

33. Article 9 of the ICCPR, implemented by the BRO Article 5, deals with arbitrary arrest or detention: "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 procedure as are established by law".

34. Again, this article should not be restricted by Hong Kong's ICCPR or BRO immigration reservations. In addition, the Human Rights Committee's General Comment 8 on Article 9 clarifies that deprivations of liberty include "all deprivations of liberty, whether in criminal cases or in other cases such as, for

example, mental illness, vagrancy, drug addiction, educational purposes, *immigration control*, etc.” [emphasis added].

35. Basic Law Article 28 also prohibits arbitrary detention:

[N]o Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited. Torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited.

This protection is applicable to non-residents in Hong Kong by virtue of Article 41. The reservations to the ICCPR as applied to Hong Kong do not apply to Basic Law rights.¹³

CRC

36. A mechanism for considering asylum claims made by children is necessary to comply with Article 22 of the CRC. This provision requires that:

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

37. In 2003, China withdrew a declaration made with respect to this article which had allowed for the detention of child asylum seekers from Vietnam.

38. The Committee on the Rights of the Child has stated in its Concluding Observations on China’s most recent report that it “is concerned about the persistence of discrimination against refugee, asylum-seeking and undocumented migrant children in the Hong Kong SAR ...” and also “notes that refugee children and

¹³ See argument in Simon NM Young, “Restricting Basic Law Rights in Hong Kong” (2004) 34 HKLJ 126-9.

undocumented migrant children are not guaranteed access to education”. It recommended that China “extend all human rights guarantees in its Constitution and in the Convention to all children within its jurisdiction on both the mainland and the SARs, including refugees, asylum-seekers and other undocumented migrants”.

CERD

39. The Committee on the Elimination of Racial Discrimination (“CERD Committee”) clarified in its General Recommendation 22 on Article 5 on refugees and displaced persons, that State Party obligations under Article 5 of CERD include ensuring that: “the return of ... refugees and displaced persons is voluntary and to observe the principle of *non-refoulement* and non-expulsion of refugees.”

40. In August 2001, the CERD Committee recommended in its concluding observations on China’s Report that:

the State party take the necessary measures to ensure that all refugees and asylum seekers receive equal treatment. To this end, the Committee recommends that the State party consider pursuing the adoption of formal legislative or administrative provisions in order to implement objective criteria for the determination of refugee status.

41. Although this recommendation is directed toward mainland China, the CERD Committee also stressed in its Concluding Observations that China, as the State party, has responsibility for implementation throughout the country, which would include Hong Kong:

[T]he Committee wishes to emphasize that irrespective of the relationship between the central authorities and the special administrative regions, and the principle “One Country, Two Systems”, the People’s Republic of China, as the State party to the Convention, has the responsibility to ensure its implementation on its entire territory.

42. The Hong Kong government has announced its intention to implement CERD into domestic legislation through an equal opportunities ordinance prohibiting racial discrimination. The treatment of refugees and asylum seekers - including any

future legislation or policies establishing screening procedures - would need to conform to such legislation. The government's Consultation Paper on a Race Bill, however, proposes an immigration exception: "as regards persons not having the right to enter and remain in Hong Kong ... the Bill should not affect any immigration legislation governing their entry into, stay in and departure from Hong Kong, or the application of any such legislation".¹⁴

43. CERD stipulates in Article 1(2) that the Convention does not "apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens" and in Article 1(3) that "[n]othing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization". Such laws, therefore, must not discriminate against any particular nationality and the proposed immigration exclusion in a race ordinance could violate CERD, indicating that the government may not intend to fully implement the Convention into domestic law. There are no general immigration reservations on CERD's application to Hong Kong, unlike the reservations made with respect to the ICCPR and the CRC.

ICESCR

44. ICESCR Article 6 ensures the right to work, Article 11 provides for the right to an adequate standard of living including food and housing, Article 12 deals with the right to health, and Article 13 provides for the right to education. These provisions are similar to protections articulated in the Refugee Convention but are more comprehensive and phrased in more direct language.

45. The Covenant would apply to refugees in the territory of a state party. While Article 2(3) provides that developing countries "may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-

¹⁴ Home Affairs Bureau, "Legislating against Racial Discrimination, a Consultation Paper", September 2004, para 68.

nationals”, Hong Kong as a developed economy could not call on this possible exception.

46. Although several Hong Kong Court judgments have confirmed that the ICCPR has been incorporated into Hong Kong law by virtue of BL Article 39, which also provides for the implementation of the ICESCR, the Courts have ruled that ICESCR rights are “promotional in nature.” In *Chan To Foon*, the Court found that, “having regard to [Hong Kong’s] existing social difficulties, ICESCR rights:

may only be guaranteed progressively; that is, as and when those difficulties are overcome. Matters of immigration, as our courts have recognized remain a major problem. If unchecked, it is clear that, in the informed opinion of the Director [of Immigration], the problem will threaten the Territory’s social fabric. As a result, in respect of immigration matters, the Government of Hong Kong is unable at this time to guarantee the rights protected in the Covenant when they relate to matters of immigration. I believe it may be taken for this reason that no reservation was entered in respect of the ICESCR: it is an aspirational covenant, not one that creates absolute obligations.¹⁵

47. In its 2001 Concluding Observations on China’s report, the Committee on Economic, Social and Cultural Rights criticized Hong Kong for these arguments stating that it

greatly regrets that some judgements of the High Court in HKSAR express the opinion that the Covenant is “promotional” (*Mok Chi Hung v. Director of Immigration*, judgement of 5 January 2001) or “aspirational” (*Chan To Foon v. Director of Immigration*, judgement of 11 April 2001) in nature. As the Committee has confirmed on numerous occasions, such opinions are based on a mistaken understanding of the legal obligations arising from the Covenant.

The Committee also reminded Hong Kong that “the provisions of the Covenant constitute a legal obligation on the part of the States parties. Thus, the Committee urges the HKSAR not to argue in court proceedings that the Covenant is only ‘promotional’ or ‘aspirational’ in nature”. The Committee has pointed out that the

¹⁵ See n 11 above [*Chan To Foon*].

ICESCR has a basic core content, and that most, if not all of the rights contained therein are justiciable.

48. The Committee has also explicitly mentioned Hong Kong's lack of refugee policy. In May 2005, The Committee on Economic Social and Cultural Rights stated in its Concluding Observations on China's most recent report that it is concerned that HKSAR lacks a clear asylum policy and that the Convention relating to the Status of Refugees of 1951 and the Protocol thereto of 1967, to which China is a party, are not extended to HKSAR. In particular, the Committee regrets the position of HKSAR that it does not foresee any necessity to have the Convention and the Protocol extended to its territorial jurisdiction.

Bangkok Principles

49. China is a member of the Asian-African Legal Consultative Organization ("AALCO") which adopted the Bangkok Principles on the Status and Treatment of Refugees in 1966 and revised and consolidated the text in June 2001. Although the Principles are declaratory and non-binding, the UNHCR has pointed out that, their provisions represent the result of serious and lengthy negotiations by member States of the [AALCO]. They reflect an important understanding of who is a refugee in the contemporary context in parts of the world with significant experience in receiving and hosting refugees.
50. The definition of "refugee" contained in the Principles is more comprehensive than the definition in Article 1 of the Refugee Convention and takes into account developments in refugee law in other regions and national jurisdictions (such as the Cartagena Declaration and the 1974 Convention Governing the Specific Aspects of Refugee Problems in Africa).
51. The definition of refugee in the Principles covers persons compelled to leave their place of habitual residence in order to seek refuge in another place outside the country of origin or nationality owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of

the country. Also, the possible grounds of persecution include colour, ethnic origin, and gender in addition to the five grounds listed in the Refugee Convention's definition.

52. When considering the establishment of refugee status determination procedures and related legal or administrative provisions, the Hong Kong government should take these developments into account.

Conclusion

53. Hong Kong needs a comprehensive, systematic policy toward asylum seekers and refugees based on international standards, including provisions currently applicable to Hong Kong by virtue of the SAR's obligations under domestic and international human rights law and customary international law. This policy should include implementation of a legal framework that provides for a refugee status determination mechanism and basic protections for refugees.
54. Extension of the Refugee Convention and Protocol to Hong Kong would highlight that refugee protection is a matter of basic international human rights, as distinct from a mere immigration control issue that may be subject to periodic shifts in policy. Extension of the Convention and the resulting obligations would also ensure the full range of refugee rights and be preferable to relying on current international and domestic legal requirements.