

LC Paper No. CB(2)2053/04-05(01)

NOTE ON ASYLUM SEEKERS AND CONVENTION AGAINST TORTURE ("CAT") CLAIMANTS IN THE HONG KONG SAR IN LIGHT OF THE CONCLUDING OBSERVATIONS OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS ("ICESCR") 13 MAY 2005:

"Para 80. The Committee is concerned that the HKSAR lacks a clear asylum policy and that the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, to which China is a party, are not extended to HKSAR. In particular, the Committee regrets the position of the HKSAR that it does not foresee any necessity to have the Convention and the Protocol extended to its territorial jurisdiction."

In May 2000 the UN Committee Against Torture also *"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"*

There is now increasing criticism with respect to the situation of asylum seekers, refugees and CAT claimants in the HKSAR.

Hong Kong Refugee Law: The Problems¹

1. HKSAR has no refugee status determination system or legislation governing the treatment of asylum seekers or refugees.
2. Refugee Convention not extended to the HKSAR despite UK and PRC (and over 140+ countries) acceding to both instruments.
3. HKSAR tries to "sub contract" its obligations² to the UNHCR (as it unlawfully tried to do with its obligations under under CAT [see the *Prabakar* CFA case])—a body that cannot be compelled to appear in HKSAR courts.
4. UNHCR refugee status determination ("RSD") process lacks a number guarantees ensuring procedural fairness such as: transparency, written reasons for refusal; provision for legal assistance, judicial review. Because of its lack of domestic legal personality (and lack of resources) it cannot be a surrogate for the HKSAR properly assuming its obligations.³ There are problems relating to access to the UNHCR.
5. HKSAR is bound by and continues to risk running afoul of the principle of *non-refoulement* at customary international law.⁴

¹ This brief note only provides a general outline of a number of the fundamental problems with respect to the treatment of asylum seekers, refugees and CAT claimants in the HKSAR. These matters can be expounded upon more fully in light of the judgment and the legal materials in the *Prabakar* case and others.

² The HKSAR denies it has any obligations at all.

³ Note the "Airport" cases—in particular *Aliyar v Director of Immigration*. HCAL 64 of 2003

⁴ See Sir Elihu Lauterpacht and Daniel Bethlehem, "The Scope and Content of the Principle of Non-refoulement" 20 June 2001, pp 61-87.

6. Under CAT, and post *Secretary for Security and Sakthevel Prabakar*, [June 2004, Court of Final Appeal FACV 16 of 2003] the HKSAR has implemented “discretionary” screening procedures⁵ for CAT claimants only. However, the procedures are non-statutory, and despite the seriousness of the consequences of the decision involved there is no provision for legal representation—no legal aid, no Duty Lawyer Service (“DLS”).⁶

7. Further, the HKSAR considers that it has no obligation to assist CAT claimants (or asylum seekers/refugees) with accommodation, food, or education for children, leaving the “problem” to the ad hoc good graces of NGO’s.⁷ The applicants are not allowed to work. Without guaranteed support what are they supposed to do?

8. Detention of asylum seekers/refugees/CAT claimants. The claimants again suffer from a lack of legislation, lack of a clear policy and a lack of any appeal on the merits.⁸

9. Prosecutions of asylum seekers/refugees/CAT claimants. Persons fleeing persecution and torture often do not have valid travel documents and international refugee law has provided that in general such persons should not be prosecuted for immigration offences. HKSAR still prosecutes, even for offences such as “overstaying” when it is quite clear that the person concerned is here exercising the fundamental right to claim asylum or the right not to be removed or deported to face torture.

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Mark Daly

⁵ We can make copies available to the Panel.

⁶ We have recent correspondence on this matter.

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⁸ Issues revolving around the case of PV and the “special advocate” can be discussed separately in the context of removal and detention.