

Paper for Special Meeting of the Legislative Council
Panel on Welfare Services on 13 January 2014

1. As the government introduces its proposal (LC Paper No. CB(2)626/13-14(06)) to adjust the level of social benefits to refugees, torture claimants and asylum seekers (collectively ‘refugees’ unless specified), it is necessary that it fully takes into consideration its obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) to ensure that the minimum core content of rights under this instrument are attained.
2. Contrary to the belief of the Hong Kong authorities, the ICESCR entails legal obligations. The notion that the ICESCR is merely an aspirational covenant to be progressively realized has been rejected both by the Committee on Economic, Social and Cultural Rights (‘CESCR’), the body entrusted with monitoring compliance with the treaty, and also by the Hong Kong courts.¹
3. In setting the level of social welfare for refugees, the government must take into account a number of considerations derived from the ICESCR, including:
 - (i) Refugees, when fleeing from persecution, will invariably come to Hong Kong without any or adequate means of subsistence, and therefore constitute a ‘disadvantaged group’.² Unlike Hong Kong residents, refugees do not have the same opportunity to achieve an adequate standard of living on the basis of their own efforts. This is particularly the case where the government operates a stringent work authorization policy, as in Hong Kong.
 - (ii) Given that refugees constitute a disadvantaged group, there is a special onus on the authorities to ensure that their rights to adequate food and housing under the ICESCR are met.³ Similarly, the ICESCR also enshrines the right to an adequate standard of living, which includes providing a minimum core of social welfare to those without the means to live. As a disadvantaged group at the periphery of destitution and without the means to live based on their own efforts, refugees fall into this minimum core entitlement of social welfare.⁴ Indeed, where the government has failed to meet the minimum core

¹ ‘Concluding observations of the Committee on Economic, Social and Cultural Rights (Hong Kong) China’. E/C.12/1/Add.58. (05/21/2001), para 16; *Kong Yunming v. The Director of Social Welfare* [2013] HKCFA 107; FACV2/2013; M Ramsden, ‘Using the ICESCR in Hong Kong Courts’, (2012) 42(3) *Hong Kong Law Journal* 839.

² Sachar, Special Rapporteur, UN Commission on Human Rights, ‘The Realization of Economic, Social and Cultural Rights: The right to adequate housing’, Second Progress Report, 21 June 1994, E/CN.4/Sub.2/1994/20 (1994) at Article 4.

³ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 4: The right to adequate housing (Art.11 (1)), 13 December 1991, E/1992/23.

⁴ CESCR, Statement on Poverty and the ICESCR, UN Doc. E/C.12/2001/10, 4 May 2001, para 18

content of each right, it is in violation of the ICESCR and bears the burden of showing it has used all available resources to prioritise the fulfillment of such duties.⁵

- (iii) The CESCR has provided interpretive guidance on what constitutes an ‘adequate’ standard of living and housing.⁶ In this respect, as the CESCR has noted, a national poverty line provides an indicia of what constitutes a minimum essential level within a given country to enjoy an adequate standard of living.⁷ Indeed, the government rationalized the introduction of a poverty line in Hong Kong on the basis that it would enable it to identify groups who are at risk owing to their socio-economic circumstances and in need of ‘targeted assistance’.⁸ Therefore, the government must look to its newly drawn poverty line to ascertain the extent to which the minimum content of ICESCR rights is met with respect to the refugee population.⁹
- (iv) A further indicia of adequacy is to look at differential treatment between different categories of welfare recipients. In particular, if the amount given to residents constitutes what the government regards as the minimum baseline, then clearly anything less than this given to refugees would fail to meet the minimum essential levels of support so as to comply with the ICESCR.

4. Taking into account these covenant based considerations, a number of concerns may be raised with respect to the current levels of social welfare provided to refugees:

- a. It is arguable that the current levels of social welfare provided to refugees falls far short of the minimum core content of a number of ICESCR rights. The government’s poverty line make this clear, where the total level of social welfare provided to refugees is 37% less than the amount deemed necessary to avoid living in poverty.¹⁰ The government’s recent proposal to adjust the

⁵ ‘General Comment No 3: The nature of States parties obligations’ (Art 2, par 1), E/1991/23 (12/14/1990), paras 3-5.

⁶ ‘General Comment No 4’, supra n 3 at para 8; ‘General Comment No 19: The Right to Social Security (art. 9)’, E/C.12/GC/19, (04/02/2008); 15 IHRR 605 (2008) at para 59.

⁷ CESCR, ‘*Concluding Observations of the CESCR: Denmark*’, E/C.12/1/Add.102, 14 December 2004, para 20.

⁸ Hong Kong Poverty Situation Report 2012 (September 2013), Census and Statistics Department, Economic Analysis Division, Economic Analysis and Business Facilitation Unit, Financial Secretary’s Office. Government of the Hong Kong Special Administrative Region at p.79.

⁹ Hong Kong’s first Poverty Line in 2012 was HK\$3,600 (US\$460) per person, per month. This approach is based on the concept of relative poverty as opposed to absolute poverty expressed in terms of basic subsistence but could be a useful guiding line when assessing the level of financial assistance-in-kind that refugees receive, available at <http://visionfirstnow.org/2013/11/02/crashing-through-the-poverty-line/> [last accessed 10 January 2014].

¹⁰ See Vision First, ‘Crashing through the poverty line’, available at: <http://visionfirstnow.org/2013/11/02/crashing-through-the-poverty-line/> [last accessed 10 January 2014].

level of social benefits does not go far enough to elevate refugees above Hong Kong's official poverty line.¹¹

- b. The multiple occupancy dwellings that refugees invariably inhabit, due to the small size of the rent subsidy provided, do not attain the requisite standards to fulfill the right to an adequate standard of housing. Such multiple occupancy dwellings have been criticized by the CESCR on the ground that they amount to inadequate housing. The CESCR noted that 'bed-space apartments, or cage homes, are an affront to human dignity and roof-top structures constitute a grave risk to the life and health of their inhabitants'.¹² The government should further note evidence of the proliferation of 'slum' housing in Hong Kong occupied by the refugee population, which places them in danger of deteriorating mental and physical health.
- c. The administration's current policy on permitting refugees the right to work is extremely restrictive. The circumstances in which the Director of Immigration will permit a refugee to work amounts to a *de facto* ban on the refugee population seeking paid employment in Hong Kong.¹³ In its analysis of the poverty line, the Hong Kong government emphasized the higher poverty risk placed upon those without a source of employment or who are economically inactive. This risk is heightened further by individuals who are 'new-arrivals' and are therefore 'in need of care and concern given their unique social economic characteristics'.¹⁴ The government further stressed the pivotal role that education and training and re-training play in enhancing self-reliance and reducing poverty risk.¹⁵ As such, the government should note its employment restrictions on mandated refugees and/or screened-in torture claimants are in direct conflict with its approach to alleviating poverty amongst this disadvantaged group.

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¹¹ For current analysis on how the government might better achieve budgeting from a socio-economic-rights-based perspective see, A Nolan, Putting ESR-Based Budget Analysis into Practice: Addressing the Conceptual Challenges, (Nolan et. al) in Human Rights and Public Finance – Budgets & Promotion of Economic and Social Rights (2013), (Oxford: Hart); R O'Connell et al, Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources (London, Routledge, 2014) chs 3 and 4.

¹² CESCR, 'Consideration of reports submitted by states parties under articles 16 and 17 of the Covenant', 11 May 2001, E/C.12/1/Add.58 at 4.

¹³ For further analysis, see: M Ramsden and L Marsh, 'The 'Right to Work' of Refugees in Hong Kong: MA v Director of Immigration', (2013) *International Journal of Refugee Law* (25:3).

¹⁴ See n.8 at p.78.

¹⁵ Ibid. at p.78.