



Panel on Constitutional Affairs Meeting on Monday, 20 May 2013

Submission by the Hong Kong Refugee Advice Centre

AGENDA ITEM IV

Hearing of the United Nations Human Rights Committee on the Third Report of the Hong Kong Special Administrative Region in the light of the International Covenant on Civil and Political Rights (ICCPR)

Problems with the Current Legal Framework for Protection in Hong Kong

1. Under the Hong Kong Basic Law, the Hong Kong SAR government has control over immigration matters and the right to develop its own laws and policies. While China has ratified the Convention Relating to the Status of Refugees, which currently has 145 State Parties, and has extended it to the Macau SAR, it has not yet been extended to Hong Kong SAR territory.
2. The Hong Kong Refugee Advice Centre (HKRAC) regrets that in its Third Report to the Human Rights Committee as well as reports to other UN human rights treaty bodies, the HKSAR government has stated that, “in view of Hong Kong’s vulnerability to immigration abuse, we maintain a firm position not to seek the extension of the Convention relating to the Status of Refugees to Hong Kong, and not to take up the screening of refugee status applications.”ⁱ
3. The United Nations High Commissioner for Refugees (UNHCR) Sub-Office in Hong Kong conducts refugee status determination for persons claiming asylum. However, the UNHCR, which operates on a limited budget, assumes this role only in the absence of the government’s acceptance of its responsibility which it has long advocated the Hong Kong SAR government to assume. It is better equipped to play an advisory, rather than operational role. The UNHCR-led refugee status determination is fraught with challenges and delays, and, moreover, does not have an independent appeals mechanism nor is subject to judicial review by the Hong Kong SAR courts.
4. At the same time, the government runs another parallel, but separate screening mechanism for torture claimants in order to meet its obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The Immigration Department set up a screening mechanism to assess refugees’

claims under CAT in 2004, which it enhanced in 2009, and a statutory framework was adopted in 2012.ⁱⁱ

5. Despite these developments, the effectiveness, transparency and fairness of the CAT screening mechanism has been called into question in large part due to its low rate of recognition. According to the government's figures, since the implementation of the enhanced mechanism in December 2009 to March 2013, the Immigration Department "substantiated" only five out of 3,110 determined claims.ⁱⁱⁱ This rate is significantly lower than those in other jurisdictions and signals serious problems with the operation of the Hong Kong screening system.
6. A number of UN human rights treaty bodies have consistently criticized the Hong Kong government for its resistance to extension of the 1951 Refugee Convention and its 1967 Protocol to Hong Kong SAR territory and its lack of domestic refugee law.^{iv} Indeed, it is one of the most frequent and unanimous recommendations made to the government by treaty monitoring bodies. By neglecting the rights of refugees, the Hong Kong government has failed to comply with its obligations under the ICCPR and other human rights instruments to respect and ensure the human rights of everyone who is subject to its jurisdiction, without discrimination.
7. In this regard, HKRAC echoes the Human Rights Committee's regret in its 2013 Concluding Observations that "Hong Kong, China maintains a position not to seek the extension of the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol, and that persons facing deportation proceedings are not always covered by safeguards established in the Covenant."^v HKRAC urges the Hong Kong SAR government to heed the recommendations of several treaty bodies, including most recently those issued by the Human Rights Committee, and seek extension of the 1951 Refugee Convention.
8. The weaknesses of the current procedures under the two-track system may result in deportation of asylum seekers back to countries where they face risks of torture, persecution or other serious human rights violations including threat to life or freedom. HKRAC urges the government to address the concern raised by the Committee about "allegations that deportation operations are not properly monitored by the relevant oversight bodies (articles 2, 6, 7 and 13)" and implement the recommendation that Hong Kong ensure that "all persons in need of international protection receive appropriate and fair treatment at all states, in compliance with the Covenant" and "not set an inappropriate high threshold for recognizing a real risk of ill-treatment on return."^{vi}
9. HKRAC calls on the government to uphold the rights of asylum-seekers, refugees, torture claimants and other persons facing grave human rights abuses as per the provisions of the ICCPR while they are seeking protection in the HKSAR, including: non-discrimination and equality (articles 2-3); the right to life (article 6); freedom from torture (article 7); the right to liberty and security of person (article 9); the rights of

detainees (article 10); the right to a fair trial (article 14); the right to privacy (article 17); freedom of religion (article 18); freedom of expression (article 19); equality before the law (article 26); and the protection of minorities (article 27).

Towards a Unified Government-led Screening Mechanism for Protection

10. HKRAC welcomes two recent judgments handed down by the Court of Final Appeal in the cases of *Ubamaka Edward Wilson v Secretary for Security and Director of Immigration* and *C & Ors v Director of Immigration*.^{vii} In the former, the Court held that the Hong Kong government has an obligation to screen and offer protection to those facing the threat of cruel, inhuman or degrading treatment or punishment (CIDTP) in their countries of origin. In the latter, the Court ruled that the Director of Immigration cannot simply rely on the UNHCR's determination of refugee status when deciding whether to remove an asylum-seeker. Rather, the government must independently assess claims to ensure that persons are not returned to places where they may be subject to persecution, torture or ill-treatment (principle of *non-refoulement*).
11. In light of these judgments and Hong Kong's obligations under the ICCPR, HKRAC calls on the government to set up a screening procedure that comprehensively assesses the protection needs of persons who may be subject to grave human rights violations. Indeed, civil society groups, legal experts and the UNHCR have advocated for years that the government adopt an integrated, government-led screening mechanism for several reasons: in order to protect the human rights of asylum seekers and refugees, increase efficiency, reduce backlogs, avoid duplication, deter abuse, and improve procedural fairness, transparency and accountability.
12. HKSAR must provide more information and a timetable explaining how and when it will implement the recent Court of Final Appeal judgments, ensuring a "high standard of fairness" in conformity with the ICCPR—particularly Articles 14-16. The following questions, in particular, must be addressed: what will happen to claims that have been decided on before the legislation comes into force? What rights and protections will be granted to successful claimants?
13. In the process of designing a screening procedure for protection, HKRAC urges the government to consult with organisations that have a wealth of expertise in the area of human rights and refugee law. These include, inter alia, the academic community, the Hong Kong Bar Association and Law Society, the UNHCR, civil society actors such as HKRAC that provide legal aid and welfare services, as well as the asylum-seekers, refugees and CAT claimants themselves. In addition, HKRAC urges the government to undertake a rigorous comparative study of the lessons learnt from the experiences of other jurisdictions that have transitioned to conducting government-led refugee status determination.

Importance of Legal Aid in Refugee Status Determination

14. Most asylum-seekers will know little about refugee law when they are forced to flee their countries and when seeking protection in a new location. Many have experienced trauma, often as a result of torture or sexual and gender-based violence, and have difficulties recounting their stories in a legally relevant, coherent and chronological manner. At worst, this can result in mistaken rejections, putting refugees back into situations of danger.
15. For this reason, access to free legal services is crucial for guiding asylum-seekers through the refugee status determination process. Any future screening mechanism must ensure that asylum-seekers, refugees and torture claimants are able to access high-quality legal assistance and counseling to ensure high standards of fairness and compliance with human rights norms.

About HKRAC

The Hong Kong Refugee Advice Centre (HKRAC) is a non-profit, human rights organisation dedicated to the protection and promotion of refugee rights in Hong Kong. HKRAC is the only NGO dedicated to the provision of high-quality pro bono legal services to refugees applying for international protection from the United Nations High Commissioner for Refugees (UNHCR) in Hong Kong. Since its establishment in 2007, HKRAC has provided life-changing legal services to over 1,000 refugee men, women and children.

ⁱ HKSAR, Third Periodic Report of Hong Kong, China to the Human Rights Committee, UN Doc.: CCPR/C/CHN-HKG/3, 19 July 2011, at para. 101, available at: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=CCPR/C/CHN-HKG/3&Lang=E>

ⁱⁱ Government of Hong Kong, Immigration (Amendment) Ordinance 2012, Ord. 23 of 2012. <http://www.immd.gov.hk/pdf/ImmOrd2012.pdf>

ⁱⁱⁱ HKSAR, "Response on torture claim screening policy", Press Release, 27 April 2013, available at: <http://www.info.gov.hk/gia/general/201304/27/P201304270556.htm>

^{iv} For the most recent treaty body recommendations, see: CERD, "Concluding observations of the Committee on the Elimination of Racial Discrimination: China (including Hong Kong and Macau Special Administrative Regions)", UN Doc.: CERD/C/CHN/CO/10-13, 15 September 2009 at para. 29; CAT, "Concluding observations of the Committee against Torture: Hong Kong Special Administrative Region", UN Doc.: CAT/C/HKG/CO/4, 19 January 2009, at para. 7; CEDAW, "Concluding comments of the Committee on the Elimination of Discrimination against Women: China", UN Doc.: CEDAW/C/CHN/CO/6, 25 August 2006 at para. 43 and 44; CESCR, "Concluding observations of the Committee on Economic, Social and Cultural Rights: People's Republic of China (including Hong Kong and Macao)", UN Doc.: E/C.12/1/Add.107, 13 May 2005 at para. 80 and 92.

^v CCPR, "Concluding Observations of the Human Rights Committee: Hong Kong, China", Advance Unedited Version, March 2013, at para 9;

^{vi} *ibid*

^{vii} See: *Ubamaka Edward Wilson v. The Secretary for Security and Director of Immigration* (FACV No. 15/2011) and *C, KMF and BF v Director of Immigration and Secretary for Security* (FACV Nos. 18/19/20 2011)