

# Hearing of the Hong Kong Special Administrative Region's third report under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('UN CAT')

**Written Submission to the Panel on Security, 7 & 11 June 2016**

## RECENT RHETORIC ON REFUGEES, CAT AND THE USM

### **CALLS TO WITHDRAW HONG KONG FROM UN CAT:**

Justice Centre notes with regret that since the concluding observations of the UN Committee against Torture ("The Committee") were released in November 2015, the Hong Kong Administration has largely disregarded the concerns raised in the review and made no efforts to implement its recommendations. In fact, some of the recent proposals for policy and legislative reform around the "Unified Screening Mechanism" (USM) completely run counter to the concerns and recommendations raised by the Committee.

Justice Centre Hong Kong also regrets the recent comments made by several high-profile public figures, on multiple occasions, calling for the withdrawal of the HKSAR territory from CAT. These comments were made in apparent relation to discussions on how to handle the "refugee problem".<sup>1</sup> Irrespective of the legal technicalities of such a measure, withdrawing from an international human rights treaty would not only be disproportionate to the issues at hand, but would roll back on the human rights protections of people in the HKSAR territory from torture and abuse. Such a move would be unprecedented, and seriously harm the international reputation of Hong Kong, placing it in the same category as other countries not signatory to the Convention – repressive regimes such as Zimbabwe, Central African Republic and North Korea.

And whilst the Administration has since clarified that Hong Kong will not withdraw from CAT,<sup>2</sup> such comments by public figures are irresponsible, misleading to the public and even inflammatory. They also demonstrate the great need to raise public awareness about Hong Kong's human rights obligations and their importance in connection with the rule of law.

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<sup>1</sup> Leung, Christy and Ngo, Jennifer, "Hong Kong could quit torture convention, says CY", South China Morning Post, 14 January 2016, available at: <http://www.scmp.com/news/hong-kong/politics/article/1901085/hong-kong-could-quit-torture-convention-says-cy>; Ngo, Jennifer and Lau, Stuart, "Beijing should consult with Hong Kong on pulling out of UN torture convention, ex-security chief says", South China Morning Post, 11 March 2016, available at: <http://www.scmp.com/news/hong-kong/politics/article/1923531/beijing-should-consult-hong-kong-pulling-out-un-torture>

<sup>2</sup> "Security chief says no plans to opt out of torture convention", The Standard, 27 January 2016, available at: <http://www.thestandard.com.hk/breaking-news.php?id=70712>

## **CONFUSION AND CONFLATION OF TERMS AND NEGATIVE STEREOTYPING:**

The Committee noted concern in its concluding observations about the prima facie portrayal of claimants as “abusers of the system”. The Government’s change in terminology from “non-refoulement claimant” to “illegal immigrant” to most recently “non-ethnic Chinese illegal immigrant (NECII)” as well as associations to “crime”, “security” and “a jeopardy to public order”, has only worsened the situation – fuelling misperceptions in the public and racial discrimination and rising intolerance towards ethnic minorities, migrants and refugees – who are often conflated with each other. This has drawn criticism from not only the Committee but several NGOs and the Equal Opportunities Commission.<sup>3</sup> These statements have also not been backed up by comparable statistics and information.

We note that in the Panel on Security Meeting of June 7 on these issues, several members of the public who filed deputations as well as LegCo members demonstrated clear misunderstanding of terminologies and conflated migrants, refugees, and ethnic minorities as one and the same. Highly charged language, such as a “nuisance to society, an “explosion” or “toxic tumours” were used. Several assertions were highly speculative and anecdotal. Justice Centre is concerned that there is a **direct causal link** between the change in terminologies used by the Hong Kong Government in official policy circles and an increase in public misunderstanding, intolerance, xenophobia and online hate speech towards ethnic minorities in Hong Kong. We urge that the Administration takes action on these recommendations by the Committee.

## **Committee’s concerns raised and recommendations on the non-refoulement claim screening procedure**

### **FAIRNESS AND TRANSPARENCY OF THE UNIFIED SCREENING MECHANISM**

In its concluding observations, the Committee regretted the low substantiation rate of non-refoulement claims, which was “indicative of a distinctly high threshold for granting protection”. Justice Centre regrets that the substantiation rate continues to hover below 1%, and that this rate is often referred to as “proof” of “bogus” claims, rather than identified as a red flag about the fairness of the USM. The Committee also noted concerns about the lack of transparency in the system, such as difficulties in accessing decisions of the Torture Claims Appeal Board, as redacted/anonymised decisions are not published.

Justice Centre welcomes the recent introduction of online statistics by the Immigration Department on the USM, but regrets that these are not fully disaggregated by nationality and that only cumulative figures are shown from

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<sup>3</sup> See: Chow, York, “Amid rising intolerance, Hong Kong must renew its commitment to stand against racism”, South China Morning Post, 20 March 2016, available at: <http://www.scmp.com/comment/insight-opinion/article/1926946/amid-rising-intolerance-hong-kong-must-renew-its-commitment> and Joint Statement, “Stop Discrimination: Community Calls for Calm on Refugee Debate”, 11 April 2016, available at: <http://www.justicecentre.org.hk/framework/uploads/2013/08/JOINT-STATEMENT-ENG.pdf>

which it is impossible to determine quarterly or even year-on-year trends or to compare the old torture claim system from the USM.<sup>4</sup> This comes to the detriment of monitoring and evaluating the USM at a time when the system is new and for which there is much public scrutiny.

Lastly, in 2015, the Security Bureau put forward certain “proposals to enhance the Unified Screening Mechanism”, which included plans to expedite the screening process.<sup>5</sup> These plans were met with great criticism by the legal community, with particular regard to the adverse effects these are likely to have upon fairness and due process. These concerns were reinforced by the Committee, which raised alarm at the “plans to fast-track the system to address the large backlog of pending applications, since such a measure may negatively impact the fairness and thoroughness of the screening procedure.”

### **“NO ASYLUM POLICY” AND LACK OF RECOGNITION OF REFUGEES**

Several human rights treaty bodies have repeatedly called on the Hong Kong Government to seek extension of the 1951 Refugee Convention; indeed, it is one of the most frequent recommendations made to the Hong Kong Government. This is in stark contrast to the paper provided by the Administration to this Panel where it is affirmed that Hong Kong has a “no asylum” policy. We reiterate that the right to seek asylum is a fundamental human right enshrined in the Universal Declaration of Human Rights.

As it stands, the Hong Kong Government has no domestic legal framework for the recognition of refugees; rather it merely grants “non-refoulement” protection, which is considered “temporary” until the claimed risks supposedly ceases to exist. As a result, people seeking protection are required to overstay on their visa if they come to Hong Kong legally, in order to be eligible to file a claim in the USM. The Committee expressed concern that claims of non-refoulement are not entertained unless the person has overstayed and thus then becomes officially “illegal”.

They note that this would force potential victims of torture to wait for their visa to expire – often several months – before being able to register in the USM and therefore gain access to rehabilitation and humanitarian assistance. This causes further and unnecessary hardship upon the most vulnerable new arrivals as they are unable to access support services during this time. Justice Centre also notes that in practice, non-refoulement protection whether in the torture or USM system has rarely been granted, and even when it is, a great number of the 52 substantiated

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<sup>4</sup> HKSAR Immigration Department, “Statistics on Non-refoulement Claim: Torture/Non-refoulement Claim Cases (as at End of March 2016)”, available at: <http://www.immd.gov.hk/eng/facts/enforcement.html>

<sup>5</sup> See: Hong Kong Bar Association, “Security Bureau’s Proposals to Enhance the Unified Screening Mechanism”, available at: [hkba.org/whatsnew/misc/Unified%20Screening%20Mechanism%20-%20Proposals%20to%20enhance%20the%20Unified%20Screening%20Mechanism%20-%20Final%20\(2\)%20-%20\(webpage\).pdf](http://hkba.org/whatsnew/misc/Unified%20Screening%20Mechanism%20-%20Proposals%20to%20enhance%20the%20Unified%20Screening%20Mechanism%20-%20Final%20(2)%20-%20(webpage).pdf); Justice Centre Hong Kong, Submission to the Security Bureau on the “Proposals to Enhance the Unified Screening Mechanism”, 13 February 2015, available at: [www.justicecentre.org.hk/framework/uploads/2014/03/Submission-to-SBre-USM-13-Feb-2015.pdf](http://www.justicecentre.org.hk/framework/uploads/2014/03/Submission-to-SBre-USM-13-Feb-2015.pdf); Law Society of Hong Kong, “Proposals to enhance the unified screening mechanism”, 16 February 2015, available at: [www.hklawsoc.org.hk/pub\\_e/news/submissions/20150216.pdf](http://www.hklawsoc.org.hk/pub_e/news/submissions/20150216.pdf)

claims continue to remain in Hong Kong without any long-term durable solution for long and indeterminate periods of time. This also causes unnecessary hardship to exactly those people who have proven claims.

## **COMPREHENSIVE REVIEW OF THE USM**

The Committee made several recommendations to the Hong Kong Government on what the non-refoulement claim screening procedure should encompass, including: unhindered access to the USM, irrespective of immigration status; greater fairness and transparency in the USM, mechanisms for early identification of victims of torture and ensuring them priority access, granting immigration status to substantiated claimants to allow them to remain legally in Hong Kong and grant legal work, in addition to seeking extension of the Refugee Convention.

We remind the Panel on Security that the purpose of the USM is to provide non-refoulement protection to genuine claims, yet most of the discussion in the Administration's paper from para. 6.2 – 6.5 focuses on "illegal immigration" and "removal", in complete contradiction to the Committee's concerns and recommendations. Justice Centre is very concerned that the "comprehensive review" that the Administration is currently undertaking on the USM is framed along similar lines, and that this may result in policies and legislation that only make the concerns raised by the Committee more aggravated. We urge that such a review adopt a rights-based perspective, incorporate the recommendations from the Committee and involve civil society and other key stakeholders.

In particular, Justice Centre regrets that the Hong Kong Government is considering strengthening the ImmD's power of detention of claimants, and that there are many calls by political parties for reinstating detention camps in Hong Kong, which was also brought up by deputations on June 7.<sup>6</sup> There are several experiences, including historically here in Hong Kong, to show that detention comes at a very high cost – both to the public purse and to the well-being of people seeking protection. The International Detention Coalition has found that detention is not a deterrent, it is very expensive and it infringes on human rights.<sup>7</sup> The UNHCR's own strategy for detention for 2014 to 2019 focuses on supporting governments to end detention of asylum seekers and refugees.<sup>8</sup> Justice Centre recommends that limited resources be spent, rather, on improving the procedural fairness and efficiency of the USM, so that those without meritorious claims can be processed quickly, and those in genuine need of protection can receive it without undue delay.

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<sup>6</sup> Hong Kong Government, "Panel on Security: 2016 Policy Address Initiatives of Security Bureau", 2 February 2016, LC Paper No. CB(2)648/15-16(03), available at: <http://www.legco.gov.hk/yr15-16/english/panels/se/papers/se20160202cb2-648-3-e.pdf>

<sup>7</sup> International Detention Coalition, "There Are Alternatives: A handbook for preventing unnecessary immigration detention", 2011, available at: <http://www.ohchr.org/Documents/Issues/Migration/Events/IDC.pdf>

<sup>8</sup> UNHCR, "Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seekers and refugees, 2014 – 2019", available at: <http://www.unhcr.org/53aa929f6.pdf>

## Concerns raised and recommendations on trafficking in persons and forced labour of domestic workers

### **POLICIES AND LAWS ON HUMAN TRAFFICKING AND FORCED LABOUR**

While welcoming the amendment to the prosecution code to include cases of human trafficking exploitation, the Committee noted concern that since its last review, there has been no change to the legislative framework in regards to human trafficking and forced labour. Justice Centre also notes that there is no information that has been provided by the Hong Kong Government as to how the Prosecution Code is being applied in practice to monitor and evaluate its effectiveness.

Justice Centre also regrets that while statistics are provided in the paper by the Administration as to how many human trafficking syndicates have been prosecuted over the past five years, absolutely no information is provided as to how many victims of human trafficking were identified in the past five years by the Administration and exactly how they were assisted. Human trafficking responses should focus on not only prosecution, but also on protection and prevention.

Recently, Hong Kong was ranked 157 out of 161 countries in the Walk Free Foundation's Global Slavery Index because of the lack of efforts by the Hong Kong Government to combat human trafficking and forced labour in the territory, placing much lower than many countries with far fewer resources than Hong Kong.<sup>9</sup> Hong Kong has also been ranked at Tier 2 in the US Trafficking in Persons Report since 2009.<sup>10</sup> Given the level of domestic and international concern about the situation in Hong Kong, the Panel on Security should conduct a public consultation to review the adequacy of existing policies and laws.

Justice Centre also notes that increasingly, the Hong Kong Government has framed the illegal immigration through human smuggling syndicates to Hong Kong as a "human trafficking" concern, with particular reference to non-refoulement claimants.<sup>11</sup> Justice Centre recommends that the Immigration Department provide detailed statistics on the number of human smuggling cases that have amounted to human trafficking and how many victims have been identified by authorities, broken down by nationality.

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<sup>9</sup> Walk Free Foundation, Global Slavery Index 2016, available at: <https://s3-ap-southeast-2.amazonaws.com/globalsslaveryindex.org-assets/downloads/Global+Slavery+Index+2016.pdf>

<sup>10</sup> US State Department, Trafficking in Persons Report, available at: <http://www.state.gov/j/tip/rls/tiprpt/>

<sup>11</sup> HKSAR Government, "LCQ18: Comprehensive review of strategy of handling non-refoulement claims, Following a question by the Hon Leung Cheung and a written reply by the Secretary for Security, Mr Lai Tung-kwok, in the Legislative Council", 13 April 2016, available at: <http://www.info.gov.hk/gia/general/201604/13/P201604130698.htm>

## THE VULNERABLE SITUATION OF MIGRANT DOMESTIC WORKERS TO EXPLOITATION

The Committee noted that migrant domestic workers are particularly vulnerable to forced labour and regretted that the Hong Kong SAR territory continue to maintain immigration policies that could actually contribute to the risk of forced labour – including through the “two week rule” and the “live-in requirement”. The Committee was also concerned that many victims of human trafficking or forced labour continue to be prosecuted for illegal stay in Hong Kong. Equally, the Committee asked that legislation be reformed to tackle the problem of debt bondage in Hong Kong, and that there be appropriate penalties for trafficking and forced labour offenders, among other recommendations.

The Committee’s recommendations echo many of the quantitative findings from a March 2016 Justice Centre report, which found that 17% of 1,000 migrant domestic workers surveyed in Hong Kong bore all the indicators required to be in forced labour.<sup>12</sup> Moreover, MDWs with excessive recruitment debt (debt burden equivalent to or exceeding 30% of their annual income) were found to be 6 times more likely to be in forced labour than MDWs with lower debt levels. The study based its methodological framework on the ILO 2012 measurement guidelines, adapted to the Hong Kong context. The study makes a total of 20 recommendations to the HKSAR Government.

It is not accurate for the Hong Kong Government to continue to deny that Hong Kong is a source, destination or transit area for human trafficking, or that the problem of illegal debt accrued by MDWs is only a problem of source countries.<sup>13</sup> In fact, Justice Centre regrets the lack of response by the government to the findings from the report, which were widely reported internationally. The Hong Kong Government should acknowledge the problem. While the Code of Practice for employment agencies in Hong Kong is a welcome measure, it is a very small step; much more concerted efforts and policy and legislative reforms need to be rolled out in order to address the particular vulnerabilities of MDWs to egregious forms of exploitation.

## About Justice Centre Hong Kong

Justice Centre Hong Kong Ltd. is a non-profit human rights organisation working fearlessly to protect the rights of Hong Kong’s most vulnerable people: refugees, other people seeking protection, survivors of torture, human trafficking and forced labour.

[www.justicecentre.org.hk](http://www.justicecentre.org.hk)

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<sup>12</sup> Justice Centre Hong Kong, “Coming Clean”: The prevalence of forced labour and human trafficking for the purpose of forced labour amongst migrant domestic workers in Hong Kong”, March 2015, available at: <http://www.justicecentre.org.hk/comingclean/>

<sup>13</sup> HKSAR Government, “Response to US report on Trafficking in Persons”, 27 July 2015, available at:

<http://www.info.gov.hk/gia/general/201507/27/P201507271028.htm>; Fraser, Niall, “Hong Kong government spokesman rejects findings of modern slavery report”, South China Morning Post, 31 May 2016, available at: <http://www.scmp.com/news/hong-kong/law-crime/article/1959995/hong-kong-government-spokesman-rejects-findings-modern>