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# Human Rights, *Non-refoulement* and the Protection of Refugees in Hong Kong

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## Abstract

Although the 1951 Convention relating to the Status of Refugees and its 1967 Protocol do not apply to Hong Kong, asylum seekers have challenged Hong Kong's lack of an adequate refugee policy in a series of judicial review actions grounded in human rights and common law principles. This article focuses on two cases in particular in which the applicants have attempted to rely, in part, on a right to *non-refoulement* derived from international and domestic law to compel the Government to establish procedures to determine the status of refugees and other similar categories of claimants. The first, *Secretary for Security v. Sakthevel Prabakar*, led to the creation of a 'torture screening' mechanism based on article 3 of the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment. In the second, *C v. Director of Immigration*, the court considered whether a rule of *non-refoulement* has emerged in customary international law and, if so, whether it applies to Hong Kong and requires government-administered refugee status determination. Although the applicants failed at first instance,<sup>1</sup> an analysis of the judgment with reference to Hong Kong's human rights obligations reveals gaps in the court's reasoning and demonstrates potential for greater reliance on these standards as the basis for developing a more comprehensive protection framework. This examination of the Hong Kong experience may have broader comparative value, especially in the Asian region and in jurisdictions not bound by the Refugee Convention or its Protocol.

## 1. Introduction

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<sup>1</sup> The Hong Kong Court of Appeal (CA) considered the applicants' appeal in Jan. 2010 and the judgment was still pending at the time of writing. The case is expected to eventually reach the Court of Final Appeal (CFA), Hong Kong's highest judicial organ.

Hong Kong became a Special Administrative Region (SAR) of the People's Republic of China on 1 July 1997 and has since been governed by a mini-constitution, the Basic Law, which guarantees Hong Kong's high degree of autonomy in all areas except foreign affairs and defense.<sup>2</sup> When exercising this autonomy, Hong Kong has the power to 'apply immigration controls into, stay in and departure from the Region by persons from foreign states and regions',<sup>3</sup> and thus may develop municipal law and policy toward asylum seekers and refugees without input from the central authorities in Beijing. Although China has acceded to both the 1951 Convention Relating to the Status of Refugees ('Refugee Convention') and its 1967 Protocol and has extended these instruments to the Macau SAR, Hong Kong has resisted their application to its territory.<sup>4</sup> Hong Kong legislation currently does not mention asylum seekers or refugees – or other similar categories of individuals seeking protection from a return to serious violations of human rights - and the Government maintains a firm policy not to grant asylum.<sup>5</sup>

Despite this official position, Hong Kong is nonetheless bound by seven core international human rights instruments<sup>6</sup> which, with some exceptions,<sup>7</sup> enumerate relevant rights – including explicit and implicit guarantees of *non-refoulement* - that extend to all persons within a state party's jurisdiction. The principle of *non-refoulement* imposes a duty on states to refrain from returning a person to a jurisdiction where he/she may face serious violations of human rights. For example, article 3 of the Convention against Torture and

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<sup>2</sup> According to art. 2 of the Basic Law, '[t]he National People's Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law'. Chapter II elaborates the relationship between the Central authorities and the Hong Kong SAR.

<sup>3</sup> Basic Law, art. 154.

<sup>4</sup> Prior to 1997, Hong Kong similarly resisted extension of the Convention under British rule. See R. Mushkat, 'Refuge in Hong Kong' (1989) 1 *IJRL* 449-480 at 451 and R. Mushkat, 'Refugees in Hong Kong: Legal Provisions and Policies' (1980) 10 *HKLJ* 169-181. According to art. 153 of the Basic Law, the Central Government is responsible for deciding whether to extend its international obligations to Hong Kong after consulting the Hong Kong Government: 'The application to the [SAR] of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the region ...'

<sup>5</sup> Security Bureau, 'Torture Claim Screening Mechanism: Enhanced Mechanism and Way Forward', LC Paper No. CB(2)370/09-10(03), Nov. 2009, para. 9 and Security Bureau, 'The Administration's Response to the Joint Submission of the Law Society and the Bar Association to the LegCo Panel on Security on Legal Representation for CAT Claimants Dated 24.9.2009', LC Paper No. CB(2)33/09-10(01), 9 Oct. 2009, para. 7.

<sup>6</sup> These include the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, the 1966 International Covenant on Economic, Social and Cultural Rights, the 1966 International Covenant on Civil and Political Rights, the 1979 Convention on the Elimination of all Forms of Discrimination against Women, the 1984 Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, the 1989 Convention on the Rights of the Child, and the 2006 Convention on the Rights of Persons with Disabilities.

<sup>7</sup> For example, ICCPR art. 25 which provides for the right to take part in the conduct of public affairs, the right to vote and to be elected, and to have access to public service.

other Cruel, Inhuman, or Degrading Treatment or Punishment ('Torture Convention') explicitly prohibits the expulsion or return ('refouler') of a person to another state where there are substantial grounds for believing that he/she would be in danger of being subjected to torture.<sup>8</sup> In addition, the International Covenant on Civil and Political Rights (ICCPR) includes an implicit right to *non-refoulement* when 'there is a real risk that [an individual's] rights under the Covenant will be violated in another jurisdiction'.<sup>9</sup> These provisions have been implemented in Hong Kong law through the Basic Law and Part II of the 1991 Bill of Rights Ordinance,<sup>10</sup> which largely replicates the ICCPR. Hong Kong courts have demonstrated their willingness to engage with international standards generally and frequently refer to international and comparative human rights materials when interpreting constitutional rights.<sup>11</sup>

Although the Government has not explicitly recognized that these provisions impose a legal duty to protect *non-refoulement* claimants in Hong Kong, it has nevertheless been piecing together a patchwork of refugee-related policies in recent years in response to a series of judicial review applications. In one set of cases, asylum seekers have challenged the lack of adequate government-administered mechanisms for determining refugee status and claims under article 3 of the Torture Convention. They have argued, in part, that Hong Kong has

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<sup>8</sup> Art. 3(1): '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. (2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights'.

<sup>9</sup> See Human Rights Committee, *A.R.J. v. Australia*, Communication No. 692/1996, UN doc. CCPR/C/60/D/692/1996, 11 Aug. 1997, para. 6.8 and Human Rights Committee, General Comment No. 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN doc. CCPR/C/21/Rev.1/Add.13, 26 May, 2004, para. 12.

<sup>10</sup> Cap. 383.

<sup>11</sup> See, for example, *R v. Sin Yau-ming* (1991) 1 HKPLR 88 at 107. In this case, the Court of Appeal held that when interpreting the Bill of Rights, guidance 'can be derived from decisions taken in common law jurisdictions which contain a constitutionally entrenched Bill of Rights. We can also be guided by decisions of the European Court of Human Rights ... and the European Human Rights Commission ... Further, we can bear in mind the comments and decisions of the United Nations Human Rights Committee ... I would hold none of these to be binding upon us though in so far as they reflect the interpretation of articles in the Covenant, and are directly related to Hong Kong legislation, I would consider them as of the greatest assistance and give to them considerable weight'. Art. 84 of the Basic Law provides that the courts 'may refer to precedents of other common law jurisdictions'. In *Director of Immigration v. Chong Fung Yuen* (2001) 4 HKCFAR 211, the court confirmed that 'the courts should give a generous interpretation to the provisions in Chapter III [of the Basic Law] that contain constitutional guarantees of freedoms that lie at the heart of Hong Kong's separate system'. For a discussion of Hong Kong's use of international standards, see C.J. Petersen, 'Embracing Universal Standards? The Role of International Human Rights Treaties in Constitutional Jurisprudence' in H.L. Fu, L. Harris, S.N.M. Young (eds.), *Interpreting Hong Kong's Basic Law: the struggle for coherence* (New York: Palgrave MacMillan, 2007), 33-53; A. Mason 'The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong' (2007) 37 *HKLJ* 299-317; J.M.M. Chan, 'Basic Law and Constitutional Review, The First Decade' (2007) 37 *HKLJ* 407-447; and J.M.M. Chan, 'Hong Kong's Bill of Rights: Its Reception of and Contribution to International and Comparative Jurisprudence' (1998) 47 *ICLQ* 306-336.

domestic legal obligations to avoid *refoulement* and must, therefore, establish fair screening procedures to provide sufficient safeguards.

In *Secretary for Security v. Sakthevel Prabakar (Prabakar)*,<sup>12</sup> the Court of Final Appeal (CFA) determined that Hong Kong's policy to comply with article 3 of the Torture Convention – as expressed in the Government's report to the UN Committee against Torture in 1999 - must be implemented according to high standards of fairness. This case led to the creation of a 'torture screening' mechanism which is administered by the Hong Kong Immigration Department.

In a later case, *C v. Director of Immigration (C)*,<sup>13</sup> the Court of First Instance (CFI) considered whether a principle of *non-refoulement* exists in customary international law and, if so, whether it applies to Hong Kong and mandates government-administered refugee status determination. Currently, the Hong Kong Sub-office of the UN High Commissioner for Refugees (UNHCR) considers refugee claims but their procedures cannot be challenged in Hong Kong courts and have been criticized for a lack of transparency.<sup>14</sup> In *C*, the court held that although *non-refoulement* has crystallized as a rule of customary international law, it is inconsistent with Hong Kong law – or has been repudiated by the Hong Kong authorities - and therefore does not apply and does not require the establishment of a screening mechanism. Neither the CFA in *Prabakar* nor the CFI in *C* ultimately decided whether the Government has *non-refoulement* obligations under the Torture Convention, the ICCPR, as incorporated into domestic law, or a broad principle in customary international law which goes beyond the scope of the Refugee Convention's provisions.<sup>15</sup> An examination of these standards, however, demonstrates a large measure of consistency between *non-refoulement* and the Hong Kong constitutional framework. Because considerable overlap exists between refugees and other categories of protection claimants fleeing serious human rights violations, reliance on human rights could move Hong Kong toward a more comprehensive screening mechanism and also provide the basis for more robust judicial review of relevant policy.

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<sup>12</sup> *Secretary for Security v. Sakthevel Prabakar* [2005] 1 HKLRD 289.

<sup>13</sup> *C v. Director of Immigration* [2008] HKCU 256.

<sup>14</sup> For discussion of the critique of the UNHCR's procedural limitations in the Hong Kong context see, for example, *Ibid.*, para. 17 and Hong Kong Human Rights Monitor, 'Shadow Report for the United Nations Committee against Torture on the implementation of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in the Hong Kong Special Administrative Region, the People's Republic of China', submitted 18 April 2008, paras. 43-44, citing M. Daly, 'Note on the Situation of Asylum Seekers, Refugees and Convention Against Torture ('CAT') Claimants in the Hong Kong SAR prepared for Joint Meeting of the Legislative Council Panels on Welfare Services and Security, 18 July 2006, LC Paper No. CB(2)2761/05-06(2).

<sup>15</sup> According to Mark Daly, one of the solicitors representing the applicants in both cases, these standards were raised by the applicants before the courts in *Prabakar* and *C*. Email to the author from M. Daly, 20 March 2010 (on file with the author).

This examination of the Hong Kong jurisprudence sheds light on the potential role of international human rights law in addressing refugee rights – the right to *non-refoulement* in particular - in a jurisdiction not bound by the Refugee Convention or Protocol. The Hong Kong example could, therefore, provide valuable comparative experience for states which have not acceded to the Convention but have relevant international obligations and/or constitutionally entrenched rights. It has particular resonance in Asia since many Asian countries - with some notable exceptions<sup>16</sup> - have been unwilling to accept the protection obligations imposed by these instruments.<sup>17</sup> Nevertheless, Asian practice is critical to the development of international refugee law.<sup>18</sup>

Section 2 of this article reviews Hong Kong's history as a haven for refugees in order to provide context for subsequent discussion and highlight its continuing influence on current policy approaches, public discourse, and the reasoning of the courts. It also summarizes the current procedures for screening torture and refugee claimants. Section 3 critically examines the judgments in *Prabakar* and *C* with reference to the sources of a right to *non-refoulement* in international law and Hong Kong law. Section 4 concludes with some reflections on the implications of a human rights analysis to refugee law and policy going forward and the potential of other human rights standards to further the protection regime despite the continuing non-applicability of the Refugee Convention in Hong Kong.

## 2. Background

### 2.1 Past refugee policy in Hong Kong

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<sup>16</sup> For example Cambodia, China, Fiji, Japan, Republic of Korea, and the Philippines. As of July 2010, there were 147 states parties to the Refugee Convention or the 1967 Protocol or both. See <<http://treaties.un.org/pages/ParticipationStatus.aspx>>.

<sup>17</sup> Some argue that Asian states have been unwilling to accept the standards promoted by the Convention partly because many were still under colonial rule when the Convention was originally negotiated and therefore view it as Eurocentric. See S.E. Davies, 'The Asian Rejection?: International Refugee Law in Asia', (2006) 52 *Australian Journal of Politics and History* 562-575, at 563.

<sup>18</sup> See J.C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005), 364 (citing K. Hailbronner, 'Non-refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?' in D. Martin (ed.), *The New Asylum Seekers: Refugee Law in the 1980s* (1986), 123-158 at 128-129). According to the UNHCR, a large portion of the world's refugees – approximately one third – 'were residing in countries in the Asia and Pacific region' at the end of 2007. See UNHCR, '2007 Global Trends, Refugees, Asylum Seekers, Returnees, Internally Displaced and Stateless Persons', June 2008, 7, available at <http://www.unhcr.org/statistics.html>.

Hong Kong is a society built by immigrants, including refugees, most arriving from mainland China during periods of political and social unrest,<sup>19</sup> and has generally accepted asylum seekers, often providing settlement or temporary protection, despite its dense population and small geographical size. Hong Kong has successfully integrated millions of people arriving from mainland China and continues to admit 150 mainland Chinese immigrants per day in accordance with a ‘one-way permit’ scheme.<sup>20</sup>

More than 200,000 people arrived in Hong Kong from Vietnam seeking asylum between 1975 and the mid-1990s and most were either resettled in a third country or repatriated to Vietnam. This period remains fresh in Hong Kong’s collective memory and the concerns raised during that time are still reflected in Government statements which attempt to justify its current policy of non-extension of the Refugee Convention. These statements will be discussed in more detail in section 3.

The first group of 3,743 Vietnamese arrived in Hong Kong on a Danish ship, the Clara Maersk, in May 1975. Hong Kong became a port of first asylum and all Vietnamese asylum seekers were granted temporary protection and allowed to remain in Hong Kong pending resettlement in third countries..<sup>21</sup> Because of increasing numbers of arrivals, and the growing reluctance of resettlement countries to accept all of them,<sup>22</sup> Hong Kong announced in June 1988 that it would begin detaining the asylum seekers in camps and would introduce procedures to determine individual refugee status.<sup>23</sup>

In the same year, the Hong Kong Government and the UNHCR concluded a ‘Statement of Understanding Concerning the Treatment of Asylum Seekers Arriving from Vietnam in Hong Kong’ in which Hong Kong also affirmed that ‘all refugees will be treated

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<sup>19</sup> For a discussion of Chinese refugees in Hong Kong, see UNHCR, ‘State of the World’s Refugees 2000: Fifty Years of Humanitarian Action’, Chapter 1: The early years, 33. The General Assembly in 1957 appealed to ‘Members of the United Nations and members of the specialized agencies and to non-governmental organizations to give all possible assistance with a view to alleviating the distress of the Chinese refugees in Hong Kong’ and authorized ‘the [UNHCR] to use his good offices to encourage arrangements for contributions’. General Assembly Resolution 1167 XII, ‘Chinese Refugees in Hong Kong’, 26 Nov. 1957

<sup>20</sup> See the Government of the Hong Kong Special Administrative Region (SAR), ‘Arrangement for Entry to Hong Kong from Mainland China’, available at <<http://www.immd.gov.hk>>.

<sup>21</sup> In 1979, more than 68,700 Vietnamese asylum seekers arrived in the territory. For an overview of the Vietnamese refugee era generally see UNHCR, n. 21 above, 79-105. For a summary of Hong Kong’s policy during this era see Hong Kong SAR Government, ‘Immigration Department Annual Report 2002-2003’, Chapter 4.

<sup>22</sup> Many of the new arrivals in the late 1980s came from northern Vietnam and resettlement countries were less willing to accept them as ‘genuine’ refugees. See UNHCR, *Ibid.*, 88.

<sup>23</sup> The determinations were based on art. 1(A)(2) of the Refugee Convention, as amended by its Protocol: A refugee is defined as ‘any person who ... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it’.

according to established international standards and will have access to resettlement'.<sup>24</sup> It further declared 'its undertaking that the determination of refugee status will be in accordance with the [Refugee Convention] and [its Protocol] and UNHCR guidelines'.<sup>25</sup> The UNHCR monitored the screening process and also initiated a Voluntary Repatriation Programme in 1989. In June 1989, Hong Kong, along with 75 other jurisdictions, signed the Comprehensive Plan of Action for Indo-Chinese Refugees.<sup>26</sup>

Part IIIA of the Hong Kong Immigration Ordinance (Cap 115) provided for the detention and screening of Vietnamese Refugees and section 13F created a Refugee Status Review Board. The process was open to judicial review and several cases challenging the screening procedures and the legality of detention went before Hong Kong courts and the Privy Council.<sup>27</sup> As conditions changed in Vietnam and the flow of asylum seekers subsided, Hong Kong ended its port of first asylum policy in January 1998 and disappplied Part IIIA of the Immigration Ordinance. While the fate of individuals who had been 'screened in' but could not be resettled in a third country or had been 'screened out' and could not be repatriated

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<sup>24</sup> 'Statement of an Understanding reached between the Hong Kong Government and UNHCR concerning the Treatment of Asylum Seekers arriving from Vietnam in Hong Kong', Annexure 1 to *The Queen v. Director of Immigration and the Refugee Status Review Board, Ex Parte Do Giau and Others* [1992] 1 HKLR 287, para. 1.

<sup>25</sup> Ibid. The Hong Kong screening process nevertheless received criticism from NGOs, lawyers and other groups for inadequate translations during interviews, poor conditions and lack of services in the camps, and the long-term detention of many asylum seekers who could not be resettled or returned to Vietnam. The overall success rate for the Vietnamese asylum seekers in the region was 28 per cent. Hong Kong had both the largest number of applicants (60,275) and the lowest success rate (18.8 per cent), see UNHCR, n. 20 above, 85.

<sup>26</sup> A number of Asian countries also signed the Comprehensive Plan of Action (CPA) in June 1989 at the International Conference on Indo-Chinese Refugees in Geneva. In this document, first asylum countries agreed to continue accepting Vietnamese asylum seekers and create mechanisms 'in accordance with established refugee criteria and procedures' including the Refugee Convention and its Protocol, 'bearing in mind, to the extent appropriate, the 1948 Universal Declaration of Human Rights and other relevant international instruments concerning refugees'.<sup>26</sup> This indicated a commitment to implement international standards through refugee status determination procedures screening Indo-Chinese asylum seekers. While many have identified the CPA's limitations and problems with its implementation, others have recommended its use as a model for resolving subsequent refugee situations. For a discussion of the CPA, see, for example, S.E. Davies, 'Realistic Yet Humanitarian? The Comprehensive Plan of Action and Refugee Policy in Southeast Asia', 8 *International Relations of the Asia Pacific* (2008) 191-217 at 192; R. Towle, 'Processes and Critiques of the Indo-Chinese Comprehensive Plan of Action: An Instrument of International Burden-Sharing?' (2006) 18 *IJRL* 537, W.C. Robinson, 'The Comprehensive Plan of Action for Indochinese Refugees, 1989-1997: Sharing the Burden and Passing the Buck' (2004) 17 *Journal of Refugee Studies* 319; R. Mushkat, 'Implementation of the CPA in Hong Kong: Does it Measure up to International Standards?' (1993) 5 *IJRL* 559; S. Bari, 'Refugee Status Determination under the Comprehensive Plan of Action (CPA): A Personal Assessment', (1992) 4 *IJRL* 487 (1992).

<sup>27</sup> For example, *Tan Te Lam v. Tai A Chau Detention Centre* [1997] AC 97 (PC) involved the detention of Vietnamese asylum seekers of Chinese ethnic origin who had been refused refugee status but could not be removed to Vietnam since the Vietnamese Government would not readmit those it did not consider Vietnamese nationals. The Privy Council held that if such removal could not be accomplished within a reasonable time period, then further detention was unlawful. In 1996, the Privy Council reversed a decision by the Court of Appeal and determined in *Nguyen Tuan Cuong and Others and Director of Immigration and Others* [1996] 423 HKCU 1 that the Director of Immigration did not uphold his statutory duty under Part IIIA of the Immigration Ordinance by refusing to screen Vietnamese migrants who had arrived in Hong Kong from southern China.



remained unresolved, the Government did not initially allow the stranded Vietnamese to establish residency in Hong Kong. In 2000, however, Hong Kong changed its policy, closed the last camps and granted residency to more than 1000 of the remaining Vietnamese. Press reports at that time indicate that the Government changed its policy only after repeated, failed attempts to secure alternative solutions.<sup>28</sup>

## 2.2 Current policy: parallel screening mechanisms

Since the disapplication of Part IIIA of the Immigration Ordinance, Hong Kong legislation has not explicitly referred to refugees or other similar categories of claimants seeking protection from *refoulement*. Despite the lack of statutory provisions, however, two separate but overlapping screening mechanisms have developed and operate in parallel.

The first, established by the Hong Kong authorities in response to the CFA's decision in *Prabakar*,<sup>29</sup> considers claims based on article 3 of the Torture Convention. The CFA held that high standards of procedural fairness are required when determining torture claims since fundamental human rights are at stake.<sup>30</sup> The court identified three necessary considerations: (1) the torture claimant 'should be given every reasonable opportunity' to establish his/her claim that he/she would be in danger of being subjected to torture; (2) '[t]he claim must be properly assessed by the Secretary ...' and (3) the Secretary for Security must give reasons for any rejection.<sup>31</sup>

The procedures initially established pursuant to this judgment allowed individuals to lodge torture claims with the immigration authorities. A 'torture claimant' would then receive a written explanation of the process, with interpretation where necessary, be asked to

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<sup>28</sup> Apparently, many of the refugees could not be resettled since they had criminal records, medical disorders or drug addictions. See G. Schloss, 'Remaining Vietnamese Boat People Set to Win Residency', *South China Morning Post*, 9 Jan. 1999. One member of the Legislative Council is quoted as stating that 'he could not object to [the refugees] staying as the number was low and they had lived here so long'. Other legislators, however, expressed concern that 'integration of the Vietnamese would undermine stability as some had criminal records', and asked the Government to explain how it would prevent the decision from attracting more 'boat people' to the territory. See S. Lee, 'Temporary ID for Viets to be Discussed', *South China Morning Post*, 22 Feb. 2000. See also G. Loo, 'Scheme Hailed, Regretted', *Hong Kong Standard*, 23 Feb. 2000; M. Wong, 'We're happy to remain, say boat people', *South China Morning Post*, 23 Feb. 2000; and D. Poon and G. Loo, 'Residency offer to 1,400 remaining Vietnamese will last six weeks', *Hong Kong Standard*, 23 Feb. 2000.

<sup>29</sup> n. 12 above.

<sup>30</sup> *Ibid.*, para. 44.

<sup>31</sup> *Ibid.*, para. 51.

complete a questionnaire, attend an interview with an immigration officer, and, in the event of a failed claim at first instance, could petition the Chief Executive of Hong Kong.<sup>32</sup>

These procedures were challenged by way of a subsequent judicial review, *FB v. Director of Immigration (FB)*,<sup>33</sup> decided by the CFI in December 2008. The court held that the mechanism failed to meet the requisite high standards of fairness set out in *Prabakar* and identified several problems including: 1) the lack of publicly funded legal assistance, 2) the inability of legal representatives to be present at interviews or even when the initial questionnaire was completed, 3) the fact that the examining officer and the decision maker were not the same person, 4) insufficient provision of training for decision makers – both at first instance and at the petition stage, and 5) lack of provision for an oral hearing on petition and no legal representation at that stage.<sup>34</sup> In response, the Government temporarily ceased its consideration of torture claims and amended the screening procedures in an attempt to meet the judgment's requirements. The revised scheme began operating in December 2009 according to temporary administrative 'Guidelines for Handling Claims Made under article 3 of the [Torture Convention]'.<sup>35</sup> The Government has also announced plans to introduce relevant legislation to provide a statutory basis for the system.<sup>36</sup>

The second, parallel mechanism is a refugee status determination procedure administered by the UNHCR's Hong Kong Sub-office. Since the disapplication of Part IIIA of the Immigration Ordinance and until the establishment of the torture screening procedures in 2004, the UNHCR provided the only avenue for individuals seeking protection from *refoulement* in Hong Kong. The Hong Kong Government and the UNHCR have maintained an informal arrangement since the closure of the Vietnamese refugee camps, and Hong Kong has allowed asylum seekers to remain in the territory – although with no legal status - until

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<sup>32</sup> 'Written replies by the Hong Kong [SAR] to the list of issues (CAT/C/HKG/Q/4) to be taken up in connection with the consideration of the fourth periodic report of Hong Kong (CAT/C/HKG/4)', UN doc. CAT/C/HKG/Q/4/Add.1, 6 Oct. 2008, paras. 40-45. See Basic Law art. 48(13) which sets out the Chief Executive's power to handle petitions and complaints.

<sup>33</sup> *FB v. Director of Immigration* [2008] HKEC 2072 [*FB*].

<sup>34</sup> *Ibid.*, para. 230.

<sup>35</sup> Version dated 28 Dec. 2009 (on file with the author).

<sup>36</sup> Security Bureau (Nov. 2009), n. 5 above. According to this document, 6,203 claims were pending at the end of Oct. 2009. See also 'Joint Position Paper by the Law Society of Hong Kong and the Hong Kong Bar Association on the Framework for Convention against Torture Claimants and Asylum Seekers', 31 March 2009, 1-2; Security Bureau, 'Hearing of the Second Report of the Hong Kong Special Administrative Region under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment', for Discussion at the Legislative Council Panel on Security Meeting on 3 Feb. 2009, LC Paper No. CB(2)737/08-09(03), Jan. 2009, Annex B; and A. Wong, 'Plan to offer torture claimants legal aid in petition hearings', *South China Morning Post*, 4 July 2009, A2.

the resolution of their claims.<sup>37</sup> The Director of Immigration also permits UNHCR-designated refugees to remain in Hong Kong pending resettlement in third countries.<sup>38</sup> The UNHCR has not provided written reasons for its decisions in the past, although it is currently in the process of revising that policy, and has only recently begun allowing legal representatives to attend interviews.<sup>39</sup> The UNHCR and the Hong Kong Government signed a memorandum of understanding in 2009 which increased their level of cooperation.<sup>40</sup> The UNHCR has organized training sessions for immigration officers responsible for screening torture claims and some have been seconded to work in the UNHCR Sub-office.<sup>41</sup>

NGOs and refugee lawyers have criticized both mechanisms for procedural limitations<sup>42</sup> and have pointed out that maintaining two separate systems wastes resources since there is considerable overlap among claimants accessing both procedures – either simultaneously or one at a time. The existence of two independent systems may even encourage abuse of the process – a result which the Hong Kong authorities wish to avoid – since claimants who avail themselves of both are generally allowed to remain in Hong Kong for longer periods of time.<sup>43</sup>

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<sup>37</sup> The UNHCR was considering 994 refugee claims as of May 2009. Email to the author from Choosin Ngaotheppitak, head of the UNHCR Hong Kong Sub-office, 20 May 2009 (on file with the author). This represents a significant decrease from approximately 2000 pending cases at the end of 2007. See 2007 UNHCR Statistical Yearbook, 65, Table 1, <<http://www.unhcr.org/statistics/STATISTICS/4981b19d2.html>>. According to the Hong Kong Government's reply to the UN Committee Against Torture, n. 32 above, 'As at end-June 2008, there are 105 refugees, 1,671 asylum-seekers and 3,279 torture claimants remaining in Hong Kong', para. 56. Most asylum seekers originate from South Asian and African countries. The nature of the informal arrangement between the UNHCR and the Hong Kong Government was described in *C v Director of Immigration* which cited a letter from the UNHCR to the applicants' solicitors: 'UNHCR provides the HKSAR with the basic biographical information of each asylum seeker who approaches UNHCR. UNHCR also regularly communicates the status and outcome of refugee status determination cases to the HKSAR'. See n. 13 above, para. 61.

<sup>38</sup> See n. 32 above, para. 57.

<sup>39</sup> Ngaotheppitak, n. 37 above.

<sup>40</sup> Hong Kong SAR Government, Press Release, 'HK and UNHCR sign agreement on enhanced co-operation', 20 Jan. 2009.

<sup>41</sup> Ibid.

<sup>42</sup> See n. 13 above, para. 17: 'Each of the applicants complains that the screening process conducted by the UNHCR is inadequate. They assert that there are often difficulties with interpretation, that the interviews are not ample enough, that claimants are not entitled to be legally represented and that the decisions, when made, lack sufficient reasoning. Perhaps the most serious complaint is that UNHCR determinations are immune from judicial scrutiny'. See also Hong Kong Human Rights Monitor, 'Shadow Report for the United Nations Committee against Torture on the implementation of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in the Hong Kong Special Administrative Region, the People's Republic of China', 18 April 2008, para. 52, citing Joint Submission by the Society for Community Organization, Hong Kong Human Rights Commission, Voices of the Rights of Asylum Seekers and Refugees to the Panel on Welfare Services and Panel on Security, 'Denial of Asylum Seekers' Rights,' LC Paper No. CB(2)2747/05-06(03), July 2006.

<sup>43</sup> See 'Government must screen torture claimants fairly', *South China Morning Post*, 5 April 2009, 'Lawyers raise stakes over torture cases', *South China Morning Post*, 5 April 2009. See also Law Society, n. 36 above. In an editorial, the *South China Morning Post* advocated for '[a] single effective and transparent screening system'

### 3. *Prabakar* and *C*: The Application of *Non-refoulement* in Hong Kong

These screening mechanisms have developed in the absence of a statutory framework and without explicit acknowledgement by the Government or the courts that Hong Kong law imposes a duty of *non-refoulement*. While the CFA in *Prabakar* merely sidestepped the issue - although still holding in favor of the applicant - the CFI in *C* denied the existence of such an obligation – at least with respect to ‘refugees’ as the term is understood in the Refugee Convention. This section considers the courts’ reasoning in these cases and explores the significance of their failure to rely on a broader principle of *non-refoulement* which reflects human rights standards. Had the court in *C*, for example, considered the protection from *refoulement* offered by the ICCPR, the Bill of Rights and the Basic Law, it may have reached a different conclusion about the consistency of *non-refoulement* in customary international law with domestic law. If Hong Kong’s human rights commitments support such consistency, then the *non-refoulement* principle may apply in Hong Kong and require Government-administered refugee status determination.

#### 3.1 *Prabakar*

Sakthivel Prabakar was an ethnically Tamil asylum seeker from Sri Lanka who was arrested for possession of a forged Canadian passport while transiting through the Hong Kong airport in January 1999. He claimed he had been tortured in Sri Lanka and was en route to Canada where he intended to claim asylum. After his arrest, he lodged an application with the UNHCR Sub-office in Hong Kong and was eventually granted refugee status, after an initial rejection and a failed appeal. The Hong Kong Government, however, refused to rescind a deportation order it had made against him after his conviction for possession of the false travel document - even after he had left Hong Kong and had resettled in Canada.<sup>44</sup> He

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which would be ‘fairer to claimants and better protect the city from being flooded with economic migrants’. See ‘Government Must Screen Torture Claimants Fairly’, *South China Morning Post*, 4 May 2009.

<sup>44</sup> See s 20(1) of the Immigration Ordinance (Cap. 115).

challenged this decision as well as the Government's reliance on the UNHCR's unexplained determinations when considering claims under article 3 of the Torture Convention.

In the judgment, the court referred to the Government's policy of *non-refoulement*, articulated in Hong Kong's periodic report to the UN Committee against Torture in 1999:

Should potential removees or deportees claim that they would be subjected to torture in the country to which they are to be returned, the claim would be carefully assessed, by both the Director of Immigration and the Secretary for Security or, where the subject has appealed to the Chief Executive, by the Chief Executive in Council.

Where such a claim was considered to be well founded, the subject's return would not be ordered. In considering such a claim, the Government would take into account all relevant considerations, including the human rights situation in the State concerned, as required by article 3.2 of the Convention.<sup>45</sup>

The court noted, however, that in practice, the Government did not independently consider such claims, but relied solely on refugee determinations made by the UNHCR Sub-office in Hong Kong when deciding whether to withhold the removal or deportation of torture claimants.

The court highlighted the prohibition of *refoulement* as the 'central safeguard of the [Torture] Convention',<sup>46</sup> and held that the Government's approach to implementing its policy under article 3 did not meet the necessary high standards of procedural fairness and the Secretary for Security must conduct an independent assessment of the claim. Although overlap may exist between refugee and torture claims, the relevant criteria considered by decision-makers are not identical. While the concept of 'persecution' in the definition of 'refugee' would certainly encompass 'torture',<sup>47</sup> the Refugee Convention, unlike the Torture Convention, requires the establishment of a causal link between the feared persecution and one of the five 'Convention grounds' (race, religion, nationality, membership of a particular social group or political opinion).<sup>48</sup> So a rejection by the UNHCR of an application for refugee status could not be relied upon as the basis for denying an article 3 claim.

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<sup>45</sup> China's third periodic report under the Torture Convention, UN doc. CAT/C/39/Add.2, 4 May 1999, para. 122, submitted pursuant to art. 19 of the Torture Convention. Cited in *Prabakar*, n. 12 above, para. 19.

<sup>46</sup> *Ibid.* (*Prabakar*), para. 1 (per Li CJ). At para. 44, Li CJ writes: 'The determination of the potential deportee's torture claim by the Secretary in accordance with the policy is plainly one of momentous importance to the individual concerned. To him, life and limb are in jeopardy and his fundamental human right not to be subjected to torture is involved. Accordingly, high standards of fairness must be demanded in the making of such a determination'.

<sup>47</sup> See J.C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), 108-109.

<sup>48</sup> n. 23 above and *Ibid.*, 135-188.

Despite its ruling in Prabakar’s favor and the judgment’s impact on the development of a torture screening mechanism, the court ultimately – and significantly – declined to determine whether Hong Kong has a legal duty to respect *non-refoulement* stating that:

For the purposes of this appeal, the Court will assume without deciding that the Secretary is under a legal duty to follow the policy as a matter of domestic law. In proceeding on the basis of such an assumption, the Court must not be taken to be agreeing with the views expressed in the judgments below that such a legal duty exists.<sup>49</sup>

The court below – the Court of Appeal (CA) – while seemingly recognizing the existence of such a duty, did not provide detailed reasoning in this regard. It noted that the Government, in its report to the Committee against Torture, had referred to article 9 of the Bill of Rights when elaborating its *non-refoulement* policy.<sup>50</sup> Article 9 essentially duplicates article 13 of the ICCPR and provides that:

[a] person who does not have the right of abode in Hong Kong but is lawfully in Hong Kong may be expelled therefrom only in pursuance of a decision reached in accordance with the law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion to, and have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.<sup>51</sup>

According to the court, since the applicant was lawfully in Hong Kong until his arrest and in Hong Kong in accordance with the law thereafter, he was entitled to the protection afforded by article 9 and a proper investigation of his torture claim.<sup>52</sup> The judgment goes on to simply state that such an obligation ‘might be expressed in terms of legitimate expectation or it might be expressed in terms of fairness and proper application of article 9 of the Bill of Rights. It matters not. The decision was taken without the decision maker having ensured that the proper enquiries were made’.<sup>53</sup> While this was enough for the court to hold in favor of Prabakar and set aside the deportation order, it did not firmly ground a duty of *non-refoulement* in Hong Kong law.

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<sup>49</sup> Prabakar, n. 12 above, para. 4.

<sup>50</sup> Sakthevel Prabakar v Secretary for Security [2002] HKEC 1451, para. 19.

<sup>51</sup> Cited in *ibid.*

<sup>52</sup> *Ibid.*, para. 22.

<sup>53</sup> *Ibid.*, para. 24.

Both the CFA and the CA missed an opportunity in *Prabakar* to clarify the basis of a right to *non-refoulement* in Hong Kong law which could have provided a sounder foundation for the development of a more comprehensive protection framework.

### 3.2 C

In *C*, the CFI considered two main issues: 1) whether the Hong Kong Government has an obligation of *non-refoulement* of refugees under customary international law and 2) if such an obligation exists then whether it imposes a duty on Hong Kong authorities to screen claimants for refugee status.<sup>54</sup> The six claimants in the case were asylum seekers who had applied for refugee status with the UNHCR Sub-office but their claims had failed both at first instance and at the appeal stage. Some had also lodged torture claims which were still pending at the time of the judgment.

Hartmann J. proceeded to determine whether a rule of *non-refoulement* had emerged in customary international law and, further, whether it had achieved the status of *jus cogens* – a peremptory norm from which no derogation is permitted.<sup>55</sup> After a review of competing scholarly opinion, he held that a principle of *non-refoulement* exists in customary international law but that it is not a peremptory norm<sup>56</sup> He writes in the judgment, that ‘it seems to me, on balance, that today states generally do adhere to the norm and do so out of recognition that it creates an obligation in law’<sup>57</sup> but that ‘it goes too far to hold - at this time - that the rule has acquired the status of a peremptory norm’.<sup>58</sup>

He then considers whether the customary rule of *non-refoulement* forms part of Hong Kong law through a discussion of the ‘doctrine of incorporation’, developed by Lord Denning in *Trendtex Trading Corporation v. Central Bank of Nigeria (Trendtex)*,<sup>59</sup> which provides for the automatic incorporation of rules of international law into English law ‘unless they are in conflict with an Act of Parliament’.<sup>60</sup> Citing *Trendtex*, Hartmann J. observes that ‘a rule of

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<sup>54</sup> See n. 13 above, para. 1.

<sup>55</sup> A peremptory norm, or *jus cogens*, is ‘accepted and recognized by the international community of States as a whole as [a] norm from which no derogation is permitted’. The 1969 Vienna Convention on the Law of Treaties, art. 53.

<sup>56</sup> n. 13 above., paras. 115 and 135.

<sup>57</sup> *Ibid.*, para. 115.

<sup>58</sup> *Ibid.*, para. 135.

<sup>59</sup> [1977] 1 QB 529.

<sup>60</sup> See n. 13 above, para. 80. For a discussion and critique of the doctrine of incorporation in the Hong Kong context, see O. Jones, ‘Customary *Non-refoulement* of Refugees and Automatic Incorporation into the Common Law: A Hong Kong Perspective’ (2009) 58 *ICLQ* 443 at 457. Jones argues that *Trendtex* should not have survived the change of sovereignty in 1997 since the Basic Law provides for a clear separation of powers and

customary international law cannot displace a domestic law. If it is in conflict with domestic law then it will not be received into our law'.<sup>61</sup> He notes that the test is one of consistency,<sup>62</sup> and seems to accept that a more stringent test would apply when human rights are at stake.<sup>63</sup> Ultimately he decides, however, that *non-refoulement* has not been incorporated into Hong Kong law and seems to apply either (or both) a test of consistency or evidence that Hong Kong has 'contracted out' of – and therefore repudiated – the rule. He reasons that a lack of domestic legislation providing protection for refugees indicates that Hong Kong's laws are contrary to the rule and that Hong Kong has 'by consistent and long-standing objection ... refused to accede to the rule'.<sup>64</sup> The latter argument appears to reflect the concept of persistent objection in international law.<sup>65</sup>

According to the judgment, three factors in particular demonstrated such inconsistency – or repudiation of the rule - including: 1) the Hong Kong Government's explicit rejection of the Refugee Convention; 2) a general reservation to the ICCPR for immigration legislation; and 3) the limited, temporary nature of a refugee regime implemented in the 1980s and 1990s designed only to deal with an influx of asylum seekers from Vietnam.<sup>66</sup>

In reaching this determination, Hartmann J. appears to incorrectly conflate an obligation of *non-refoulement* with the Refugee Convention as a whole and also seems to

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the doctrine of incorporation involves judicial lawmaking. He does not consider in detail the implications of a constitutional right to *non-refoulement* in his analysis, however.

<sup>61</sup> See n. 13 above, para. 82.

<sup>62</sup> Ibid., para. 83, citing *Chung Chi Cheung v. R.* [1939] AC160 at 168.

<sup>63</sup> Ibid., para. 84, citing *R. v. Secretary of State for the Home Department, ex parte Phansopkar* [1976] 1 QB 606 at 626: '... in my judgment it is the duty of the courts, so long as they do not defy or disregard clear unequivocal provision, to construe statutes in a manner which promotes, not endangers, those rights. Problems of ambiguity or omission, if they arise under the language of an Act, should be resolved so as to give effect to, or at the very least so as not to derogate from the rights ...'

<sup>64</sup> Ibid. (C), para. 194(iii).

<sup>65</sup> The concept of the persistent objector, although widely accepted, is controversial, especially in the human rights context. Cassese claims that 'there is no firm support in State practice and international case law for a rule on the "persistent objector"'. See A. Cassese, *International Law* (OUP, 2<sup>nd</sup> edn., 2005), 163. See also J. Wouters and C. Ryngaert, 'Impact on the Process of the Formation of Customary International Law', in M.T. Kamminga and M. Scheinin (eds.), *The Impact of Human Rights Law on General International Law* (OUP, 2009), at 130-131; H. Lau, 'Rethinking the Persistent Objector Doctrine in International Human Rights Law' (2005) 6 *CJIL* 495; T.L. Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law' (1985) 26 *HILJ* 457; D.A. Colson, 'How Persistent must the Persistent Objector Be?' (1986) 61 *WLR* 957; T. Meron, *The Humanization of International Law* (Martinus Nijhoff Publishers, 2006), 374-376; J.I. Charney, 'The Persistent Objector Rule and the Development of Customary International Law' (1985) 56 *BYIL* 1 (1985).

<sup>66</sup> n. 13 above, para. 89. Hartmann J. sets out the factors considered by the Court of Appeal in *Madam Lee Bun and Another v. Director of Immigration* [1990] 2 HKLR 466. He states that he is satisfied that the judgment in that case is binding on him (para. 92).



confuse *non-refoulement* with the concept of asylum.<sup>67</sup> This distinction is critical for understanding the implications of the Convention's non-applicability to Hong Kong since a rejection of the Convention does not necessarily imply a rejection of *non-refoulement*. Failure to implement full protections for all refugees similarly may not be demonstrative of a repudiation of *non-refoulement*. In addition, Hartmann J. does not explore in any depth the broader *non-refoulement* principle – reflected in international law and Hong Kong constitutional law - which goes beyond the more limited articulation found in article 33 of the Refugee Convention,<sup>68</sup> and which is clearly consistent with Hong Kong law. A more detailed analysis of Hong Kong's human rights commitments is also likely to demonstrate consistency with the narrower principle of *non-refoulement* of refugees facing potential persecution on one of the five Refugee Convention grounds – since the term 'persecution' is generally defined with reference to serious human rights violations.<sup>69</sup>

### 3.2.1 *Non-refoulement in international and comparative law*

Before developing these arguments in greater detail below, the next two sections will first review the international and domestic sources of a right to *non-refoulement* in order to provide a basis for understanding these gaps in the judgment.

The principle of *non-refoulement* of refugees is well-established in international law. In addition to article 33 of the Refugee Convention, a number of other international and regional instruments – of both a binding and non-binding character - contain explicit

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<sup>67</sup> For a discussion of the difference between asylum and *non-refoulement*, see Hathaway, *The Rights of Refugees in International Law* (2005), 300-301.

<sup>68</sup> Art. 33(1) provides that 'No Contracting State shall expel or return ("refouler") 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'. Art. 33(2) limits the benefit of the provision which is not available to 'a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'. The applicants' solicitor confirmed that this point was raised by the applicants before the court – but was not picked up in the judgment. See, above n. 15.

<sup>69</sup> M. Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge: Cambridge University Press, 2007), 27. Foster cites Grahl-Madsen, *The Status of Refugees in International Law*, 193, who refers to Vernant's suggestion in 1953 that persecution should be equated 'with severe sanctions and measures of an arbitrary nature, incompatible with the principles set forth in the Universal Declaration of Human Rights'. She credits Hathaway's proposition that persecution be defined as 'a sustained or systemic violation of basic human rights demonstrative of a failure of state protection' for the expansion of a human rights approach. See Hathaway (1991) above n. 47, 104-5. She also cites a number of domestic judgments, UNHCR documents, and scholarly commentaries which support a human rights interpretation. (See Foster, 27-33)

prohibitions of *refoulement*.<sup>70</sup> These include the 1969 Organization of Africa Unity Convention Governing the Specific Aspects of Refugee Problems in Africa,<sup>71</sup> the 1984 Cartagena Declaration,<sup>72</sup> and the Bangkok Principles.<sup>73</sup> In addition, some instruments provide for complementary, or subsidiary, protection from *refoulement* for persons who may face serious harm if expelled, but may not fall within the definition of refugee in the Refugee Convention and Protocol. These include the Torture Convention,<sup>74</sup> the 1969 American Convention on Human Rights (article 22(8)),<sup>75</sup> and the 2004 European Union Qualification Directive.<sup>76</sup> Although opinion varies, scholars generally agree that the principle of *non-refoulement* has become a rule of customary international law binding on all States regardless

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<sup>70</sup> See generally, J. McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007); G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford University Press, 2007), 285-354; A. Duffy, 'Expulsion to Face Torture? *Non-refoulement* in International Law' (2008) 20 *IJRL* 373-390; D. Weissbrodt and I. Hörtreiter, 'The Principle of *Non-refoulement*: Art. 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the *Non-refoulement* Provisions of Other International Human Rights Treaties' (1999) 5 *BHRLR* 1-73.

<sup>71</sup> Art. 2(3): 'No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons of [race, religion, nationality, membership of a particular social group or political opinion] or [external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality]'.

<sup>72</sup> Section III, para. 5: 'The colloquium adopted the following conclusions ... To reiterate the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a cornerstone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*'.

<sup>73</sup> Art. III: 'No one seeking asylum in accordance with these Principles shall be subjected to measures such as rejection at the frontier, return or expulsion which would result in his life or freedom being threatened on account of his race, religion, nationality, ethnic origin, membership of a particular social group or political opinion'.

<sup>74</sup> Art. 3(1). For a comprehensive discussion of this obligation see M. Nowak and E. McArthur, *The United Nations Convention Against Torture* (OUP, 2008), 126-228; J. McAdam, n. 70 above, 111-135; and Goodwin-Gill and McAdam, n. 70 above, 301-305. Under art. 3 the claimant must demonstrate he/she is 'in danger of' being subjected to torture. The CAT Committee has commented that it would be necessary to establish that a return to torture 'would have the foreseeable and necessary consequence of exposing [an individual] to a real risk of being ... tortured'. (See *Mutombo v. Switzerland*, Communication No. 13/1993, U.N. doc. A/49/44 at 45 (1994), para. 9.4. The Committee has issued decisions on 136 communications involving art. 3 and Nowak McArthur observe that these represent '[t]he vast majority of individual complaints decided by the CAT Committee', Nowak and McArthur, 127).

<sup>75</sup> 'In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions'.

<sup>76</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. Subsidiary protection applies to 'a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin ... would face a real risk of suffering serious harm ... and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country. Art. 15 provides that "serious harm" consists of death penalty or execution, torture or inhuman or degrading treatment or punishment; or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'. For a discussion of subsidiary protection in the Council Directive, see R. Piotrowicz and van Eck, 'Subsidiary Protection and Primary Rights' (2004) 53 *ICLQ* 107 and McAdam, n. 70 above, 60-84.

of treaty obligations<sup>77</sup> and, although originally derived from article 33 of the Refugee Convention, now goes beyond the confines of this provision and reflects developments in human rights law. Lauterpacht and Bethlehem's authoritative review of *non-refoulement* in customary international law – which Hartmann J. cites favorably in *C* - concludes that the principle requires that '[n]o person seeking asylum may be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or to return to a territory where he or she may face a threat of persecution or to life, physical integrity, or liberty'.<sup>78</sup> Also,

No person shall be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or return to a territory where substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment.<sup>79</sup>

In addition to these explicit obligations, the Human Rights Committee, the body which monitors the implementation of the ICCPR, and the European Court of Human Rights have interpreted an implicit right to *non-refoulement* in the ICCPR and the European Convention on Human Rights respectively.<sup>80</sup>

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<sup>77</sup> Principles of customary international law arise from consistent state practice and *opinio juris* (the belief that the practice is compulsory). For a detailed explanation of the sources and content of the principle of *non-refoulement* at customary international law, see Sir Elihu Lauterpacht and Daniel Bethlehem, 'The Scope and Content of the Principle of *Non-refoulement*', 20 June 2001, 61-87, available at <<http://www.unhcr.ch>>. See also G.S. Goodwin Gill, *The Refugee in International Law* (Oxford: Clarendon Press, 1996), 117-171. A minority of scholars, including Hathaway, dispute the existence of a customary rule. See JC Hathaway, *The Rights of Refugees under International Law* (2005), 363-367. See Discussion of customary international law in M. Dixon and R. McCorquodale, *Cases and Materials on International Law* (OUP, 2003), 28-37.

<sup>78</sup> *Ibid.* (Lauterpacht and Bethlehem), para. 253(b). Also cited in, n. 13 above, para. 103. Exceptions may be possible in light of 'overriding considerations of national security or public safety' but only in circumstances 'in which the threat does not equate to and would not be regarded as being on a par with a danger of torture or cruel, inhuman or degrading treatment or punishment and would not come within the scope of other non-derogable customary principles of human rights' (para. 253(c)).

<sup>79</sup> *Ibid.* (Lauterpacht and Bethlehem), para. 253(a). They also observe that '[t]his principle allows of no limitation or exception'.

<sup>80</sup> Art. 3 of the European Convention on Human Rights prohibits torture or inhuman or degrading treatment or punishment. A number of cases have established that this includes an implicit obligation of *non-refoulement* including, for example, *Soering v. United Kingdom* (1989) 11 EHRR 439, *Chahal v. UK* (1996) 23 EHRR 413, and *Garabayev v. Russia* [2007] ECHR 38411/02. In *Soldatenko v. Ukraine* [2008] ECHR 2440/07, the ECHR held that '[i]t is the settled case law of the Court that extradition by a Contracting State may give rise to an issue under art. 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question would, if extradited, face a real risk of being subjected to treatment contrary to art. 3 in the receiving country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of art. 3 of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment' (at para. 66). See also paras. 67-69 of *Soldatenko* for an elaboration of other general principles the court has developed when considering states' *non-refoulement* obligations under art. 3. For further discussion see, for

In its jurisprudence and General Comments, the Human Rights Committee has expounded on the obligation of states parties to the ICCPR to refrain from returning a person to a place where he/she would be exposed to a real risk of a violation of rights under the Covenant.<sup>81</sup> Articles 6 (the right to life) and 7 (the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment) are particularly relevant.

Article 6(1) provides that '[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'. The Committee notes that this is 'the supreme right from which no derogation is permitted even in time of public emergency',<sup>82</sup> that it should not be interpreted narrowly, and that it requires positive action to ensure protection.<sup>83</sup> The Committee considered the implicit right to *non-refoulement* contained in article 6 in *A.R.J. v. Australia*, an individual communication brought under the first Optional Protocol to the ICCPR by an Iranian national who had been convicted of a drug charge in Australia. Mr J. argued that he would be executed or tortured if returned to Iran and therefore deportation by Australia would violate his right to life. The Committee found no violation, based on evidence indicating that Iran would not impose the death penalty for the relevant offence and there was no outstanding warrant for A.R.J.'s arrest. It stated, however, that if he had been 'exposed to a real risk of a violation of article 6, paragraph 2 [concerning the death penalty] in Iran, this would entail a violation by Australia of its obligations under article 6, paragraph 1'.<sup>84</sup> It asserted that '[i]f a State party deports a person within its territory and subject to its jurisdiction in such circumstances that as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, that State party itself may be in violation of the Covenant'.<sup>85</sup> The Committee further explained that

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example, *Goodwin-Gill and McAdam*, n. 70 above, 311-323. Hathaway, citing *R (Ullah) v. Special Adjudicator; Do v. Secretary of State for the Home Department* [2004] UKHL 26 (UK HL, June 17, 2004), notes that 'there is nascent support for the view that states parties to the European Convention on Human Rights and Fundamental Freedoms will not be allowed to remove persons who face the risk of a particularly serious violation of a fairly wide range of human rights'. See Hathaway, *The Rights of Refugees* (2005), 369.

<sup>81</sup> *A.J.R.* n. 9 above. McAdam notes the HRC's tacit acceptance 'that removing an individual to face a real risk of violation of any ICCPR right could constitute *refoulement*' (See *Goodwin-Gill and McAdam*, n. 70 above, 308).

<sup>82</sup> Human Rights Committee General Comment 6, para. 1 and General Comment 14, para. 1

<sup>83</sup> *Ibid.* (General Comment 6), paras. 1 and 5.

<sup>84</sup> *A.R.J.* n. 9 above, para. 6.11. Art. 6(2) provides that '[i]n countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court'.

<sup>85</sup> *Ibid.*, para. 6.9.

States parties to the Covenant must ensure that they carry out all their other legal commitments, whether under domestic law or under agreements with other states, in a manner consistent with the Covenant. Relevant for the consideration of this issue is the State party's obligation, under article 2, paragraph 1, of the Covenant, to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant. The right to life is the most fundamental of these rights.<sup>86</sup>

Similarly, according to its General Comment on the general legal obligation imposed on states under article 2, the Committee considers that the duty to

respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.<sup>87</sup>

Article 7 of the ICCPR provides that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. The Committee's General Comment 20 indicates that '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*' and that 'States parties should indicate in their reports what measures they have adopted to that end.'<sup>88</sup>

Unlike the explicit *non-refoulement* obligation in article 3 of the Torture Convention, the implicit duty in article 7 goes beyond avoiding a return to torture and also includes *non-refoulement* to face cruel, inhuman, or degrading treatment or punishment. The Committee has also remarked on the need for fairness when determining who may be subject to such a risk observing 'that where one of the highest values protected by the Covenant, namely the right to be free from torture, is at stake, the closest scrutiny should be applied to the fairness of the procedure applied to determine whether an individual is at a substantial risk of torture'.<sup>89</sup>

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<sup>86</sup> Ibid., para. 6.8. See also *G.T. v. Australia* (706/1996), UN doc. CCPR/C/61/D/706/1996, paras. 8.1 and 8.2.

<sup>87</sup> General Comment 31, n 9 above.

<sup>88</sup> Human Rights Committee, General Comment 20, 1992, para. 9.

<sup>89</sup> *Ahani v. Canada* (1051/2002), para. 10.6.

Significantly, considerable overlap exists between the explicit and implicit rights to *non-refoulement* in the Torture Convention and the ICCPR and the duty of *non-refoulement* of refugees in article 33 of the Refugee Convention which prohibits *refoulement* to the frontiers of territories where an individual's 'life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'. Article 33 is generally understood to apply to 'refugees'<sup>90</sup> a term which includes the concept of 'persecution'.<sup>91</sup> Although there is no clear definition of persecution in international law,<sup>92</sup> it has been increasingly interpreted with reference to violations of internationally recognized human rights. Foster observes that

[o]ne of the most significant developments in refugee law jurisprudence in recent years has been the well-documented move towards an understanding of 'being persecuted', as well as other elements of the definition [of refugee], that is informed and understood in the context of international human rights standards.<sup>93</sup>

This close connection between the protection of refugees and those claiming a right to *non-refoulement* to states where they may face violations of rights in the ICCPR is underscored by the Committee's frequent comments on refugee laws and policies in its concluding observations on states parties' reports.<sup>94</sup> With respect to *non-refoulement*, international human rights standards arguably provide broader protection than article 33 since they do not require proof that the harm feared is based on any of the Refugee Convention grounds (race, religion, nationality, membership of a particular social group or political opinion). If an individual faces potential persecution, the implicit and explicit rights to *non-refoulement* in the ICCPR and the Torture Convention would likely provide protection for a significant proportion of individuals falling within the definition of 'refugee' in the Refugee Convention.

Courts in some domestic jurisdictions have drawn on the Torture Convention, the ICCPR and the Human Rights Committee's interpretive materials when deliberating on the existence of a right to *non-refoulement* in their constitutional documents. In *Suresh v.*

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<sup>90</sup> n. 23 above. '[Any person who] owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'.

<sup>91</sup> Goodwin-Gill and McAdam, n. 70 above, 232.

<sup>92</sup> UNHCR, 'Handbook on procedures and criteria for determining refugee status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees' (Geneva, 1979, re-edited 1992), HCR/IP/4/Eng/REV.1; J. Pirjola, 'Shadows in Paradise – Exploring *Non-refoulement* as an Open Concept' (2007) 19 *IJRL* 639-660 at 645.

<sup>93</sup> See, Foster, above n. 69; and Hathaway above n. 47, as cited by Foster in above n. 69.

<sup>94</sup> See, for example, Concluding Comments on Spain's Report, UN doc. CCPR/C/ESP/CO/5, 5 Jan. 2009, para. 16; Concluding Comments on Japan's report, UN doc. CCPR/C/JPN/CO/5, 18 Dec. 2008, para. 25; Concluding Comments on Denmark's report, UN doc. CCPR/C/DNK/CO/5, 16 Dec. 2008, para. 10; Concluding Observations on France's report, UN doc. CCPR/C/FRA/CO/4, 31 July 2008, para. 20.

*Canada (Minister of Citizenship and Immigration)*,<sup>95</sup> the Canadian Supreme Court refers to both article 3 of the Torture Convention and article 7 of the ICCPR and notes that: '[w]hile the provisions of the ICCPR do not themselves specifically address the permissibility of a state's expelling a person to face torture elsewhere, General Comment No. 20 to the ICCPR makes clear that Art. 7 is intended to cover that scenario ...'.<sup>96</sup> The court adds that 'the prohibition in the ICCPR and the CAT on returning a refugee to face a risk of torture reflects the prevailing international norm'.<sup>97</sup>

In *Attorney General v. Ahmed Zaoui (Zaoui)*,<sup>98</sup> the New Zealand Supreme Court considered provisions prohibiting torture and the arbitrary deprivation of life in its Bill of Rights, which are similar to their counterparts in the ICCPR, noting that:

[t]hose provisions do not expressly apply to actions taken outside New Zealand by other governments in breach of the rights stated in the Bill of Rights. That is also the case with articles 6(1) and 7 of the ICCPR. But those and comparable provisions have long been understood as applying to actions of a state party – here New Zealand – if that state proposes to take action, say by way of deportation or extradition, where substantial grounds have been shown for believing that the person as a consequence faces a real risk of being subjected to torture or the arbitrary taking of life.<sup>99</sup> The focus is not on the responsibility of the state to which the person may be sent. Rather, it is on the obligation of the state considering whether to remove the person to respect the substantive rights in issue.<sup>100</sup>

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<sup>95</sup> 2002 SCC 1. For a discussion of this case, see O.C. Okafor and P.L. Okoronkwo, 'Re-configuring *Non-refoulement*? The *Suresh* Decision, "Security Relativism", and the International Human Rights Imperative' (2003) 15 *IJRL* 30-67.

<sup>96</sup> *Ibid.* (*Suresh*), para. 66.

<sup>97</sup> *Ibid.*, para. 72. Although finding that 'torture is so abhorrent that it will almost always be disproportionate to interests on the other side of the balance, even security interests', the court held that deportation to torture may be possible in 'exceptional circumstances' (see paras. 76 and 129). The Committee against Torture criticized this position in its concluding comments on Canada's report in 2005: 'The Committee expresses its concern at: (a) The failure of the Supreme Court of Canada, in *Suresh v. Minister of Citizenship and Immigration*, to recognize at the level of domestic law the absolute nature of the protection of art. 3 of the Convention, which is not subject to any exception whatsoever'. See UN doc. CAT/C/CR/34/CAN, 7 July 2005, para. 4(a). Similarly the Human Rights Committee expressed concern over Canada's 'policy that, in exceptional circumstances, persons can be deported to a country where they would face the risk of torture or cruel, inhuman or degrading treatment, which amounts to a grave breach of art. 7 of the Covenant' and stated that Canada 'should recognize the absolute nature of the prohibition of torture, cruel, inhuman or degrading treatment, which in no circumstances can be derogated from'. See CCPR/C/CAN/CO/5, 20 April 2006, para. 15.

<sup>98</sup> [2005] NZSC 38.

<sup>99</sup> *Ibid.* The court cited *Soering*, above n. 80, paras 90 and 91, *Kindler v. Canada* (1993) Human Rights Committee, UN doc. CCPR/C/48/D/470/1991, paras 13.1-13.2, *R (Ullah) v. Special Adjudicator* [2003] 1 WLR 770 (CA), *Chalal*, above n. 80, paras. 73-82. See also for extradition the powers of the Minister of Justice in ss 30(2)(b), 48(1)(b) and 49 of the Extradition Act 1999.

<sup>100</sup> *Ibid.* (*Zaoui*), para. 79. The court noted that the New Zealand Government accepted that the obligations with respect to torture and arbitrary deprivation of life were absolute (contrary to the Canadian approach in *Suresh*).

This approach is reflected in immigration laws in a number of jurisdictions. For example, the Canadian Immigration and Refugee Protection Act 2001, defines a ‘person in need of protection’ as ‘a person in Canada whose removal ... would subject them personally to a danger, believed on substantial grounds to exist, of torture within the meaning of article 1 of the Convention Against Torture; or to a risk to their life or to a risk of cruel and unusual treatment or punishment’.<sup>101</sup> The New Zealand Immigration Act 2009 reforms New Zealand’s status determination procedures to allow claims for protection based on the Torture Convention and the ICCPR in addition to refugee status applications.<sup>102</sup>

### 3.2.2 Non-refoulement in Hong Kong law

Hong Kong constitutional law arguably contains an implicit right to *non-refoulement* which reflects the provisions in international human rights instruments and the broad principle in customary international law discussed above. Its content includes, at least, *non-refoulement* to torture, cruel, inhuman, degrading treatment or punishment and violations of other fundamental rights – especially those which are non-derogable<sup>103</sup> - including the arbitrary deprivation of life.

The Hong Kong Bill of Rights essentially duplicates the provisions in the ICCPR, including articles 6 and 7<sup>104</sup> and the Basic Law contains a similar expression of relevant rights in article 28. Together, these documents provide for an implicit constitutional right to *non-refoulement*.<sup>105</sup> Indeed, the extent of Hong Kong’s international human rights commitments and their incorporation in domestic law signals Hong Kong’s acceptance of the broader *non-refoulement* norm in customary international law discussed above.

The ICCPR has constitutional significance in Hong Kong since article 39 of the Basic Law provides for its entrenchment: ‘[t]he provisions of the [ICCPR], the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to

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For a discussion of this case, see R. Haines, ‘National Security and *Non-refoulement* in New Zealand: Commentary on *Zaoui v Attorney-General* (No 2)’ in McAdam (ed), *Forced Migration, Human Rights and Security* (Hart Publishing, 2008), 63-91.

<sup>101</sup> Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 97.

<sup>102</sup> ss 130 and 131.

<sup>103</sup> Art. 4(1) of the ICCPR allows states to derogate from many of the rights in the Covenant in public emergencies which threaten the life of the nation. No derogation may be made to certain rights, however, listed in art. 4(2).

<sup>104</sup> Arts. 2 and 3 of Part II of the Bill of Rights Ordinance.

<sup>105</sup> See K. Loper, ‘Toward Comprehensive Refugee Legislation in Hong Kong?’ Reflections on Reform of the ‘Torture Screening’ Procedures’, (2009) 39 *HKLJ* 253-9.



Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region'. Young notes that the Basic Law is not the 'exclusive source of constitutional rights' in Hong Kong since it 'engrafts the rights and freedoms in the ICCPR ... onto itself according to the terms of article 39'.<sup>106</sup>

In addition, article 28 of the Basic Law arguably creates a stand-alone implicit right to *non-refoulement* by providing for the inviolability of the freedom of the person and prohibiting arbitrary or unlawful arrest, detention or imprisonment, arbitrary or unlawful search of the body, deprivation or restriction of the freedom of the person, torture, and arbitrary or unlawful deprivation of life.<sup>107</sup> Therefore, the combination of articles 28 and 39 of the Basic Law, coupled with articles 2 and 3 of the Bill of Rights and principles of customary international law, elaborate the content of *non-refoulement* in Hong Kong law.

Hong Kong courts have interpreted fundamental rights in Hong Kong robustly and the judiciary has played an active role in the protection of rights.<sup>108</sup> In the landmark case of *Ng Ka Ling and Others v. Director of Immigration* in 1999, the CFA confirmed the constitutional nature of the Basic Law and the courts' jurisdiction to determine the compatibility of legislation and executive acts with the Basic Law, concluding that 'laws which are inconsistent with the Basic Law are of no effect and are invalid'.<sup>109</sup> The court held that 'the exercise of this jurisdiction is a matter of obligation, not of discretion so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency'.<sup>110</sup> The implementation of policies and laws must therefore be consistent with constitutional rights including *non-refoulement*.

Section 11 of the Bill of Rights, however, incorporates a broad reservation to the ICCPR - made by the British on behalf of Hong Kong and extended by China after 1997 -

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<sup>106</sup> S.N.M. Young, 'Restricting Basic Law Rights in Hong Kong', (2004) 34 *HKLJ* 109-132 at 110. Young describes this as a 'complex legal matrix of overlapping constitutional rights both in and outside the Basic Law'.

<sup>107</sup> At first glance, the application of this article appears limited to Hong Kong residents, but Basic Law art. 41 provides that '[p]ersons in the Hong Kong [SAR] other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed in this chapter'. Although vague, this formulation seems to indicate that non-residents have the same rights as residents unless these rights are restricted by law. Arguably, non-derogable rights, such as many of the rights enumerated in art. 28, have not been limited by law for non-residents. This interpretation is consistent with Hong Kong's obligation under the ICCPR to 'ensure the rights set forth in the Covenant to all individuals within its territory and subject to its jurisdiction' (art. 2(1)). See Human Rights Committee, General Comment 15: The Position of Aliens under the Covenant, 1986, and General Comment 31, para. 10.

<sup>108</sup> See generally Chan (2007), n. 11 above.

<sup>109</sup> (1999) 2 HKCFAR 4.

<sup>110</sup> *Ibid.*, para. 61.

which essentially exempts immigration legislation from constitutional challenge.<sup>111</sup>

Although Hong Kong courts have upheld the legitimacy of this exception in several cases,<sup>112</sup> these have involved rights – such as protections for the family - which do not reflect rules of customary international law, peremptory norms, or non-derogable rights.<sup>113</sup> In one such case, *Chan To Foon & Others v The Director of Immigration and the Secretary for Security*, the court acknowledged this distinction with regard to peremptory norms:

... 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 ...<sup>114</sup>

The limits of section 11 are further delineated by a General Comment issued by the Human Rights Committee.<sup>115</sup> The Committee does not accept the validity of reservations to provisions in the ICCPR 'that represent customary international law (and *a fortiori* when they have the character of peremptory norms)'. As a result, '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'.<sup>116</sup> The Human Rights Committee further notes that '...the normal consequences of an unacceptable reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation'.<sup>117</sup>

The CFI cited this General Comment favorably in *Ubamaka Edward Wilson v. Secretary for Security (Ubamaka)*, a case decided in May 2009.<sup>118</sup> In *Ubamaka*, the applicant argued that he was at risk of double jeopardy, amounting to cruel inhuman or degrading treatment, if the Hong Kong authorities deported him to Nigeria. He feared that he

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<sup>111</sup> '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'.

<sup>112</sup> See for example *Mok Chi Hung v. Director of Immigration* [2001] 1 HKC 281; *Chan To Foon & Others v. The Director of Immigration and the Secretary for Security* [2001] HKCU 1; and *Chan Mei Yee v. Director of Immigration* [2000] HKEC 788.

<sup>113</sup> Art. 23(1) of the ICCPR, which provides that 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State', is not listed as one of the non-derogable rights in art. 4(2) of the Covenant. Art. 10(1) of the ICESCR provides that the 'widest possible protection and assistance should be accorded to the family, which is the fundamental group unit of society'.

<sup>114</sup> See n. 112 above (*Chan To Foon*). In *Ng Ka Ling* the provision in question related to categories of permanent residents.

<sup>115</sup> Human Rights Committee, General Comment 24 'Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under art. 41 of the Covenant', UN doc. CCPR/C/21/Rev.1/Add.6, 1994.

<sup>116</sup> *Ibid.*, para. 8.

<sup>117</sup> *Ibid.*, para. 18.

<sup>118</sup> [2009] HKEC 710.

could face conviction in Nigeria for a drug-related offence for which he had already served a long prison term in Hong Kong. In the judgment, Reyes J. noted that government counsel properly accepts that the reservation to the application of the [Hong Kong Bill of Rights] and ICCPR in relation to immigration legislation do not apply where [Bill of Rights] [article] 3 and ICCPR [article] 7 are concerned. This is because the injunction against inflicting torture or other forms of inhuman or degrading treatment are peremptory norms of customary international law. It is not possible for a state to derogate from those norms.<sup>119</sup>

Reyes J. quashed the deportation order on the basis that ‘in all the circumstances, to deport Mr. Ubamaka at some point in the future to face the real risk of re-trial in Nigeria would, I think, be a cruel blow, amounting to inhuman treatment of a severity proscribed by the [Bill of Rights], the ICCPR and [the Torture Convention]’.<sup>120</sup>

Accordingly, although applicable in many immigration-related situations, the reservation – and the corresponding exception in the Bill of Rights – would not apply to the implicit right to *non-refoulement* discussed above. This is true since the rights involved – freedom from torture and arbitrary deprivation of life – are non-derogable and arguably peremptory norms. Even if they are not peremptory norms – and even if Hartmann J. is correct in *C* that a rule of *non-refoulement* has not achieved the status of *jus cogens* – the Human Rights Committee’s General Comment on treaty reservations would still apply to rules of customary international law. Therefore, where the deportation or removal of an individual would likely result in serious violations of his/her human rights, the Director of Immigration must exercise his general discretion – provided by the Immigration Ordinance<sup>121</sup> – consistently with a constitutional right to *non-refoulement*. In any event, article 28 of the Basic Law likely serves as an autonomous right reflecting similar content without the impact of the ICCPR immigration reservation and similar Bill of Rights exception.<sup>122</sup>

Hong Kong’s human rights obligations are therefore relevant to the protection of refugees because they require *non-refoulement* in a broader range of circumstances than currently considered in the torture screening procedures based on article 3 of the Torture Convention. While claimants in Hong Kong seeking protection from *refoulement* to serious violations of human rights in articles 6 and 7 of the ICCPR may not overlap entirely with Refugee Convention ‘refugees’, such claims would encompass a wide range of similar

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<sup>119</sup> Ibid., para. 94.

<sup>120</sup> Ibid., para. 111.

<sup>121</sup> Cap. 115, ss. 11 and 13.

<sup>122</sup> See Young, n. 106 above, 111.

refugee-like situations. The differences between the definitions of ‘refugee’, ‘torture claimant’, and other categories of persons who would qualify for protection from *refoulement* under these broader standards, begin to break down in the face of this analysis. Protection through government-sponsored screening procedures, however, has not been expanded to cover these other categories of claimants.

### 3.2.3 *Constitutional Rights, Consistency and Incorporation of Non-refoulement*

In *C, Hartmann J.* does not consider the implicit constitutional rights discussed above, although he cites Lauterpacht and Bethlehem’s discussion of a broader *non-refoulement* principle in customary international law.<sup>123</sup> In his view their analysis commands ‘particular authority’.<sup>124</sup> As noted above, their formulation of the principle’s content goes beyond the *non-refoulement* of refugees, as defined in the Refugee Convention, and incorporates developments in general human rights law.<sup>125</sup> They also observe that the implementation of the principle of *non-refoulement* into domestic legislation provides evidence of state practice and *opinio juris*.<sup>126</sup> Thus Hong Kong’s entrenchment of the ICCPR into domestic law contributes to this process and, at the same time, demonstrates consistency with the principle. At the very least, it undermines any argument that Hong Kong law is *inconsistent* with *non-refoulement*.

Hartmann J. also favorably cites a document produced by a roundtable of experts in 2001 which expressed a consensus that refugee law is dynamic and ‘informed by the broad object and purpose of the 1951 Refugee Convention and its 1967 protocol, as well as by developments in related areas of international law, such as human rights law and international humanitarian law’.<sup>127</sup> Nevertheless he ultimately fails to acknowledge the significance of the breadth of the *non-refoulement* principle – and its reflection of rights entrenched in Hong Kong’s constitution - for determining whether it had been incorporated into Hong Kong law.

When considering the issues of consistency and incorporation, Hartmann J. relied heavily on *Madam Lee Bun and Another v. Director of Immigration*, a case decided by the CA in 1990 which he believed was binding.<sup>128</sup> The applicants were asylum seekers from

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<sup>123</sup> See n. 13 above, para. 103.

<sup>124</sup> *Ibid.*

<sup>125</sup> See n. 77 above (Lauterpacht and Bethlehem).

<sup>126</sup> *Ibid.*, 148, para. 213.

<sup>127</sup> See n. 13 above, para. 104.

<sup>128</sup> *Ibid.*, paras. 85-93 and 138-143.

mainland China alleging that they were political refugees. Although their claims had been examined in detail, they argued that they had been deprived of their rights to a fair hearing since they were not given the opportunity to respond to concerns about their credibility and suspected fabrication of their stories. The court dismissed their appeal on the basis that, apart from Vietnamese refugees, the legislature had not intended to fetter the discretion of the Director of Immigration and therefore those claiming political persecution could not access any special rights.<sup>129</sup> The court reasoned that a litigant could not rely on customary international law ‘in the face of inconsistent domestic legislation’.<sup>130</sup>

The CA, in *Madam Lee Bun*, and Hartmann J., in *C*, based their conclusions on three main grounds: 1) the lack of extension of the Refugee Convention to Hong Kong; 2) the legislature’s enactment of specific provisions regarding Vietnamese refugees in the 1980s and 90s but not other classes of asylum seekers; and 3) the immigration reservation to the ICCPR as it applies to Hong Kong. In fact, Hartmann J. claims, that he would have come to the same conclusion ‘if the [CA] had made no such judgment and if the matter had come before [him] as an entirely new issue’.<sup>131</sup> His adoption of the earlier judgment’s approach, however, demonstrates his failure to recognize the impact of constitutional rights and the limitations of the immigration reservation to situations which do not amount to violations of non-derogable rights or rules of customary international law, as discussed above.

Hartmann J.’s reliance on this case is also flawed because it was decided in 1990 before the enactment of the Bill of Rights or the Basic Law which have implemented many of Hong Kong’s international human rights obligations into domestic law including an implicit right to *non-refoulement*. Hong Kong courts have confirmed the need to distinguish current cases involving human rights from those decided before the Bill of Rights and/or the Basic Law came into force.<sup>132</sup> If the court in *Madam Lee Bun* could have considered these provisions, it may have reached a different conclusion.

In addition, the case was decided without the benefit of the Human Rights Committee’s General Comment issued in 1994 which clarified that states may not take out reservations to limit rights which reflect principles of customary international law.<sup>133</sup> Hartmann J. cites *Chan To Foon*’s conclusion that the Director of Immigration is not bound by the ICCPR when applying Hong Kong’s immigration laws but he does not consider the

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<sup>129</sup> Ibid., paras. 90 and 138.

<sup>130</sup> n. 66 above cited in *C*, n. 13 above, para. 92.

<sup>131</sup> Ibid. (*C*), para. 143.

<sup>132</sup> *W v. H* [2008] HKEC 766.

<sup>133</sup> Human Rights Committee, n. 115 above.

court's distinction between peremptory norms and the family-related rights which were at issue in that case.<sup>134</sup>

### 3.2.4 *The Non-extension Policy and Conflation of Non-refoulement with other Refugee Rights*

Hartmann J. also appears to accept the reasoning in *Madam Lee Bun* that Hong Kong's rejection of the Refugee Convention provides further evidence of inconsistency between Hong Kong law and *non-refoulement*. Non-application of a treaty in and of itself, however, does not preclude a rule set forth in that treaty from binding a non-state party as a rule of customary international law.<sup>135</sup> Also, Hartmann J.'s discussion of the Refugee Convention in the judgment often reflects a mistaken conflation of what should be regarded as distinct protection obligations in the Refugee Convention. The first is the Convention's requirement that states provide specific refugee rights, flowing from recognition of their 'legal status', and the second is the more basic right to *non-refoulement* which also derives from customary international law and international human rights law.

McAdam clarifies this distinction noting that in the Refugee Convention, '[p]rotection comprises two elements: the threshold qualification (refugee) [underscored by the principle of *non-refoulement*] and the rights that attach (status)'.<sup>136</sup> While arguing that 'persons protected by the extended principle of *non-refoulement* ought to receive a legal status equivalent to that accorded by the Refugee Convention',<sup>137</sup> she acknowledges that '[t]here is not yet a consistent understanding of what that resultant legal status should entail'.<sup>138</sup>

[w]hile the [Torture Convention], [European Convention on Human Rights], ICCPR, and [Convention on the Rights of the Child] provide important curbs on States' power to expel aliens, they are presently incomplete forms of protection. A State may have an obligation not to deport, but the question remains as to what extent it is then responsible to take measures allowing the individual to exist and subsist. Whereas a State's recognition of a person as a Convention refugee leads to the conferral of Convention status, no similar

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<sup>134</sup> n. 13 above, para. 147.

<sup>135</sup> n. 55 above, arts. 34-8.

<sup>136</sup> McAdam, n. 70 above. For a comprehensive account of the rights of refugees provided by the Refugee Convention see Hathaway, n. 18 above.

<sup>137</sup> *Ibid.* (McAdam), 5.

<sup>138</sup> *Ibid.*, 3.

grant of rights currently stems from protection under human rights law.

Crucially, the extent of protection provided by these treaties is safety from *refoulement*.<sup>139</sup>

In *RV v Director of Immigration*, a case decided shortly after *C*, Hartmann J. himself seems to recognize this distinction between a right to *non-refoulement* and other rights related to the refugee experience.<sup>140</sup> The applicant in this case was an asylum seeker from Cameroon who had lodged refugee and torture claims with both the UNHCR and the Hong Kong immigration authorities. He had entered Hong Kong on a false passport and faced prosecution for this offence, although his refugee and torture claims had not yet been determined. He applied for judicial review of the decision to prosecute. In the judgment, Hartmann J. claimed that *non-refoulement* of a successful torture claimant has become a ‘peremptory norm of customary international law, incorporated into Hong Kong’s domestic law’.<sup>141</sup> He then reasoned that although Hong Kong had ‘taken on the obligation not to *refoule* a person who is at risk of torture and, in determining that issue, has set up a screening process’ this obligation could be distinguished from a right not to be prosecuted. ‘Nothing has been put before me ... to suggest that [Hong Kong] has, integral to its obligations under the Convention against Torture and/or under customary international law, undertaken never to prosecute a claimant who has entered Hong Kong illegally, no matter what the circumstances of that illegal entry’.<sup>142</sup> While this lack of provision for other refugee-specific rights may be unsatisfactory - and Hong Kong needs to consider appropriate policy and legal reforms to fill this gap – it does not diminish Hong Kong’s legal obligation to respect *non-refoulement*.<sup>143</sup>

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<sup>139</sup> Ibid., 17. She also writes that ‘By contrast to the universal human rights instruments which are based on a more abstract and wide-ranging human rights ideal, the Convention is unique in creating a legal status for its beneficiaries, the components of which are non-derogable and tailored to the precarious legal position of non-citizens whose own country of origin is unable or unwilling to protect them.’, 5-6.

<sup>140</sup> [2008] 4 HKLRD 529.

<sup>141</sup> Ibid., para. 90.

<sup>142</sup> Ibid. While the Refugee Convention does not provide for a right not to be prosecuted per se, Article 31(1) provides that states parties ‘shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence’.

<sup>143</sup> Not only is the lack of status and rights unsatisfactory, it may also be ultimately unsustainable as policy develops in response to the broader *non-refoulement* principle applicable to Hong Kong. It may in fact be necessary to ensure other rights in order to avoid a situation which could lead to ‘constructive’ *refoulement*, such as lack of food or shelter. In any case, however, the rights enumerated in the International Covenant on Economic, Social, and Cultural Rights apply to Hong Kong. To some extent, the Government may recognize the connection between *non-refoulement* and other rights and has been providing in-kind welfare assistance to asylum seekers and torture claimants since 2006. See *G and Ors. v. Director of Social Welfare*, HCAL31/2006, HCAL25/2006 and J. Cheng, ‘Political refugee scores a first’, *The Standard*, 1 March 2006. The

Hartmann J. also appears to mistakenly conflate *non-refoulement* with the concept of asylum. For example, in order to support his argument that Hong Kong has repudiated the rule of *non-refoulement*, he reasons ‘that the Hong Kong Government has purposefully distanced itself from the process of determining who is a refugee and thereafter where best that refugee may be settled in the world *in order specifically to avoid compromising its position that it has no policy of granting political asylum*’.<sup>144</sup> He also mentions the right to seek asylum in article 14(1) of the Universal Declaration of Human Rights stating that it is ‘a proclamation of ethical values, rather than legal norms’, adding that ‘such rights must yield to the express requirements of domestic laws and, as I have said earlier, I am satisfied that such laws, both by what they say and what they omit to say, create no ambiguity.’<sup>145</sup> He concludes by affirming that he is ‘satisfied that the rule of customary international law prohibiting *refoulement* of refugees has not been incorporated into Hong Kong domestic law’.<sup>146</sup> As Hathaway explains, however, ‘*non-refoulement* is not the same as a right to asylum from persecution’.<sup>147</sup> He notes that ‘the duty of *non-refoulement* ... does not affirmatively establish a duty on the part of states to receive refugees ... States parties may ... deny entry to refugees so long as there is no real chance that their refusal will result in the return of the refugee to face the risk of being persecuted.’<sup>148</sup> Therefore, a firm policy not to grant asylum does not, in and of itself, support a repudiation of *non-refoulement*.

A number of past and current government statements also support the contention that Hong Kong’s non-extension policy does not indicate a rejection of *non-refoulement* nor inconsistency with the principle in customary international law. These statements demonstrate that the non-extension policy is aimed at preventing refugees from coming to Hong Kong in the first place but that once they arrive they will not be *refouled*.

The history of refugees in Hong Kong has led to a paradox: while Hong Kong owes much of its success as an international city to the integration of large numbers of migrants from the Chinese mainland and elsewhere, fears exist that further influxes would undermine its economy and way of life. The prevention of ‘floodgates’, Hong Kong’s small geographical size, and a desire to avoid abuse of the system are themes underpinning the official position.

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<sup>144</sup> n. 13 above, para. 163. Emphasis added.

<sup>145</sup> Ibid., para. 165-6.

<sup>146</sup> Ibid., para. 167.

<sup>147</sup> Hathaway (2005), n. 18 above, 300-302.

<sup>148</sup> Ibid.



The view that refugees are undesirable because they use public resources and that government provision of social services would act as a ‘pull factor’ date back to the 1950s when more than a million refugees fled mainland China after the communist revolution in 1949.<sup>149</sup> Chui describes similar attitudes after the Vietnamese refugees began arriving in the mid-1970s, observing that Hong Kong people exhibited ‘parochialism and defensiveness’ in part because of strong negative public reaction to the large numbers of Vietnamese ‘boat people’.<sup>150</sup> He writes that ‘the local people have been agitated both by the large sum of revenue spent on building camps for the Vietnamese, as well as by the occasional disorder within the camp in the vicinity of open camps’.<sup>151</sup>

Some commentators have claimed that the Hong Kong Government deliberately denied the Vietnamese access to adequate social services and detained them in camps in order to discourage further flows to the territory.<sup>152</sup> In *Chieng A Lac v the Director of Immigration*,<sup>153</sup> a case challenging the detention of Vietnamese asylum seekers, the Government confirmed this deterrence approach. The Assistant Director for Immigration and the Head of the Vietnamese Refugees Branch maintained that:

... If the effectiveness of the detention policy is not preserved, or is perceived as being not preserved, it would provide a magnet for an unlimited invasion from Vietnam. Furthermore, it would not be acceptable to the residents of Hong Kong and would cause security and public order problems. Hong Kong is already overcrowded with some of the densest areas of population in the world. It is already the focus for massive illegal immigration from China with whom the population here has close ties of family and kinship, a problem which is dealt with rigorously by detention and removal of illegal immigrants. Any departure from its pronounced detention policy in terms of illegal immigrants from Vietnam would be severely criticised and would lead to resentment and public outcry.<sup>154</sup>

This mindset has lingered since the closure of the Vietnamese camps and continues to affect government policy, even in the current context which does not amount to a mass influx

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<sup>149</sup> T. Sweeting, ‘The Power of Faith and Social Activism’, *South China Morning Post*, 17 July 2004, 4.

<sup>150</sup> E. Chui, ‘Housing and Welfare Services for New Arrivals from China: Inclusion or Exclusion’ in J. Chan and B. Rwezaura (eds.), *Immigration Law in Hong Kong* (Sweet & Maxwell Asia, 2004), 242.

<sup>151</sup> *Ibid.*

<sup>152</sup> See, for example, Hathaway (2005), n. 18 above, 381-382 and E.B. Burton and D.B. Goldstein, ‘Vietnamese Women and Children Refugees in Hong Kong: An Argument against Arbitrary Detention’ (Fall 1993) 4 *Duke Journal of Comparative and International Law* 71.

<sup>153</sup> *Chieng A Lac & Others v. The Director of Immigration & Others* [1997] HKLRD 271.

<sup>154</sup> *Ibid.* at 291-292.

situation.<sup>155</sup> In 2005, officials from the Immigration Department expressed similar concerns that extension of the Refugee Convention and provision of greater protection could attract a larger number of asylum seekers.<sup>156</sup> At a meeting of the welfare services and security panels of Hong Kong's Legislative Council in July 2006, the administration explicitly linked the policy of non-extension of the Refugee Convention to the past Vietnamese refugee 'problem'.<sup>157</sup> According to the minutes of the meeting, one official worried about 'the drastic surge in asylum seekers', noting that the UNHCR's success rate was low, and reasoned that 'around 85-90% of the claimants were not genuine refugees'.<sup>158</sup> He went on to compare the current situation with the Vietnamese refugee 'problem' in the 1980s concluding 'that there was a strong case not to cause the extension of the Convention to Hong Kong so as to prevent possible abuses of the existing mechanisms'.<sup>159</sup>

At the same meeting, another government representative reinforced the connection between past experiences and current policies and their objectives when discussing the financial costs to Hong Kong. She 'drew members' attention to the Vietnamese refugee problems in the 1980s, which has brought us a financial burden of [HK]\$8.7 billion in providing assistance to them'<sup>160</sup> and reiterated 'that given Hong Kong's unique situation, such as the dense population, economic prosperity in the region, and liberal visa regime, it would make Hong Kong vulnerable to possible abuses if the Convention were to be extended to Hong Kong'.<sup>161</sup>

In October 2008, the Hong Kong Government reiterated before the UN Committee against Torture its 'firm policy not to grant asylum' and indicated that it has 'no plan to extend to Hong Kong the application of the [Refugee Convention]'.<sup>162</sup> It justified this

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<sup>155</sup> K. Loper, 'Representations of Refugees in Hong Kong Law, Policy and Public Discourse', paper presented at a workshop on Representation and Displacement: Refugees, IDPs and Stateless Persons in State and Nation, Refugee Studies Centre, Oxford University, February 2007 (on file with the author).

<sup>156</sup> R. Mushkat and K. Loper, 'Refugee Protection in the Asia and Pacific Region: An External Study of Refugee Law & Practice in Hong Kong', prepared for the UNHCR, (on file with the author), para. 36.

<sup>157</sup> Minutes of joint meeting of the panel on welfare services and the panel on security, 18 July 2006, LC Paper No. CB(2)3077/05-06.

<sup>158</sup> Ibid.

<sup>159</sup> Ibid., para. 22(b).

<sup>160</sup> Ibid., para. 29. Similar sentiments among the public have been reported by the press. For example, in March 2009, the *South China Morning Post* reported that several businesspeople of south Asian origin are advocating reopening refugee camps to detain asylum seekers awaiting the outcome of their claims in Hong Kong. The article quoted an immigration consultant who suggested that '[m]any [asylum seekers] don't even know what the words refugee or asylum mean ... They should be kept together in a camp, where they have very limited access to Hong Kong while their claims are assessed. This would stop those who are not genuine from even attempting to come to the city' See B. Crawford and Y. Tsui, 'Businessmen fear more asylum seekers: Reopen refugee camps, say S Asians', *South China Morning Post*, 9 March 2009.

<sup>161</sup> Ibid. (Minutes of joint meeting), para. 29.

<sup>162</sup> See n. 40, above, para. 57(b).

approach by claiming that ‘Hong Kong is small in size and has a dense population’ and its ‘unique situation, set against the backdrop of ... relative economic prosperity in the region and [a] liberal visa regime, makes [Hong Kong] vulnerable to possible abuses if the Convention were to be extended ...’<sup>163</sup> Again, this statement intimates that the objectives behind non-extension are connected to fears that the provision of rights could draw refugee claimants to the territory and encourage disingenuous applications. It does not, however, indicate that non-extension is aimed at avoiding a duty of *non-refoulement* which can be characterized, in contrast, as a duty of restraint.<sup>164</sup>

Notably, past and current Government statements have not contained similar arguments with respect to *non-refoulement* and have not suggested that returning refugees to their countries of origin would resolve these issues. While Hong Kong’s refugee policy has been described generally as ‘ambivalent’,<sup>165</sup> the Government has not shown ambivalence toward *non-refoulement*. Indeed, once asylum seekers have arrived, the Director of Immigration exercises his general discretion provided by the Immigration Ordinance<sup>166</sup> and allows them to remain in Hong Kong until the resolution of their claims. In fact policies designed to avoid attracting refugees implicitly, and perhaps ironically, underscore the Government’s recognition of its *non-refoulement* obligations. In other words, it does not want to attract asylum seekers because it knows it may not return them.

This acceptance of *non-refoulement* is implicit in the Government’s arrangement with the UNHCR as well as the scope of Hong Kong’s human rights commitments. The UNHCR has stated that:

In the absence of necessary refugee-related legislation and procedures, the HKSAR’s cooperation with UNHCR has demonstrated the respect for the principle of *non-refoulement* and to the protection of refugees and asylum-seekers in Hong Kong. Among other aspects, this cooperation includes de facto respect for UNHCR’s refugee status determination process and the withholding of deportation of persons who are under active consideration by UNHCR.<sup>167</sup>

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<sup>163</sup> Ibid., para. 50.

<sup>164</sup> Hathaway (2005), n. 47 above, 301 citing *M38/2002 v. Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 131 (Aus. FCC, June 13, 2003).

<sup>165</sup> Jones, n. 32 above, 457.

<sup>166</sup> n. 44 above, ss. 11 and 13.

<sup>167</sup> UNHCR, letter to the applicants’ solicitors, 23 November 2007, cited in *C*, n. 13 above, para. 60.

Additionally, in the event of a successful claim, the Government will not return the individual to his/her country of origin but will wait while the UNHCR seeks his/her resettlement in a third country.

#### 4. Conclusions

An acceptance of the legal basis for *non-refoulement* in Hong Kong – customary international law and/or constitutional provisions - should lead the court back to the *Prabakar* principles – as supplemented by *FB* - which require a consideration of the fairness of the procedures to ensure effective protection from *non-refoulement* when fundamental human rights are at stake. If the CA finds that high standards of fairness require government-administered refugee status determination, this could result in the merging of torture and refugee screening procedures and possibly consideration of ICCPR claims.

To summarize, an analysis of the judgment in *C*, in light of the right to *non-refoulement* binding on Hong Kong, suggests several conclusions which could inform future appeals and other judicial review cases involving a right to *non-refoulement*. Overall, the court failed to fully consider Hong Kong's constitutional rights and their relevance to refugees which resulted in gaps in the court's reasoning. In particular, the constitutional right to *non-refoulement*, which overlaps significantly with – but in many ways goes beyond - the right to *non-refoulement* in the Refugee Convention, is consistent with the broader norm of *non-refoulement* in customary international law. Given Hong Kong's general embrace of human right principles, the lack of explicit protection in Hong Kong law for refugees from *refoulement* to persecution on a Convention ground does not limit the application of a far-reaching customary norm of *non-refoulement* in Hong Kong. In addition, the court misunderstood the significance of the policy of non-extension of the Refugee Convention which does not imply a repudiation of, or inconsistency with, *non-refoulement*. Hartmann J.'s reliance on government policy statements to reason that Hong Kong law and practice has been inconsistent with the principle of *non-refoulement* in customary international law, fails to consider the distinction between different protection obligations in the Refugee Convention.<sup>168</sup> Finally, Hartmann J. did not consider the limits of the immigration exception in the Bill of Rights when the rights at stake reflect rules of customary international law.

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<sup>168</sup> These statements are cited in *Ibid.* (*C*), paras. 150-159. Only one of the quotes - from an affirmation submitted by the government in the case of *C* - actually mentions *non-refoulement*. Although Hartmann J.

Although some decisions, such as *Prabakar* and *FB*, have resulted in limited success in achieving protection for torture claimants from *refoulement*, the analysis of the gaps in *C* demonstrates that greater scope exists for the application of constitutional rights by the courts in judicial review proceedings involving asylum seekers. The courts have played a key role in the development of nascent refugee protections and further reliance on human rights could strengthen these measures.

This article presents only a partial assessment of Hong Kong's recent refugee-related adjudication, however, and the *non-refoulement* cases form part of a broader litigation strategy pursued by refugee advocates in Hong Kong. A number of other cases have tested – and continue to test - the extent of Hong Kong's other obligations toward refugees and torture claimants based on international human rights standards. Some have dealt with economic and social rights, including the rights to social welfare<sup>169</sup> and employment.<sup>170</sup> Another judgment handed down by the CA in July 2008 considered the right not to be arbitrarily detained and triggered changes in Hong Kong's detention policy.<sup>171</sup> Some individuals who had been detained under the previous policy were awarded damages for unlawful detention by a court in March 2009.<sup>172</sup>

Advocacy efforts outside the courts have also influenced policy developments and the combination of legal approaches and increasing public discourse has led to incremental but important changes to Hong Kong's refugee policy. Authorities have responded to lobbying by NGOs, media reports highlighting the plight of refugees locally, discussions with government officials initiated by members of the Legislative Council, and concluding observations issued by UN human rights treaty bodies.

Several of the UN human rights treaty bodies have underscored the connection between Hong Kong's implementation of its obligations under key human rights instruments and its treatment of refugees and have criticized Hong Kong's lack of refugee law and relevant procedures. For example, the Committee on the Elimination of all Forms of

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claims that this affirmation mirrors previous statements over the past 12 years, none of the other citations mention *non-refoulement* and all of them reflect the other objectives discussed in section 2 of this article.

<sup>169</sup> The 'Bag of Rice' case, a judicial review application which was ultimately withdrawn after negotiations with the Social Welfare Department, challenged the government's lack of protection of economic, social, and cultural rights. An asylum seeker from Cameroon had been given 2 bags of rice and some cans of food, but no accommodation or a place to cook the food. Shortly after the resolution of this case, the Hong Kong government announced that it would provide minimal assistance to asylum seekers and torture claimants awaiting the outcome of their claims with the UNHCR and the Hong Kong government. See, above n. 143.

<sup>170</sup> *Iqbal Shahid v. Secretary for Justice* [2009] HKEC 330.

<sup>171</sup> See Security Bureau, Hong Kong SAR Government, 'Detention Policy', available at: <<http://www.sb.gov.hk/eng/special/pdfs/Detention%20policy-e.pdf>>.

<sup>172</sup> *A v. Director of Immigration* [2009] HKEC 337, 3 March 2009. Y. Chui, 'Asylum seekers who filed torture claims get damages for time in jail', *South China Morning Post*, 4 March 2009.

Discrimination against Women (CEDAW) expressed concern at the situation of women asylum seekers and refugees in Hong Kong and urged the Government to extend the Refugee Convention to its territory.<sup>173</sup> The Committee on the Rights of the Child commented on discrimination against refugee and asylum seeking children and the lack of guarantees of access to education.<sup>174</sup> The Committee on Economic, Social and Cultural Rights remarked on Hong Kong's lack of a clear asylum policy and recommended the extension of the Refugee Convention.<sup>175</sup> In 2000, 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 correcting the situation.<sup>176</sup> In its 2009 concluding observations on China's state report, the Committee also mentioned the absence of a 'legal regime governing asylum and establishing a fair and efficient refugee status determination procedure'.<sup>177</sup> In September 2009, the Committee on the Elimination of Racial Discrimination wrote in its concluding observations on China's report that '[w]hile noting the planned legislative framework for torture claimants in Hong Kong SAR, the Committee is concerned that the State party has not adopted a refugee law as such, including a screening procedure for asylum claims'.<sup>178</sup>

Although this examination of judicial approaches to *non-refoulement* in Hong Kong points to an important role for the courts in securing refugee protection, this avenue for policy change remains constrained by the slow pace of litigation, insufficient statutory measures,

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<sup>173</sup> Committee on the Elimination of Discrimination against Women, Concluding Comments on China's report, UN doc. CEDAW/C/CHN/CO/6, para. 43.

<sup>174</sup> Committee on the Rights of the Child, Concluding Observations on China's Report, UN doc. CRC/C/CHN/CO/2, 24 November 2005, paras. 31 and 81.

<sup>175</sup> Committee on Economic, Social and Cultural Rights, Concluding Observations on China's report, UN doc. E/C.12/1/Add.107, 13 May 2005, para. 80.

<sup>176</sup> Committee against Torture, Concluding Comments on China's report, included in Report of the Committee against Torture to the General Assembly, UN doc. A/55/44, 2000, para. 141. The extent to which Hong Kong has incorporated its obligations under the Torture Convention is unclear. In its initial report to the Committee against Torture in 1999, the SAR government stated that the Crimes (Torture) Ordinance (Chapter 427) 'was enacted to give effect in Hong Kong to [CAT]'. Despite implementing elements of CAT's definition of torture (art. 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 CAT requirements. The Committee against Torture, in its Concluding Observations on Hong Kong's report in 2000, 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]' (paras. 138 and 140). Despite these criticisms, the government subsequently claimed, in its submissions in *Prabakar*, that it 'has not introduced and has no intention in future of proposing in the legislature the incorporation of [CAT] into domestic law' (see Case for the Appellant, *Sakthevel Prabakar and Secretary for Security*, FACV No. 16/2003 at 20).

<sup>177</sup> Committee against Torture, Concluding Observations on Hong Kong's Report, UN doc. CAT/C/HKG/CO/4, 19 Jan. 2009, para. 7.

<sup>178</sup> Committee on the Elimination of Racial Discrimination, Concluding Observations on China's Report, UN doc. CERD/C/CHN/CO/10-13, 15 Sept. 2009, para. 29.

and lack of obligations under the Refugee Convention. NGOs and lawyers representing refugees continue to advocate for extension of the Refugee Convention and Protocol to Hong Kong. Hathaway notes the continuing relevance of the rights set out in the Refugee Convention since ‘general human rights norms do not address many refugee-specific concerns’<sup>179</sup> and McAdam observes that ‘human rights law enhances and extends these rights, but only the Refugee Convention creates a mechanism – refugee status – by which they attach, and which does not permit derogation’.<sup>180</sup> McAdam, while not discounting ‘the value of international human rights law’, argues ‘that it does not provide an adequate basis on its own for crafting a clear set of entitlements recognized at the national level for persons with a complementary protection need’.<sup>181</sup> Refugee Convention standards, in combination with human rights provisions already applicable to Hong Kong, would provide a more solid foundation for the realization of the full range of refugee rights. The Refugee Convention, as supplemented by its Protocol, still forms the basis for establishing a legal status for refugees which provides more comprehensive protection at the domestic level and a range of rights explicitly relevant to the refugee context.

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<sup>179</sup> Hathaway (2005), n. 18 above, 154, cited in McAdam, n. 70 above, 12.

<sup>180</sup> McAdam, n. 70 above, 13.

<sup>181</sup> McAdam, n. 70 above, 12-13.