

**Submission to the United Nations Human Rights Committee  
List of Issues on the Fourth Report of the Hong Kong Special Administrative  
Region under the International Covenant on Civil and Political Rights**

**May 2020**

## **1. Introduction**

Justice Centre Hong Kong (“Justice Centre”) appreciates the opportunity to provide a submission to the Human Rights Committee in advance of the adoption of the list of issues for the Hong Kong Special Administrative Region (“Hong Kong”)’s fourth report under the International Covenant on Civil and Political Rights (“ICCPR”). This submission focuses on ICCPR’s application in Hong Kong in the mixed or forced migration context.

Justice Centre is a non-profit human rights organisation working to protect the rights of Hong Kong’s most vulnerable migrants: refugees, other people seeking protection, and survivors of torture, human trafficking and forced labour. We provide substantial legal and psychosocial support to over 100 individuals seeking protection in Hong Kong per year, and provide general legal information and support to over 200 individuals.

## **2. Developments in Hong Kong’s protection landscape since 2013**

There have been significant policy and legal changes in Hong Kong’s protection landscape since the Human Rights Committee last reviewed Hong Kong in 2013.

As a result of several landmark judicial decisions<sup>1</sup>, the Hong Kong Government (“the Government”) launched the “Unified Screening Mechanism” (“USM”) in March 2014 to screen non-refoulement claims on the following grounds:

- The prohibition of torture, with reference to the 1984 Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“UNCAT”)<sup>2</sup>;
- The prohibition of cruel, inhuman or degrading treatment or punishment (“CIDTP”), with reference to Article 7 of the ICCPR<sup>3</sup>;
- The right to life, with reference to Article 6 of the ICCPR<sup>4</sup>;
- The prohibition on return to risk of persecution, with reference to Article 33 of the 1951 Convention relating to the Status of Refugees (“Refugee Convention”)<sup>5</sup>;

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<sup>1</sup> *Ubamaka v Secretary for Security and Another* [2012] HKCFA 87; (2012) 15 HKCFAR 743; [2013] 2 HKC 75; *FACV 15/2011* (21 December 2012) and *C and Others v Director of Immigration and Another* [2013] HKCFA 21; (2013) 16 HKCFAR 280; [2013] 4 HKC 563; *FACV 19/2011* (25 March 2013)

<sup>2</sup> Incorporated domestically via Immigration Ordinance (Cap 115) Part VIIC and *Secretary for Security v Sakthevel Prabakar* *FACV No. 16 of 2003* (8 June 2004)

<sup>3</sup> Incorporated domestically via the Hong Kong Bill of Rights Ordinance (Cap 383), Article 3

<sup>4</sup> Incorporated domestically via the Hong Kong Bill of Rights Ordinance (Cap 383), Article 2

<sup>5</sup> *C and Others v Director of Immigration and Another* [2013] HKCFA 21; (2013) 16 HKCFAR 280; [2013] 4 HKC 563; *FACV 19/2011* (25 March 2013)

- The prohibition on breaches of fundamental, non-derogable and/or absolute human rights on return or removal<sup>6</sup>. This ground is sometimes referred to as “all applicable grounds” but has not been defined by the Government.

In brief, there are two stages to the USM. At first instance protection claimants are interviewed by an immigration officer who will issue a written decision. Claimants aggrieved by the immigration officer’s decision may appeal to the Torture Claims Appeal Board (“TCAB”) or the Non-refoulement Claims Petition Office (“NRCPO”). The USM process is completed at the appeal stage, but claimants may resort to judicial review to challenge a USM decision where it contains public law errors.

While the USM is a welcome development, Justice Centre is gravely concerned about the inadequacies of the screening mechanism and the Government’s overall policy on non-refoulement protection. We maintain that Hong Kong’s protection regime falls short of international human rights standards, including rights guaranteed under the ICCPR, UNCAT, the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), the Convention on the Elimination of all Forms of Discrimination Against Women (“CEDAW”), the United Nations Convention on the Rights of the Child (“CRC”) and the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”), all of which are applicable to Hong Kong.

We echo the observations and recommendations of the respective committees, namely:

- Human Rights Committee (CCPR/C/CHN-HKG/CO/3) at [9]
- Committee against Torture (CAT/C/CHN-HKG/CO/5) at [6] – [7]
- Committee on the Rights of the Child (CRC/C/CHN/CO/3-4) at [29], [30], [82] and [84]
- Committee on Economic, Social and Cultural Rights (E/C.12/CHN/CO/2) at [41], [42] and [51]

### **3. Concerns regarding the Unified Screening Mechanism (Articles 2, 3, 6, 7, 13, 24, 26)**

#### **3.1 Low substantiation rate**

Hong Kong’s substantiation rate for non-refoulement claims remains at less than 1%, which is among the lowest in the developed world. We echo the Committee Against Torture’s observations that the threshold for granting protection is excessively high<sup>7</sup>, with claimants from high risk countries, such as Somalia, Yemen and the Central African Republic routinely rejected for protection. The low recognition rate is also indicative of systematic failures of the screening mechanism, including poor quality

<sup>6</sup> See for example, *Re Mohammad Palash* [2018] HKCA 417; CACV 297/2017 (23 July 2018) and *Re MD Zahidur Rahman Manik* [2018] HKCA 766; CACV 314/2018 (29 October 2018), which concern the right to fair trial

<sup>7</sup> CAT/C/CHN-HKG/CO/5 at [6]

decisions, a general lack of substantive and procedural fairness, and a lack of legal representation.

Year	2017	2018	2019
<b>No. of claims determined at first instance</b>	4182	5965	1344
<b>No. of claims substantiated at first instance</b>	20	15	4
<b>Substantiation rate at first instance</b>	0.47%	0.25%	0.29%
<b>No. of claims determined at appeal stage</b>	2820	4808	4925
<b>No. of claims substantiated at appeal stage</b>	19	26	33
<b>Substantiation rate at appeal stage</b>	0.67%	0.54%	0.67%
<b>Cumulative substantiation rate</b>	0.55%	0.38%	0.59%

Table 1: Substantiation rate in the period 2017-2019<sup>8</sup>

### 3.1 Lack of legal assistance

The Government stated at paragraph 48 of its State Report that publicly-funded legal assistance (“PFLA”) is available to all claimants during the entire screening process. Justice Centre must clarify two points.

Firstly, PFLA is not available to claimants at the initial registration stage of the USM. Pursuant to Section 37X of the Immigration Ordinance, people wishing to instigate a USM claim must first provide the Immigration Department with a written signification setting out a “general indication of the person’s reasons for claiming non-refoulement

<sup>8</sup> Immigration Department, “Statistics on Non-refoulement Claim”. Available at: <https://www.immd.gov.hk/eng/facts/enforcement.html>. Security Bureau, “TCAB Statistics” (October 2017). Available at: [https://accessinfo.hk/zh\\_HK/request/tcab\\_statistics#incoming-652](https://accessinfo.hk/zh_HK/request/tcab_statistics#incoming-652); Security Bureau, “Torture Claims Appeal Board- Q4, 2017” (March 2018). Available at: [https://accessinfo.hk/zh\\_HK/request/torture\\_claims\\_appeal\\_board\\_q4\\_2](https://accessinfo.hk/zh_HK/request/torture_claims_appeal_board_q4_2); Security Bureau, “Torture Claims Appeal Board- Q1, 2018” (April 2018). Available at: [https://accessinfo.hk/zh\\_HK/request/torture\\_claims\\_appeal\\_board\\_q1\\_2](https://accessinfo.hk/zh_HK/request/torture_claims_appeal_board_q1_2); Security Bureau, “Torture Claims Appeal Board- Q2, 2018” (July 2018). Available at: [https://accessinfo.hk/zh\\_HK/request/torture\\_claims\\_appeal\\_board\\_q2\\_2](https://accessinfo.hk/zh_HK/request/torture_claims_appeal_board_q2_2); Security Bureau, “Torture Claims Appeal Board- Q3, 2018” (October 2018). Available at: [https://accessinfo.hk/zh\\_HK/request/torture\\_claims\\_appeal\\_board\\_q3\\_2](https://accessinfo.hk/zh_HK/request/torture_claims_appeal_board_q3_2); Security Bureau, “Torture Claims Appeal Board- Q4, 2018” (January 2019). Available at: [https://accessinfo.hk/zh\\_HK/request/torture\\_claims\\_appeal\\_board\\_q4\\_2\\_2](https://accessinfo.hk/zh_HK/request/torture_claims_appeal_board_q4_2_2); Security Bureau, “Torture Claims Appeal Board - Q1 2019” (April 2019). Available at: [https://accessinfo.hk/zh\\_HK/request/torture\\_claims\\_appeal\\_board\\_q1\\_2\\_2](https://accessinfo.hk/zh_HK/request/torture_claims_appeal_board_q1_2_2); Security Bureau, “Torture Claims Appeal Board – Q2 2019” (July 2019). Available at: [https://accessinfo.hk/zh\\_HK/request/torture\\_claims\\_appeal\\_board\\_q2\\_2\\_2](https://accessinfo.hk/zh_HK/request/torture_claims_appeal_board_q2_2_2); Security Bureau, “Torture Claims Appeal Board – Q3 2019” (December 2019). Available at: [https://accessinfo.hk/zh\\_HK/request/torture\\_claims\\_appeal\\_board\\_q3\\_2\\_2](https://accessinfo.hk/zh_HK/request/torture_claims_appeal_board_q3_2_2); Security Bureau, “Torture Claims Appeal Board – Q4 2019” (January 2020). Available at: [https://accessinfo.hk/zh\\_HK/request/torture\\_claims\\_appeal\\_board\\_q4\\_2\\_3](https://accessinfo.hk/zh_HK/request/torture_claims_appeal_board_q4_2_3)

protection in Hong Kong”. If the written signification is deemed inadequate, the claim will be considered to not have been made and detention or refoulement may result<sup>9</sup>. An understanding of the relevant grounds for protection is clearly required to put together a written signification and not least to determine the relevancy of information to be provided. Claimants who are illiterate, speak minority languages, suffer from mental or physical health difficulties, or are traumatised due to torture and/or persecution will face additional difficulties in preparing a satisfactory written signification.

Second, while PFLA is generally available to claimants at first instance, its availability at the appeal stage depends upon the opinion of the handling duty lawyer regarding the merits of the claim or appeal. Statistics show that the proportion of claimants provided with PFLA at the appeal stage is low, at less than 8%. Moreover, although claimants who are rejected for PFLA at the appeal stage are entitled to request a second opinion by a fresh duty lawyer as to the merits of their case, this option is not published anywhere and there is no apparent requirement for claimants to be informed of this option. The numbers of claimants seeking a second opinion remains very low at less than 4%, suggesting most claimants are not aware of their right to request this.

	Q1 2018	Q2 2018	Q3 2018	Q4 2018	Q1 2019	Q4 2019
% claimants provided PFLA at the appeal stage	8%	6%	6%	5%	8%	6.25%
% claimants requested second opinion after being denied PFLA	1%	1%	1%	1%	4%	n/a
% claimants provided PFLA after requesting second opinion	40%	100%	0%	83%	82%	n/a

Table 2: Percentage of claimants provided with PFLA at the appeal stage<sup>10</sup>

### 3.2 Low quality decision-making

Justice Centre observes that USM decisions are of a low standard. Basic mistakes are frequently noted, including mistaking claimants’ countries of origin, using unverified information from Wikipedia as evidence to determine claims<sup>11</sup>, or using outdated,

<sup>9</sup> Immigration Department, “Notice to Persons Making a Non-refoulement Claim” at [23]. Available at: [https://www.immd.gov.hk/pdf/notice\\_non-refoulement\\_claim\\_en.pdf](https://www.immd.gov.hk/pdf/notice_non-refoulement_claim_en.pdf)

<sup>10</sup> Figures for Q2 2019 and Q3 2019 is not available yet. Security Bureau, “Free legal representation before the Torture Claims Appeal Board” (July 2019). Available at: [https://accessinfo.hk/en/request/free\\_legal\\_representation\\_before#incoming-1122](https://accessinfo.hk/en/request/free_legal_representation_before#incoming-1122) and Security Bureau, “Free legal representation at TCAB, Q4 2019” (January 2020). Available at: [https://accessinfo.hk/en/request/free\\_legal\\_representation\\_at\\_tca#incoming-1291](https://accessinfo.hk/en/request/free_legal_representation_at_tca#incoming-1291)

<sup>11</sup> See for example *Md Nazir Ahmed Sarkbar v Torture Claims Appeal Board* [2018] HKCFI 801, available at: [http://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=114733&QS=%2B&TP=JU](http://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=114733&QS=%2B&TP=JU)

substandard or otherwise non-credible sources as country of origin information. Examples include using the Pakistan police force's website to prove state protection exists for victims of persecution, and suggesting human rights are respected by the Egyptian state because they are apparently protected in the Egyptian constitution.

We note that USM decisions display an overall poor grasp of non-refoulement law and key legal and factual concepts. For instance, adjudicators often reduced sexual and gender-based violence ("SGBV") to private acts, and do not recognise SGBV can constitute torture, CIDTP and/or persecution. In relation to the right to life under ICCPR Article 6, adjudicators limit their consideration to capital punishment, and fail to consider other forms of arbitrary deprivation of life, such as extrajudicial killing or indiscriminate killing within internal armed conflicts, when considering whether this ground of protection is engaged. In cases involving family members, adjudicators almost never consider child-specific forms of persecution and/or human rights violations, such as child soldiers recruitment risks in Yemen, which may be distinct from those of their family members and may give rise to independent protection claims.

There is also a worrisome trend of adjudicators displaying cynicism or hostility toward claimants. In one specific case of a client assisted by Justice Centre, the adjudicator insisted the hearing continue despite the pregnant claimant going into labour, which has been found by the High Court to be unlawful, failing to adhere to a high standard of fairness<sup>12</sup>. The High Court commented: "What is unacceptable is [the adjudicator's] clear cynicism. Despite her obvious pregnancy, he undoubtedly assumed that a complaint of pain was an excuse to adjourn the hearing. He did not stop to consider the complaint may have been genuine. She at one point can clearly be heard on the audio recording drawing in a deep long breath as if in pain yet if he had any doubts, he still made no enquiry of her situation to ascertain if it is genuine"<sup>13</sup>.

Despite repeated calls from civil society, TCAB/NRCPO decisions are not published in contrast to other common law jurisdictions, such as the UK<sup>14</sup>, Canada<sup>15</sup> and Australia<sup>16</sup>. This makes it challenging to monitor the decision-making of adjudicators, and limits the system's transparency and accountability.

### 3.3 Lack of procedural safeguards

People seeking protection who have suffered torture, trafficking, and other forms of human rights violations may be too traumatised to articulate their experiences and require special measures to assist them through the asylum process to ensure

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<sup>12</sup> Villarico Louterliz Talag v. Torture Claims Appeal Board [2018] HKCFI 468; HCAL 179/2017. Available at: <http://hklii.hk/eng/hk/cases/hkcfi/2018/468.html>

<sup>13</sup> Ibid at [7]

<sup>14</sup> See the UK Government, "Immigration and asylum tribunal appeal decisions". Available at: <https://www.gov.uk/immigration-asylum-appeal-decisions>

<sup>15</sup> See Immigration and Refugee Board of Canada, "Decisions". Available at: <https://irb-cisr.gc.ca/en/decisions/Pages/index.aspx>

<sup>16</sup> See Australasian Legal Information Institute, "Refugee Review Tribunal of Australia". Available at: <http://www6.austlii.edu.au/cgi-bin/viewdb/au/cases/cth/RRTA/>



fairness<sup>17</sup>. Regrettably, as far as Justice Centre is aware there appears to be no policy or guidance on vulnerable persons' participation in USM process. The TCAB/NRCPO's limited procedural guidance<sup>18</sup> only provides that claimants should indicate their special needs in their Notice of Appeal or Petition, and that the appeal board "will take steps to accommodate such special needs as far as practicable"<sup>19</sup>. There is no practical guidance on how people at heightened vulnerabilities or other special needs, such as survivors of SGBV, survivors of torture or children, should be approached during interview or at appeal hearings, for example. Again, this is inconsistent with international best practice and the practice of other common law jurisdictions.

The lack of policy and practical guidance on vulnerable claimants significantly hampers the fairness of the USM. For example, we observed that adjudicators deem late disclosure of SGBV or torture as an adverse factor counting against claimants' credibility, without regard to the complex role trauma, cultural differences, shame, gender and other intersecting factors play in claimants' capacity to present their cases. We have also assisted claimants who were re-traumatised by the USM process, including a woman who was aggressively questioned by the Government's lawyers about her SGBV experiences at her TCAB hearing, and a child with a severe psychological condition who was made to testify at her family's TCAB hearing despite the family's requests that the experience would be harmful to her. Subsequent to the hearing the child's mental health deteriorated and she attempted suicide.

#### **4. Concerns regarding the Government's non-refoulement policy (Articles 2, 6, 7, 13, 24)**

##### **4.1 Policy of enforced illegality**

The Government maintains that people seeking protection in Hong Kong are "illegal immigrants" and must not be treated as "asylum seekers" or "refugees" as the Refugee Convention has never been applied to Hong Kong<sup>20</sup>. However, this illegality is in fact created by Hong Kong's statutory regime: section 37W of the Immigration Ordinance mandates that people seeking protection must overstay their visas – and henceforth become officially "illegal" – before they are eligible to lodge non-refoulement claims.

The impact of this policy of enforced illegality is manifold.

First, depending on the claimant's nationality, the permission of stay can be a significant length of time during which the claimant is not eligible for humanitarian assistance, including access to food, shelter, and medical care. Second, even

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<sup>17</sup> See for example, UNHCR, Guidelines on International Protection No.1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (7 May 2002).

<sup>18</sup> Security Bureau, "The Principles, Procedures and Practice Directions of the Torture Claims Appeal Board" (Sixth Edition, 28 August 2019) and "The Practice and Procedure Guide of the Administrative Non-refoulement Claims Petition Scheme" (Fifth Edition, 28 August 2019). Available at <https://www.sb.gov.hk/eng/links/tcab/index.htm>

<sup>19</sup> Ibid, at [24.1] and [30.1] respectively.

<sup>20</sup> Human Rights Committee, "Fourth periodic report submitted by Hong Kong, China under article 40 of the Covenant, due in 2018" (14 February 2020) ("HKSAR State Report") at [39]

claimants with substantiated claims are not given refugee status but continued to be classified as “illegal immigrants”. Refugees are thus denied the right to work and forced to rely on the government’s assistance which is aimed merely at preventing destitution. This illegal status is also inherited by children born to claimants in Hong Kong, who may be stateless<sup>21</sup>. The inadequacies of the Government’s humanitarian assistance and the lack of durable solutions are discussed in detail below.

Third, the Government’s categorisation of people seeking protection in Hong Kong as “illegal immigrants” feeds into a discriminatory narrative that portrays people in need of international protection as abusers of the system or criminals. Since 2015 Justice Centre has observed the use of xenophobic terms such as “fake refugees”, “toxic tumours” and “Southeast Asian thieves” by the media and some politicians, especially in periods leading up to major elections. The Committee on Economic, Social and Cultural Rights<sup>22</sup>, the Committee on the Rights of the Child<sup>23</sup> and Special Mandate holders<sup>24</sup> have also expressed concern over discrimination and the use of negative and stigmatising rhetoric towards refugees, migrants and ethnic minorities.

#### 4.2 Inadequate humanitarian assistance

Non-refoulement claimants are provided with minimal humanitarian assistance through the Government’s outsourced service provider, the International Social Service (“ISS”). The monthly assistance includes<sup>25</sup>:

- food allowance of HK\$1,200 in the form of pre-paid supermarket cards
- rent allowance of HK\$1,500 per adult and \$ 750 per child paid directly to the landlord
- HK\$300 for utilities
- petty cash for transportation
- other basic necessities, such as toiletry items, provided in kind

The Government’s rationale for its humanitarian assistance policy is to ensure a deterrent effect:

“[the Government] has been providing, through a non-governmental organisation, humanitarian assistance meeting basic needs to claimants during their presence in the HKSAR to prevent them from becoming destitute. At the same time, we need to ensure that such humanitarian assistance will not create

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<sup>21</sup> Annie Li, “When ‘qualifying’ as a refugee gets you permanent ‘illegal’ status in Hong Kong”, *Oxford Monitor of Forced Migration* Volume 8, No.2 (January 2020), p.30. Available at: <https://www.oxfordmigration.com/post/when-qualifying-as-a-refugee-gets-you-permanent-illegal-status-in-hong-kong>

<sup>22</sup> E/C.12/CHN/CO/2 at [41]

<sup>23</sup> CRC/C/CHN/CO/3-4 at [29] – [30]

<sup>24</sup> Communication No. CHN 14/2016. Available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=22905>

<sup>25</sup> Secretary for Security, “Humanitarian assistance for non-refoulement claimants” (15 February 2017). Available at: <https://www.info.gov.hk/gia/general/201702/15/P2017021500554.htm>

a magnet effect which may have serious implications for the sustainability of our current support systems and for our immigration control.”<sup>26</sup>

We are gravely concerned that claimants are unable to access humanitarian assistance during the period where they are waiting for their permission of stay to expire, and the period between the filing of their written signification and their registration at ISS, which could take months. During these periods claimants have no access to basic subsistence, including food, shelter, or medical care. While some assistance is available via NGOs, claimant’s inability to access critical social welfare can be dangerously detrimental. For instance, Justice Centre assisted a family who was unable to obtain medicine for their young child’s epilepsy during the period between the filing of their written signification and their registration.

Further, the minimal humanitarian assistance provided by the Government compounded by claimants’ inability to take up legal work forces claimants to live for prolonged periods in poverty and destitution, so much so that that this policy may constitute “constructive” refoulement.

#### **4.3 Lack of durable solutions**

The Government has no policy on durable solutions for people with substantiated USM claims. Recognised claimants are only granted non-refoulement protection, and it is the Government’s position that no additional rights are conferred, such as residency rights, greater socio-economic protection or any legal right to work. As stated, people with substantiated claims continue to be treated by the Government as illegal immigrants or overstayers.

Following the Court of Final Appeal’s 2014 decision in *GA v Director of Immigration*, substantiated claimants may apply for permission to take employment. However, only about 40% of claimants are able to successfully apply for a work permit, raising concerns that criteria applied by the Director of Immigration are too stringent, including requiring claimants to have a job offer from an employer before they are able to apply for permission<sup>27</sup>. Moreover, the permission is only granted for a six-month period, meaning claimants need to reapply frequently, which is onerous and unattractive to employers.

The Government has stated that substantiated claims on persecution grounds will be referred to the UNHCR Hong Kong Sub-office for resettlement. The number of individuals successfully resettled remains low, however. As of November 2018, 107 individuals were referred to UNHCR Hong Kong and only 4 had been resettled in a

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<sup>26</sup> HKSAR State Report, Annex 7B.

<sup>27</sup> Secretary for Security, “Torture Claims” (21 January 2015). Available at: <https://www.info.gov.hk/gia/general/201501/21/P201501210634.htm> and Immigration Department, “Permission to work for non-refoulement claimants and refugees” (9 March 2018). Available at: [https://accessinfo.hk/en/request/permission\\_to\\_work\\_for\\_non\\_refou](https://accessinfo.hk/en/request/permission_to_work_for_non_refou)



third country<sup>28</sup>. Claimants substantiated on other grounds of protection are not eligible for resettlement.

## 5. Arbitrary detention in the immigration context (Article 7, 9)

Justice Centre is concerned about the detention of protection claimants at immigration detention centres and other statutory designated places of detention, including prisons<sup>29</sup>. Our concerns include an overall lack of transparency, wide statutory powers to detain people for immigration control, a lack of adequate procedural safeguards, and substandard conditions of detention.

We echo the Human Rights Committee’s observations in General Comment 35, that immigration detention must be justified as reasonable, necessary and proportionate in light of the circumstances and reassessed as it extends in time. The detention of asylum seekers while their claims are being resolved would be arbitrary in the absence of specific grounds. In particular, the indefinite detention of individuals because of the State’s inability to return them due to statelessness or other external obstacles outside of their control is unjustifiable<sup>30</sup>.

### 5.1 Lack of transparency

The Immigration Department detains over 10,000 people every year<sup>31</sup>, but advises Justice Centre that it does not maintain statistics on the number of non-refoulement claimants who are under immigration detention<sup>32</sup>. In a paper submitted to the Legislative Council, however, the Government stated that as of November 2018, 60 non-refoulement claimants pending final termination of their claims were detained under immigration powers<sup>33</sup>.

Year	2015	2016	2017	2018
No. of people detained	10972	10749	10948	11510

Table 3: The number of people detained by the Immigration Department per year

Justice Centre estimates 30-40% of our clients, including children, have been detained at some point during their asylum claims. Amongst those who were detained, around 26% have been identified by Justice Centre as survivors of torture and/or CIDTP and as such should not have been detained in the first place.

<sup>28</sup> Security Bureau, “Legislative Council Subcommittee to Follow Up Issues Relating to the Unified Screening Mechanism for Non-refoulement Claims Follow-up matters to the meeting of 27 November 2018” (January 2019) LC Paper No. CB(2)592/18-19(01). Available at: [https://www.legco.gov.hk/yr16-17/english/hc/sub\\_com/hs54/papers/hs5420181127cb2-592-1-e.pdf](https://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs54/papers/hs5420181127cb2-592-1-e.pdf)

<sup>29</sup> The Immigration (Places of Detention) Order (Cap 115B) provides that statutory designated places of detention includes prisons and police stations. See <https://www.hkii.hk/eng/hk/legis/reg/115B/sch1.html>

<sup>30</sup> CCPR/C/GC/35 [18]

<sup>31</sup> Immigration Department, “Appendix 13 – Enforcement Branch Statistics”, Annual Report 2018. Available at: [https://www.immd.gov.hk/publications/a\\_report\\_2018/en/appendices-13.html](https://www.immd.gov.hk/publications/a_report_2018/en/appendices-13.html)

<sup>32</sup> Immigration Department, “Immigration Detention” (March 2020). Available at: [https://accessinfo.hk/en/request/immigration\\_detention\\_2#incoming-1315](https://accessinfo.hk/en/request/immigration_detention_2#incoming-1315)

<sup>33</sup> See note 28

## 5.2 Lack of procedural safeguards

The power to detain protection claimants under the Immigration Ordinance (Cap 115) is wide. Of particular concern is Section 37ZK, which allows for prolonged detention of protection claimants “pending final determination of the claimant’s torture claim”. It provides:

### **37ZK. Detention pending final determination**

Without limiting any other power conferred by this Ordinance, a claimant may be detained under the authority of the Director of Immigration, the Deputy Director of Immigration or any assistant director of immigration pending final determination of the claimant’s torture claim.

Moreover, there are no judicial oversight or procedural safeguards, such as a bail application process or an independent review mechanism, to review the cases of immigration detainees. While detainees can apply for *habeas corpus*, to our knowledge there has been no successful application in the immigration context. The Immigration Department’s policy for detention provides: “Detention will be kept under regular review and will be reviewed when there is a material change of circumstance”<sup>34</sup>, but we believe this is insufficient to guarantee the rights of detainees are protected.

The longest period of detention of an asylum seeker Justice Centre is aware of is 3 years and ongoing<sup>35</sup>.

There is also no policy to ensure vulnerable persons are not detained unnecessarily and for prolonged periods of time. In particular, there is insufficient published guidance or policy to ensure the timely identification of survivors of torture or CIDTP in order to ensure they are not detained<sup>36</sup>.

## 5.3 Substandard conditions of detention

We are concerned about the substandard conditions at detention facilities, including substandard food, the lack of halal food for Muslim detainees, the lack of basic amenities such as beds and blankets, and poor hygiene in cells<sup>37</sup>.

<sup>34</sup> Immigration Department, “Policy for detention pending final determination of the claimant’s torture claim”. Available at: [https://www.immd.gov.hk/pdf/Detention\\_policy\\_en.pdf](https://www.immd.gov.hk/pdf/Detention_policy_en.pdf)

<sup>35</sup> This case of prolonged detention has also been reported in the media. See: Cheng Tze Yu, “Vietnamese refugee ‘Golden Eagle’ ‘s second life sentence”, *Ming Pao Weekly* (28 July 2018) (in Chinese). Available at: <https://www.mpweekly.com/culture/%e8%b6%8a%e5%8d%97-%e8%b6%8a%e5%8d%97%e6%88%b0%e7%88%ad-%e8%b6%8a%e5%8d%97%e8%88%b9%e6%b0%91-79490>

<sup>36</sup> Survivors of torture or CIDTP often experienced detention in their home countries; prolonged detention therefore have profound psychological impact upon them. For more information, see Guideline 7: Detention of Vulnerable Persons at UNHCR, “UNHCR’s Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers” (February 1999).

<sup>37</sup> Laura Westbrook, “Coronavirus: Hong Kong lawyers, lawmakers flag hygiene issues at detention centre, but Immigration says health measures in place” (26 April 2020). Available at: <https://www.scmp.com/news/hong-kong/health-environment/article/3081544/coronavirus-hong-kong-lawyers-lawmakers-flag>

We are especially concerned about the quality of or lack of access to healthcare in detention facilities. Yuli Riswati, a domestic worker detained at the Castle Peak Immigration Detention Centre, alleged she was subject to a strip search by a male medical officer<sup>38</sup>. There appears to be a lack of mental health support for detainees, which is worrying as detention may increase detainees' likelihood of developing mental health issues. We are aware of at least one case of a detainee attempting suicide due to their prolonged detention.

## **6. Lack of protection for victims of human trafficking in all its forms (Article 7, 8, 9)**

Evidence compiled by civil society organisations<sup>39</sup> and other stakeholders, such as the United States Department of State<sup>40</sup>, shows that Hong Kong remains a source, destination, and transit site for human trafficking.

Regrettably, there is no comprehensive anti-human trafficking legislation in Hong Kong. Existing legislation only criminalises human trafficking for the purpose of transnational sex work<sup>41</sup>. While China is a signatory to the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime ("Palermo Protocol"), it has not been extended to Hong Kong.

Justice Centre is concerned that the Government refused to extend the Palermo Protocol to Hong Kong on the grounds that it would enable "abuse by overstayers and illegal migrants" and enable victims of trafficking to remain in Hong Kong<sup>42</sup>, which disregards Hong Kong's international obligations to protect victims of trafficking and prima facie assumes people in need of protection are abusers of the system.

### **6.1 Issues with victim identification**

While the Government has a human trafficking victim screening mechanism in place<sup>43</sup>, Justice Centre is concerned about the adequacy of the mechanism. The number of

<sup>38</sup> "Male doctor strip searched me: expelled Indonesian", RTHK (7 December 2019). Available at: <https://news.rthk.hk/rthk/en/component/k2/1496483-20191207.htm>

<sup>39</sup> See for example, Amnesty International, "Exploited for Profit, Failed by Governments: Indonesian Migrant Domestic Workers Trafficked to Hong Kong" (November 2013). Farsight, "Modern Slavery in East Asia: Protecting the rights and promoting the autonomy of domestic workers from Indonesia and the Philippines" (February 2016). Justice Centre Hong Kong, "Not Stopping Here: Hong Kong as a Transit Site for Human Trafficking" (January 2019); Justice Centre Hong Kong, "Coming Clean: The prevalence of forced labour and human trafficking for the purpose of forced labour amongst migrant domestic workers in Hong Kong" (February 2016). Available at: <https://www.justicecentre.org.hk/research/#publications>

<sup>40</sup> "Hong Kong: Trafficking Profile" in United States Department of State, "Trafficking in Persons Report" (June 2019). P. 229.

<sup>41</sup> Crimes Ordinance (Cap 200.), Section 129.

<sup>42</sup> HKSAR State report at [68]

<sup>43</sup> Security Bureau, "Victim Identification". Available at: <https://www.sb.gov.hk/eng/special/bound/iimm.htm>

trafficking victims identified by the Government remains very low, despite that civil society efforts to screen victims suggest the number of victims is significantly higher<sup>44</sup>.

For instance, Justice Centre estimated in 2016 that 17% of migrant domestic workers in Hong Kong were in conditions of forced labour, and among those workers 14% had been trafficked into it<sup>45</sup>. This means potentially over 9000 people among the approximately 390,000 migrant domestic workers in Hong Kong are victims of human trafficking for the purpose of forced labour<sup>46</sup>.

However, in the year 2019, the Government only identified 2 people as victims of human trafficking. We are concerned that the low number of trafficking victims identified by the Government reflects inadequacies of the victim identification mechanism, including vagueness of the screening form, lack of training for police and immigration officers, and the lack of legal representation for victims at their screening interviews.

Year	2017	2018	2019
No. of people screened	4710	7500	6790
No. of people identified as victims of human trafficking	10	18	2

Table 4: No. of people screened and identified as victim of human trafficking by the Government from 2017-2019<sup>47</sup>.

## 6.2 Arbitrary detention of victims of trafficking (Article 7, 9)

There is credible evidence that potential victims of human trafficking are exploited to commit drug-related offences in Hong Kong<sup>48</sup>. Justice Centre has observed that potential victims of trafficking are not identified as such, with victims consequently prosecuted and imprisoned for the offences they were exploited to commit.

While the Prosecution Code, which is a set of instructions prepared by the Department of Justice to guide prosecutors, provides that prosecutors should “consider a credible

<sup>44</sup> See for example, Holmes Chan, “NGO task force identifies 63 victims of human trafficking in Hong Kong using new toolkit” (31 July 2018). Available at: <https://hongkongfp.com/2018/07/31/ngo-task-force-identifies-63-victims-human-trafficking-hong-kong-using-new-toolkit/>

<sup>45</sup> Justice Centre Hong Kong, “Coming Clean: The prevalence of forced labour and human trafficking for the purpose of forced labour amongst migrant domestic workers in Hong Kong” (February 2016). Available at: <https://www.justicecentre.org.hk/research/#publications>

<sup>46</sup> The number of migrant domestic workers in Hong Kong as of June 2019 is stated in a press release of the Hong Kong Government: Hong Kong Government, “Government response to US Trafficking in Persons Report 2019” (June 2019). Available at: [www.info.gov.hk/gia/general/201906/20/2019062000915.htm](http://www.info.gov.hk/gia/general/201906/20/2019062000915.htm).

<sup>47</sup> Statistics available in Hong Kong Government, “Government response to US Trafficking in Persons Report 2019” (June 2019). Available at: [www.info.gov.hk/gia/general/201906/20/2019062000915.htm](http://www.info.gov.hk/gia/general/201906/20/2019062000915.htm) and Kelly Ho, “Hungry and indebted: Kenyan domestic worker falls victim to forced labour in Hong Kong”, Hong Kong Free Press (6 April 2020). Available at: <https://hongkongfp.com/2020/04/06/hungry-and-indebted-kenyan-domestic-worker-falls-victim-to-forced-labour-in-hong-kong/>

<sup>48</sup> Justice Centre Hong Kong, “Submissions for the Working Group on Arbitrary Detention’s study on arbitrary detention relating to drug policies” (March 2020). Available at: <https://www.justicecentre.org.hk/framework/uploads/2020/04/Justice-Centre-Hong-Kong-Submission-to-WGAD-Study-on-Drug-Polices.pdf>

claim that a defendant or intended defendant is a victim of trafficking” and “appropriately deal with the case” with reference to international standards and practices<sup>49</sup>, the efficacy of the provision is in doubt. When asked to provide statistics on the application of the said provision, such as the number of individuals who have been identified by prosecutors as having credible claims as victims of trafficking, the Department of Justice advised that they do not maintain such information<sup>50</sup>. Two recent judgements also suggest that the authorities, including the Courts, fail to recognise the presence of significant human trafficking indicators.

### **Case 1: *HKSAR v Dang Hung Ngoc and Vu Dinh Nguyen*<sup>51</sup>**

Vu and Dang, two Vietnamese men, were convicted of cultivating cannabis plants in Hong Kong<sup>52</sup>.

Vu is a 23-year-old man who entered Hong Kong illegally via China. He was offered work by a man who took him to a villa to water cannabis plants and clean the premise. A key that could open the padlock of the main entrance to the villa was found in Dang’s room, indicating Vu may be kept in the villa by Dang. The starting point of his sentencing was *enhanced by 6 months* for his illegal immigrant status. He was sentenced to 7 years 8 months.

Dang is a 66-year-old naturalised British citizen who entered Hong Kong with a visitor’s permit. He met a woman who offered him a cleaning job with food and accommodation at the said villa. Dang claimed he did not call the police upon detecting the smell of cannabis after a week of being employed at the villa as he was afraid and could not speak Chinese. He was sentenced to 8 years and 6 months.

### **Case 2: *HKSAR v Gutierrez Alvarez Keishu Mercedes*<sup>53</sup>**

A Venezuelan woman was convicted of trafficking cocaine into Hong Kong and sentenced to 25 years’ imprisonment.

She alleged she was tricked into leaving Venezuela for Brazil after applying online for an advertising job. When she arrived in Brazil, she was met by a man who detained her in the home of another man for a month and a half, where she was ill-treated, beaten and frequently raped. She was then coerced into taking substances, which she alleged she did not know were drugs, to Hong

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<sup>49</sup> Department of Justice, “Prosecution Code” (2013) at [18.2]. Available at: <https://www.doj.gov.hk/eng/public/pubsoppapcon.html>

<sup>50</sup> Department of Justice, “Human Trafficking: Prosecutions” *Access to Information Request* (November 2019). Available at: [https://accessinfo.hk/en/request/human\\_trafficking\\_prosecutions#incoming-1209](https://accessinfo.hk/en/request/human_trafficking_prosecutions#incoming-1209)

<sup>51</sup> *HKSAR v Dang Hung Ngoc and Vu Dinh Nguyen* [2019] HKCFI 1954 (Court of First Instance).

<sup>52</sup> There is a well-established link between cannabis production and human trafficking; for example see note 13 above and Amelia Gentleman, “Trafficked and enslaved: the teenagers tending UK cannabis farms”, *The Guardian* (25 March 2017). Available at: <https://www.theguardian.com/society/2017/mar/25/trafficked-enslaved-teenagers-tending-uk-cannabis-farms-vietnamese>; “How a boy from Vietnam became a slave on a UK cannabis farm”, *BBC* (21 January 2020). Available at: <https://www.bbc.com/news/stories-51176958>

<sup>53</sup> *HKSAR v Gutierrez Alvarez Keishu Mercedes* CACC 320/2016; [2020] HKCA 184 (Court of Appeal).



Kong via Abu Dhabi. The man threatened to kill her family members if she did not comply. She was also told she would be watched from her arrival at Hong Kong airport until her arrival at the hotel. The issue of human trafficking was raised in an unsuccessful application to permanently stay the proceedings.

Furthermore, Hong Kong is one of the few jurisdictions to not make any distinction with regard to the accused's role and seniority within a drug operation in sentencing<sup>54</sup>. This means "drug mules" or couriers, who may be victims of trafficking, receive draconian custodial sentences.

Although the Palermo Protocol does not explicitly grant immunity from criminal prosecution to trafficked persons, the principle of non-criminalisation of victims is enshrined in other instruments and accepted as integral to protecting victim's rights<sup>55</sup>. As such, the prosecution and prolonged detention of human trafficking victims for drug-related offences, committed as a consequence of their trafficking may be in contravention of international human rights standards, including but not limited to the prohibition on arbitrariness under ICCPR Article 9, and the prohibition against CIDTP under ICCPR Article 7.

Please contact Rachel Li (rachel@justicecentre.org.hk), Research and Policy Officer at Justice Centre Hong Kong, with any questions regarding this submission.

### **About Justice Centre Hong Kong**

Justice Centre Hong Kong is a non-profit organisation focused on the promotion of human rights through our legal, psychosocial, research, policy and advocacy work. We are committed to driving change for a just and fair society. Founded in 2007 as The Hong Kong Refugee Advice Centre, over seven years we helped over 2,000 men, women and children on the road to a new life. Building on our expertise in refugee issues, in 2014 we identified a clear need for an increased response to tackling forced labour and human trafficking in Hong Kong, and expanded our remit to fill this gap and rebranded as Justice Centre Hong Kong. We now help around 300 people each year through our direct services and aim to benefit many more through our research, policy and advocacy work.

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<sup>54</sup> *HKSAR v Kilima Abubakar Abbas* CACC 143/2016; [2018] HKCA 602 (Court of Appeal).

<sup>55</sup> See for example UNODC, "A Human Rights-Based Approach to Trafficking in Persons: the principle of non-criminalisation of victims" (May 2019). Available at: <https://www.unodc.org/e4j/en/tip-and-som/module-8/key-issues/principle-of-non-criminalization-of-victims.html>