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HCAL 132/2006 and
1, 43, 44, 48 and 82/2007

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 132 OF 2006

BETWEEN

C — Applicant

and

DIRECTOR OF IMMIGRATION — Respondent

AND

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 1 OF 2007

BETWEEN

AK — Applicant

and

DIRECTOR OF IMMIGRATION — Respondent

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A B C D E F G H I J K L M N O P Q R S T U V

AND

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 43 OF 2007

BETWEEN

KMF	Applicant
and	
DIRECTOR OF IMMIGRATION	1st Respondent
SECRETARY FOR SECURITY	2nd Respondent

AND

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 44 OF 2007

BETWEEN

VK	Applicant
and	
DIRECTOR OF IMMIGRATION	Respondent

A B C D E F G H I J K L M N O P Q R S T U V

AND

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 48 OF 2007

BETWEEN

BF	Applicant
and	
DIRECTOR OF IMMIGRATION	1st Respondent
SECRETARY FOR SECURITY	2nd Respondent

AND

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 82 OF 2007

BETWEEN

YAM	Applicant
and	
DIRECTOR OF IMMIGRATION	Respondent

(HEARD TOGETHER)

Before : Hon Hartmann J in Court

Dates of Hearing : 10-14 December 2007

Date of Handing Down Judgment : 18 February 2008

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JUDGMENT

Introduction

1. These applications for judicial review raise two central issues. The first issue is whether the Government of Hong Kong, acting through the Director of Immigration, has an obligation under customary international law not to expel a refugee to the frontiers of any territory where he would face persecution on account of his race, religion, nationality, membership of a particular social group or political opinion. The second issue is whether – if such an obligation exists – the Government of Hong Kong is obliged, as an integral element of that obligation, to determine the true status of all refugee claimants.

2. Each of the six applicants asserts that he has come to Hong Kong because he has a well-founded fear of persecution in his country of nationality or former habitual residence, that persecution being based on his ethnic origin, membership of a particular social group or political affiliation. Each applicant asserts that, if returned, there is a real risk he will again be subject to persecution. In short, each applicant has sought protection in Hong Kong on the basis that he is a 'refugee' as that word is understood in the 1951 United Nations Convention Relating To The Status of Refugees and its 1967 Protocol ('the Refugee Convention').

3. The applicants are representative of an increasing number of persons who come to Hong Kong seeking to be recognised as refugees. At this time, I am told that there are close to 2,000 such claimants. This

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may not constitute a mass influx but for Hong Kong it is nevertheless a significant number.

4. Hong Kong has never had the Refugee Convention extended to it. In consequence, there is no domestic legislation requiring the screening of persons who claim to be refugees nor the granting of asylum to those whose claims are accepted. As to why this is so, in a paper presented to the Legislative Council Panels on Security and Welfare Services in July 2006, the Government gave the following explanation :

> "Hong Kong is small in size and has a dense population. Our unique situation, set against the backdrop of our relative economic prosperity in the region and our liberal visa regime, makes us vulnerable to possible abuses if the [Refugee Convention] were to be extended to Hong Kong. We thus have a firm policy of not granting asylum and do not have any obligation to admit individuals seeking refugee status under the [Refugee Convention.]"

5. Refugee claimants, however, are not simply expelled to their country of nationality or the country from where they have come and left to the hazards of fate. An *ad hoc* arrangement has been reached with the Hong Kong Sub-Office of the United Nations High Commissioner For Refugees ('the UNHCR') in terms of which officers from the UNHCR accept applications from persons in the position of the six applicants and then, independently of the Hong Kong Government, determine whether refugee status should be acknowledged.

6. In ordinary usage, the term 'refugee' is, of course, broad in scope. It applies to any person who flees his place of abode in order to escape conditions that he believes to be intolerable. Today, 'humanitarian refugees', as they are called; that is, persons fleeing civil

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wars, natural disasters or the generalised anarchy so often present in failed states, make up the greatest number of the world's refugees.

7. Under the Refugee Convention, however, the term 'refugee' is specifically defined and to that extent has become a term of art. Art.33 defines a refugee as a person who —

> "… owing to 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 [as a result of such events], is unable or, owing to such fear, is unwilling to return to it."

8. Pursuant to the *ad hoc* arrangement which I have described, each of the applicants has made a claim to be recognised as a refugee with the UNHCR. Their claims have been investigated. The UNHCR, however, has declined to accord refugee status to any of them. Each of the applicants has appealed by way of an internal UNHCR appeal procedure but those appeals too have been dismissed.

9. In the light of these determinations by the UNHCR, the Director of Immigration ('the Director') has sought to have each of the applicants removed from Hong Kong, if necessary back to their country of nationality or former habitual residence. In this regard, as a statement of general policy, in the paper presented to the Legislative Council Panels on Security and Social Services in July 2006, the following was said :

> "The Immigration Department will continue to maintain close liaison with the UNHCR Hong Kong Sub-office to ensure persons whose claims for refugee status have been denied, and

> who have no permission to remain here, leave Hong Kong in accordance with our law."

10. Although none of the applicants has been accorded refugee status by the UNHCR, if a person *is* recognised as a refugee, it means it is accepted that, if repatriated, that person will be open to a real risk of persecution. In such circumstances, it is the inevitable practice of the Director not to repatriate that person but to afford him temporary refuge until the UNHCR – *not* the Hong Kong Government – is able to settle that person elsewhere in the world. I have described this practice of the Director as 'inevitable' because, during the course of the hearing, it was never suggested that the Director had in fact returned a recognised refugee to a country where there was a real risk he would be persecuted.

11. This practice on the part of the Director mirrors what has been codified in the Refugee Convention. Art.33(1) of the Convention contains a prohibition against *refoulment*; that is, a prohibition against expelling or returning a refugee to the frontiers of territories where his life or freedom would be threatened. The article reads :

> "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."

12. It is to be noted that art.33(1) forbids expulsion or return, it does not talk of the original act of permitting admission. As Kay Hailbronner expresses it in his article, *Non-Refoulment and 'Humanitarian' Refugees : Customary International Law or Wishful*

Thinking? (1986) 26 : 4, Virginia Journal of International Law, 857, at 861 :

> "The plain language of the 1951 Refugee Convention demonstrates a reluctance of states to enter into far-reaching obligations to grant admission to, as opposed to non-return of, refugees. Furthermore, those commenting on the 1951 Refugee Convention and the 1967 Refugee Protocol express the belief that states were unprepared to include in the Convention any article on admission, as opposed to non-return, of refugees. The coverage of *non-refoulement*, based on these standards, is limited to those who have already entered state territory, either lawfully or unlawfully.

13. On behalf of the six applicants, it is contended that this inevitable practice on the part of the Director constitutes *de facto* recognition of the principle of *non-refoulment* as it has matured into a rule of customary international law.

14. The Director, however, does not acknowledge any formal legal obligation under any rule of international law. On his behalf, it is said that his practice is no more than the exercise of the discretion given to him to manage Hong Kong's scheme of immigration, a scheme governed by the provisions of the Immigration Ordinance, Cap.115. In the exercise of that discretion, it is said, each case being considered in good faith on its merits, if there are exceptional humanitarian or compassionate grounds, the Director may allow a person to stay in Hong Kong.

15. On behalf of the applicants, however, it is said that, when acting in respect of refugee claimants, the Director is not free of all legal obligations under international law. It is accepted that the Director is not subject to any specific provisions of international treaty law. It is contended, however, that he must act in accordance with norms of

customary international law as they apply to refugees which have been incorporated into the common law and therefore into the law of Hong Kong. Indeed, in respect of refugees, it is said that the principle of *non-refoulment* has matured into a peremptory norm of customary international law – one that is absolute, permitting of no refusal – a norm which is binding on all jurisdictions in the international community, whether or not they are party to the Refugee Convention, and therefore binding on Hong Kong.

16. On behalf of the applicants, it is further said that one of the consequences of the Director being bound by the peremptory norm of customary international law to observe *non-refoulment* is an obligation imposed on him to first determine who is and who is not a refugee. It is contended that this is not an obligation which can be surrendered to the UNHCR. While the Director may receive assistance when that is needed, it is for him, and nobody else, to determine who is or is not a refugee so that he will know who must be protected from *refoulment*.

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.

18. The UNHCR, while it accepts that its resources are often stretched has – understandably – declined to enter into a debate as to the

merits and shortcomings of its systems. In a press release dated 11 July 2006, issued in respect of a matter unrelated to these present applications, the UNHCR said that its *Procedural Standards for Refugee Status Determination* are —

> "guidelines issued by UNHCR Headquarters in Geneva for field offices. They function as a best practice tool and have been adopted accordingly to accommodate the resources and capacity of the field offices. This is done in adherence to the principles of refugee protection."

19. The Director denies that he is aware that the UNHCR procedural standards are lacking in the manner alleged. In an affirmation dated 31 August 2007, Mr Choi Suet Yung, the Assistant Secretary for Security of the Security Bureau, has made the following assertions :

> "… The Government does not accept that the refugee assessment process of [the UNHCR] Hong Kong Sub-office is unfair, unreasonable or opaque as alleged … The UNHCR is the international organization mandated to protect refugees. It possess the relevant experience, knowledge and network to support refugee status determination work. It would not be necessary or justified for the HKSARG to duplicate the efforts of UNHCR in refugee status determination; such duplicated efforts would unlikely achieve a more accurate or fair result."

20. However, it is asserted on behalf of the applicants that – whether the Director acts in *de facto* recognition of the customary international law norm prohibiting *refoulment* of refugees or acts solely on humanitarian grounds – his delegation of responsibility to the UNHCR is unlawful :

(i) If the Director's policy, as it is described, is designed to ensure that refugees are not *refouled*, it is unlawful – including being unlawful in the sense of being *Wednesbury*

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unreasonable – because the decision-making process is not under the control of the Hong Kong Government, it is instead under the control of an independent body, its decisions being (essentially) unreasoned and being immune from judicial scrutiny. The Director, therefore, cannot know in any particular case whether he is or is not *refouling* a refugee because he does not know the basis of the UNHCR decision although he must be aware of shortcomings in its decision-making process and therefore the real possibility that it is an unfair process.

(ii) If, however, the Director's policy is intended to enable him to identify in any particular case exceptional humanitarian grounds which will influence the exercise of his discretion, the same objections apply. How can the Director lawfully exercise his discretion when in any particular case he does not know the basis of the UNHCR decision although he must be aware of shortcomings in the decision-making process?

21. It is further asserted that, under the Basic Law and common law, the failure of the Director to ensure that the Hong Kong Government itself conducts the screening of refugee claimants in unlawful because the Director may not surrender his discretionary powers to an independent body such as the UNHCR which is immune from judicial scrutiny and in that process allow Hong Kong, as a sovereign entity, to be bound by the decisions of that body.

22. The six applications, therefore, have one central purpose; namely, to obtain declarations to the effect that the Hong Kong Government, represented by the Director, is obliged under both customary

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international law and common law to screen refugee claimants and that this obligation is not one which can be surrendered to the UNHCR.

The declaratory relief sought

23. Although there are slight differences in expression, I think it may fairly be said that the declaratory relief sought by the six applicants is to the following effect.

24. The first declaration sought is one that defines a 'refugee' under customary international law and states the minimum protection that must be afforded to such a person; namely, *non-refoulment* :

> "It is declared that a person who is in Hong Kong and who has, or had, a well-founded fear of persecution in a place outside the People's Republic of China by reason of race, religion, nationality, membership of a particular social group or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence, is a refugee and may not be expelled or returned (refouled) in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality or membership of a particular social group or political opinion, provided there are no reasonable grounds for believing him to be a danger to the security of Hong Kong or, having been convicted of a particularly serious crime, that he constitutes a threat to the community of Hong Kong."

25. The second declaration sought is one that states the existence, under customary international law of the principle of *non-refoulment* :

> "A declaration that *non-refoulement* of persons claiming protection from persecution in other countries is a principle of customary international law that has attained the status of *ius cogens* [a peremptory norm] and is a part of the common law in the HKSAR."

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26. The third declaration sought goes to the duties of the Director :

> "A declaration that, in deciding whether to exercise removal powers under the Immigration Ordinance in respect of persons who claim to be refugees and who are entitled not to be *refouled*, the Director of Immigration must, in accordance with the highest standards of fairness, carry out an independent inquiry into their status before making any decision to direct their removal to a place where they fear persecution."

27. The fourth declaration sought is an alternative to the third declaration. It is to the following effect :

> "A declaration that in deciding whether to exercise removal powers under the Immigration Ordinance Cap.115 in respect of persons who advance humanitarian grounds against removal to another place, the Director of Immigration must, in accordance with the highest standards of fairness, carry out an independent inquiry into the existence of humanitarian grounds before making any decision to direct their removal to a place where they fear persecution."

28. As I understand it, this alternate declaration is to be considered in the context of the challenge that, even if the Director acts only in the exercise of his discretion on humanitarian grounds, it is unlawful for him to surrender or delegate to the UNHCR the essential decision-making process which determines the manner of how he is to exercise that discretion.

Determining only issues of Hong Kong domestic law.

29. At this stage, it is necessary to emphasise that, if this court is to grant declaratory relief, it will only do so if the Director is found to have any obligation under Hong Kong domestic law. For a statement of the

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principle, see, for example, *Judicial Remedies in Public Law* by Clive Lewis, Sweet & Maxwell, 3rd Ed, para.7-040 :

> "The courts will not … grant relief in respect of obligations arising under international treaties, since these do not create obligations enforceable in English law unless incorporated by statute or unless it is necessary to interpret the treaty in order to adjudicate on a claim arising under domestic law. …"

30. While therefore much of this judgment is focused on issues arising in public international law, its determinations are restricted to those legal obligations, if any, which I am satisfied have been received into our domestic law.

The Convention Against Torture

31. While the Refugee Convention has not been extended to Hong Kong, the Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment or Punishment ('the Convention Against Torture') has been extended and therefore applies. The Convention Against Torture also incorporates the rule of *non-refoulment*. Art.(3) reads :

> "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."

32. As to the meaning of 'torture', art.1(1) defines it as —

> "… any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on

discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity …"

33. It will be seen that the concept of 'persecution' under the Refugee Convention – encompassing, as it does, all forms of hostile ill-treatment and discrimination – is broader than the concept of 'torture' as it is defined in the Convention Against Torture. Within the context of the two Conventions, it may be said that all torture is a form of persecution but not all persecution constitutes torture. Accordingly, two different determinations have to be made. As was said by the Court of Final Appeal in *Secretary for Security v. Prabakar* (2004) 7 HKCFAR 187, at 178 :

"… But more importantly, for the purposes of this appeal, it must be noted that, having regard to their different provisions, a person who is outside the protection of the Refugee Convention may nevertheless be protected by the Convention Against Torture."

34. If a person claims the protection of *non-refoulment* under the Convention Against Torture, as that Convention has been extended to Hong Kong, the Government has adopted a policy of not deporting that person to a country where his fear of being tortured is considered to be well-founded. That policy involves the Government itself conducting a screening exercise and doing so in accordance with high standards of fairness. In *Secretary for Security v. Prabakar*, at 204, the Court of Final Appeal said that —

" The determination of the potential deportee's torture claim by the Secretary [of Security] 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 right not to be subjected to torture is involved. Accordingly, high standards of fairness must be demanded in the making of such determination.

It is for the Secretary to make such a determination. The courts should not usurp that official's responsibility. But having regard to the gravity of what is at stake, the courts will on judicial review subject the Secretary's determination to rigorous examination and anxious scrutiny to ensure that the required high standards of fairness have been met."

35. As it is, recent experience has shown that a great many refugee claimants also make claims under the Convention Against Torture. Indeed, it appears that an almost invariable practice has arisen of seeking protection under the two Conventions in sequence. By this I mean that the great majority of claimants first make a claim to the UNHCR to be recognised as a refugee and thereafter, if that fails, then proceed to make a claim direct to the Hong Kong Government under the Convention Against Torture. In short, an invariable two-stage process has arisen.

36. A consequence is that genuine claimants invariably face the spectre of two separate and uncertain investigations, having to recount the same history of misfortune under the scrutiny of two different investigative bodies. To the trauma of an uncertain future is added the wear-and-tear of delay, a delay (at this time) that often amounts to several years. False claimants, however, are able to abuse the system, exploiting the delay occasioned by two essentially independent investigations. If they are able to obtain their freedom by way of release on recognisance, they can then turn their hand to whatever holds out a profit and do so for an extended period of time.

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37. But that being said, as I have said earlier, it must be recognised that the matters to be determined in a claim for refugee status are different from those to be determined in a claim made under the Convention Against Torture. One claim may fail while the other succeeds.

38. The six applicants, who assert that the Director, and not the UNHCR, is obliged to determine whether a person is to be recognised as a refugee, assert also that, as the fundamental human rights of a refugee claimant are at stake, the Director must adhere to the same ‘high standards of fairness’ in making this determination as he does in making a determination under the Convention Against Torture. In short, it is submitted that the requirements laid down in *Prabakar* must also apply in the screening all refugee claimants by the Hong Kong Government.

The applicants

39. For present purposes, it is not necessary to outline in detail the history of each applicant’s claim. But some brief background should be given, if only to have a broader understanding of the very real complexities – geographical, social, political – that colour claims to be recognised as a refugee and the difficulties that are presented in their determination.

C

40. The 1st applicant, C, was born in the Democratic Republic of the Congo, known as Zaire. He is now in mid-30s and is an ethnic Tutsi.

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According to the applicant, he was trained in Zaire as an army intelligence officer. He admits that the unit to which he was posted – known as DEMIAP – was engaged in human rights abuses. He says, however, that he had no way of leaving the unit without endangering his own life or that of his family. He therefore remained in the unit until about 1998 when he was himself arrested and detained. During his detention, he says, he was tortured.

41. When he was released, the applicant says that he fled to Rwanda where he applied for refugee status. However, when he was approached by members of the Rwandan military intelligence to work for them, he fled to Uganda. While in Uganda, he was able to obtain a visa for Korea and in February 2004 flew there via Hong Kong. According to the applicant, when he attempted to claim asylum in Korea, he was put on a plane and returned to Hong Kong. He arrived here in late February 2004.

42. The applicant's claim for refugee status was rejected in March 2004. His appeal was dismissed a few days later. The claim was rejected under the provisions of art.1(F)(a) of the Convention on the basis that he was a person with respect to whom there were serious reasons for considering that, when he had been with DEMIAP in Zaire, he had committed crimes against humanity.

43. On the day that his appeal was dismissed by the UNHCR, the applicant made a claim under the Convention Against Torture. That claim, I understand, has not yet been finally determined.

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AK

44. The 2nd applicant was born in Guinea. It is possible that, when he arrived in Hong Kong, he may have been under 18 years of age and therefore a 'child' in Terms of the 1989 Convention on the Rights of the Child. The Convention – subject to reservation in respect of immigration matters – is extended to Hong Kong.

45. According to the 2nd applicant, his family was involved in opposition politics in Guinea. In the result, his father and other members of his family were killed by Government militia. The applicant says that he went into hiding until, with the help of a friend, he was able to fly out of Guinea. He asserts that he had no idea of the destination of the flight.

46. He remembers only that he stopped at various places before arriving in Hong Kong. He flew into Hong Kong in late December 2005 and was treated initially as a 'stranded passenger', it being recorded that his possessions had been lost or stolen *en route* to Hong Kong. While attempts were made for him to fly out of Hong Kong, he remained 'air side' at the airport.

47. In February 2005, the applicant was formally interviewed. The record of interview makes no suggestion that he claimed refugee status. According to the record of interview, he said that his parents were alive and living in Guinea and he had no siblings. He spoke of himself as a student. However, the applicant says that, as he spoke little English, he was unable to make himself fully understood. He said he had always attempted to claim refugee status. The applicant says that he had not lost his papers and possessions before coming to Hong Kong. They had been

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in a backpack which he had with him when he arrived at the airport but the backpack itself was lost or stolen.

48. The UNHCR investigated the applicant's claim for refugee status but it was rejected within a matter of a month or so. The applicant appealed. In late 2006, his appeal was dismissed. As yet, the applicant has made no claim under the Convention Against Torture.

KMF

49. The 3rd applicant was born in 1982 in the Republic of Congo, known as Congo-Brazzaville. He is in his mid-20s. According to the applicant, he and his family were the victims of ethnic unrest. He spent time in detention. His family was killed and he was forced into hiding in remote forest areas controlled by armed gangs. One gang, known as the Cobras, had some sort of official support. The applicant was pursued by this gang. He had to flee the country. He came to Hong Kong in November 2004, flying via Ethiopia and Thailand.

50. A few days after his arrival in Hong Kong, the applicant went to the offices of the UNHCR to claim refugee status. His claim was rejected. The applicant appealed but, in July 2006, that appeal was dismissed by the UNHCR. As yet, the applicant has not made a claim under the Torture Convention.

VK

51. The 4th applicant, VK, was born in Sri Lanka in 1964 and is now in his 40s. He is a Tamil. According to the applicant, in the 1980s

he was recruited to assist the Liberation Tigers of Talim Eelam in their armed struggle. For a time, he collected funds in Europe. In 1990, he was recognised by France as a refugee and granted asylum. The applicant says that in 1993 he returned to Sri Lanka 'for family reasons' and settled in a part of Sri Lanka away from the war zone. He married and had children.

52. However, he says he was arrested on a number of occasions, the last being in 2000 when he was tortured. Thereafter, he says that he fled Sri Lanka, arriving in Hong Kong in December 2000. A few days after his arrival, he sought to be recognised as a refugee by the UNHCR. While his claim was under investigation, he was able to bring his family to Hong Kong.

53. In or about March 2003, the applicant was informed by the UNHCR that his claim had been dismissed under art.1(F)(b) of the Convention on the basis that there was a reason to believe that he had committed a serious 'non-political' crime. The applicant appealed this decision but the appeal too was dismissed.

54. In March 2003, the applicant made a claim under the Torture Convention. I understand that the determination of that claim is still pending.

BF

55. The 5th applicant was also born in the Republic of the Congo. He is in his mid 30s. According to the applicant, he followed an elder brother into opposition politics. Among other things, he distributed

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literature. Like his brother, however, the applicant says that he came under threat and was forced to flee. He says that initially he sought refuge in the neighbouring state of the Democratic Republic of Congo (Zaire) where he made an application to the UNHCR to be recognised as a refugee. However, according to the applicant, he still feared that he may be tracked down and, in the result, flew to Hong Kong in November 2003.

56. A few days after his arrival, he approached the offices of the UNHCR where he claimed refugee status. His claim was investigated but rejected in December 2004. His appeal was rejected in March of the following year.

57. The applicant made a claim under the Torture Convention but this was rejected in October 2006. He then appealed, his appeal being treated as a petition to the Chief Executive under art.48(13) of the Basic Law. That appeal, I understand, awaits determination.

YAM

58. The 6th applicant was born in Togo in 1979 and is now in his late 20s. He says that he was the member of a political party, one of his functions being to act as a security guard. According to the applicant, after elections in 2005 there was widespread violence in Togo. The applicant says that soldiers of the Government hunted him. His wife was badly assaulted. The applicant says that he fled to the neighbouring state of Benin where he was sheltered as a refugee and where he made a claim to the UNHCR. However, it is his case that the refugee camp was attacked by locals before his claim could be processed. Personal papers

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were lost. The applicant says that he returned briefly to Togo to obtain an identity document and then fled Africa.

59. Having flown via Paris, he arrived in Hong Kong in October 2006 and contacted the UNHCR. His claim for refugee status was rejected by the UNHCR at the end of October 2006. His appeal was rejected in December of that same year. The applicant has made a claim under the Torture Convention which, I understand, awaits determination.

The position of the UNHCR in respect of the present applications for judicial review

60. Although it chose not to be represented at the hearing, the senior member of the Hong Kong Sub-Office of the UNHCR did send a letter to the applicants' solicitors on 23 November 2007. As to the conduct of the Hong Kong Government in respect of persons who claimed refugee status, the UNHCR representative was of the view 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. Persons who wish to seek asylum with UNHCR are permitted access to UNHCR."

61. As to the degree of co-operation between the UNHCR and the Hong Kong Government in the process of determining refugee status, the letter said :

> "Under current cooperation arrangements for refugee status determination, UNHCR provides the HKSAR with the basic

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> 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. Other information – including the reasons for UNHCR decisions, interview records, and other details – is not shared with the HKSAR."

Customary international law : looking to the underlying principles.

62. In the sixteenth century, in his *Commentaries on the Laws of England*, Blackstone described public international law – he called it the 'law of nations' – as a "system of rules, deducible by natural reason, and established by universal consent" which ensured "the observance of justice and good faith" between states. Blackstone held that this law of nations was part of the law of the land; that is, part of the common law.

63. The authors of *Oppenheim's International Law* (9th Edition) describe custom as 'the oldest and the original source of international law'.

64. The statute of the International Court of Justice, the instrument which endows that court with jurisdiction to decide international law disputes, gives to the court (under art.38.1) the power to apply "international custom, as evidence of a general practice accepted as law".

65. Academic writers are agreed that a rule of customary international law has three fundamental elements. First, the rule should be of a norm-creating character, capable therefore of forming the basis of a general rule of law. Second, there must be a settled and consistent practice by states; not by all states, but by states generally. Third, the

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practice must be followed because it is accepted as being legally obligatory.

66. In his speech in *R. (European Roma Rights) v. Prague Immigration Officer* [2005] 2 AC 1, at 35, Lord Bingham was of the view that the elements of customary international law have been accurately and succinctly summarised by *the American Law Institute, Restatement of the Law, Foreign Relations Laws of the United States, 3d (1986), 102(2) and (3)* in the following terms :

> "(2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.
>
> (3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted."

67. This summary, said Lord Bingham, was valuably supplemented by the following comment :

> "c. *Opinio juris*. For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (*opinio juris sive necessitates*); a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law. A practice initially followed by states as a matter of courtesy or habit may become law when states generally come to believe that they are under a legal obligation to comply with it. It is often difficult to determine when that transformation into law has taken place. Explicit evidence of a sense of legal obligation (e.g., by official statement) is not necessary; *opinio juris* may be inferred from acts or omissions."

68. Accordingly, a settled and consistent practice among states, if it is to develop into a rule of customary international law, must be

accompanied by conduct on the part of states – including those which are specially affected – acknowledging that the practice has acquired the force of law.

69. It is, however, open to individual states to 'contract out' of the process. In his text, *Principles of Public International Law* (6th Edition), at p.11, Ian Brownlie said :

> "Evidence of objection must be clear and there is probably a presumption of acceptance which is to be rebutted. Whatever the theoretical underpinnings of the principle, it is well recognized by international tribunals, and in the practice of states."

70. In its 1950 judgment in *the Asylum Case (Columbia/Peru)* 1 CJ Reports (1950) 266, at 277, the International Court of Justice recognised that a rule of customary international law, even if proved, would not be binding on a state which had, by evidence of its actions, repudiated it :

> "But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939 …"

71. On behalf of the Director, it is argued that Hong Kong has never recognised any form of legal obligation to adhere to a norm of international custom concerning the *refoulment* of refugees. In this regard, it is said, Hong Kong is no different from many other –indeed the majority – of jurisdictions in Asia. This persistent non-recognition is evident *inter alia* from the fact that the Refugee Convention has never

been extended to Hong Kong, from other reservations in our laws and from numerous statements made by the Hong Kong Government.

72. But that being said, the fact that the Refugee Convention has never been extended to Hong Kong, while a relevant factor, is not decisive. I say that because a rule of customary international law maintains its independent existence even though that rule has partially or even exactly been codified in a treaty.

73. A rule of customary international law may exist before a treaty has been created or may emerge from the terms of a treaty. In *Nicaragua v. United States of America* (*Case Concerning Military And Paramilitary Activities In And Against Nicaragua*) ICJ Reports (1986) p.14, para.175, the International Court of Justice rejected the argument that it should refrain from applying rules of customary international law because they had been 'subsumed' or 'supervened' by those of international treaty law. It concluded :

> "… even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability."

74. Of particular relevance to the reservation applied to Hong Kong in respect of the Refugee Convention, the International Court of Justice went on to say :

> "Nor can [a] multilateral treaty reservation be interpreted as meaning that, once applicable to a given dispute, it would exclude the application of any rule of customary international law the content of which was the same as, or analogous to, that

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> of the treaty-law rule which had caused the reservation to become effective."

75. In addition, what must be recognised is that a rule of customary international law may acquire such a special status that it becomes what is called a peremptory norm, one that is absolute and cannot be denied. Of importance in the present case is the almost universally recognised principle that, while a state has the freedom to 'contract out' of a rule of customary international law, no such freedom exists in respect of rules which have acquired the status of peremptory norms. Traditional concepts of sovereign consent do not apply to peremptory norms.

76. On behalf of the six applicants, it is contended, first, that there is a rule of customary international law prohibiting the *refoulment* of refugees and, second, that the rule has now acquired the status of a peremptory norm. The prohibition, it is said, is now a substantive norm of *jus cogens*.

77. The concept of *jus cogens* was first formally embodied in the text of the Vienna Convention on the Law of Treaties, art.53 of which concerns treaties conflicting with a peremptory norm of general international law :

> "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

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78. Much of the impetus for the recognition of *jus cogens* arose out of the state-sponsored atrocities of the Second World War. In plain terms, *jus cogens* seeks to be a supreme law, one which, recognising fundamental human rights, denies the unlimited will of the state. *Jus cogens* recognises that some deeds are so wrong, so abhorrent, that no legitimate legal order could fail to proscribe them.

Incorporation of customary international law into Hong Kong's domestic law.

79. As I have said earlier, Blackstone, in his *Commentaries on the Laws of England*, recognised over 200 years ago that customary international law is part of the common law. But how is a rule of customary international law received into domestic law? Upon what basis may judges in Hong Kong act upon it?

80. In *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 1 QB 529, at 553, Lord Denning MR came to the conclusion, now accepted, that international law came into the law of England by way of what is called the 'doctrine of incorporation', that doctrine holding that the rules of international law are incorporated into English law automatically and are considered to be part of English law unless they are in conflict with an Act of Parliament.

81. An important consequence of the doctrine was expressed by Lord Denning in the following terms :

> "Seeing that the rules of international law have changed – and do change – and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time,

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> do form part of our English law. It follows, too, that a decision of this court – as to what was the ruling of international law 50 or 60 years ago – is not binding on this court today. International law knows no rule of stare decisis. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change – and apply the change in our English law – without waiting for the House of Lords to do it."

82. The doctrine of incorporation, however, does acknowledge that a rule of 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.

83. The basic test appears to be one of consistency : if a rule of customary international law is consistent with domestic law, it will be incorporated. If it is inconsistent, it will not. In this respect, the Privy Council, in its judgment in *Chung Chi Cheung v. R.* [1939] AC 160, at 168, said :

> "There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, *so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals*." [my emphasis]

84. However, when fundamental human rights are in issue, the test, it appears, is more stringent. In *R. v. Secretary of State for the Home Department, ex parte Phansopkar* [1976] 1 QB 606, at 626, the test was considered in the following terms :

> "It may, of course, happen under our law that the basic rights to justice undeferred and to respect for family and private life have

> to yield to the express requirements of a statute. But 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 …"

Previous Hong Kong jurisprudence

85. This is not the first time that it has been argued before our courts that the customary international law principle of *non-refoulment* has been incorporated into Hong Kong's domestic law. The issue arose some 18 years ago when it was considered by our Court of Appeal in *Madam Lee Bun and Another v. Director of Immigration* [1990] 2 HKLR 466.

86. The appellants had come into Hong Kong illegally from the Mainland. When arrested, they claimed that they had fled the Mainland for fear of political persecution and, if returned, were at risk of such persecution. In short, they claimed to be refugees in the manner defined in the Refugee Convention. The Director, however, issued orders for their removal. The validity of those orders was unsuccessfully challenged at first instance by way of an application for judicial review. On appeal, it was submitted that the Director, before coming to his decision to issue the removal orders, had been bound to give the appellants an opportunity to be heard and to rebut assertions adverse to them. The right to be heard, it was submitted, was given to the appellants by either the Refugee Convention or customary international law. The submission was rejected.

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87. In respect of the Refugee Convention itself, Sir Derek Cons VP, giving the judgment of the Court, said :

> " In our view the Convention does not assist the appellant. It is common ground that although the United Kingdom has ratified the Convention and that it has been extended to many, if not most, of Her Majesty's other dominions, it has not been extended to Hong Kong. 'Treaties and declarations do not become part of our law until they are made law by Parliament': *per* Lord Denning, M.R. *R. v. Chief Immigration Officer, ex parte Bibi* [1976] 1 WLR 979 at 984H. *R. v. Secretary of State, ex parte Kirkwood* [1984] 2 All ER 390 is further authority that the Secretary of State, when exercising statutory powers, is not obliged to have regard to a convention which has not become part of domestic law; a *fortiori* then, with regard to Hong Kong, where the Crown is not even party to the Convention."

88. In respect of customary international law, as I understand it, the court proceeded, on the basis that, assuming that there was a rule of international customary law prohibiting the *refoulment* of refugees, as certain authors proposed, that rule had not been incorporated into Hong Kong's domestic law :

> " The argument for customary international law proceeds on the assumption that such law is part and parcel of the common law: see *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 1 QB 529. Our attention is then drawn to the learned writings of Professors Plender and Goodwin-Gill in respectively *International Migration Law* (revised 2nd ed.) and *The Refugee in International Law*, where it is suggested, for the reasons the authors there set out, that the principle of non-refoulement, - that is not to return a person to the country whence he came if his life or freedom would there be threatened on account of race, religion, nationality, membership of a particular social group or political opinion – has become nowadays part of international customary law. But we observe that Professor Plender notes, at p. 433, that in some states, including the United Kingdom, it is not open to a litigant in domestic courts to rely upon the principle in the face of inconsistent domestic legislation. This is confirmed by Professor Brownlie, in his *Principles of Public International Law* 3rd ed. at p.45."

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89. As to whether the rule against *refoulment*, assuming it to be such, had been received into Hong Kong law, the Court of Appeal took account of three factors :

(i) That the Refugee Convention itself, although ratified by the United Kingdom, had not been extended to Hong Kong.

(ii) That in 1981, the Legislature had enacted, as Part 3A of the Immigration Ordinance, specific provisions with regard to Vietnamese refugees – great numbers of whom had come to Hong Kong, presenting a humanitarian crisis – but to no other class of persons claiming refugee status.

(iii) That, while, the International Covenant on Civil and Political Rights had been extended to Hong Kong – art.13 giving the right to an alien lawfully within a territory to be expelled from it only in pursuance of a decision reached in accordance with law – the extension of the Covenant to Hong Kong had been subject to the following rider :

> "The Government of the United Kingdom reserves the right not apply Article 13 in Hong Kong in so far as it confers a right of review of a decision to deport an alien and a right to be represented for this purpose before the competent authority."

90. In light of these three factors, said the Court —

> "… we can only conclude that the legislative authority in Hong Kong intends that, apart from Vietnamese refugees, those claiming political persecution shall not be accorded any special rights and that the general discretion given to the Director shall remain unfettered by rules. It is well established that the principles of natural justice may be used by courts to supplement legislation: see Lord Reid in *Wiseman v. Borneman* 1971 AC 297 at 308, but we do not think the principles can be used to contradict the clear intention of the legislature."

91. In summary, it seems to me, that, while the Court of Appeal was prepared to acknowledge certain academic opinion that the prohibition against *refoulment* of refugees had matured into a rule of customary international law, the *ratio* of its judgment was that no such rule had been incorporated into Hong Kong law, the 'legislative authority' having repudiated any such rule.

92. During the course of submissions, it appeared to be argued that the judgment had proceeded on mistaken bases and was therefore *per incuriam*. I do not accept that. I am satisfied that the judgment, in so far as it spoke to the state of both international and domestic law in 1990, is binding on me.

Is there a rule of customary international law prohibiting refoulment of refugees?

93. As I have said earlier, the Court of Appeal in *Madam Lee Bun and Another* did not engage itself in an enquiry into whether or not there was a rule of customary international law prohibiting *refoulment*. It did no more than acknowledge certain academic writings to that effect as part of the pathway to the *ratio* of its judgment.

94. In this regard, it is to be remembered that, while the importance of academic opinions have long been accepted in issues of international law, common law courts have recognised that such opinions alone, while they may point to the true state of the law, cannot make the law. As Cockburn CJ said in *R. v. Keyn* (1876) 2 Ex D 63, 202 :

> " … even if entire unanimity had existed in respect of the important particulars to which I have referred, in place of so

> much discrepancy of opinion, the question would still remain, how far the law as stated by the publicist had received the assent of the civilized nations of the world. For writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it. This assent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage …"

95. In the circumstances, it seems to me that the two issues of whether there is a rule of customary international law against *refoulment* of refugees and, if so, whether that rule has become a peremptory norm, remain open.

96. In an article, entitled '*Non-Refoulment Revised*' published in 2003 in the European Journal of Migration and Law, Vol.5, page 23, Nils Coleman, commences by writing :

> "The issue of the international legal status of the principle of *non-refoulement* has been debated since the 1960s. The majority doctrinary opinion is that the principle has over time acquired the status of customary international law. …"

97. As it is, the author concludes that while the principle of *non-refoulment* may have acquired the status of a rule of customary international law in some regions of the world, although not in Asia —

> "… it is arguable that the nature of the principle of *non-refoulement* as universal customary international has never been definitely established. …"

98. In short, it may be said that, certainly among academic writers, there has not been – and is not now – a universal concensus on the issue.

99. Prof. Roda Mushkat, until recently at the Hong Kong University, is recognised by Nils Coleman as a proponent for the existence of the principle of *non-refoulment* as a rule of customary international law : one of the majority. In her work, '*One Country, Two International Legal Personalities: the Case of Hong Kong'* (Hong Kong University Press), Prof. Mushkat, concludes that the principle of *non-refoulment* contained in the Refugee Convention has received such universal recognition "in international legal instruments, numerous declarations in different international fora, successive resolutions of the UN General Assembly resolutions and the Executive Committee of the UNHCR, as well as in the laws and practices of states" that it has matured into a "norm of customary international law binding on all members of the international community", whether or not they are, or have been, parties to the Refugee Convention.

100. Following from this, on behalf of the applicants, it is contended, to employ the words of the *San Remo Declaration on the Principle of Non-Refoulment*, that the rule may now be regarded as 'the cornerstone of international refugee law'.

101. The *San Remo Declaration* was made on the occasion of the fiftieth anniversary of the Refugee Convention. It arose out of a 'round table' meeting of members of the International Institute of Humanitarian Law, the UNHCR and a panel of experts on international law. In part, the Declaration reads :

> " The principle of *non-refoulement* of refugees can be regarded as embodied in customary international law on the basis of the general practice of States supported by a strong *opinio juris*. The telling point is that, in the last half-century, no State has expelled or returned a refugee to the frontiers of a country where his life or freedom would be in danger – on account of his

> race, religion, nationality, membership of a particular social group or political opinion – using the argument that *refoulement* is permissible under contemporary international law. Whenever *refoulement* occurred, it did so on the grounds that the person concerned was not a refugee (as the term is properly defined) or that a legitimate exception applied."

102. During the course of the hearing, concerns were raised by Mr Anderson Chow SC, leading counsel for the Director, that the principle of *non-refoulment* had not yet become sufficiently precise to transcend a general aspiration or understanding and to be part of the law as it exists (the *lex lata*) of all states. The *San Remo Declaration*, however, meets that concern in the following terms :

> " That is not to say that every specific legal ramification of the principle of *non-refoulement* of refugees is generally agreed upon today in the context of customary international law. The nature of customary international law (as distinct from treaty law) is such that not every 'i' can be dotted and not every 't' can be crossed. But while there are doubts affecting borderline issues, the essence of the principle is beyond dispute. This essence is encapsulated in the words of Article 33(1) of the 1951 Refugee Convention, which can be regarded at present as a reflection of general international law."

103. Of particular authority, in my view, is an opinion completed in 2001 by Sir Elihu Lauterpacht QC and Daniel Bethlehem QC (both noted scholars in the field of international law) entitled : *The Scope and Content of the Principle of Non-Refoulment*. The authors of the opinion conclude that "*non-refoulment* must be regarded as a principle of customary international law". Reduced to its essentials, they say that the content of the principle may be expressed as follows :

> "1. No 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

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> integrity, or liberty. Save as provided in paragraph 2, this principle allows of no limitation or exception.
>
> 2. Overriding reasons of national security or public safety will permit a State to derogate from the principle expressed in paragraph 1 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. The application of these exceptions is conditional on strict compliance with due process of law and the requirement that all reasonable steps must first be taken to secure the admission of the individual concerned to a safe third country."

104. In the same year; that is, in 2001, a 'round table' of some 35 international law experts, meeting at the Lauterpacht Research Centre for International Law at the University of Cambridge, concluded that *non-refoulment* is a principle of customary international law. The experts went on to express the broad concensus that —

> "Refugee law is a dynamic body of law, 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."

105. In his speech in *R. (European Roma Rights) v. Prague Immigration Officer*, *supra*, para.26, Lord Bingham came to a more cautious conclusion when he observed that :

> " There would appear to be general acceptance of the principle that a person who leaves the state of his nationality and applies to the authorities of another state for asylum, whether at the frontier of the second state or from within it, should not be rejected or returned to the first state without appropriate inquiry into the persecution of which he claims to have a well-founded fear. …"

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106. But, as I have indicated earlier, the prevailing opinion is not universally accepted. There exists a body of academic opinion to the effect that – at this time – there is insufficient evidence to justify the assertion that the duty to avoid *refoulment* of refugees has evolved beyond the scope of the Refugee Convention.

107. Kay Hailbronner, in an article entitled *Non-Refoulment and 'Humanitarian' Refugees : Customary International Law or Wishful Legal Thinking* (1986) 26:4 Virginia Journal of International Law 857, speaks of the principle of *non-refoulment* as only "universal customary law in the making", having matured into customary law only in the regions of Western Europe, the American Continent and Africa – but not in Asia :

> "Commentators have taken the view that the principle of *non-refoulement* must be considered today as a rule of customary international law. Whether this view finds sufficient support in a virtually extensive and uniform state practice accompanied by the necessary *opinio juris* is doubtful. Although the 1951 Refugee Convention has been ratified by a large number of countries, almost all states of Eastern Europe, Asia, and the Near East have consistently *refused* to ratify refugee agreements containing *non-refoulement* clauses. The drafting history of the United Nations Declaration on Territorial Asylum, as well as the statements made during the 1977 Conference on Territorial Asylum, show a reluctance to enter into legally binding obligations to admit a large number of refugees even on the basis of a temporary stay. On the other hand, states have never claimed a general right to return refugees to a country where they may face severe persecution on account of race, religion, or political opinion. For this reason, the principle of *non-refoulement* has been described as universal customary law in the making, and regional customary law in Western Europe, the American Continent, and Africa."

108. Nils Coleman too gives weight to the same view; namely, that, at best, the principle of *non-refoulment* has evolved into a rule of regional customary international law. He takes issue with the rule being inferred

on the basis that it has been accepted by a majority of specially affected states worldwide. That, he says, goes against the fabric of customary law which arises out of "consensus in an international community where states participate as equals in forming customary law". He is also concerned at the "contradictory situation of declaring the principle of *non-refoulement* universal customary international law while several main refugee areas have a history of negative practice and still do not adhere to the principle".

109. In this regard it is to be noted that, as at February 2007, the UNHCR reported that the following states in Asia had not acceded to the Refugee Convention (19 in all, 20 if the Territory of Hong Kong is included) :

> "Bangladesh, Bhutan, Brunei Darussalam, India, Indonesia, Democratic republic of Korea, Lao People's Democratic Republic, Malaysia, Maldives, Mongolia, Myanmar, Nepal, Pakistan, Singapore, Sri Lanka, Taiwan, Thailand, Uzbekistan, Vietnam …"

110. In his text, *The Rights of Refugees Under International Law*, Cambridge University Press, 2005, James Hathaway, at p.364, while acknowledging the many official pronouncements of the UNHCR and other international bodies and gatherings of experts, is of the view that —

> "… even the *opinio juris* component of the test for customary status is not clearly satisfied, as most states of Asia and the Near East have routinely refused to be formally bound to avoid *refoulement*. The Chief Justice of India, for example, has affirmed that while courts in his country 'have stepped in' on occasion to prevent refugee deportations, 'most often these are *ad hoc* orders. And an *ad hoc* order certainly does not advance the law. It does not form part of the law, and it certainly does not make the area clear.
>
> Most fundamentally; however, it is absolutely untenable to suggest that there is anything approaching near-universal respect

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among states for the principle of *non-refoulement*. To the contrary, as the recounting of state practice at the beginning of this chapter makes depressingly clear, *refoulement* still remains part of the reality for significant numbers of refugees, in most parts of the world. Indeed, the United Nations Commission on Human Rights has formally expressed its 'distress' at the 'widespread violation of the principle of *non-refoulement* and of the rights of refugees'. The effort to disguise this fact by reference to the institutional positions and practices of UNHCR mistakenly assumes that the work of international agencies can *per se* give rise to international law binding on states."

111. Hathaway continues with a note of caution to the effect that there is —

> "… a real risk that wishful legal thinking about the scope of the duty of *non-refoulement* may send the signal that customary law as a whole is essentially rhetorical, with a resultant dilution of emphasis on the real value of those norms which really have been accepted as binding by a substantial majority of states. There is no doubt that many refugees will benefit from at least one of the various treaty-based duties of *non-refoulement*; it may also be the case that the increasing propensity of states to embrace *non-refoulement* of some kind in their domestic laws may at some point give rise to at least a lowest common denominator claim based on a new general principle of law."

112. The author concludes with a direct statement that —

> "… it is simply disingenuous to assert that there is presently a universal duty of *non-refoulement* that is substantively in line with the provisions of Art. 33 and which is owed to all refugees, by all states."

113. I have taken note of the dissenting voices. I have reminded myself of the dangers of legal wishful thinking : considering it right that it should be so and therefore making it so. On balance, however, it seems to me that today it must be recognised that the principle of *non-refoulment* as it applies to refugees has grown beyond the confines of the Refugee

Convention and has matured into a universal norm of customary international law.

114. I recognise that a good many states have not acceded to the Refugee Convention itself and, by their actions, have been unambiguous in their repudiation of the norm as it has evolved in customary international law. But that being said, the International Court of Justice, the primary judicial body of the United Nations, has emphasised that universal adherence is not required for a rule of customary international law to come into being. In *Nicaragua v. United States of America* (*Case Concerning Military And Paramilitary Activities In And Against Nicaragua*) ICJ Reports (1986) p.14, para.186, the Court put it in the following terms :

> "The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule"

115. In my judgment, doing the best I can in an area where there are strongly conflicting opinions, 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. Most states that are specially affected with refugee-related problems recognise the binding effect of the norm.

116. In coming to my finding, I have also taken into account the present recognition by states generally that fundamental humanitarian considerations have themselves evolved into a humanitarian law, that law linking and, to a greater or lesser degree, binding the conduct of states.

Has the rule against refoulment acquired the status of a peremptory norm?

117. On behalf of the applicants, considerable reliance is placed on a pronouncement of the UNHCR Executive Committee made in 1996 that the "principle of *non-refoulment* is not subject to derogation" : that it has therefore acquired the status of a norm of *jus cogens*. The full text of the Executive Committee conclusion is as follows :

> "Distressed at the widespread violations of the principle of *non-refoulement* and of the rights of refugees, in some cases resulting in loss of refugee lives, and seriously disturbed at reports indicating that large numbers of refugees and asylum-seekers have been *refouled* and expelled in highly dangerous situations; recalls that the principle of *non-refoulement* is not subject to derogation."

118. I note, however, that the conclusion was made by the Executive Committee (consisting then of only 51 members) against the backdrop of "widespread violations of the principle of *non-refoulment*".

119. In an article published in 2001 in the International Journal of Refugee Law, Vol.13, number 4, entitled *The Jus Cogens Nature of Non-Refoulment*, Jean Allain writes that the rule against *refoulment* has acquired the status of a peremptory norm.

120. He commences, however, from a basis far more certain than that of many other academic writers. It is clear, he says, that the norm prohibiting *refoulment* is part of customary international law, the only uncertainty being whether the norm has achieved the status of *jus cogens*.

121. In approaching the question, the author speaks of the need to consider the current practice of states but, on my reading, his underlying

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rationale appears to be why it is so important that the principle of *non-refoulment* should have its enhanced status; the desired end result therefore colouring present reality.

122. In this regard, it is to be noted that Nils Coleman, in his article, *Non-Refoulment Revised*, page 46, said the following :

> " Occasional claims have been made that the principle of *non-refoulement* has even attained the status of *jus cogens* (see for example, Allain, J., 'The *jus cogens* nature of *non-refoulement*') which seem to be based on primarily teleological argumentation. Although it would undoubtedly be of beneficial effect to the overall international protection of refugees, the existence of a peremptory norm of *non-refoulement* cannot be considered realistic. …"

123. What is telling, in my view, is that the opinion – *The Scope and Content of the Principle of Non-Refoulment* – completed in 2001 by Sir Elihu Lauterpacht and Daniel Bethlehem makes no assertion that the rule against *refoulment* has attained the status of a peremptory norm. Nor, to my understanding, did the subsequent 'round table' meeting of some 35 international law experts.

124. In his article, *Adjudicating Jus Cogens* (1994) 13 Wisconsin International Law Journal, Christopher Ford, at p.3, said the following of the rule :

> " As the Vienna Convention illustrates, despite its uncertain doctrinal origins, *jus cogens* is an important concept in international law. Peremptory law embodies in modern international jurisprudence the idea that states cannot simply do *whatever* they wish. The content of peremptory law changes over time, in step with the 'conscience of the international community.' But at any given moment, norms of *jus cogens* are – in theory – the supreme commandments of international legal order."

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125. If the doctrinal origins of *jus cogens* are uncertain it appears to me that its substantive content is equally open to debate.

126. The prohibition against genocide – genocide being a denial of the right of existence of entire human groups – has been accepted with minimum controversy as a peremptory norm.

127. In England certainly, the prohibition against systematic torture has also been accepted as a peremptory norm. See, for example, *Jones v. The Ministry of the Interior, Al-Mamlaka Al-Arabiya* [2005] 2 WLR 808, *per* Mance LJ, para.31 :

> "… It is common ground, as I have indicated, that systematic torture would, if established, constitute a high international crime contrary to *jus cogens*—or peremptory international law. …"

128. The prohibition against slavery too appears to have been recognised as a peremptory norm with little controversy.

129. But, as Christopher Ford has expressed it, other candidates for peremptory norm status have been propounded by jurists and publicists alike with "varying degrees of acceptance." Proposed norms, he said, have included "the prohibition of racial discrimination, the illegality of mass murder or imprisonment, freedom of the seas, the prohibition of piracy, the protection of basic human rights, the prohibition upon non-genocidal crimes against humanity" and "the *non-refoulement* of refugees".

130. In this last respect, the 'Cartagena Declaration on Refugees' adopted in 1984 by the Colloquium on the International Protection of

Refugees in Central America, Mexico and Panama declared that the principle of *non-refoulment* was a rule of *jus cogens*. Paragraph 5 of the Declaration reads :

> "To reiterate the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner-stone 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*."

131. However, as Goodwin-Gill and McAdam, the authors of *The Refugee In International Law*, Oxford University Press, 3rd Ed., page 38, say of this declaration :

> " The refugee crisis in Central America during the 1980s led in due course to one of the most encompassing approaches to the refugee question. … But [the Cartagena Declaration] emerged not from within a regional organization, but out of an *ad hoc* group of experts and representatives from governments in Central America, meeting together in a colloquium in Colombia. It is not a formally binding treaty, but represents endorsement by the States concerned of appropriate and applicable standards of protection and assistance. Moreover, it recommends that the definition of a refugee to be used in the region include, in addition to the elements of the 1951 Convention and the Protocol, persons who have fled their country, because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances seriously disturbing public order. …"

132. The Declaration, therefore, having arisen out of a particular crisis in one part of the world, seeks to elevate the rule against *refoulment* not as it applies to refugees who fear persecution if they are *refouled* but to refugees of all kinds, to those I have described, as 'humanitarian refugees'. That, in my view, is not simply the elevation of an existing norm, it is the

expansion of that norm into one that is new, a norm of far greater scope than the Refugee Convention itself.

133. In recognition of its humanitarian ideal, it may be said that the principle of *non-refoulment* should today be incapable of derogation or repudiation. But that, to my understanding, is not the basis upon which a norm of *jus cogens* is formed. One must look to the practice of states generally and why it is that they adhere to the practice.

134. Torture has been recognised as being so abhorrent that *refoulment* is not subject to exception. Even a person who was a principal torturer himself, while he may be brought to justice by other means, may not be *refouled* if it places him at risk of the very torture he once practised. Refugee law, however, is subject to exceptions. Issues, for example, going to the mass influx of refugees pose profound problems.

135. While, on balance, I am drawn to the conclusion that the rule against *refoulment* is a rule of customary international law, I think it goes too far to hold – at this time – that the rule has acquired the status of a peremptory norm. Put another way, the ideal does not accord with present reality and, if the ideal is to prevail, it may bring the norm itself into disrepute.

136. The issue that next falls for consideration is whether the rule against *refoulment* – being a norm of customary international law but not a peremptory norm – has been received into Hong Kong's domestic law.

137. On behalf of the Director, it is argued that the rule, by consistent conduct, has most clearly been repudiated.

Has Hong Kong repudiated the rule against refoulment?

138. In its judgment in *Madam Lee Bun and Another*, given in 1990, the Court of Appeal did not conclude that Hong Kong domestic law was merely inconsistent with the customary international law rule against *refoulment*. The finding of the court was more specific. It said :

> "… we can only conclude that the legislative authority in Hong Kong intends that, apart from Vietnamese refugees, those claiming political persecution shall not be accorded any special rights and that the general discretion given to the Director shall remain unfettered by rules."

139. More than that, when considering principles of natural justice, the court went on to say that such principles could not be used "to contradict the clear intention of the legislature".

140. On my reading, put plainly, the Court of Appeal came to a determination that Hong Kong; that is, its Government and Legislature, had a firm and purposive policy that persons claiming political persecution – refugees – should not be accorded any special rights.

141. Equally, I think, it may be inferred from the judgment that humanitarian or compassionate issues were to be left to the discretion of the Director in his management of Hong Kong's scheme of immigration.

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142. I am bound to say that, if the Court of Appeal had made no such judgment and if the matter had come before me as an entirely new issue, I would have had little difficulty in coming to the same conclusion.

143. In its judgment in *Madam Lee Bun and Another*, the Court of Appeal took into account the reservation which was applied when the International Covenant on Civil and Political Rights was extended to Hong Kong : see para.89 (iii) of this judgment. There have, however, been other reservations of a similar kind.

144. The 1989 Convention on the Rights of the Child has been extended to Hong Kong. Art.22(1) of the Convention reads :

> " States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties."

145. The Convention, however, remains subject to the following reservation :

> "The Government of the People's Republic of China reserves, for the Hong Kong Special Administrative Region, the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the Hong Kong Special Administrative Region of those who do not have the right under the laws of the Hong Kong Special Administrative Region to enter and remain in the Hong Kong Administrative Region, and to the acquisition and possession of residentship as it may deem necessary from time to time."

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146. The legislation that is applied is the Immigration Ordinance. That statute, however, does not contain any special provision regarding refugee claimants in general or persons under 18 who claim the same status. Accordingly, both adult and child claimants are subject to the general provisions of the Ordinance, including provisions which go to removal and deportation.

147. As I have indicated earlier, the applicant, AK, may have been under the age of 18 when he came to Hong Kong. But, as I have said, in respect of immigration matters, the Convention on the Rights of the Child has not been incorporated into Hong Kong's domestic law. In this regard, in an earlier judgment – *Chan To Foon v. Director of Immigration* [2001] 3 HKLRD 109, at 121 – I said :

> "In my judgment, the voice of those responsible for entering into international instruments could not be clearer. The manifest instruction to the Director is that, in applying Hong Kong's immigration laws, he is not bound by the provisions of the ICCPR or the CRC."

148. Mr Philip Dykes SC, leading counsel for the applicants submitted that the real issue is that Hong Kong has not enacted laws to specifically exclude incorporation of the customary law principle of *refoulment*. What matters, he says, is whether Hong Kong, not having legislated to accommodate the rule, has in fact legislated against it and created a law that specially and specifically empowers an immigration official to *refoul* refugees and refugee claimants on account of their status. Such a law, he says, would be within the competence of the legislature. But Hong Kong has not enacted such a law. Nor has it stated that it will use existing immigration powers to *refoul* refugees and refugee claimants.

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That is consistent, says Mr Dykes, with the principle that statutory powers are to be used in a manner that conforms with international law and, as such, the existing statutory powers should be construed in such a way as to accommodate incorporation of the rule.

149. I am unable to accept those submissions. Cutting through the 'Gordian Knot', the answer, it seems to me, is plain. When all matters are taken in context – the refusal to accede to the Refugee Convention, the refusal to enlarge the terms of the Immigration Ordinance, the making of specific reservations concerning immigration and the often-stated policy against asylum – Hong Kong's refusal to pass legislation incorporating the rule is equivalent to passing legislation for the purpose of excluding it. Nor, in my view, for reasons to which I shall turn shortly, can it be said that the Director employs his relevant statutory powers in a manner that amounts to acceptance of the rule of customary international law. The Director may exercise his powers with basic humanitarian values in mind but that is a different and distinct basis from the one Mr Dykes proposes.

150. Has the Government's manifest policy changed since 1990? Nothing has been put before me to suggest any such change. To my understanding, it remains equally clear and equally firm.

151. On behalf of the Director, it is said that the Hong Kong Government, because of the unique circumstances that apply to it, has been forced to operate a restrictive policy of immigration and, as an integral part of that policy, has consistently refused to be bound by any rule or principle of international law concerning *non-refoulment* of refugees. In an

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affirmation dated 28 February 2007, Mr Chu King Man, the Principal Assistant Secretary (Security) of the Security Bureau has stated the position of the Government in the following terms :

> "The Government has a firm policy of not granting asylum. Hong Kong is small in size and has a high and dense population. Our unique situation, set against the backdrop of our relative economic prosperity in the region and our liberal visa regime, makes us vulnerable to possible abuses. The Government both before and after the handover has consistently rejected the notion that Hong Kong is subject to the principle of refugee non-refoulement as a rule of customary international law. That rejection lay behind not extending the UK's obligations under the Refugee Convention to Hong Kong before the handover; and the later decision not to extend the People's Republic of China's obligations under the Refugee Convention to the HKSAR. Both before and after 1997, the Government has consistently acted on the basis that it is under no such duty."

152. That statement mirrors a number of public statements made by the Hong Kong Government over the past 12 years.

153. In a debate in the Legislative Council in February 1996, the Secretary for Security stated the Government position that, "with the exception of illegal entrants of Vietnamese origin, there is no other official policy or legislation in Hong Kong law governing the screening of refugees". The Secretary went on to say that it was a general policy, as regards illegal entrants not of Vietnamese origin, to "repatriate them to their country of origin unless there are exceptional humanitarian or compassionate grounds on which the Director of Immigration may exercise his discretionary power to allow them to stay in Hong Kong".

154. As I have said earlier, the humanitarian crisis presented by the mass influx of Vietnamese boat people in the last 25 years or so of the

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twentieth century was the only occasion brought to my attention when Hong Kong put legislative measures into place allowing for a form of asylum and for a process of screening of refugee claimants. Those measures, for all practical purposes, fell away in 1998.

155. When legislation was passed in respect of the Vietnamese boat people, it presented an opportunity, if there had been any desire to take it, to widen the provisions to include refugee claimants of all kinds. But the legislation remained precise and restricted and, as it transpired, temporary.

156. I have said earlier that there has been no change in policy. By way of illustration, in January 1999, in answer to a question asked by a Legislative Councillor concerning requests for political asylum, the Government gave the following written response :

> "Apart from being a port of first asylum for Vietnamese boat people, the Government has never had any policy of granting political asylum to any person, before or after the handover. As from 9 January 1998, the port of first asylum policy for Vietnamese boat people has been abolished.
>
> With regard to requests for permission to remain in Hong Kong on exceptional humanitarian or compassionate grounds, as in the past, the Director of Immigration may, in accordance with the Immigration Ordinance, exercise discretion to authorise a person to remain in Hong Kong.
>
> …
>
> Since we do not have a policy of granting political asylum, no particular procedure has been formulated for the processing of such applications."

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157. In a paper prepared in April 2006 concerning welfare assistance for asylum seekers, the Government said the following to the Legislative Council :

> "We have a firm policy of not granting asylum and do not have an obligation to admit individuals seeking refugee status under the Refugee Convention. Claims for refugee status which are lodged in Hong Kong are dealt with by the UNHCR. Our understanding is that those who are determined to be refugees by the UNHCR will be provided with subsistence allowance and resettled elsewhere by the UNHCR."

158. By way of a collateral observation, it should be said that our courts have long recognised that the Hong Kong Government has been unable to liberalise its immigration regime to the extent of many other jurisdictions. In *Ngo Thi Minh Huong (An Infant) v. The Director of Immigration* (2000–01) 9 HKPLR 186, at 192, Yeung J, as he then was, echoed numerous other judgments when he said :

> " Hong Kong, being what it is: a modern cosmopolitan city with a large population in a small area and a standard of living much higher than many if its neighbouring countries, not to mention its motherland with over one billion people, its attraction to illegal immigrants cannot be underestimated. Unless it is allowed to maintain and enforce a strict immigration policy, the continued stability and prosperity and even the very survival of Hong Kong may well be at stake."

159. Yeung J's pronouncement was made in a judgment dismissing an application for judicial review made on behalf of a female child, some 11 years of age, who, being of Vietnamese nationality, had sought recognition as a refugee. In that respect, Yeung J said :

> "Immigrants from Vietnam had burdened Hong Kong for over 20 years by reason of 'policy of the port of first asylum' until January 1998 with the addition of s 13AA to the Immigration Ordinance (Cap 115). Now illegal immigrants from Vietnam

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> are to be treated just like any other illegal immigrants. There is in my view no obligation whatsoever on the part of the director to consider the applicant's claim for refugee status, be it an express one or otherwise."

160. Has there nevertheless, by means of a consistent exercise of the Director's discretion not to repatriate persons granted refugee status by the UNHCR, been created a *de facto* recognition of the customary international law rule against *refoulment* and an adherence to that rule?

161. It is the Director's position that, although he has in fact never returned a recognised refugee to a country where there was a real risk he would be persecuted, this has never amounted to a *de facto* recognition by him of any binding rule of customary international law prohibiting the *refoulment* of refugees. To the contrary, it is said on behalf of the Director that the Hong Kong Government has publicly and consistently refused to be bound by any such rule.

162. The Director's position may be summarised as follows :

(i) The norm of customary international law, if it be such, prohibiting *refoulment* of refugees arises out of a basic humanitarian principle. That basic humanitarian principle is to the effect that, absent compelling reasons otherwise, a member of the community of civilised nations does not expel a person to a place where that person is in real danger of being persecuted.

(ii) The Director, in the exercise of his administrative discretion, considering each case according to its own circumstances, will take into account exceptional humanitarian or compassionate grounds. Such grounds will invariably

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encompass a situation in which the Director has reason to believe that, if an illegal entrant is repatriated, he will face persecution.

(iii) The fact, however, that the Director in good faith may take into account the same ethical values that form the genesis of the customary international rule against *refoulment* does not mean that the Director has espoused that rule either wittingly or unwittingly.

(iv) Put another way, acting in good faith by taking into account basic humanitarian considerations cannot itself be a source of legal obligation when none would otherwise exist : see the judgment of the International Court of Justice in *In re Border and Transborder Armed Actions (Nicaragua v. Honduras)* [1988] 1 CJ Rep 69, 105, para.94.

163. In my judgment, there is force in these contentions. The distinction drawn, while perhaps fine on one view, is nevertheless a true distinction. There is simply no evidence that the Director has fashioned the exercise of his discretion so as to give *de facto* recognition to any rule of customary international law prohibiting *refoulment* of refugees. To the contrary, it appears to me 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.

164. More than that, I believe it would be jurisprudentially unwise to hold that, because the Director's exercise of discretion, based solely on

respect for humanitarian principles has – to this date – provided the same result as the rule against *refoulment* in customary international law, it must be taken as an indirect acceptance of, and adherence to, that rule. As Yeung J expressed it *Ngo Thi Minh Huong (An Infant v. The Director of Immigration*, page 195 *:*

> "It would indeed be a sad day for Hong Kong if the court is to encourage the Executive in its administrative acts to simply do what it is barely required and necessary under the law less the Government be subject to criticism for the very reason of having acted generously and sympathetically …"

165. I have at all times taken into account that a claim for political asylum is recognised as a basic human right. Art.14(1) of the Universal Declaration of Human Rights, adopted in 1948 by the General Assembly of the United Nations, declares – as a proclamation of ethical values, rather than legal norms – that :

> "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

166. But 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.

167. In summary, I am satisfied that the rule of customary international law prohibiting *refoulment* of refugees has not been incorporated into Hong Kong domestic law.

168. If, however, I am wrong in that regard, if such a rule has been incorporated into our domestic law, it is necessary to give some

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consideration to the issue that lies at the heart of these applications for judicial review; namely, whether the Director is obliged, by reason of the rule, to ensure that the Hong Kong Government *itself* determines all claims for refugee status.

Is the Hong Kong Government under a legal obligation to screen all refugee claimants?

169. Mr Anderson Chow, for the respondents, submitted that, even if this court found that a rule of customary international law prohibiting *refoulment* of refugees had been received into the domestic law of Hong Kong, it would be 'a quantum leap' to contend that the rule imposed a duty on the Government to itself conduct an assessment of all refugee claims.

170. What is plain, I believe, is that the customary law rule against *refoulment* does not encompass any specific procedural requirement concerning the manner in which refugee status is to be determined. Indeed, the Refugee Convention itself lays down no specific procedural requirements. That being the case, it is difficult to see how it can be said that the rule of customary international law which has evolved out of the Refugee Convention has had incorporated into itself – by the consistent and general practice of states – some set procedure.

171. For the fact is that there is no consistent and general procedural practice adhered to by states. Practices differ greatly. This perhaps explains why for many years the annual General Assembly resolution on the UNHCR has called for asylum seekers to have access to 'fair and efficient procedures' for the assessment of their status. It may also explain why in 1977 the Executive Committee of the UNHCR

expressed the hope that all parties to the Refugee Convention would adopt such procedures and would also entertain UNHCR participation in those procedures. In a very general sense, basic procedural requirements were recommended by the Committee. But, as the authors of *The Refugee In International Law*, page 533, observe :

> "… The UNHCR Executive Committee recommendations offer a very basic agenda, comprising guidance to applicants, the provision of competent interpreters, a reasonable time to 'appeal for formal reconsideration' of a negative decision, 'either to the same or a different authority, whether administrative or judicial, according to the prevailing system'. They are not binding, but indicate a practically necessary minimum if refugees are to be identified and accorded protection in accordance with international obligations."

172. In summary, neither the Refugee Convention nor the rule of customary international law prohibiting *refoulment* prescribe set procedures. It may be inferred, of course, that such procedures should be fair and efficient but I am unable to read that as somehow giving rise to a binding rule that it must be national authorities which ensure fairness and efficiency rather than the UNHCR.

173. On behalf of the applicants it is argued that the mandate of the UNHCR was never intended to encompass responsibility for determining refugee status. I have no difficulty in accepting that under the Refugee Convention determination of refugee status is primarily a responsibility of national authorities and not the UNHCR. But that being said, whatever the intentions of those who drafted the constitution of the UNHCR, over the years the UNHCR has taken on a broad range of roles in forwarding the process by which, at the national level, the true status of refugee claimants is determined. This ranges from taking on full responsibility

for the decision-making process to merely giving advice to domestic authorities.

174. A material observation, in my view, is that not even all states which have acceded to the Refugee Convention have created mechanisms for the screening of refugee claimants. In the result, four states, including the Peoples' Republic of China (which sits on the Executive Committee) leave the screening process to the UNHCR. The other three are Afghanistan, Cambodia and Turkmenistan.

175. As to the role of the UNHCR, the authors of *The Refugee In International Law* make the following observations :

> "Participation by UNHCR in the determination of refugee status derives sensibly from its supervisory role and from the obligations of States parties to cooperate with the Office, and it allows UNHCR to monitor closely matters of status and of the entry and removal of asylum seekers. The procedures themselves will differ, necessarily, in the light of States' own administrative and judicial framework; so too will the nature and degree of involvement of UNHCR. The fundamental issue, however, remains the same—identifying those who should benefit from recognition of their refugee status, and ensuring, so far as is practical, consistent and generous interpretations of essentially international criteria.
>
> In a few countries, UNHCR participates directly in the decision-making process; in others, the local office may attend hearings in an observer capacity, while in yet others the exact role may be determined *ad hoc*, for example, by intervening at appellate level, or by submitting *amicus curiae* briefs. Generally, UNHCR's procedural responsibilities may be summarized as contributing to the effective identification of refugees in need of protection. This may entail: (1) offering an assessment of the applicant's credibility in the light of the claim and of conditions known to exist in his or her country of origin. …"

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176. The UNHCR itself, in a letter dated 18 May 2004 prepared for certain earlier court proceedings in Hong Kong, said the following :

> "In the absence of other protection mechanisms, UNHCR institutes refugee status determination ('RSD') for asylum seekers by virtue of its mandate. UNHCR RSD procedures are usually to be found in locations where the State has not acceded to relevant international law, has no national refugee protection mechanisms, institutes such procedures selectively, or has rudimentary refugee status determination and related procedures."

177. A consideration of the matters I have just canvassed makes it plain that parties to the Refugee Convention are under no treaty obligation to adopt specific procedures in determining refugee status. There may be recommendations issued by the Executive Committee but, as sensible as they may be in seeking a fair and efficient screening procedure, they are not binding. In light of that, I fail to see how it can be said that, under the rule of customary international law prohibiting *refoulment*, a rule which has its roots in the Refugee Convention, there is nevertheless mandated a set of binding procedures.

178. As the UNHCR has itself acknowledged, there may be occasions when national authorities are unwilling or unable to make refugee status determinations and in such instances the fairest and most efficient procedure may be for the UNHCR itself to take on the responsibility. It is to be remembered that it is a responsibility which, as an international organisation, the UNHCR is particularly well equipped to discharge.

Is the Director, in considering whether to exercise his discretion on humanitarian or compassionate, obliged first to screen refugee claimants?

179. At the outset, what must be underscored is that Hong Kong has no asylum policy. An illegal entrant, whether he claims refugee status or not, while he may make submissions in mitigation of his circumstances, has no right to a hearing subject to procedural rules of fairness. If an illegal entrant is given permission to remain in Hong Kong it is because the Director has exercised an administrative discretion. The Legislature has given to the Director the exclusive discretionary power, one that is not subject to specific statutory restrictions, to decide whether a person illegally in Hong Kong may remain and, if so, for how long and under what conditions.

180. As Litton JA, as he then was, observed in *R. v. Director of Immigration*, *ex parte Chan Heung Mui* [1993] 3 HKPLR 533, at 547 :

> "It must always be borne in mind that it is for the Director and not for the courts to administer the scheme of immigration control under the Ordinance."

181. The Director's discretionary power is broad. As Litton JA said in the judgment to which I have just referred :

> "An application to review the decision of the Director … is unlikely to be successful unless it can demonstrated that there has been a misuse by the Director of his power or that 'his decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.'"

182. If the Director fails to exercise his discretionary powers in furtherance of the Immigration Ordinance then he acts outside of his

powers. But the Ordinance makes no provision, substantive or procedural, concerning refugee claimants generally.

183. Equally, the Director must exercise his discretionary powers in the public interest; that is , the public interest of Hong Kong. It seems to me that, in an open, democratic society such as Hong Kong, unless there are pressing reasons to the contrary, the Director must therefore take into account, in the exercise of his discretion, humanitarian or compassionate factors that apply to any individual person, or group of persons, who fall under his jurisdiction.

184. But it is for the Director to best determine how to obtain relevant information so that he can exercise his discretion and for him to determine what weight, if any, to give to that information.

185. Equally, it must be the case that the Director has the authority, in the exercise of his discretionary power, to seek assistance in order to identify whether humanitarian or compassionate circumstances do or do not exist. The determination of which person, or which body of persons, can best render that assistance is an integral part of the exercise of his discretionary power.

186. Equally, it must be the case that the Director, if he is faced with an on-going problem, has the authority to develop a policy as to the approach which he will adopt in the generality of cases.

187. Mr Dykes, however, makes the point that the Director cannot simply surrender his discretionary powers. Under the statute they are

exclusively his. Mr Dykes pitches his submission at the highest level. There is no provision in the Basic Law, he says, permitting a body independent of Hong Kong to make decisions binding on Hong Kong. The UNHCR may assist in determining who is to be recognized as a refugee but it may not receive delegation of that entire responsibility, one which is – in all reality – binding on the Director and therefore on Hong Kong as a sovereign entity.

188. In my judgment, however, it is not tenable to suggest that the Director has delegated his discretionary powers to the UNHCR to the extent that the determinations of the UNHCR concerning recognition of refugee status are binding on the Director and, through him, on the Hong Kong Government. There is no evidence that the Director has fettered his discretion in such manner. There is certainly no evidence that the Director has committed himself to be bound by all future determinations made by the UNHCR. The fact that the Director has seen fit up to this date to abide by determinations made by the UNHCR is no evidence that he has bound himself to abide by all future determinations.

189. But he may not rely on UNHCR determinations, submits Mr Dykes, when the UNHCR itself is immune from judicial scrutiny by our courts. Immunity from judicial scrutiny means that the UNHCR may make determinations that offend the most basic tenets of fairness or are irrational and yet not be held accountable.

190. If Mr Dykes is correct in his submission, it means that the Director may not lawfully seek the assistance of any international body that is not subject to the supervisory jurisdiction of the Hong Kong courts

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in respect of any matter that concerns the exercise of his discretionary powers : the International Red Cross, international labour organizations and such bodies. That, in my view, would lead to an absurdity.

191. In any event, the UNHCR is not unaccountable. It is accountable to the Director himself. If in any particular case, the Director has reason to believe that he should not act upon a determination made by the UNHCR, whether favourable or unfavourable to a claimant, he does not have to act upon it. He can ask that the determination be reconsidered, he can ignore it. He has many options open to him.

192. Is it then unreasonable, as a matter of policy, to rely in the generality of cases on the findings of the UNHCR when those findings are not supported by a full statement of reasons? If the Director was exercising a judicial or quasi-judicial discretion there may be some strength in the contention. But he is not.

193. Earlier in this judgment, I have referred to assertions made on behalf of the Director that the UNHCR is considered to be the international organisation possessing "the relevant experience, knowledge and network" to make refugee status determinations. The Director is aware of the experience of the UNHCR in these matters, he is aware that it works according to tested procedures, he is aware that it has knowledge of 'country conditions'. More than that, the Executive Committee of the UNHCR has asked states to entertain UNHCR participation in procedures for determining refugee status. I can find no basis for contending that the Director has acted irrationally in relying on the findings of the UNHCR simply because those findings are not supported by detailed reasons.

A B C D E F G H I J K L M N O P Q R S T U V

A summary of my findings

194. The determinations made in this judgment may be summarised as follows :

(i) That there is a universal rule of customary international law which prohibits the *refoulment* of refugees.

(ii) That the rule, however, has not attained the status of a peremptory norm; that is, a norm from which no derogation by any state or jurisdiction is permitted.

(iii) That, by consistent and long-standing objection, Hong Kong has refused to accede to the rule and the rule, being contrary to Hong Kong's laws, has not been incorporated into its domestic law.

(iv) That, as the rule has no application in domestic law, the Hong Kong Government is under no obligation pursuant to the rule to conduct a screening of all refugee claimants.

(v) That, in determining whether to exercise his statutory discretion on humanitarian or compassionate grounds in respect of a person who claims that, if *refouled*, he faces a real risk of persecution, the Director is not obliged to himself determine first whether that person faces such danger but may allow that determination to be made by the UNHCR provided that the Director does not, in so doing, fetter his discretion.

My orders

195. In light of these findings, the various forms of relief sought by the six applicants are refused.

196. In respect of costs, I see no reason why costs should not follow the event and be awarded to the respondents. There will be an order *nisi* to that effect. There will also be an order for legal aid taxation.

(M.J. Hartmann)
Judge of the Court of First Instance,
High Court

Mr Philip Dykes, SC and Mr Hectar Pun,
instructed by Messrs Barnes & Daly, assigned by Director of Legal Aid, for Applicants in all cases

Mr Anderson Chow, SC and Ms Grace Chow,
instructed by Department of Justice, for Respondents in all cases