

# HONG KONG'S POLICIES RELATING TO ASYLUM-SEEKERS: TORTURE AND THE PRINCIPLE OF NON-REFOULEMENT

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## ABSTRACT

*In the years following the transfer of sovereignty from British to Chinese rule, the Hong Kong Special Administrative Region has consistently tried to maintain a reputation as a jurisdiction that enjoys an independent judiciary and the rule of law. However, over the past decade, a series of events in particular areas have challenged this perception. The status of refugees and how they are treated represents one such area. The status of asylum seekers has always been a matter of concern as Hong Kong has never been a signatory to the 1951 United Nations Convention Relating to the Status of Refugees. Additionally, recent court decisions regarding the question of non-refoulement and the absence of a government screening process for refugees make it increasingly difficult for observers to accept Hong Kong as a forward-looking, world-class city.*

*This article examines recent decisions that deal with Hong Kong's obligations under international law regarding avoiding the ejection of refugees to jurisdictions where they will likely face persecution or torture. In particular, this article focuses on *C. and Others v. Director of Immigration*, in which Hong Kong's Court of First Instance considered whether an obligation of non-refoulement exists, and whether Hong Kong's government has a duty to provide a screening process to determine the status of all refugee claimants. Also explored is an earlier decision by Hong Kong's Court of Final Appeal, *Secretary for Security v. Prabakar*, in which a screening procedure for torture claimants was established.*

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*In light of these decisions, this article outlines the current procedures used to determine refugee status and highlights the difficulties faced by refugees while awaiting resettlement in a third country. This article argues that the administration does in fact have a legal obligation under both international and Hong Kong law to provide asylum seekers a fair and transparent means of refugee status determination.*

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*No man for any considerable period can wear one face to himself and another to the multitude, without finally getting bewildered as to which may be the true.*<sup>1</sup>

—Nathaniel Hawthorne

## I. INTRODUCTION

This article primarily examines the case of *C. and Others v. Director of Immigration*, which dealt with two basic issues.<sup>2</sup> First, as a threshold matter, the Court of First Instance considered whether the Hong Kong government has an obligation under international law not to expel a refugee to a jurisdiction where he would face persecution according to the categories found under the Refugee Convention.<sup>3</sup> Second, the court contemplated that

1. Nathaniel Hawthorne, *THE SCARLET LETTER* 197 (Bantam Books 1986) (1850).

2. *C. and Others v. Director of Immigration*, HCAL 132/2006, para. 1 (C.F.I. Feb. 18, 2008) (Legal Reference System) (H.K.).

3. See Convention Relating to the Status of Refugees art 1.2 (a), July 28, 1951, 189 U.N.T.S. 150, as amended by Protocol Relating to the Status of Refugees, Dec. 16, 1966, 606 U.N.T.S. 267 (“A person who owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside his country of his nationality of his habitual

if such an obligation is found to exist, it would then consider whether the government has a further duty to determine the status of all refugee claimants.

In the judgment handed down in February 2008, the Court of First Instance (CFI) ruled that Hong Kong is not bound by one of the fundamental principles found in customary international law: the principle of non-refoulement, the obligation not to return a refugee to a country where he is at risk of persecution.<sup>4</sup> Specifically, the court ruled against the six applicants' claims that the government was obligated to provide an independent refugee status determination (RSD) procedure.<sup>5</sup> In this paper I argue that the issues of RSD, torture, and non-refoulement are bound up together and must be regarded as part of a wider context. In this regard, I also consider the decisions found in the recent cases of *Secretary for Security v. Prabakar*, which was decided in 2005 by the Court of Final Appeal, and *FB and Others v. Director of Immigration, Secretary for Security* (decided by the Court of First Instance in 2008).

In *Prabakar*, the Court of Final Appeal (CFA) held that in determining claims made by asylum seekers relating to Article 3 of the United Nations Convention against Torture (stating "no State Party shall return, refoul or extradite" a person to another State where there are grounds for believing that that person would be in danger of being subjected to torture), decision makers are legally obliged to meet "a high standard of procedural fairness"<sup>6</sup> in screening asylum claims.<sup>7</sup> The court went on to spell out those standards, detailing a set of criteria for screening torture claimants:

In considering the potential deportee's torture claim, the necessary high standards of fairness should be approached as follows: (1) The potential deportee, who has the burden of establishing that he would be in danger of being subjected to torture if deported to the country concerned, should be given every reasonable opportunity to establish his claim. (2) The claim must be properly assessed by the Secretary. The question as to what weight the Secretary may properly place on UNHCR's decision in relation to refugee status will be addressed later. (3) Where the claim is rejected, reasons should

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

4. *C. and Others v. Director of Immigration*, HCAL 132/2006, para. 167 (C.F.I. Feb. 18, 2008) (Legal Reference System) (H.K.).

5. *Id.* at para. 177.

6. The Court of First Appeal's criteria for procedural fairness included access to legal representation as well as providing written rationations in a courts asylum decision. See *Secretary for Security v. Sakthevel Prabakar*, FACV 16/2003, para. 44. (C.F.A. June 8, 2004) (Legal Reference System) (H.K.).

7. *Id.*

be given by the Secretary. The reasons need not be elaborate but must be sufficient to enable the potential deportee to consider the possibilities of administrative review and judicial review.<sup>8</sup>

In the subsequent case of *FB and Others*, the CFI examined current procedures for determining the status of applicants invoking the Convention against Torture.<sup>9</sup> The court held that Hong Kong's policy concerning asylum seekers who claimed that they faced torture was illegal and unfair in that it did not meet the criteria set out in *Prabakar*.<sup>10</sup> In particular, the court objected to the government's failure to provide asylum seekers with legal assistance, legal representation during the interview process, and legal representation at the oral hearing.<sup>11</sup> The court also objected to the fact that the immigration official who interviews the refugee does not himself make the final decision on whether to grant asylum, as well as the fact that those decision makers generally lacked full and proper training.<sup>12</sup>

Given these developments, the court's decision in *C. and Others v. Director of Immigration* must be reconsidered. Historical and political factors, including Hong Kong's unique constitutional arrangement with the People's Republic of China (PRC), further warrant a reexamination of this case.

## II. HISTORICAL BACKGROUND

When China regained control of Hong Kong from Britain on July 1, 1997, the region came under the sovereignty of the PRC under the somewhat unique status of a "Special Administrative Region" for a period of 50 years.<sup>13</sup> This arrangement of "one country, two systems" was first agreed to in 1984 in a treaty signed by the governments of Britain and the PRC.<sup>14</sup> In this treaty, the two governments agreed that following the transfer of sovereignty, Hong Kong would be "directly under the authority of the Central People's Government,"<sup>15</sup> but that the Hong Kong Special Administrative Region ("HKSAR") would "be vested with executive, legislative and judicial power including that of final adjudication" and that "the laws currently in force will re-

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8. Secretary for Security v. Sakthevel Prabakar, FACV 16/2003, para. 51 (C.F.A. June 8, 2004) (Legal Reference System) (H.K.).

9. *FB v. Director of Immigration*, HCAL 51/2007, para. 230 (C.F.I. Dec. 5, 2008) (Legal Reference System) (H.K.).

10. *Id.*

11. *Id.*

12. *Id.*

13. See Joint Declaration, China-Gr. Brit., Dec. 19, 1984, 1399 U.N.T.S. 33, art. 3 (12).

14. *Id.*

15. *Id.* at art. 3(2).

main basically unchanged.”<sup>16</sup> The Joint Declaration also states that following the transfer of sovereignty, “rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement of correspondence, of strike, of choice of occupation, of academic research and of religious belief” would be protected by law.<sup>17</sup>

The terms of this bilateral agreement were subsequently reiterated in the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China (Basic Law), which was promulgated by the Seventh National People’s Congress in April 1990 and took effect on July 1, 1997.<sup>18</sup> The relevant protections of the rights and freedoms of Hong Kong residents may be found in Articles 2 and 8 of that document. Article 8 states that, with the exception of any laws found to be in contravention of the Basic Law, the laws of Hong Kong previously in force, including “the common law, rules of equity, ordinances, subordinate legislation, and customary law, shall be maintained.”<sup>19</sup>

Since the handover in 1997, the PRC has generally honored these undertakings, including constitutional decisions of the CFA. However, there have been signs that, when convenient, the governments of the HKSAR and the PRC will ignore the CFA’s constitutional decisions and call on the Standing Committee of the National People’s Congress to “reinterpret” the Basic Law. This pattern began following the CFA’s decision in *Ng Ka Ling v. Director of Immigration*, in which the CFA considered whether the children of Hong Kong permanent residents born on the mainland were entitled to live in the HKSAR.<sup>20</sup> In response, the National People’s Congress narrowly construed Article 158, which authorizes the Hong Kong courts to make its own interpretations of the Basic Law in adjudicating cases.<sup>21</sup> I have previously argued that the effect of this narrow construction by the Central People’s Government was twofold: first, it overturned

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16. *Id.* at art. 3 (3).

17. *Id.* at art. 3(5).

18. Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, (1990) pmb1.

19. *Id.* at art. 8.

20. For the relevant cases involving the right of abode in Hong Kong, see *Ng Ka Ling v. Director of Immigration*, [1999] 1 H.K.C. 291 (C.F.A.); *Chan Kam Nga v. Director of Immigration*, [1999] 1 H.K.C. 347 (C.F.A.).

21. Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, (1990) art. 158 (“The power of interpretation of this law shall be vested in the Standing Committee of the National People’s Congress. The Standing Committee of the National People’s Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.”).

the CFA's determination that the mainland-born children had the right of residence; second, it curtailed the powers of the CFA to interpret the Basic Law.<sup>22</sup>

The decision by the Central Government to reinterpret the Basic Law was repeated in 2004, concerning both the term length of the HKSAR Chief Executive following his predecessor's resignation and then again regarding the timetable for granting Hong Kong residents universal suffrage rights in the elections of the Chief Executive and the Legislative Council.<sup>23</sup> As Mark Conrad points out, this marked the first time that the Central People's Government addressed a matter of interpreting the Basic Law without consulting the HKSAR government.<sup>24</sup> As a result of these interpretations, while the Hong Kong courts clearly remain able to rule on most questions of law, a widespread perception has developed that they lack the authority to decide "hard" cases, calling into question the independence of the Hong Kong judiciary and the true nature of "one country, two systems."

### III. THE SIGNIFICANCE OF JUDICIAL REVIEW

All of the principal cases to be discussed here (in particular, *C and Others*, *Prabakar* and *FB and Others*) were actions for judicial review. Judicial review is a remedy that allows an applicant to appear before the court in order to review issues that involve constitutional rights, specific legislation, or administrative policy based on what constitutional scholar Yash Ghai has referred to as "the values and principles of the common law."<sup>25</sup> Established case law indicates that this remedy may be based on grounds of illegality, irrationality, or procedural impropriety.<sup>26</sup> This form of judicial recourse was highly relevant prior to the handover to Chinese rule in 1997, and its relevance has only continued to grow since then. One reason for this is that given Hong Kong's limited representative democracy, the courts are widely perceived as being independent from a government that lacks either a popular mandate or direct accountability.<sup>27</sup>

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22. James A. Rice, *Political Domination and the Rule of Law in Hong Kong*, 23 UCLA PAC. BASIN L. J. 51, 58 (2005).

23. See STANDING COMMITTEE OF THE TENTH NATIONAL PEOPLE'S CONGRESS, THE INTERPRETATION OF PARAGRAPH 2, ARTICLE 53 OF THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA (2005), available at <http://www.hklii.org/hk/legis/en/ord/2108/longtitle.html>.

24. See Mark R. Conrad, *Interpreting Hong Kong's Basic Law: A Case for Cases* 23 UCLA PAC. BASIN L. J. 1, 7 (2005).

25. YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY & THE BASIC LAW 305 (2nd ed. 1999).

26. See *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 374, 410-11; *Assoc. Picture House Ltd. v. Wednesbury Corp* (1948) 1 K.B. 223.

27. See GHAI, *supra* note 25, at 190-91.

Use of judicial review was exercised during the Boat People Crisis of the 1980's and 1990's, when tens of thousands of Vietnamese asylum seekers arrived in Hong Kong and were detained by the British colonial administration pending screening.<sup>28</sup> Since the 1951 United Nations Convention Relating to the Status of Refugees (The Refugee Convention) was never extended to Hong Kong, the remedy of judicial review was viewed as being an essential tool for refugees and the interest groups seeking to challenge the indefinite detention of these individuals.<sup>29</sup> The remedy of judicial review has also played a significant role immediately following the handover, notably concerning the right of abode in Hong Kong for thousands of mainland-born children, because it was the only means whereby the applicants could challenge the decision made by the Immigration Department.<sup>30</sup>

Discussing the manner in which Hong Kong's Basic Law has been interpreted in the years following 1997, Conrad has argued that the approach taken by the Central People's Government of reinterpreting the Basic Law has "upset the balance" between the Chinese and Hong Kong centers of power. He argues in favor of a "cases and controversies" approach that requires reliance to be placed on the "independent interpretation by the HK-SAR courts."<sup>31</sup> Given this background, the application for judicial review before the CFI in *C. and Others* was significant in that an appeal to the judiciary appeared to be the only workable check on the decisions of an otherwise unaccountable government authority.

#### IV. THE APPLICATION

There were a total of six applicants in *C. And Others*. Given the applicants' statuses as asylum seekers who were vulnerable to subsequent persecution upon possible refoulement, the applicants were referred to in their application before the court by acronyms as "C," "AK," "KMF," "VK," "BF," and "YAM."<sup>32</sup> In order to protect their identities, the details of their stories have not been released to the public. The six applicants in this case argued that they were entitled to refugee status and that the

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28. See *Re Pham Van Ngo*, [1991] 1 H.K.L.R. 499 (H.C.); *Superintendent of Tai A Chau Detention Centre v. Tan Te Lam*, [1995] UKHL 39.

29. As of 2007, a total of 147 states were party to the 1952 Refugee Convention, the 1967 Protocol or both.

30. See *Ng Ka Ling and another v. Director of Immigration*, [1999] 2 H.K.C.F.A.R. 4 (C.F.A.).

31. Conrad, *supra* note 24, at 7.

32. *C. and Others v. Director of Immigration*, HCAL 132/2006, paras. 40-59 (C.F.I. Feb. 18, 2008) (Legal Reference System) (H.K.).

Hong Kong government had a duty to give due effect to the principle of non-refoulement in cases involving torture.<sup>33</sup>

Article 3.1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) prohibits refoulement where there are “substantial grounds” for believing that an applicant would be in danger of being subjected to torture upon return.<sup>34</sup> In reference to this obligation, the CFI centered its opinion on authority from the CFA in *Secretary for Security v Prabakar*.<sup>35</sup> It also focused on the unsatisfactory nature of the current two-stage process of screening<sup>36</sup> wherein asylum seekers first seek protection under the Refugee Convention and subsequently under the Torture Convention.<sup>37</sup> The court observed that this system resulted in instances of abuse on the part of asylum seekers:<sup>38</sup> “[i]ndeed, it appears that an almost invariable practice has arisen of seeking protection under the two Conventions in sequence.”<sup>39</sup> The court’s statement that “they can turn their hand to whatever holds out a profit and do so for an extended period of time”<sup>40</sup> further suggests that the court was worried that individuals abuse the system.

The court’s perceived abuse of the current system is misplaced. In reality, asylum seekers currently at risk may spend weeks or months in detention with their status undetermined.<sup>41</sup> They are then subjected to a refugee screening process by the United Nations High Commissioner for Refugees (UNHCR).<sup>42</sup> If they are subsequently found to be refugees, they may be released from detention on recognizance.<sup>43</sup> Those asylum seekers who are determined by the UNHCR not to be refugees are normally subject to detention pending their removal from the territory.

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33. See *Secretary for Security v. Sakthevel Prabakar*, FACV 16/2003 (C.F.A. June 8, 2004) (Legal Reference System) (H.K.).

34. For a list of 145 states participating in the Convention Against Torture of Other Cruel, Inhuman or Degrading Treatment or Punishment, see [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en) (last visited March 5, 2011).

35. *Secretary for Security v. Sakthevel Prabakar*, FACV 16/2003 (C.F.A. June 8, 2004) (Legal Reference System) (H.K.).

36. *C. and Others v. Director of Immigration*, HCAL 132/2006, paras. 35-36 (C.F.I. Feb. 18, 2008) (Legal Reference System) (H.K.).

37. *Id.* at para. 35.

38. *Id.* at para. 36.

39. *Id.* at para. 35.

40. *Id.*

41. Letter from the Law Firm of Barnes & Daly to author (Sept. 3, 2008) (on file with author).

42. *Id.*

43. Immigration Ordinance, (1997) Cap. 115, § 36.

Hong Kong also has a poor record of allowing refugees to settle within its borders. Consequently, asylum seekers must often wait several months, and sometimes up to several years, for another country to accept them. In the meantime, due to existing immigration policies, these individuals are legally prohibited from either working or studying in Hong Kong. This situation underscores the need for the kind of relief applicants were seeking in this case: a fair, accountable, and efficient refugee screening determination process.

There has been a trend in the courts to endorse harsh policies relating to refugees. In *MA and Others v. Director of Immigration*, decided in January 2011, the CFI considered five refugee applications including that of "MA," a Pakistani national who was officially mandated as a refugee by the UNHCR in 2004.<sup>44</sup> MA sought to overturn the decision by the Director of Immigration denying him the right to work.<sup>45</sup> Due to the Director of Immigration's decision, MA was forced to survive on "assistance in kind" as well as tide over support from charitable groups.<sup>46</sup> MA brought an action for judicial review, challenging the Immigration Department's "blanket policy" of denying permission to work for screened-in refugees or mandated torture claimants. The court upheld the Immigration Department's policy.<sup>47</sup>

## V. THE UNHCR'S ROLE IN HONG KONG

The UNHCR was first established by the United Nations in 1950, and it is the *de facto* body that determines refugee claims in Hong Kong.<sup>48</sup> However, beyond supplying a brief form letter to the applicant (e.g., stating that the applicant's story is not credible) it does little else to provide transparency into its review process. The UNHCR does not provide substantive reasons to either the applicants or the court for its decisions nor does it provide any explanation for its screening process of asylum seekers' applications and their subsequent appeals, which are made to the same decision maker.<sup>49</sup>

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44. *MA and others v. Director of Immigration*, HCAL 10/2010, para. 2 (C.F.I. Jan. 6, 2011) (Legal Reference System) (H.K.).

45. *Id.*

46. *Id.*

47. *Id.* at para. 111.

48. See Convention Relating to the Status of Refugees pmbl., July 28, 1951, 189 U.N.T.S. 150; U.N. Comm. Against Torture, Considerations of Reps. Submitted By States Parties Under Article 19 Of The Convention, 41st Sess., Nov. 3-Nov. 21, 2008, U.N. Doc. CAT/CHKG/CO/ (Nov. 21, 2008).

49. Letter from the Law Firm of Barnes & Daly to author (Sept. 3, 2008) (on file with author).

Despite this lack of transparency, the CFI noted in *C and Others* that the Director of Immigration claimed to be unaware that the UNHCR procedures were in any way deficient.<sup>50</sup> The court cited an affirmation made in August 2007 by the Assistant Secretary for Security denying the existence of procedural irregularities or improper standards of adjudication on the part of the UNHCR:

. . . 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 (sic) possess the relevant 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 a refugee status determination; such duplicated efforts would unlikely achieve a more accurate or fair result.<sup>51</sup>

However, given the unwillingness of the UNHCR to make itself available to the court, it is unclear how the Secretary would be in a position to make such a determination. The court's acceptance of this assertion in light of the Secretary's failure to provide any independent evidence that might substantiate such a claim brings into question the court's agenda and motivations.

The lack of transparency in the UNHCR review process also poses the question of how the Director of Immigration may lawfully exercise his discretion, when in any particular case he does not know the basis of the UNHCR decision.<sup>52</sup> This question parallels the central assertion made by the applicants in *C. and Others*: that the Hong Kong government has a duty under customary international and common law to screen and adjudicate claims made by asylum seekers, and that this duty may not be delegated to the UNHCR in the absence of some form of recourse.

The court in *C and Others* allowed the UNHCR to enter its own letter to the applicants' solicitors into the record.<sup>53</sup> In its letter, the Hong Kong Sub-Office of the UNHCR acknowledged the manner in which the Hong Kong administration cooperated with local operations and decision-making procedures:<sup>54</sup>

In the absence of necessary refugee-related legislation and procedures, the HKSAR's cooperation with the UNHCR has demonstrated the respect for the principle of non-refoulement and to the protection of refugees and asylum seekers in

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50. *C. and Others v. Director of Immigration*, HCAL 132/2006, para. 19 (C.F.I. Feb. 18, 2008) (Legal Reference System) (H.K.).

51. *Id.* at para 19.

52. *Id.* at para. 20.

53. *Id.* at paras. 60-61.

54. *Id.*

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 of UNHCR. Persons who wish to seek asylum with UNHCR are permitted access to UNHCR.<sup>55</sup>

However, this arrangement could be perceived as being inconsistent with UNHCR's position of enjoying immunity from local jurisdiction and it affords no opportunity for the applicants to respond and openly examine the merits of such decisions and adjudicative procedures.

The court went on to cite another passage of the same UNHCR November 23 letter and addressed to the applicants' solicitors:

Under current cooperation arrangements for refugee status determination, UNHCR provides the HKSAR with the basic biographical information of each asylum seeker who approaches UNHCR. UNHCR also regularly communicates the status and outcome of refugee status determination cases to the HKSAR. Other information – including the reasons for the UNHCR decisions, interview records, and other details– is not shared with the HKSAR.<sup>56</sup>

The court afforded the UNHCR a position of authority and credibility, immune to adversarial scrutiny, by allowing it to state its case before the court in spite of the applicants' inability to subject UNHCR claims and evidence to cross examination. This imbalance would appear to be contrary to some of the most fundamental principles inherent in the rule of law.<sup>57</sup>

The other procedural issue that is raised here is how the Director of Immigration may be certain that asylum seekers are afforded a fair decision making process if the UNHCR does not share the reasoning of its decisions with the Director. This point goes directly to what I believe is the rationale of the court's ultimate conclusion:

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

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55. *Id.*

56. *Id.*

57. See STUART HAMPSHIRE, JUSTICE IS CONFLICT 16-17 (Princeton University Press 2000) (“Only the one most general feature of the process of decision is preserved as the necessary condition that qualifies as a process, whatever it happens to be, to be accounted as an essentially just and fair one: *that contrary claims are heard*. An unjust procedure, violating this necessary condition of procedural fairness, is unjust always and everywhere and without reference to any distinct conception of the good” (emphasis added).).

determination to be made by the UNHCR, provided that the Director does not, in so doing, fetter his discretion.<sup>58</sup>

In effect, the court found that Director is not himself obliged to determine whether an asylum seeker faces a danger if refouled. Instead, the Director may allow the UNHCR to make that decision for him on condition that it does not fetter the Director's own discretion. This delegation of responsibility to the UNHCR allows the Director of Immigration to avoid a screening process that would be under the scrutiny of the judiciary.

In its 2008 report to the United Nations Committee Against Torture, the Hong Kong Human Rights Monitor highlighted this problem:

The UNHCR communicates its decision on the status of the asylum seeker to the Director of Immigration, who has unfettered discretion to decide whether or not to abide by the decision or to ignore it in making its immigration decision. However this "contracting out" does not insure that there is adequate communication between the two offices.<sup>59</sup>

It would seem that in *C. and Others*, the court has not fully applied the decision found in *Prabakar*.<sup>60</sup> There, Chief Justice Andrew Li argued that although the decision to recommend deportation on the part of the Secretary for Security may well have been well-intentioned, the failure to undertake her own assessment of the case independent of the UNHCR was wrong for two reasons:

A person's recognition by the UNHCR as a refugee is of itself a good reason not to order his return. But his non-recognition by the UNHCR as a refugee is not of itself a good reason to order his return. There are circumstances in which recognition as a refugee can be withheld from a person even though he can resist return on the ground that it would put him in peril of being tortured. And the Secretary did not know whether the UNHCR's refusal to recognise Mr. Prabakar as a refugee was based on the existence of such circumstances or on something else. She did not give reasons on the issue crucial to her decision, for she had put herself in the position of a decision-maker who was incapable of giving reasons for her decision. This was because she did not know why the issue crucial to her decision had been resolved against the person affected.<sup>61</sup>

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58. *C. and Others v. Director of Immigration*, HCAL 132/2006, para. 194 (C.F.I. Feb. 18, 2008) (Legal Reference System) (H.K.).

59. HONG KONG HUMAN RIGHTS MONITOR, SHADOW REPORT FOR THE UNITED NATIONS COMMITTEE AGAINST TORTURE, at paras. 41-2 (2008).

60. *Secretary for Security v. Sakthevel Prabakar*, FACV 16/2003 (C.F.A. June 8, 2004) (Legal Reference System) (H.K.).

61. *Id.* at para. 69.

Thus, in light of the *Prabakar* decision, the Director of Immigration should have subjected the applicants in *C. and Others* to additional screening after the UNHCR failed to recognize them as refugees to determine if there were sufficient grounds not return the refugee despite the UNHCR's decision.

## VI. THE APPLICABILITY OF CUSTOMARY INTERNATIONAL LAW

Customary international law may be found when two elements are present: widespread state practice over time, and the general understanding that abiding by the practice is a legal obligation, referred to as *opinio juris*. The element of widespread state practice requires that the practice or rule is actually followed by a significant number of states, and is not objected to by a significant number of other states.<sup>62</sup> In *C. and Others*, the court agreed there is a universal rule of customary international law that prohibits the refoulement of refugees.<sup>63</sup> However, the court also noted that even if such a rule of international law may have been established, it does not bind a state that has "repudiated" or persistently objected to the rule during the period in which the rule formed.<sup>64</sup> As stated in the *Asylum Case*, some rules of customary international law are generally not considered binding on states that persistently objected to the rule.<sup>65</sup>

The court also addressed the issue of how customary international law is subsequently incorporated into Hong Kong's body of law. The court cited *Trendtex Trading Corporation v. Central Bank of Nigeria*,<sup>66</sup> an English case where Lord Denning outlined what is known as the "doctrine of incorporation." The doctrine holds that rules of customary international law are incorporated automatically into English law unless they are in conflict or inconsistent with enacted legislation.<sup>67</sup> Further, in the case of *R. v. Secretary for State for the Home Department, ex parte Phansopkar*, the English Court of Appeal held that in cases where fundamental human rights are at issue, the test for determining whether the customary rule of international law conflicts with a statute is more rigorous.<sup>68</sup> The Court of Appeal ruled that stat-

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62. See, e.g., North Sea Continental Shelf Case (Ger. v. Den.), 1969 I.C.J. 3, para. 77.

63. *C. and Others v. Director of Immigration*, HCAL 132/2006, para. 71 (C.F.I. Feb. 18, 2008) (Legal Reference System) (H.K.).

64. See *Asylum Case* (Colum. v. Peru), 1950 I.C.J. 266, 278 (Nov. 20).

65. *Id.* at 277.

66. *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] Q.B. 529, 553.

67. *Id.*

68. *R. v. Secretary for State for the Home Department, ex parte Phansopkar* [1976] 1 Q.B. 606.

utes which may conflict with principles of customary international law are to be construed “in a manner which promotes, not endangers those rights.”<sup>69</sup>

Drawing from an excerpt of a 2007 UNHCR report, the court in *C. and Others* made a distinction between customary international law and what it referred to as “regional international law.”<sup>70</sup> The UNHCR report named Asian nations that have *not* acceded to the Refugee Convention.<sup>71</sup> These states included Hong Kong along with Bangladesh, Bhutan, Brunei Darussalam, India, Indonesia, Democratic People’s Republic of Korea, Lao Democratic Republic, Malaysia, Maldives, Mongolia, Myanmar, Nepal, Pakistan, Singapore, Sri Lanka, Taiwan, Thailand, Uzbekistan, and Democratic Republic of Vietnam.<sup>72</sup> The court reasoned that since these nations had not ratified the Refugee Convention, the international norm of non-refoulement did not apply within an Asian regional context. However, that some states fail to comply with the wider body of international law does not necessarily mean that these norms should be considered invalid. Indeed, the following states of the Asia Pacific region *have* in fact ratified the Refugee Convention, which may indicate sufficient widespread acceptance of the principle in Asia:

Afghanistan, Australia, Azerbaijan, People’s Republic of China, Cambodia, Fiji, Islamic Republic of Iran, Israel, Japan, Kazakhstan, Kyrgyzstan, Republic of Korea, New Zealand, Papua New Guinea, Republic of the Philippines, Samoa, Solomon Islands, Tajikistan, Timor Leste (East Timor) Togo, Turkey, Turkmenistan, and Tuvalu.<sup>73</sup>

Indeed, it is argued here that the principles of *non-refoulement* should be considered even more stringently during times when they are not deemed expedient by governments. These norms relating to asylum were intended to have force not just in times of tranquility but during times of domestic and/or international crisis. Writing about similar prohibitions against the use of torture in a related context, Professor Jeremy Waldron has argued that human rights instruments possess what Gerald Newman has referred to as a “suprapositive” effect. Waldron argues:

They were “conceived as reflections of nonlegal principles that have normative force independent of their embodiment in law, or even superior to the positive legal system.” Though

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69. *Id.* at 626.

70. *C. and Others v. Director of Immigration*, HCAL 132/2006, para. 108 (C.F.I. Feb. 18, 2008) (Legal Reference System) (H.K.).

71. *Id.* at para. 109.

72. *Id.*

73. U.N. HIGH COMM’R FOR REFUGEES, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL., <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> (Oct. 1, 2008).

they are formal treaties based on the actual consent of the states that are party to them, they also represent a consensual acknowledgment of deeper background norms that are binding on nations anyway, treaty or no treaty.<sup>74</sup>

## VII. CONTRASTING APPROACHES TO NON-REFOULEMENT

In its decision, the court in *C. and Others* examined the body of scholarly literature and suggested those writings somehow belied a lack of consensus in matters like the *opinio juris* of the non-refoulement principle.<sup>75</sup> This determination comports with the court's earlier view when it stated that the question of whether "there is a rule of customary international law against refoulement of refugees and, if so whether that rule has become a peremptory norm, remain[s] open."<sup>76</sup> The court noted that certain rules of customary international law may acquire a special status whereby they become what are known as "peremptory norm," that is "norms that are absolute and cannot be denied."<sup>77</sup> Here the court found guidance in an academic paper by Nils Coleman, who claimed that while it is generally recognized that the "majority of doctrinary opinion is that the principle of non-refoulement has over time acquired the status of customary international law, . . . it is arguable that the nature of the principle of non-refoulement as universal customary law has never been definitely established."<sup>78</sup> In further aid of this view, the court favored a 1986 article where Kay Hailbronner who argued that although the principle of non-refoulement had matured into customary law in the regions of Western Europe, the Americas and Africa, it had not yet done so in Asia.<sup>79</sup>

The situation in Hong Kong stands in contrast to the case of India, a state that has also chosen not to sign the Refugee Convention. The Indian government has responded inconsistently at times on the subject of refoulement of refugees. James Hathaway (author of *The Law of Refugee Status*) has pointed out the importance of India and that in the past India has sent Tamil refugees back to Sri Lanka despite the ongoing conflict in that

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74. Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1693 (2005).

75. In English, *Opinio juris sive necessitates* is translated as "an opinion of law."

76. *C. and Others v. Director of Immigration*, HCAL 132/2006, para. 95 (C.F.I. Feb. 18, 2008) (Legal Reference System) (H.K.).

77. *Id.* at para. 75.

78. Nils Coleman, *Non-Refoulement Revised: Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law*, 5 EURO. J. OF MIGRATION L. 23, 49 (2003).

79. See Kay Hailbronner, *Non-Refoulement and 'Humanitarian' Refugees: Customary International Law or Wishful Thinking?*, 26 VA. J. INT'L L. 857, 867 (1986).

country.<sup>80</sup> However, in the same text he also acknowledges that in a case involving a group of Chakma refugees threatened with expulsion by a group of nationalist vigilantes, “governments have an affirmative duty to take such action as is necessary to avoid the *refoulement* of refugees instigated and carried out by third parties.”<sup>81</sup> As Hathaway notes, the Supreme Court of India relied on Article 21 of the Indian Constitution, which guarantees the rights of life and liberty, to avoid the *refoulement* of the refugees.<sup>82</sup>

While India has not signed the Refugee Convention, it has accepted significant numbers of refugees from neighboring states. Indeed, the formation of modern India was itself based on a massive refugee crisis. Following what is known as Partition when India and Pakistan separated from a single British protectorate to form separate states, some ten million Hindus, Muslims, and Sikhs fled from their homes on one side of the newly formed border to the other in order to seek protection from sectarian persecution and violence.<sup>83</sup> Over the years, India has accepted tens of thousands of refugees from neighboring Tibet. In fact, according to the Institute of Peace and Conflict Studies, Tibetan refugees form the largest group of refugees in South Asia. In 1959, following the flight of the Dali Lama to Dharamsala, some 85,000 refugees from China were granted asylum in India. Since then, an additional 25,000 Tibetans have been granted asylum.<sup>84</sup> As such, even though India has not formally signed the Refugee Convention, its actions over the course of several decades indicate that the country is nevertheless in substantive compliance with the provisions of the treaty. It is suggested that the court in *C and Others* should have taken these important factors into consideration when considering how much weight to place on the views of the scholarly writings which were placed before it.

While both the applicants and the government in *C. and Others* supplied extensive materials, it appears that the more persuasive sources are those supplied by the applicants in support of their claim. These sources indicate that the principle of non-*refoulement* has developed beyond the strict application of the Refugee Convention and is now a universal norm of interna-

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80. See JAMES HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 317 (Cambridge University Press 2005).

81. *Id.*

82. *Id.* at 318.

83. See *Flashback to the Indian Partition*, BBC WORLD SERVICE, Jan. 11, 2002, [http://news.bbc.co.uk/2/hi/south\\_asia/1751044.stm](http://news.bbc.co.uk/2/hi/south_asia/1751044.stm).

84. See U.S. COMM. FOR REFUGEES & IMMIGRANTS, *WORLD REFUGEE SURVEY 2008 – INDIA* (2008), available at <http://www.unhcr.org/refworld/docid/485f50d82.html>.

tional customary law. While the court cautioned against wishful thinking, “considering it right that it should be so and therefore making it so,” it nevertheless concluded that “on balance” the principle of non-refoulement has matured into a universal norm of customary international law.<sup>85</sup>

### VIII. NON-REFOULEMENT’S STATUS AS A PEREMPTORY NORM

*C. and Others* also considered the question of whether the international customary rule of non-refoulement constitutes a *jus cogens* norm, or a peremptory norm of international law.<sup>86</sup> In the words of the court, “*jus cogens* recognizes that some deeds are so wrong, so abhorrent that no legitimate legal order could fail to proscribe them.”<sup>87</sup> *Jus cogens* norms address certain core values of international law which are so fundamental to human rights and the international order that they create universally binding norms.<sup>88</sup> Furthermore, unlike customary international law, no nation may validly claim to “opt out” or ignore such norms.<sup>89</sup> The Vienna Convention on the Law of Treaties, defines a *jus cogens* norm as, “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.”<sup>90</sup> Examples of this would include the crimes of piracy or slavery, or the prohibition against torture.<sup>91</sup>

The court in *C and Others* cited a passage from a 1996 report made by the UNHCR’s Executive Committee:

[The Executive Committee] Distressed at the widespread violations of the principle of non-refoulement, and of rights of refugees, in some cases resulting in loss of refugee lives, and

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85. *C. and Others v. Director of Immigration*, HCAL 132/2006, para. 113 (C.F.I. Feb. 18, 2008) (Legal Reference System) (H.K.).

86. In English, *Jus cogens*, is translated as “that law which is compelling”.

87. *C. and Others v. Director of Immigration*, HCAL 132/2006, para. 78 (C.F.I. Feb. 18, 2008) (Legal Reference System) (H.K.).

88. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (“... 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.”).

89. See OPPENHEIM’S INTERNATIONAL LAW 7-8 (R.Y. Jennings & A. Watts eds., 9th ed. 1992).

90. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331; *Id.* at art. 64 (“If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”)

91. See *Prosecutor v. Furundzija*, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-17/1-A ¶ 213 (July 21, 2000).

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.<sup>92</sup>

The same Executive Committee report [which was not cited in the decision] goes on in the following paragraph to state:

[The Committee] Reaffirms the fundamental importance of the principle of non-refoulement, which prohibits expulsion and return of refugees, in any manner whatsoever, to the frontiers of territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion, whether or not they have formally been granted refugee status, or of persons in respect of whom there are grounds for believing that they would be in danger of being subjected to torture, as set forth in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>93</sup>

Recall that the court has assumed that UNHCR screening is consistently done in a fair and efficient manner, and has placed great trust in the UNHCR in that regard. However, with respect to the UNHCR's Executive Committee claims that the principle of non-refoulement is not subject to derogation by states, the court is quite willing to disregard the UNHCR's views.

Professor Rhoda Mushkat, for many years a professor at the University of Hong Kong, has argued that the principle of non-refoulement spelled out in the Refugee Convention has received such universal recognition that it has matured into a "norm of customary international law that is binding on all members of the international community."<sup>94</sup> In addition, the San Remo Declaration on the Principle of Non-Refoulement asserts that this rule may now be regarded as the "cornerstone of international refugee law."<sup>95</sup>

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92. Executive Committee of the U.N. High Comm'r for Refugees, *General Conclusion on International Protection*, U.N. Doc.12A (A/51/12/Add.1), para i. (Oct. 11, 1996).

93. *Id.* at para. j.

94. RHODA MUSHKAT, *ONE COUNTRY, TWO INTERNATIONAL LEGAL PERSONALITIES: THE CASE OF HONG KONG* 86-87 (Hong Kong University Press 1997) ("Non-refoulement is moreover a peremptory rule, derogation from which is restricted to cases involving a refugee 'whom there are reasonable grounds for regarding as a danger of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the security of that country'").

95. INT'L INST. OF HUMANITARIAN LAW, *SAN REMO DECLARATION ON THE PRINCIPLE OF NON-REFOULEMENT* (2001). ("The Principle of Non-Refoulement of Refugees incorporated in Article 33 of the Convention relating to the Status of Refugees of 28 July 1951 is an integral part of Customary International Law.")

Additionally, an opinion by Sir Elihu Lauterpacht QC and Daniel Bethlehem QC, entitled "The Scope and Content of the Principle of Non-Refoulement," published in 2001, along with the results of a roundtable discussion at the University of Cambridge, and the views expressed by Lord Bingham in the case of *R. (European Roma Rights) v Prague Immigration Officer* all lend support for the view that the "non-derogable character" of the non-refoulement of refugees "was progressively acquiring the character of a peremptory rule of international law."<sup>96</sup> The Lauterpacht and Bethlehem opinion also suggests that, "it may well be that the relevant rules amount to *jus cogens* of a kind that no State practice and no treaty can set aside. That the principle of non-refoulement amounts to a rule of *jus cogens* was suggested by the Executive Committee [of the UNHCR] as early as 1982."<sup>97</sup>

Sadly, the court in *C and Others* has ignored this considerable amount of literature on the issue of non-refoulement as a peremptory norm. Instead the court has focused on that authority which tends to support the opposite conclusion. In the *C. and Others* decision however, the court cited Hathaway, who has observed that a "recounting of state practice . . . makes depressingly clear, [that] refoulement still remains part of the reality for significant numbers of refugees in most parts of the world."<sup>98</sup> Hathaway further notes that, "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.'<sup>99</sup>

While Hathaway may not be persuaded that there is currently sufficient evidence to justify the claim that the principle of non-refoulement has become established as a peremptory norm, I believe that reluctance may be countered with a better answer.

When one considers the unique origins of refugee law, (set as it was against the worst atrocities of the Second World War and in particular, the Holocaust) one is persuaded that this body of law was predicated on a widespread understanding that there will likely be at least *some* nations that will not adhere to, (and will in fact consistently flout) these most basic international norms and conventions.<sup>100</sup> In contemporary times, these recalcitrant nations include some of the same states that the court in *C*

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96. SIR ELIHU LAUTERPACHT QC & DANIEL BETHLEHEM QC, THE SCOPE AND CONTENT OF THE PRINCIPLE OF NON-REFOULEMENT: OPINION, para. 52 (2008).

97. *Id.* at para. 195.

98. HATHAWAY, *supra* note 81, at 364.

99. *Id.* at 364-65.

100. *Id.*

and *Others* cited as being objectors, such as North Korea, Bhutan and Burma.

I suggest that both the Torture and Refugee Conventions are unique in that they have been crafted not in contemplation of universal compliance, but with the understanding that some nations will consistently oppose and flout these basic norms. The “depressing” reality to which Hathaway refers does not imply as the court suggests that the norm of non-refoulement is not peremptory.<sup>101</sup> Instead, it suggests that because some states will continue to violate basic human rights, the laws embedded in the Torture and Refugee Conventions are necessary to civilized nations as basic norms.

#### IX. HONG KONG’S REPUDIATION OF THE RULE OF NON-REFOULEMENT

*C. and Others* also addressed the issue as to whether Hong Kong has “repudiated” the rule against refoulement found in customary international law.<sup>102</sup> In support of its conclusion, that Hong Kong has repudiated this rule, the court reiterated that it was the “clear intention” of the Government and legislature that refugees “shall not be accorded any special rights” and that any possible humanitarian or compassionate issues should be left to the “unfettered discretion” of the Director of Immigration in his management of Hong Kong’s scheme of immigration.<sup>103</sup>

The court considered the 1990 Hong Kong Court of Appeals decision in *Madam Lee Bun and Another v Director of Immigration*.<sup>104</sup> In the case, a mainland family arrived in Hong Kong illegally and claimed that they had fled China to avoid persecution for their political beliefs. However, it was decided that the Refugee Convention did not apply to the appellants since it had never been extended to Hong Kong.<sup>105</sup> The court distinguished the situation of Vietnamese refugees, for which the Hong Kong Immigration Ordinance had specifically been amended, and ruled that such protection had not been extended to mainland refugees.<sup>106</sup>

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101. *C. and Others v. Director of Immigration*, HCAL 132/2006, para. 110 (C.F.I. Feb. 18, 2008) (Legal Reference System) (H.K.).

102. *C. and Others v. Director of Immigration*, HCAL 132/2006, para. 138 (C.F.I. Feb. 18, 2008) (Legal Reference System) (H.K.).

103. *Id.*

104. *See Madam Lee Bun and Another v Director of Immigration*, [1990] 2 HKLR 466.

105. *Id.* at 468.

106. Immigration Ordinance, (1998) Cap. 115, Part III A (H.K.).

The *C. and Others* court relied heavily on the decision in *Madam Lee Bun*, and cited several passages from it.<sup>107</sup> Given this reliance, it is important to consider the COA's *Madam Lee Bun* written opinion itself and the opinion in a wider context. *Madam Lee Bun* was decided immediately following the June 4, 1989 Tiananmen Square massacre and subsequent political crackdown. At the time, Hong Kong was still a British colony. Hong Kong and Britain were then at a very sensitive juncture both in terms of wider relations with China and the matter of Hong Kong's return to Chinese rule as had been set out in the Sino-British Joint Declaration of 1984. Faced with the real possibility of a mass influx of people from China into Hong Kong and all of the social and political implications that would result, the *Madam Lee Bun* court would have been particularly sensitive to the ramifications of any decision in favor of mainland refugees.

In some important respects, however, the practical realities of the *C. and Others* case differ from those of *Madam Lee Bun*. Hong Kong was no longer a British colony but rather a Special Administrative Region of China.<sup>108</sup> Furthermore, the issue in *Madam Lee Bun* was the possibility of a mass influx of people into the territory, whereas *C. and Others* considered no more than 2,000 applicants without the prospect of an imminent mass influx of the scale that allowing mainland families refugee status would imply. Due to these crucial differences, perhaps the court in *C. and Others* should not have relied as heavily on *Madam Lee Bun* as it did.

The court argued that while the Director is not bound by the provisions of the Refugee Convention or other international humanitarian instruments, he may exercise his powers with "humanitarian values in mind."<sup>109</sup> In support of this position the court cited a passage from the policy statement of the Principal Assistant Secretary for Security for the HKSAR.<sup>110</sup> This passage is strikingly similar to the report presented to the Legislative

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107. *C. and Others v. Director of Immigration*, HCAL 132/2006, paras. 85-90, 93, 138, 143 (C.F.I. Feb. 18, 2008) (Legal Reference System) (H.K.).

108. See Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, (1990), art. 1.

109. *C. and Others v. Director of Immigration*, HCAL 132/2006, para. 149 (C.F.I. Feb. 18, 2008) (Legal Reference System) (H.K.).

110. *Id.* at para. 151 ("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 obligation under the Refu-

Council Panel on Security and Welfare Services in July 2006 and cited as background information at the beginning of the judgment.<sup>111</sup>

This Security Department paper stressed Hong Kong's "unique situation" of "small size and relative prosperity, as well as liberal visa regime," set against a (presumably) poorer and (more authoritarian) region as *prima facie* justification for Hong Kong not having a policy of granting political asylum.<sup>112</sup> The court then summarized what it understood to be the position of the Director of Immigration:

- (i) The norm of customary international law, if it be such, prohibiting refoulement 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 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 rule against refoulement does not mean that the Director has espoused that rule either wittingly or unwittingly. Put another way, acting in good faith by taking into account basic humanitarian considerations cannot itself be a source of legal obligation where none would otherwise exist.<sup>113</sup>

The court thus sought to make the distinction between behavior that is consistent with humanitarian considerations though discretionary, on the one hand, and behavior compelled by international norms on the other.<sup>114</sup> The court concluded that while

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gee Convention to the HKSAR. Both before and after 1997, the Government has consistently acted on the basis that it is under no such duty.")

111. *Id.* at para. 4.

112. *Id.*

113. *Id.* at para. 162.

114. *In re Border and Transborder Armed Actions (Nicar v Hond.)*, [1988] I.C.J. 69, para. 106 (Dec. 28), and repeated in, *In re Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nig.)* [1998] I.C.J. 275, para. 297 (June 11) ("[t]he principle of good faith is, as the Court has observed, 'one of the basic

the Director may take humanitarian considerations into account, he is in no way obligated to do so. In other words, while the Hong Kong government consistently claims that it measures up to the aforementioned “ethical values that form the genesis” of international law and practice regarding the internationally recognized rule against refoulement, it also seeks to distance itself from any positive obligation to do so.

The Court seems to be making a distinction between the underlying values of humanitarian considerations and the state’s willingness to be bound by a norm or rule. The court suggests that the Director should take into consideration humanitarian values, but this is not sufficient to establish that he is bound by a rule or norm. However, it is hard to imagine a situation in which the Director of Immigration could allow an asylum seeker to be returned to face persecution and at the same time claim that he was acting in accordance with the underlying humanitarian considerations. This raises the philosophical and legal question of whether an institution, or for that matter an individual, can genuinely subscribe to the idea of a moral value while at the same time not be under an obligation to adhere to that principle or norm. It would also seem that the moral agent who professes to hold a given value but who is not accountable under a corresponding norm encounters a similar kind of moral “bewilderment” that is referred to above by Hawthorn.

#### X. HONG KONG’S DEMOCRACY AND THE POWERS OF THE DIRECTOR

The court in *C. and Others* made the following observations with regard to the discretionary power held by the Director in Hong Kong’s form of governance:

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 and compassionate factors that apply to any individual person or group of persons who fall under his jurisdiction (emphasis added).<sup>115</sup>

The court seems to reason that because Hong Kong is an “open and democratic society” there are core principles of humanitarianism and compassion that must be respected. I would argue that the court is mistaken in its characterization of Hong Kong as having a democratic system. In *The Spirit of the Laws*,

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principles governing the creation and performance of legal obligations’ . . . ; it is not in itself a source of obligation where none would otherwise exist.”)

115. *C. and Others v. Director of Immigration*, HCAL 132/2006, para. 183 (C.F.I. Feb. 18, 2008) (Legal Reference System) (H.K.).

Montesquieu wrote, “[i]n a republic when the people as a body have sovereign power, it is a democracy.”<sup>116</sup> He also referred to the separation of powers as between the judicial, executive, and legislative, famously arguing this to be the “grand secret of liberty and good government.”<sup>117</sup> However, Hong Kong does not enjoy universal suffrage either in the election of the Chief Executive or the Legislative Council.<sup>118</sup>

The court reasoned that it is solely for the Director to decide how to obtain relevant information, so that he can determine “what weight if any, to give to it.” But the problem with this reasoning is that in the absence of any meaningful legislative oversight there is very little scope for other parties to challenge such decisions.<sup>119</sup> In contrast, Saunders, J. in *FB and Others* applies the decision in the Australian case of *Wabz v. Minister for Immigration and Multicultural and Indigenous Affairs*, in which any ministerial discretion is to be circumscribed by principles of procedural fairness.<sup>120</sup>

Since the Chief Executive and his government are not directly accountable to the public, I suggest that the role of Hong Kong’s judiciary as a check upon what is an otherwise unaccountable source of administrative power is particularly critical. As Montesquieu argued in the *Spirit of the Laws*:

Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power of life and liberty over the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor.<sup>121</sup>

Not considered by the court however, was the body of persuasive authority in recent UK asylum cases involving torture. For example, Lord Bridge in *R v Secretary of State for the Home*

116. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 10 (Anne M. Cohler et al. eds. & trans., Cambridge University Press 1989) (1748).

117. See 1 F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY* 1, 129 (1982).

118. The Chief Executive (who is empowered to appoint all senior government officials) is currently chosen by an 800 member Election Committee which itself is selected by officials of the Central Government. See Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, (1990), arts. 48(5). Although 30 of the 60 member legislative body is popularly chosen by “geographical constituencies,” the rest of the legislature are made of the “functional constituencies” which are made up of either professional or special interest groups and chosen by small circle elections. *Id.* at art. 68, Annex II, I(1).

119. See *C. and Others v. Director of Immigration*, HCAL 132/2006, para. 184 (C.F.I. Feb. 18, 2008) (Legal Reference System) (H.K.).

120. See *Wabz v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2004] 204 ALR 687(Austl.).

121. MONTESQUIEU, *supra* note 116, at 157.

*Department, Ex p Bugdaycay* stated “where the administrative decision under challenge is one which may put the applicant’s life at risk, the basis of the decision must call for the most anxious scrutiny”<sup>122</sup> More recently, Lord Steyn (upholding Dyson LJ in *R v Secretary of State for the Home Department Ex p Sivakumar*) underlined the need for a rigorous approach: “[t]his is not a mantra to which lip service only should be paid. It recognizes the fact that what is at stake in these cases is fundamental human rights, including the right to life itself.”<sup>123</sup> For the court in *C. and Others* to demur to the Director’s discretion in such important matters is a retreat from the open and democratic society to which it claims to aspire.<sup>124</sup>

## XI. CONCLUSION

In light of the fact that Hong Kong has not adopted the Refugee Convention, there is all the more the need to employ the language of law’s moral foundations that are reflected in the decisions in *Prabakar* and *FB and Others*.

The UNHCR’s Committee against Torture expressed similar sentiments in the concluding document of its 41st session.<sup>125</sup> The Committee issued a set of recommendations including those relating to “[r]efugees and non-return to torture.”<sup>126</sup> The Committee expressed concern that there still is no legal regime governing asylum and establishing “a fair and efficient refugee status determination procedure.”<sup>127</sup> It also recommended that the HKSAR consider the extension of the 1951 Refugee Convention and 1967 Protocol to Hong Kong.<sup>128</sup>

In early 2011, following the court’s ruling in *Ma and Others v. Director of Immigration*, Mark Daly, the solicitor for the applicants in that case, was quoted in Hong Kong’s leading English language newspaper as saying:

“Without the judiciary breathing life into the Basic Law and these human rights instruments, government power will remain basically unchecked. I think it leads to bad or no poli-

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122. *R v. Secretary of State for the Home Department, ex parte Bugdaycay* [1987] 1 AC 514, 531 E-G (H.L.).

123. *R v. Secretary of State for the Home Department, ex parte Sivakumar*, [2003] UKHL 14, 16 (H.L.)

124. *C. and Others v. Director of Immigration*, HCAL 132/2006, para. 183 (C.F.I. Feb. 18, 2008) (Legal Reference System) (H.K.).

125. See U.N. Comm. Against Torture, Considerations of Reps. Submitted By States Parties Under Article 19 Of The Convention, 41st Sess., Nov. 3-Nov. 21, 2008, U.N. Doc. CAT/CHKG/CO/ (Nov. 21, 2008).

126. *Id.*

127. *Id.*

128. *Id.*

cies because effectively they're given carte blanche to do whatever they want to do."<sup>129</sup>

I hope that these comments prove helpful in some small way in a discussion of Hong Kong's past, present, and future with regard to its aspirations as well as its corresponding international obligations as a global city.

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129. Chris Ip, *Refugees denied right to work*, S. CHINA MORNING POST, Jan. 7, 2011, at A3.