The Fifth Report of the Hong Kong Special Administrative Region of the People's Republic of China under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Hong Kong Bar Association's Submission to the United Nations Committee Against Torture

(At the 56th Session, 9 November to 9 December 2015, Geneva)

Article 1: Definition of Torture

1. The HKSAR Government has taken no action to implement the recommendations of the United Nations Committee Against Torture ("the Committee") in its Concluding Observations of 19 January 2009 (CAT/C/HKG/CO/4) to adopt a more inclusive definition of the term "public official" in the definition of torture in the Crimes (Torture) Ordinance (Cap 427) and to abolish the defence of "lawful authority, justification or excuse) in section 3(4) of the same Ordinance.

2. The Hong Kong Bar Association ("HKBA") further notes that the offence of torture under the Crimes (Torture) Ordinance does not cover any infliction of pain or suffering done at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It also does not cover any infliction of pain or suffering on the ground of discrimination of any kind.

3. The HKBA considers that the HKSAR Government's position in respect of the Crimes (Torture) Ordinance is indefensible following the judgment of the Court of Final Appeal in Ubamaka v Secretary for Security (FACV 15/2011, 21.12.2012), which confirmed that the prohibition of torture under Article 3 of

the Hong Kong Bill of Rights (ie Hong Kong's domestication of the International Covenant on Civil and Political Rights as applied to Hong Kong) is absolute and non-derogable.

4. The HKBA asks the Committee to consider stating clearly in its Concluding Observations that the Crimes (Torture) Ordinance in its current form plainly fails to fulfil the obligation of the HKSAR under Article 4 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("UNCAT").

Article 3: Non-refoulement Protection (Torture, CIDTP and Persecution)

5. The HKBA notes the positive move on the part of the HKSAR Government to amend the Immigration Ordinance (Cap 115) in 2012 to introduce a statutory scheme for screening claimants for non-refoulement protection under Article 3 of UNCAT. However, this statutory scheme provides for a procedure with strict timetabling towards determination of the claim for protection. Further there are particularly two provisions of concern. Section 37ZC makes provision for medical examination to be conducted by a medical practitioner as arranged by an immigration officer, the Government decision-maker, and the requirement that the claimant must disclose the medical report of the examination so arranged. Section 37ZC thus denies the claimant the opportunity for presenting his or her own medical expert evidence on the occurrence of past torture. Rather the medical investigation remains on the side of the Government. Further, section 37ZD, whereby an immigration officer is permitted to take into account certain behaviour (such as failure to make a claim at certain situations, and failure without reasonable excuse to make full disclosure of material facts in support of the torture claim) of the claimant for the purpose of holding that the claimant's credibility is damaged, does not in the opinion of the HKBA, promote fairness in the determination of claims for non-refoulement protection. The HKBA urges the Committee to express its concern over these aspects of the statutory scheme.

6. Later, the HKSAR Government has, in compliance of the judgment of the Hong Kong Court of Final Appeal in Ubamaka v Secretary for Security (FACV 15/2011, 21.12.2012), established a Unified Screening Mechanism ("USM") to assess non-refoulement protection claims (including claims that a person substantially believes that he or she would be subjected to cruel, inhuman or degrading treatment or punishment if returned (pursuant to Article 3 of the Hong Kong Bill of Rights) and claims of risk of persecution within the meaning of the Convention on the Status of Refugees 1951). The USM came into operation in March 2014. At the same time, the Hong Kong Sub-office of the United Nations High Commission for Refugees ("UNHCR") ceased screening asylum claims in Hong Kong under its mandate. Rather, the non-refoulement claimant must first succeed in establishing persecution risk for non-refoulement protection before his or her case would be passed to the UNHCR for refugee status determination. The HKBA disapproves of this arrangement since screening asylum claims for the purpose of establishing refugee status and screening persecution risk claims for the purpose of non-refoulement protection are different processes with different legal consequences. The HKBA asks the Committee to raise this matter as a matter of concern with both the HKSAR Government and the UNHCR.

7. The HKBA makes the following observations of the USM:

(a) The USM is not a "unified" mechanism. It is only a combination of mechanisms using the same case officer to determine three types of claims applying three sets of standards and asking the same appeal board to hear appeals/petitions from the decision of that case officer, again applying three sets of standards.

(b) The USM is further complicated by the fact that the determination of non-refoulement claims under UNCAT is underpinned by Part VIIC of the

Immigration Ordinance and that the determination of non-refoulement claims under Article 3 of the Hong Kong Bill of Rights and the determination in respect of persecution risks are not underpinned by statute; they are administrative schemes. Yet, the USM purports to treat all non-refoulement claims made by way of the common Non-refoulement Claim Form as if they are all governed by Part VIIC of the Immigration Ordinance and purports to apply the provisions of Part VIIC on all of them. As noted above, many provisions of Part VIIC are stringent procedural requirements carrying serious consequences for non-compliance. Other provisions of Part VIIC empower the Director of Immigration to require information and documentation from the claimant, to require the claimant to attend a medical examination, to sanction detention pending determination, to revoke a favourable decision, and to limit the making of subsequent claims. The HKBA seriously doubts whether this approach of the USM is a proper one. For example, it appears unsatisfactory that the case officer is empowered under section 37ZD (above) to hold that the credibility of a claimant is damaged by reason of certain conduct for the purpose of determining the UNCAT claim but in respect of the same case, he presumably may not do so in respect of that claimant's claim under Article 3 of the Hong Kong Bill of Rights and/or persecution risk. Presumably, claimants who had had their UNCAT claims already determined against them but had made a non-refoulement claim under the USM would only have their claims for protection under Article 3 of the Hong Kong Bill of Rights and/or due to persecution risk determined and in such cases, the Part VIIC provisions do not apply.

(c) The instructions to case officers of the USM provides a definition of "persecution risk" that does not follow the definition of refugees under the Convention on the Status of Refugees. Instead a selective amalgam of Article 1A(2) and Article 33 of the Convention was used.

(d) Case officers have been instructed to require a claimant to signify in writing his or her intention to seek non-refoulement protection. The case officer is not to consider a non-refoulement claim unless it is satisfied that the written signification of the claimant has given a general indication of the reasons for making such a claim, being reasons that relate to an act falling withn torture, ill-treatment and/or persecution. A decision on the part of an immigration officer as to whether there is written signification is critical and there is clear risk for potential abuse and "pre-screening", particularly where the stage at which a written signification is required is during the time when claimants are in detention and before they have legal representation.

(e) The bifurcation of the USM assessments also affects the process of legal redress following an adverse decision by the case officer. Rejection of a claim under UNCAT is subject to statutory appeal to the Torture Claims Appeal Board. Rejection of a claim under Article 3 of the Hong Kong Bill of Rights or persecution risk is subject to a petition to the an adjudicator vested with delegated authority of the Chief Executive of the HKSAR. While the procedure for hearing of the statutory appeal under Part VIIC of the Immigration Ordinance is provided for in Schedule 1A of the Ordinance, this does not mean that Schedule 1A is applicable to petitions against the rejection of a Hong Kong Bill of Rights Article 3 claim or a persecution risk claim.

(f) The USM does not protect against chain refoulement, ie the danger of a person expelled from Hong Kong being, in turn, expelled by a non-risk state to a risk state.

The legal professional bodies in Hong Kong (ie the HKBA and the Law Society of Hong Kong) have jointly asked the HKSAR Government to establish the USM by legislative amendments. The HKSAR Government has so far not been able to do so. The HKBA asks the Committee to note the above shortcomings of the USM and express concern over them. The HKBA

also asks the Committee to urge the HKSAR Government to amend the Immigration Ordinance to put the USM on a statutory footing.

8. On the other hand, the HKSAR Government has in the course of 2015 sought to introduce certain "enhancements" to the USM, which have been roundly criticized by the HKBA and the Law Society of Hong Kong. These proposed measures include a new claim form (which appears to have been compiled with the purpose of reducing the total number of questions but not the total number of issues that need to be addressed, since some questions in the new claim form are in fact a combination of questions in the present claim form), provision of a "screening bundle" with many categories of documents that may contain information about the claimant excluded (which also frustrates the effective access on the part of the claimant to personal data held by the Immigration Department, a right guaranteed under Hong Kong law that the present practice fully gives effect to), scheduling the screening interview shortly after assignment of the publicly funded lawyer (which, coupled with the current exceedingly short time limit for submission of the claim form, is likely to have a deleterious effect on the preparation of the claimant's case), and capping the total number of hours the lawyer may spend on an individual case (which represents a departure from a commitment by the HKSAR Government in 2009 that "no cap should be imposed on the number of sessions of a case, which will duly take into account the individual circumstances"). The HKBA notes that the HKSAR Government has, in spite of opposition from the legal profession, given notice of implementing the "screening bundle" measure and the "scheduling screening interview" measure from 2 November 2015. The HKBA asks the Committee to question the HKSAR Government on the fairness of these measures and express as a matter of concern that these measures are likely to be counter-productive.

9. The HKBA notes that the assessment of non-refoulement claims involves the evaluation of country of origin information. The HKSAR courts have held that

the said assessment involves a joint endeavour on the part of the claimant and on the part of the Immigration Department. However, the Immigration Department has declined to share with the legal profession its own country of origin information resources, which include field studies of several South Asia risk states. Moreover, case officers often disclose country of origin information in their possession for the first time during the screening interview and ask the claimant to comment immediately. The HKBA regards the Immigration Department's practices to country of origin information to be unsatisfactory and asks the Committee to question the HKSAR Government on the fairness of these practices and express as a matter of concern that relevant country of origin information resources ought to be disclosed in advance and shared with the claimant and his or her legal representative.

10. The HKSAR Government's information indicates that between December 2009 and February 2014, 4,755 claims relying on Article 3 of UNCAT were determined, with 22 substantiated and 4,733 rejected. Following the implementation of USM, 1,873 claims were determined by the end of May 2015, with 8 substantiated (including 2 substantiated on appeal by the Torture Claims Appeal Board ("TCAB")). The HKBA considers the number and proportion of substantiated claims to be *distinctly low* in comparison with other countries, bearing in mind that the USM allows the claimant to rely on Article 3 of the Hong Kong Bill of Rights for non-refoulement protection, a ground that, unlike Article 3 of UNCAT, does not involve establishing the involvement of a "public official" or acquiescence of the risk state. The HKBA asks the Committee to question the HKSAR Government closely on the reasons for the low number of substantiated claims.

11. The HKBA notes also that USM allows the claimant to rely on the ground that he or she substantially believes that if returned, he or she would be ill-treated at the risk state and that the ill-treatment amounts to cruel, inhuman or degrading treatment or punishment ("CIDTP"). The HKBA is not aware of

any claim of CIDTP having been held substantiated by the Immigration Department or on petition by the TCAB. The HKBA considers this matter to be anomalous, bearing in mind that the severity of the physical or mental harm or suffering for establishing CIDTP must be lower than that for establishing torture. The HKBA questions whether the Immigration Department has wrongly applied the Court of Final Appeal judgment in Ubamaka v Secretary for Security (FACV 15/2011, 21.12.2012) and has taken out of context the words of the court in paragraphs 172 to 176, which referred to the United Kingdom case of R (Limbuela) v Secretary of State for the Home Department [2006] 1 AC 396 and R (Ullah) v Special Adjudicator [2004] 2 AC 323; and the Strasbourg cases of Soering v United Kingdom (1989) 11 EHRR 439 and Al Husin v Bosnia and Herzegovina (App No 3727/08, 7.2.2012). to demand the surmounting of a "very high threshold" in CIDTP claims. The HKBA asks the Committee to question the HKSAR Government on this matter and express its concern of it.

12. The HKSAR Government has not responded to the repeated calls by the legal profession for publication of the TCAB's decisions, notwithstanding that comparable administrative appeal bodies in England, Australia and Canada routinely publish their decisions in a redacted format. The HKSAR Government's latest position is that this is a matter of the TCAB, not the Government. The HKBA believes that even if this were the true position, the TCAB should be given the resources to publish its decisions and the provision of such resources is matter of the Government. The HKBA asks the Committee to urge the HKSAR Government makes available resources for the publication of the TCAB's decisions.

13. The legal profession in Hong Kong has constantly urged the HKSAR Government to extend the Convention on the Status of Refugees and its Protocol to Hong Kong. The Committee urged the HKSAR Government to do

so in its Concluding Observations in 2009. The HKBA asks the Committee reiterate this recommendation.

14. The HKBA has not been informed that the HKSAR Government had put in place, in line with the Committee's Concluding Observations in 2009, any post-return monitoring arrangements. The HKBA asks the Committee to question the HKSAR Government on this matter and express its concern over the apparent absence of such arrangements.

15. The HKBA notes the publicized concern about the living conditions of asylum seekers and non-refoulement claimants in Hong Kong. Asylum seekers and non-refoulement claimants are not permitted to work and the process of examination of claims takes many months, even years. While the HKSAR Government now recognizes, following a judgment of the Hong Kong Court of Final Appeal, that its policies may expose asylum seekers to cruel, inhuman or degrading treatment, the Government maintains the same approach in respect of asylum seekers and non-refoulement claimants through criminal offences of taking up employment while a person is illegal remaining in Hong Kong or has a removal or deportation order in force against him. The Government only maintains the policy of entertaining applications by screened-in refugees and successful non-refoulement claimants for permission to take up work and such applications would only be granted on in exceptional cases. The HKBA asks the Committee to question the HKSAR Government on how this policy of immigration control operates and whether consideration has been given in decision-making to the impact of physical and mental inactivity and dependence on in-kind humanitarian assistance to the applicants' enjoyment of their rights to an adequate standard of living and physical and mental health guaranteed under the ICESCR.

16. The HKBA urges the Committee to question the Central People's Government and the HKSAR Government closely of cases of rendition of persons from

Hong Kong to Mainland China or a foreign country, where the person(s) concerned faced torture or other cruel, inhuman or degrading treatment or punishment or were likely to be punished for their political views, religious beliefs or ethnic origin.

Article 12: Complaints Against the Police Force

17. The HKBA notes the Committee's Concluding Observations in 2009 that the HKSAR should continue to take steps to establish a fully independent mechanism mandated to receive and investigate complaints on police misconduct. The Committee considered that the body should be equipped with the necessary human and financial resources and have the executive authority to formulate binding recommendations in respect of investigations conducted and findings regarding such complaints, in line with the requirements of Article 12 of UNCAT. The HKBA finds that there has been no institutional improvement in line with the Concluding Observations up to now. The Independent Police Complaints Council ("IPCC") has remained a monitoring body of investigations of police complaints conducted by the Complaints Against the Police Office ("CAPO"), a division of the police force.

18. The unsatisfactory and non-compliant nature of the present arrangements has been adequately exposed in the recent police complaint case against Police Superintendent Franklin King-wai CHU, who allegedly assaulted demonstrators and pedestrians with a baton in Mongkok on one occasion during the Umbrella Movement occupation period in 2014. The alleged assault was captured by television news footage. The IPCC decided, upon examining CAPO's report of the investigation, that the complaint was substantiated. However, CAPO questioned this decision of the IPCC by submitting an amended investigation report. The IPCC was obliged to hold a special meeting in late July 2015 to discuss the amended investigation report and then voted by a simple majority to uphold its original decision to

substantiate the complaint. No action has yet been taken against PS Chu, who has now retired from the police force with full pension.

19. The HKBA notes that in the last 5 years, there were 328 complaints of assault by a police officer. None of the complaints were held substantiated.

20. The HKBA considers the present unsatisfactory arrangements in police complaint investigation and supervision to be worrying in the light of an increasing trend on the part of the police force to use force to dispel demonstrations and to resort to violence against arrested demonstrators. On 13 June 2014, demonstrators were arrested outside the Legislative Council Complex and they subsequently complained that they had been beaten up by police officers on the way to the Aberdeen police station, which was not the nearest police station. On 28 September 2014, the police force fired CS gas canisters at demonstrators notwithstanding that the overwhelming majority of them were engaging in peaceful demonstration and without displaying visual signs to require them to disperse lest CS gas would be used. On 15 October 2014, police officers apprehended Ken Kin-chiu TSANG near Tamar Park in Admiralty, one of the areas of Hong Kong under occupation during the Umbrella Movement, and 7 police officers allegedly carried him to a dark corner nearby and assaulted him with fists and kicks. The alleged assault was captured by a television news film crew. The 7 police officers have eventually been charged with the offence of causing grievous bodily harm on another with intent (which carries the maximum penalty of life imprisonment) on 15 October 2015. Towards the end of the occupation under the Umbrella Movement, police officers carried out operations to clear the blocked roads in Mongkok and Admiralty and more than several demonstrators have claimed that they were injured during those operations by police officers and have filed claims with the HKSAR courts for monetary damages.

21. The HKBA notes that the conditions of detention in police cells and immigration facilities are not conducive to long periods of detention. Yet there have been cases of persons being held in the cells of different police stations for days and even weeks. In Abid Saeed v Secretary for Justice (DCCJ 562/2011, 30.1.2015), the District Court found that the holding cells of the Castle Peak Bay Immigration Centre for persons detained pending investigation with a view for their removal were overcrowded and that Mr. Saeed had to be moved to different police stations to spend the night in the cells there for 17 consecutive nights in 2006. The District Court further found that Mr. Saeed was not allowed to take a shower on a regular basis during a period of detention of 44 days; that he was not given an opportunity to change his clothes in 40 days; that there was no adequate bedding, clean blankets and internal flushing toilet in the police cell; and also that on each occasion he arrived at the police station for overnight detention and on each occasion he was transferred back to Castle Peak Bay Immigration Centre in the morning, he was subject to a strip search and some of those strip searches involved requiring him to remove all his clothes and performing sitting up and standing down while naked. The District Court held that those strip searches amounted to degrading and inhuman treatment. The District Court further found unlawful use of handcuffs during part of the period of detention. The District Court awarded damages in the total amount of HK$210,000 (or US$27,000). The HKBA has been informed that there have been no appeals against the judgment of the District Court and the HKSAR Government thereafter reached settlements in a number of civil actions involving similar allegations. The HKBA urges the Committee to question the HKSAR Government on the conditions of detention now in the Castle Peak Bay Immigration Centre and the police station cells, and to express its concern that the conditions and facilities there should be improved.

Human Trafficking

22. The criminal law of Hong Kong only addresses human trafficking for the purpose of prostitution, and does not cover instances of forced labour. This falls short of the relevant international human rights standards, as the UN Protocol on Trafficking (2000) defines human trafficking as "*a situation where the recruitment, transportation, harbouring or receipt of persons involves force, coercion, deception or abuse of power for the purpose of exploitation*". The HKBA asks the Committee to recommend to the HKSAR Government that Hong Kong should enact anti-human trafficking laws which adopt the definition of trafficking as provided for in the UN Protocol.

23. Trafficked persons or suspected trafficked persons, including women, are routinely prosecuted for immigration offences such as breach of condition of stay in the case of prostitutes and imprisoned. There appears to be no practice or policy of treating them as victims and not subject to criminalization, as the Committee called for in its 2009 Concluding Observations.

Foreign Domestic Helpers

24. The HKBA considers that all human rights treaty bodies, including the Committee, were well justified in expressing concern over the situation of foreign domestic helpers in Hong Kong. However, the HKSAR Government has continued to maintain the immigration policies that contribute to their risk of being treated in an inhuman or degrading manner in Hong Kong, including the "two week rule" and the "live-in requirement". Complaints by foreign domestic helpers of assaults, including serious injuries and sexual abuse, by the employer are frequent. In February 2015, an employer of two foreign domestic helpers was convicted and sentenced to 6 years' imprisonment for charges of inflicting or causing grievous bodily harm, and of assaults, and of criminal intimidation of the two foreign domestic helpers (DCCC 421, 651/2014). This is not an isolated case; see also HKSAR v Tai Chi Wai &

Anor (CACC 355/2013, 8.9.2014), involving a foreign domestic helper who was abused by her employers over a period of two years.

25. Foreign domestic helpers do not appear to have access to court to challenge the "live-in requirement" and the "two week rule" since these conditions have been regarded by the HKSAR Government as immigration conditions regulating their stay in Hong Kong. The HKSAR Government considers that such application of immigration legislation on foreign domestic helpers, who have no right to remain in Hong Kong, is precluded from judicial scrutiny by virtue of section 11 of the Hong Kong Bill of Rights Ordinance (Cap 383), which domesticates the immigration legislation reservation to the ICCPR; and that they likewise cannot avail themselves of the protection of the fundamental rights guaranteed in Chapter III of the Basic Law. It seems likely that, in the light of the Hong Kong Court of Final Appeal judgment in Vallejos v Director of Immigration (FACV 19, 20/2012, 25.3.2013), the immigration policy with restrictive conditions of stay would be steadfastly maintained by the HKSAR Government so as to justify exclusion of foreign domestic helpers as a class from being capable of "ordinarily residing in Hong Kong" for the purpose of acquiring permanent resident status with enjoyment of right of abode in Hong Kong. The HKBA urges the Committee to question the HKSAR Government as to its views of the *Vallejos* judgment and the consequential implications for the immigration policy towards foreign domestic helpers, and to maintain its concern calling for the abolition of the "live-in requirement" and the "two week rule".

Imported Workers

26. Hong Kong does import limited categories of foreign workers for types of work that supply of local labour appears to be difficult. Such imported workers are subject to restrictive immigration conditions similar to those applied to foreign domestic helpers. Many of them, particularly those imported to work for infrastructure projects, work long hours and live under

basic conditions. The HKBA asks the Committee to question the HKSAR Government on the conditions attached to such imported workers and express concern as to their working and living conditions.

Dated 17th October 2015.

HONG KONG BAR ASSOCIATION