中华人民共和国常驻联合国日内瓦办事处和瑞士其他国际组织代表团

PERMANENT MISSION OF THE PEOPLE'S REPUBLIC OF CHINA

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The Permanent Mission of the People's Republic of China to the United Nations Office at Geneva and other International Organizations in Switzerland presents its compliments to the Office of the High Commissioner for Human rights and with reference to the latter's communication【AL CHN 14/2016】dated 3 January 2017, has the honour to transmit herewith the reply by the Chinese Government.

The Permanent Mission of the People's Republic of China to the United Nations Office at Geneva and Other International Organizations in Switzerland avails itself of this opportunity to renew to the Office of the High Commissioner for Human Rights the assurances of its highest consideration.

Geneva, 13 March 2017

Office of the High Commissioner for Human Rights
GENEVA

联合国人权理事会言论自由问题特别报告员、移民人权问题特别报告员、少数群体问题特别报告员和当代形式种族主义问题特别报告员2017年1月3日联合来函【AL CHN 14/2016】收悉，中国政府对来函答复如下：

致聯合國特別報告員的回覆

《難民公約》從未適用

香港特別行政區(「香港特區」)位於東亞,在中華人民共和國(「中國」)南岸,面向南中國海。香港的東、南及西面臨海,北接中國的另一城市深圳市。香港人口極為密集:面積只有1 106平方公里,卻居住了730萬人(2015年的數字),人口密度約為每平方公里6 760人(在若干較稠密地區,人口密度更高達每平方公里57 000人以上)。在香港特區的管轄範圍內,亦包括1 650平方公里的海域和超過260個大小不一的島嶼,形成長逾730公里的海岸線。

2. 香港是世界上人口密度最高的司法管轄區之一(人口密度高於全球大部份主權國家),海岸線長、簽證制度寬鬆(約170國家/地區的國民可免簽證來港,訪港旅客人數約為每年6 000萬至7 000萬人次),是區內的交通樞紐(逾100間航空公司營運往來香港與全球190個地點之間的航班)。因此,我們必須維持有效的出入境管制,以確保本港治安良好及保障本地勞工的生計和就業機會。防止非法入境者進入及停留在香港並把他們有效遣返,同時歡迎及便利來自世界各地的真正旅客來訪,是香港特區出入境政策的重心。

3. 基於以上獨特背景,1951年聯合國《關於難民地位的公約》(「《難民公約》」)及其1967年議定書從未適用於香港。香港特區政府(及1997年回歸中國之前的香港政府)的一貫政策都是不給予庇護,亦不會核實或確認難民身份;特區政府絕無任何計劃考慮改變政策。香港特區的環境應與一些城邦國家比較(例如新加坡、摩納哥或巴林等);資料顯示這些國家也沒有類似的審核機制處理尋求庇護或免遣返保護的人。再者,香港特區並不是區內唯一不給予庇護的地區:「東南亞國家聯盟」的十個國家中,有八個(即文萊、印度尼西亞、老撾、馬來西亞、緬甸、新加坡、泰國和越南)不是《難民公約》的簽署國。

4. 儘管《難民公約》從未適用於香港,但二十世紀七十年代至九十年代出現越南船民問題期間,我們仍然承擔起很大部份的責任。我們當時的做法並非基於《難民公約》的義務,而是執行當時英國政府的政策。此外,有關越南船民的「綜合行動計劃」完結至今已將近二十年,聯合國難民事務高級專員(「聯合國難民署」)仍拖欠香港11.62億元的暫支款項。

5. 特別報告員來函的附件引述了數份文書，但該等文書在國際法下對香港特區並無約束力。香港特區政府並沒有針對非法入境者或逾期居留者作出任何種族歧視的行為；在附件所引述的有關文書的條文與目前的討論完全無關。我們的意見載於**附錄 I**。

消除種族歧視

6. 香港特區政府致力消除種族歧視和促進少數族裔人士的平等機會。整體而言，為了保障社會和諧，鼓勵共融和教育公眾認識平等概念相信仍然是消除偏見和歧視的主要途徑。另一方面，《中華人民共和國香港特別行政區基本法》(「《基本法》」)、實施適用於香港的《公民權利和政治權利國際公約》的條文的《香港人權法案條例》(香港法例第 383 章) 以及《種族歧視條例》(香港法例第 602 章) 為禁止種族歧視提供了法律框架。

香港特區的法律制度

7. 中國的全國人民代表大會通過《基本法》授權直轄於中央人民政府的香港特區實行高度自治，依照《基本法》的規定享有行政管理權、立法權、獨立的司法權和終審權。《基本法》第 8 條規定，「香港原有法律，即普通法、衡平法、條例、附屬立法和習慣法，除同本法相抵觸或經香港特別行政區的立法機關作出修改者外，予以保留。」香港特區的終審權屬於香港特區終審法院；最終上訴案件由終審法院五名法官組成的合議庭審理，包括終審法院首席法官、三名常任法官及一名非常任法官。終審法院可根據需要邀請其他普通法適用地區的法官參加審判，而多名來自英國、澳洲和新西蘭的卓越法官均曾担任終審法院法官，並繼續參加案件的審判工作。

出入境管制

8. 為實施有效的出入境管制，我們在《入境條例》(香港法例第 115 章) 訂明，任何進入香港的外國人須接受入境事務主任的訊問，並須取得入境許可，而入境事務主任有權施加特定的逗留條件 (例如訪客於留港期間不得接受有薪的僱傭工作或開辦業務) 和逗留期限(例如訪客只能於某段期限內留在香港)。未能取得入境許可的人即是非法入境者，而違反所施加的逗留期限的人則為逾期逗留者，兩者皆屬違

法，屬刑事罪行[1]。我們相信全球大部份國家均有類似的法例規定。

9. 非法入境者和逾期逗留者會盡快被遣返或遞解離境。在遣返或遞解的過程中，他們有機會向入境事務主任提供理由，解釋為何不應被遣返。如該人聲稱被遣返至另一國家有遭受酷刑、殘忍、不人道或侮辱的處遇或懲罰（「不人道處遇」）、被任意剝奪生命或被迫害等苛待的風險，而有關風險是真實及其本人要面對的，入境事務主任會根據統一審核機制審核其免遣返聲請，在審核完成前不會把他遣返至該風險國家。

10. 在統一審核機制下提出免遣返聲請抗拒遣返的非法入境者和逾期逗留者，**不會被視作「尋求庇護者」或「難民」**。香港特區政府從來沒有在任何官方文件把免遣返聲請人稱為「難民」（無論是真難民還是偽冒／假難民）或「尋求庇護者」，有關指控純屬子虛烏有。而指控香港特區政府發表針對難民（或免遣返聲請人）或移民的負面言論亦是毫無事實根據。我們強烈反對有關指控。

<u>統一審核機制</u>

11. 統一審核機制以香港特區立法會（「立法會」）於 2012 年通過的《入境條例》第 VIIC 部所規定的酷刑聲請法定審核機制為藍本，以合乎香港特區法院要求的「高度公平標準」；按我們的理解，有關標準與其他實施普通法的司法管轄區包括英國、加拿大、澳洲、及新西蘭[2]採用的標準一致。有關程序如下：

(a) 首先，免遣返聲請人需填寫聲請表格，提供他們的個人資料，並說明如被遣返他們畏懼會遭受的風險。現時，《入境條例》規定聲請人有 28 日時間完成表格。在現行的行政安排下，聲請人通常額外獲得 21 日（令有關期限延長至 49 日），以確保他們有足夠時間完成表格。有關期限比絕大部份其他處理

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[1] 《入境條例》第 38(1)條訂明，任何人如屬在未得入境事務主任准許下不可在香港入境的人，但卻未有該項准許而在香港入境；或在香港非法入境後未得處長授權而留在香港，即屬犯罪。

第 41 條訂明，任何人違反逗留條件（包括逗留期限屆滿後留在香港），即屬犯罪。

[2] 見 Secretary of State for the Home Department *Thirukumar & Ors* [1989] Imm AR 402, *Sethi v Canada (Minister of Employment and Immigration)* [1988] 2 FCR 537, *Jorge Murillo-Nunez v Minister of Immigration and Ethnic Affairs* [1995] FCA 1526, *BV v Immigration and Protection Tribunal* [2014] NZCA 594 等.

庇護或免遣返聲請的司法管轄區更長[3]。《入境條例》訂明，如有充份理據，可進一步延長有關期限。

(b) 他們會與入境事務主任會面，以說明或闡釋在聲請表格內提供的資料。

(c) 入境事務主任會就聲請作出決定，並以書面將其決定及理據告知聲請人。聲請人如不滿，有權提出上訴，並由獨立運作的法定酷刑聲請上訴委員會（「上訴委員會」）審理。

12. 所有免遣返聲請人均可獲得由公帑支付的法律支援（「公費法律支援」）；支援計劃現時由「當值律師服務」[4]運作。在有關計劃下，免遣返聲請人毋須通過案情審查，即可在入境事務處（「入境處」）的審核過程中享有公費法律支援（即填寫聲請表格、出席審核會面及向聲請人解釋入境處的決定）。公費法律支援的律師名冊上有超過500名大律師及事務律師，他們均曾參加相關訓練課程及具備充足的法律經驗；每名聲請人平均可獲逾20小時的法律服務。在2015-16年度，香港特區政府用於向免遣返聲請人提供公費法律支援的開支為1億6百萬元。整個審核過程均有公費傳譯／翻譯服務，有關服務由合乎司法機構所訂立的資格的人提供。相較世界各地幾乎所有司法管轄區，香港特區向聲請人提供的支援有過之而無不及。

13. 上訴委員會所有委員均為前司法人員或其他具備大律師或律師資格的法律專業人士。其運作獨立於香港特區政府。所有免遣返聲請被入境處拒絕的人均有權向上訴委員會提出上訴。所有上訴均會以書面覆檢或（在大部份個案中）以口頭聆訊的方式重新考慮案情，而非單從公法角度進行覆檢。根據上訴委員會的紀錄，在統一審核機制下，超過90%的上訴獲安排舉行口頭聆訊。與入境處的審核一樣，上訴委員會亦會以書面將其決定及理據告知有關聲請人。

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[3] 在澳洲，尋求庇護者必須在申請保護簽證時交回已完成的申請表。新西蘭要求尋求庇護者在審核會面前一星期交回有關聲請的書面陳述（有關會面一般會在提出庇護聲請後四星期內進行）。加拿大給予尋求庇護者最多15天交回聲請表格。

[4] 「當值律師服務」是由香港特區政府全數資助的機構。它於1978年成立，由執委會負責管理。執委會成員全由香港大律師公會和香港律師會委任，日常運作則由一名擁有法律資格的全職總幹事負責。在法律援助署提供的法律援助以外，「當值律師服務」提供四項法律支援計劃，分別是（i）當值律師服務計劃、（ii）法律諮詢計劃、（iii）話法律諮詢計劃及（iv）免遣返聲請人法律支援計劃。

14. 我們認為，統一審核機制在程序上提供充份保障，確保免遣返聲請人有一切合理機會確立他們的聲請，合乎「高度公平標準」的要求。

15. 在統一審核機制下，如免遣返聲請經過上述的審核程序後被入境處拒絕（而聲請人沒有提出上訴，或上訴亦被上訴委員會駁回），則該名聲請人會依法被遣返或遞解離境。

16. 在統一審核機制下，所有免遣返聲請均按相同程序獲得審核。有關某類別的聲請人在統一審核機制下受到歧視的指控絕對不能成立。

有特別需要的聲請人

17. 如入境處或上訴委員會與聲請人對其身體或精神狀況有爭議，而有關狀況可能影響其聲請的審核結果，則聲請人可獲安排由合資格的醫生進行醫療檢驗。

18. 入境處的個案主任亦曾接受適當訓練，以體察易受傷害的聲請人的特別需要[5]。入境處不時提醒聲請人，如希望其聲請能盡快獲得處理，或在審核過程中有任何特別需要，應向入境處提出。

19. 有關醫生和就聲請作出決定的人均曾接受由相關專家[6]主講有關免遣返聲請的訓練課程。課程內容包括《伊斯坦布爾議定書》[7]、聯合國難民署相關程序的標準、暴力行為在心理留下的證據，以及如何處理經歷過暴行的人和有特別需要的聲請人（包括未成年人／兒童）等。

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[5] 入境處的援助例子包括：由女性個案主任處理聲稱曾受性侵犯或因宗教理由提出要求的女性聲請人的個案；安排親屬／監護人陪同未成年或無行為能力的聲請人出席會面；為身體有殘疾的聲請人提供無障礙通道；在會面中給予兒童、年老或體弱的聲請人更寬鬆的待遇；在有需要時尋求社工或其他受訓專業人員的協助等。

[6] 包括衞生署及醫院管理局的醫學專家、聯合國難民署的代表、前英國邊境事務署（現為英國內政部簽證及移民署）及其他合資格的海外專家。

[7] 《酷刑和其他殘忍、不人道或有辱人格的待遇或處罰的有效調查和文件記錄守則》。

門檻

20. 若有充份理由相信，如被遣返往存在風險的國家，聲請人將會遭受包括酷刑、不人道處遇、任意剝奪性命或迫害等苛待的風險，則其免遣返聲請會被確立。在決定每一宗聲請時，個案主任會考慮所有相關因素，包括聲請人提出的事實及文件證據、關於風險國家的資料，以及本地及海外的案例。

21. 就統一審核機制下確立聲請的門檻「過高」的指控，特別報告員須留意，個案主任所採用的門檻是由香港特區法院所訂立。終審法院於 *Ubamaka Edward Wilson 訴 保安局局長*（2012）[8] 一案中裁定，免遣返聲請人「若要依賴（實施《公民權利和政治權利國際公約》第 7 條的《香港人權法案》第 3 條）尋求保護，必須以事實確立：（i）一旦被驅逐出境，他會遭受的苛待達到所謂的『最低的嚴苛程度』；以及（ii）他有真實及相當大的風險會受到這種苛待。明顯地，要確立符合這些要求，必須達到非常高的門檻」（判辭第 171 及 172 段）[9]。如聲請人認為入境處（及／或上訴委員會）拒絕其聲請時採用的門檻錯誤，他可以就聲請被拒的決定提出司法覆核。無論入境身份為何，任何身在香港的人（只要通過經濟審查及案情審查）均可獲得公費提供的法律援助。

22. 統一審核機制確保免遣返聲請人有一切合理機會確立其聲請，並在程序上獲得充份的保障（公費法律支援、傳譯服務、在需要時提供醫療檢驗、上訴機制、以及向特區法院提出司法覆核等），有關保障比其他司法管轄區相若甚至更多。統一審核機制於 2014 年 3 月實施起至 2016 年 12 月期間，入境處共決定了 6 383 宗聲請，其中 49 宗聲請（0.8%）獲得確立。如上文所述，聲請人有充份的法律及程序保障，因此所謂的「低確認率」只反映在香港被拒絕的免遣返聲請都缺乏理據。香港面對的地緣政治情況與歐洲國家不同， 80%的免遣返聲請人來自南亞及東南亞地區（而不是中東及非洲地區），因此與鄰近的司法管轄區相比才合適。按照聯合國難民署[10]的數字，2015 年大韓民國作出 3 264 宗（關乎庇護聲請的）裁決，其中 24 宗獲確認（0.7%）；

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[8] *Ubamaka Edward Wilson v Secretary for Security* FACV 15/2011, 2012 年 12 月 21 日。

[9] 參照英國上議院在 *R (Limbuela) v Secretary of State for the Home Department* [2006] 1 AC 396 及歐洲人權法院在 *Al Husin v Bosnia and Herzegovina* [2012] ECHR 232 的判辭。

[10] http://popstats.unhcr.org

而日本則作出 3 859 宗裁決，其中 6 宗獲確認（0.2%）。在日本及大韓民國尋求庇護的人中，大部份來自南亞及東南亞地區，分別佔 79%及 54%，與香港的情況相若。由此可見，因「確認率」達不到某個（任意訂立的）水平就指控審核機制不公平是不合理的。

羈留

23. 《公民權利和政治權利國際公約》於 1976 年起適用於香港時，已加入保留條文，訂明該公約並不影響管限無權進入及停留於香港的人進入、逗留於及離開香港的出入境法例。有關保留條文通過《香港人權法案條例》第 11 條收納入香港法律。終審法院在 *Ghulam Rbani 訴律政司司長*（2014）[11]一案中，裁定根據（透過《香港人權法案條例》第 11 條實施的）入境保留條文，無權進入或逗留在香港的人不能依據（實施《公民權利和政治權利國際公約》第 9(1)條的）《香港人權法案》第 5(1)條挑戰《入境條例》賦予入境處的羈留權力。但在行使有關權力時，入境處必須遵守普通法的 *Hardial Singh* 原則[12]。入境處的羈留政策已載於其部門網址以供公眾查閱。當局會定期覆檢所有羈留個案。以 2016 年年底計，有 435 名非法入境者被羈留（包括 53 名免遣返聲請人[13]），超過 99%的免遣返聲請人獲擔保外釋，以等待其聲請的決定。

24. 香港安排（已提出免遣返聲請的）非法入境者擔保外釋的政策，屬區內罕見；資料顯示，鄰近司法管轄區包括澳洲、日本、泰國及印尼等均有訂立政策，無論非法入境者是否尋求庇護／國際保護，仍會強制羈留（全部或某類別的）非法入境者[14]。羈留非法入境者（包括正尋求庇護／國際保護的人）在歐洲國家（根據指令 2013/33/EU[15]的第 8 條）及美國[16]亦存在。

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[11] *Ghulam Rbani v Secretary for Justice* FACV 15/2013, 2014 年 3 月 13 日。

[12] 有關原則在 *R(I)v Secretary of State for the Home Department* [2003] INLR 196 概述如下：「(i) 內政大臣必須意圖遣送該人，並且只能以此為目的拘留他；(ii) 被遣送者只能被拘留一段在有關個案的整體情況下屬合理的時間；(iii) 如在合理時間屆滿前已預計內政大臣無法在該合理期間內把該人遣送出境，則不應繼續拘留他；(iv) 內政大臣務須盡力及盡快將他遣送出境」。

[13] 根據《入境條例》（第 115 章）第 37ZK 條。

[14] http://www. globaldetentionproject.org

[15] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=EN

[16] 根據《非法移民和移民責任法案》，如果尋求庇護者在美國機場和邊境要求保護，或在

全面檢討及諮詢持份者

25. 統一審核機制自2014年實施，免遣返聲請的數目由2010年至2013年的平均每月102宗，大幅增加至2014年的463宗及2015年421宗（增幅超過300%）。政府用於處理免遣返聲請的開支在過去五年大幅增加260%；預計在2016-17年度超過11億元（2011-12年度的開支為3億1千5百萬元）。

26. 免遣返聲請亦對社會構成影響。在2016年，共有1 506名獲擔保外釋的非華裔人士（絕大部份為免遣返聲請人[17]）因干犯盜竊、嚴重毒品罪行、傷人和嚴重傷人等刑事罪行被警方拘捕，較2015年（1 113名）及2014年（665名）分別上升35%及126%。另外，共有302名獲擔保外釋的非華裔人士因非法工作[18]而被入境處拘捕，較2015年（232名）及2014年（166名）分別上升30%及82%。就罪案率而言，在2016年，每1 000名正在擔保外釋的非華裔人士有88.7人被捕；相比之下，每1 000名十歲或以上的香港人口有4.91人被捕，而每1 000名訪港旅客有0.07人被捕。有關數字會定期更新及按需要發佈。

27. 香港特區政府歡迎公眾討論有關數字應如何解讀，或是否應進一步蒐集其他統計數字以供公眾參考。但是，在毫無具體證據的情況下指控香港特區政府「發放具誤導性數字」（而沒有指明哪些數字具誤導性及有關數字如何構成誤導），香港特區政府絕對不會接受。事實上，其他西方國家（例如：英國[19]及美國[20]）的執法機關亦會利用拘捕數字來分析某些人口群組的犯罪情況。

入境時沒有旅行證件或持有偽造證件，他們將被強制拘留，直到他們被判斷為有「可信的恐懼」。

[17] 在2016年年底，在16 972名正在香港擔保外釋的非華裔人士中，有16 755人（99%）曾提出免遣返聲請以抗拒被遣返。

[18] 違反《入境條例》（第115章）第38AA條，當中訂明非法入境者或獲發出遣送離境令或遞解離境令的人，均不得接受僱傭工作或開設／參與業務。

[19] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/219967/stats-race-cjs-2010.pdf

[20] https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-43

28. 為免生誤會，「非華裔非法入境者」一詞在香港已沿用數十年，以便區分從中國其他地區非法來港的華裔非法入境者。

29. 如上文第 2 段所述，若考慮到香港面積細小且情況特殊，免遣返聲請人大幅增加（超過 300%）的現象是非常顯著，必須注視。以每平方公里土地接獲的聲請計算，香港所接獲的聲請（2015 年為每平方公里 4.6 宗聲請），比德國 2015 年難民危機的高峰時（每平方公里 1.2 宗庇護申請[21]）高出三倍，情況令公眾甚為關注。不同區議會已通過動議，促請香港特區政府採取行動。由 2014 年至 2016 年期間，立法會曾 26 次討論有關事宜，包括向政府提出口頭／書面問題、動議辯論及在保安事務委員會進行討論。2016 年 10 月 28 日，立法會內務委員會亦通過就該議題成立小組委員會跟進。為令公眾知悉有關問題的性質及尋求最佳的解決辦法，這些討論實屬必須。至於針對立法會議員或個別公眾人士的具體論述而提出的批評，香港特區政府不便代為回應，但相信特別報告員在作出任何定論前，會確保有關批評有事實根據。

30. 我們於 2016 年 11 月向立法會保安事務委員會提交的最新討論文件，載於**附錄 II** 以供參考。

31. 有關情況所引起的公眾關注不難理解，亦非針對任何特定種族、國籍或宗教背景的人。香港特區政府發放免遣返聲請人數字、相關開支和犯罪情況等資料時，除指出聲請人為非法入境者或逾期逗留者外，從未以任何方式把資料與任何特定種族、國籍或宗教拉上關係。特別報告員來函的附件引述的數份文書，在國際法下均沒有約束力。而無論如何，香港特區政府絕不會以種族、國籍或宗教等理由歧視非法入境者或逾期逗留者。特別報告員應注意，在*香港特別行政區 訴 Tarok Das* (2015)[22]一案中，法庭亦關注到部份外國人非法進入香港，或合法進入香港但在簽證限期後逾期逗留，他們在被發現或被拘捕時才提出免遣返聲請，即使聲請難以確立，以達到迴避或抵抗法律程序及/或繼續留在香港的目的。法院在該案的判辭中指出：「政府需採取更多措施，將無理及無意義的聲請篩走。正如本人(即法官)先前指出，此問題已嚴重影響法院、法律制度、以及社會大眾。而且，審核機制被無理甚至別有用心的聲請人濫用的風險不容忽視。」

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[21] 根據歐盟統計局的資料，德國土地面積 357 000 平方公里，2015 年接獲 441 800 宗庇護申請。

[22] *HKSAR v Tarok Das*, HCMP 1872/2015, 11 August 2015

32. 針對有關情況，行政長官在2016年施政報告中宣布，香港特區政府會全面檢討處理免遣返聲請的策略。檢討將涵蓋以下四個主要範疇：

(a) 入境前管制：減少非法入境者及入境風險高的外國人抵達香港；

(b) 審核程序：修訂法例，提升審核程序的效率，並在完成修例前加快審核；

(c) 羈留：考慮推行措施，加強羈留非法入境者的能力；及

(d) 執法及遣返：採取有效的執法措施打擊非法活動（包括非法工作），並確保聲請被拒絕的人盡快被遣返。

33. 在（a）方面，香港特區的執法部門已加強打擊人蛇集團及非法入境的執法行動，修訂法例加重針對人蛇集團成員的懲罰，以及實施網上預辦入境登記系統，以防止入境風險高的旅客啟程來港。

34. 在（b）方面，我們會參考統一審核機制運作至今的經驗，檢討現有的審核程序。我們留意到，近年全球不少地區均面對移民湧入帶來的挑戰，很多政府已修訂法律應付有關挑戰。我們當然亦會在檢討中參考這些經驗。

35. 在（c）方面，我們會物色適當的設施，並檢討有關羈留非法入境者的法律條文。

36. 在（d）方面，如上述第8段所述，非法入境者及逾期逗留者（不論是否已提出免遣返聲請）均不能在香港工作，僱用他們亦屬刑事罪行。我們已加強執法，打擊有關非法受僱活動。至於遣返方面，我們正積極研究方案，以更有效的方法將免遣返聲請已在統一審核機制下獲得充份考慮而最終被拒絕的非法入境者及逾期逗留者遣返。聲請尚未獲最終裁決的人不會被遣返。

37. 有關檢討的概要載於**附錄II**文件的**附件D**。

38. 香港特區政府一直就全面檢討下提出的具體建議向相關持份者進行諮詢／簡介。香港特區政府現正展開修訂《入境條例》的工作，以改善審核程序，期望於2017-18年度會期內向立法會提交修訂條例

草案。進行全面檢討期間，香港特區政府定會繼續邀請所有相關持份者參與討論。無論如何，所有改善審核程序的措施必須合乎由終審法院訂立的「高度公平標準」。因此，特別報告員毋需顧慮「全面檢討未必能充份顧及免遣返聲請人受到保護的需要」。

人道援助

39. 人道援助方面，社會福利署與非政府組織合作為免遣返聲請人提供實物援助，讓有關人士不致陷於困境。援助計劃的範圍涵蓋聲請人的基本需要，包括住屋津貼、食物券、衣物、其他基本日用品、交通津貼及輔導服務等。有需要的聲請人經醫院管理局或社會福利署評估後可申請減免公立診所或醫院的醫療費用。難以在可見將來被遣返的未成年人若提交就學申請，會由教育局處理。

執法機關的訊問

40. 另外，有指便衣人員在沒有身份證明文件的情況下訊問免遣返聲請人，特別報告員應留意，執法人員如穿着便服，一律須在執行職務及行使權力時表明身份及出示委任證。即使執法人員身穿制服，除非當時情況不容許或有關要求並不合理，否則他們亦應在市民要求時表明身份及出示委任證。在 2015 年及 2016 年，入境處及警方並無接獲擔保外釋的非華裔人士提出任何有關「執法人員沒有透露身份」的投訴。除非有關指控具有事實根據，否則純屬傳聞，不應理會。

41. 香港特區政府對特別報告員在事前已有既定立場，認定香港特區政府採用「具煽動性的言詞」及採取「系統性做法……以鼓吹民族、種族及宗教仇恨而構成煽動歧視及敵視」，表示極度遺憾。特別報告員在聽取香港特區政府（作為被指控的一方）的回應前，並在毫無事實根據下已對香港特區政府存有偏見，無助特別報告員履行其職責。

促進社會和諧

42. 如上所述，在目前情況下，免遣返聲請人所引起的公眾關注與種族、國籍或宗教完全無關(亦並非針對他們的種族、國籍或宗教)，更不涉及少數族裔共融及社會和諧的問題。然而，為了完整起見，香港特區政府在促進種族平等方面所作的努力簡述如下。

43. 在2008年制定的《種族歧視條例》規定，任何人如在指定範疇，包括僱傭，教育，貨品、設施或服務的提供，以及處所的處置或管理，基於另一人的種族而歧視該人，即屬違法。該條例亦將種族騷擾以及中傷列作違法。香港特區政府堅決維護意見和表達的自由，同時香港特區的法律也有足夠的保障措施和條文，以有效地懲處或遏止任何涉及暴力的種族主義行為。《種族歧視條例》進一步加強現有的法例，並將任何人藉公開活動，基於另一人或屬某類別人士的成員的種族，而煽動對該另一人或屬該類別人士的成員的仇恨、嚴重的鄙視或強烈的嘲諷列作違法。此外，條例也禁止任何人作出嚴重中傷的行為，即威脅損害另一人的身體、財產或處所，又或煽動其他人威脅損害該另一人的身體、財產或處所。根據《種族歧視條例》第46條，任何人基於他人的種族而作出嚴重中傷行為，即干犯刑事罪行，最高可被判罰款100,000元及監禁兩年。

44. 香港特區政府確信，立法工作必須與公眾教育及社區支援工作相輔相成，方能推動共融。民政事務局於2002年成立種族關係組，為「促進種族和諧委員會」提供秘書處服務，以及提供或資助一連串的服務，例如少數族裔人士支援服務中心、社區支援小組、語文課程及電台節目，推廣種族和諧並協助少數族裔人士融入社會。香港特區政府並通過與少數族裔羣體的恆常接觸、「促進種族和諧委員」會和「少數族裔人士論壇」，與少數族羣保持溝通。

香港特區政府
2017年2月

附錄I

對特別報告員所引述的文書的意見

- 《1951年關於難民地位的公約》及該公約《1967年議定書》從來不適用於中華人民共和國（「中國」）轄下的香港特別行政區（「香港特區」），中國並無責任在香港特區履行該公約所訂明的義務。

- 特別報告員所引述《公民權利和政治權利國際公約》適用於香港的有關規定，受聯合王國（即英國）政府於1976年將該公約引伸至香港時作出的保留條文所限制：「聯合王國政府保留權利，不時按其需要，繼續實施有關管制進入聯合王國、逗留於及離開聯合王國的出入境法例。因此，聯合王國政府接納公約第十二條四款及其他條文，惟聯合王國對當時無權進入及在聯合王國停留人士法例規定，必須得以實施。聯合王國亦就其每一屬土，保留同樣的權利。」中國政府於1997年6月20日去信通知聯合國秘書長，該公約適用於香港的有關規定（包括上述保留條文）在1997年7月1日後仍然繼續有效。

- 香港特區政府設有合乎「高度公平標準」的審核機制，充分履行《禁止酷刑和其他殘忍、不人道或有辱人格的待遇或處罰公約》第3條所訂明的義務。

- 香港特區政府並不涉及任何《消除一切形式種族歧視國際公約》第1(1)條所指的「種族歧視」行為，故該公約的相關條文（尤其是第2(1)、4、5及7條）與本港的情況無關。即使香港特區政府的公眾發佈被個別人士認為是「負面」（香港特區政府強烈反對有關指控），有關公眾發佈的目的仍然是就非法入境者抗拒遣返的問題展開客觀的討論，而非歧視任何特定的種族、國籍或宗教。

- 至於特別報告員所提述的其他文書，包括聯合國人權事務委員會的一般性意見、聯合國消除種族歧視委員會的一般性建議、聯合國特別報告員的報告、聯合國大會的決議、聯合國人權理事會的決議及聯合國關於民族或族裔、宗教和語言上屬於少數群體的人的權利宣言（1992），在國際法上均不具有約束力，亦不帶來任何國際義務。無論如何，香港特區政府並沒有以種族、國籍或宗教為理由歧視非法入境者或逾期居留人士，因此特別報告員來函附件所引述的文書一概不適用。

立法會 CB(2)110/16-17(06)號文件

2016年11月11日
討論文件

立法會保安事務委員會

全面檢討處理免遣返聲請的策略

目的

本文件向委員簡介非華裔非法入境者及審核免遣返聲請的最新情況，以及標題所述的全面檢討的進度。

最新情況

2. 非華裔非法入境者的人數，自2014年起大幅增加，由2013年之前每年平均500至1 000名，增加至2014年的1 984名，2015年更上升至3 819名。在2016年首十個月，有2 046名非華裔非法入境者自首或被截獲，比去年同期減少約33%[1]。自2016年年初起，警方和入境事務處（入境處）加強打擊偷運人蛇來港的犯罪集團（見下文第6段）後，有關數字自本年第二季起明顯下跌。詳情見附件一。

3. 免遣返聲請方面，在2016年首十個月，入境處接獲3 481宗聲請，較去年同期減少約15%[2]。由統一審核機制自2014年3月實施至2016年8月底(共30個月)，每月平均接獲426宗聲請。2016年9月和10月則分別接獲198宗及186宗。詳情見附件二。

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[1] 在2015年首十個月，有3 057名非華裔非法入境者自首或被截獲。

[2] 在2015年首十個月，接獲的聲請有4 118宗；全年則共有5 053宗。

4. 截至2016年10月底，尚待入境處審核的聲請有10 675宗，當中7 054宗（66%）是在統一審核機制於2014年3月實施後提出的新聲請。此外，3 954宗由聲請被拒絕的人提出的上訴尚待酷刑聲請上訴委員會（上訴委員會）裁決。尚待審核的聲請人當中，51%的入境身份為非華裔非法入境者（主要來源國家包括越南、巴基斯坦和孟加拉），44%為逾期逗留人士（最主要來源國家是印度）[3]。聲請人的背景和相關統計數字載於附件三。

全面檢討

5. 政府曾於2016年2月向保安事務委員會作簡報[4]，將針對四個範疇進行全面檢討，包括(a)入境前管制、(b)審核程序、(c)羈留，以及(d)執法及遣送。我們將於以下各段闡述現時工作和未來的計劃。全面檢討的概要載於附件四。

入境前管制

6. 尚待審核的免遣返聲請人當中，約有一半為偷渡來港的非華裔非法入境者，主要來自越南、巴基斯坦和孟加拉等須持簽證來港國家。鑑於不少非華裔非法入境者經由內地進入香港，自2016年年初起，本港執法機關與內地當局合作，加強執法打擊安排偷運非華裔非法入境者來港的犯罪集團[5]。如上文第2段所述，有關措施已初見成效。執法機關會維持執法力度，防止非華裔非法入境者再大幅上升。

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[3] 其餘主要為抵港時被入境處拒絕入境的人。

[4] 見立法會CB(2)648/15-16(05)號文件。

[5] 自2016年2月進行了四次大型聯合行動，在內地和香港共拘捕264名疑犯，包括87名人蛇集團核心成員；同時，在內地拘捕了接近10 000名非華裔非法入境者。

7. 其餘一半的聲請人主要是逾期逗留人士，即（以旅客身份或持其他有效簽證）合法進入香港，但沒有在逗留期限屆滿前離開的外國人，當中超過 30%為印度籍旅客。

8. 目前，印度籍旅客可免簽證來港（逗留最多 14 天）。換言之，他們只要持有有效護照，便可來港。抵港後（即使在管制站被拒入境）隨即可提出免遣返聲請。對所有印度護照持有人實施簽證規定是其中一個應對辦法，但為顧及印度與香港緊密的經濟和社會聯繫，現時我們暫未打算實施簽證規定。不過，我們計劃向準備訪港的印度護照持有人實施新的入境前登記規定[6]，以防止入境風險較高（例如可能逾期逗留／提出免遣返聲請）的印度籍旅客登機或登船來港。

9. 有關規定實施後，印度護照持有人須通過網上系統辦理入境前登記，否則不能免簽證來港[7]。在辦理網上申請時，申請人需提供相關的個人資料、出入境及旅遊記錄、訪港行程等資料。該系統會根據申請人所提供的資料，進行風險評估[8]。預計在大部份情況下，申請人應可即時得知申請結果。如果申請成功，申請人可列印入境前登記批准通知書，在登機或登船時使用。未能辦妥入境前登記（或未持有有效簽證）的印度護照持有人，不會獲准登機或登船來港[9]。

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[6] 加拿大和美國近年均已推出類似系統。

[7] 根據《入境條例》第 5(4)條（及第 2A(1)條），任何人（除永久性居民外）抵港並接受訊問時須出示有效的旅行證件。該條例第 61 條訂明，除非證件上有簽證，或該證件的持有人已取得簽證，否則該證件不屬有效旅行證件，但入境處處長可就上述簽證規定向任何人或任何界別或種類的人給予豁免。入境前登記規定實施後，只有「持有有效印度護照並已辦妥入境前登記」，或屬於下文註 9 所豁免的印度籍旅客，方可獲豁免簽證。

[8] 入境處的入境前登記系統，會按照申請人所提供的資料，以及處方就來自印度的免遣返聲請人和逾期逗留人士的背景所進行的持續分析的數據，決定該人是否屬於入境風險高的組別。有關的評估準則，會按最新趨勢不時修訂。

[9] 以下人士可獲豁免，毋須進行入境前登記而可繼續享有免簽證待遇：(a)外交及公務護照的持有人；(b)來港辦理聯合國公務的聯合國通行證

10. 我們計劃最快於2017年年初實施入境前登記。推出登記系統前，我們會向本港的印度社群、航空公司及船公司、旅遊業和商界等持份者作出簡介，以確保他們充分了解有關要求。我們亦會考慮採取適當措施，在印度宣傳入境前登記的規定。

審核聲請

11. 政府已開始檢討《入境條例》(第115章)中有關審核聲請的程序(包括上訴程序)及相關事宜的法律條文。我們會參考統一審核機制的運作經驗及其他國家的相關法律條文及做法，在2016-17年度草擬有關法案，並計劃在2017-18年度內向立法會提交條例草案。

12. 在經改善的法定審核機制實施前，我們需加快審核聲請，減少積壓個案的數目(或至少令個案不再繼續累積)。統一審核機制於2014年3月實施後，入境處於2014-15年度決定了1 509宗聲請，於2015-16年度決定了2 201宗，預計於2016-17年度可決定約3 000宗。按此進度審核聲請，積壓的聲請個案會繼續增加。

13. 為此，入境處已完成內部檢討，以進一步加快審核聲請。首先，入境處已獲得額外資源，以增派人手加快審核聲請。第二，入境處會盡量簡化程序，善用現有資源。入境處估計，通過上述兩項措施，2017年年初起，聲請處理量可從2016-17年度的3 000宗(每日13宗)增加75%至2017-18年度的5 000宗或以上(每日23宗或以上)。

14. 為增加個案處理量75%至每年5 000宗或以上，政府須確保為聲請人提供的傳譯服務和公費法律支援亦會相應增加。傳譯服務方面，入境處現正增聘操不同語言的全職傳譯員[10]，以處理更多個案。

持有人；(c)香港旅遊通行證持有人；以及(d)已登記使用e-道服務的人。

[10] 政府亦已建議當值律師服務考慮聘用全職傳譯員，但該機構決定不採納有關建議。

15. 根據2008年的一宗裁決，政府須為聲請人提供公費法律支援[11]。為此，當值律師服務[12]自2009年起推行免遣返聲請人（前稱酷刑聲請人）法律支援計劃（當值律師服務計劃）。2015年，當值律師服務計劃名冊內490名曾受相關培訓的律師，為約2 500名聲請人提供支援（即每名律師每年平均處理5.2宗個案）。如入境處將處理量提升至每日23宗，則每名律師平均需處理的個案會增加至每年約10宗。我們估計，現時律師名冊應該足以應付新增的工作量[13]。同時，我們亦會邀請法律界繼續舉辦相關培訓，讓其他律師日後可加入名冊。

16. 我們已建議當值律師服務增加處理量，但獲悉該機構在招聘和挽留人手（特別是法庭聯絡主任職級）方面面臨重大困難。因此，當值律師服務難以在2017年年初將轉介至律師的個案量由每日13宗增加至23宗。

17. 為盡早加快審核工作，政府打算以試驗形式設立一個由同一批律師組成的輔助名冊，以補當值律師服務計劃的不足。我們會邀請當值律師服務現有名冊內的所有律師加入新設立的輔助名冊，並盡量按當值律師服務現有的分派原則將個案分派至輔助名冊下的律師[14]。設立輔助名冊的目的，是讓當值律師服務計劃名冊內已受訓練和經驗豐富的律師可以同時為更多聲請人（每日增加10宗）提供公費法律支援，務求盡快減少積壓個案，同時可確保所提供的法律支援維持一貫質素及標準。

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[11] 高等法院原訟法庭在 *FB 等人 訴 入境事務處處長* (2009) 2 HKLRD 346 一案中裁定「(政府)不向無法承擔律師費的聲請人提供公費法律代表的政策，既不合法，亦違反政府按高度公平標準審核聲請的責任」。

[12] 當值律師服務是由政府全數資助的機構，在法律援助署提供的法律援助以外，提供四項法律援助計劃，包括當值律師服務計劃、法律諮詢計劃、電話法律諮詢計劃及免遣返聲請人法律支援計劃。當值律師服務由執委會負責管理，執委會成員全由香港大律師公會和香港律師會委任，日常運作則由一名全職總幹事負責。

[13] 據了解，當值律師服務規定名冊內每名律師最多可同時處理 25 宗聲請，遠高於目前或預計每年所需處理的聲請數目。

[14] 當值律師服務計劃主要是將聲請個案輪流分配至名冊下的當值律師。

18. 參考當值律師服務計劃的經驗，為確保輔助名冊的運作更加靈活，以應付日後可能出現聲請急增的情況，我們會盡量簡化試驗計劃的行政工作，減少不必要的行政架構及開支。首先，為簡化運作及節省行政和會計開支，輔助名冊內的律師每接辦一宗個案，會獲支付一筆標準律師費（而非按時數收費）。第二，除標準律師費以外，我們會就每宗個案向律師提供一筆法律行政支援津貼（而非由試驗計劃直接聘請法庭聯絡主任或其他行政人員提供有關服務）。我們已向香港大律師公會和香港律師會簡介有關建議的框架，並會繼續就運作細節與兩個律師會及當值律師服務保持聯絡，期望於2017年年初推出試驗計劃，令入境處可盡快將聲請處理量提升75%至每年5 000宗或以上。

19. 另外，自2016年7月至今，政府已委任24名新委員加入上訴委員會，令委員人數增加至現時的52人，以應付上訴委員會持續增加的工作量，並為入境處即將進一步增加個案量做好預備。我們預期，入境處每年就更多聲請作出決定後，上訴委員會的工作量會進一步增加。為此，我們會繼續增加上訴委員會的委員，確保處理上訴的工作不會成為審核程序的另一個樽頸[15]。

羈留、遣送及執法

20. 入境處不斷加強採取執法行動，打擊非法勞工和僱主。在2016年首十個月，入境處展開了476次針對非華裔非法勞工的行動（包括與其他執法機關進行的聯合行動）（較2015年同期增加71%），拘捕了421名非華裔非法勞工和254名本地僱主，分別較2015年同期增加26%及44%。同時，我們已加強宣傳工作，提醒僱主僱用不可合法受僱的人是刑事罪行，可被判即時監禁。

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[15] 為配合入境處計劃將聲請處理量提升至每年 5 000 宗，預計上訴委員會於 2017-18 年度將會接獲 4 500 宗或以上的上訴。

21. 此外，我們會從法律、資源、公眾安全等角度，研究不同措施，以羈留更多非法入境者（包括免遣返聲請人）及為羈留設施的管理提供更有效的支援。入境處亦已開始檢討遣送程序，以確保可盡快將聲請被拒絕的人遣離香港。

諮詢意見

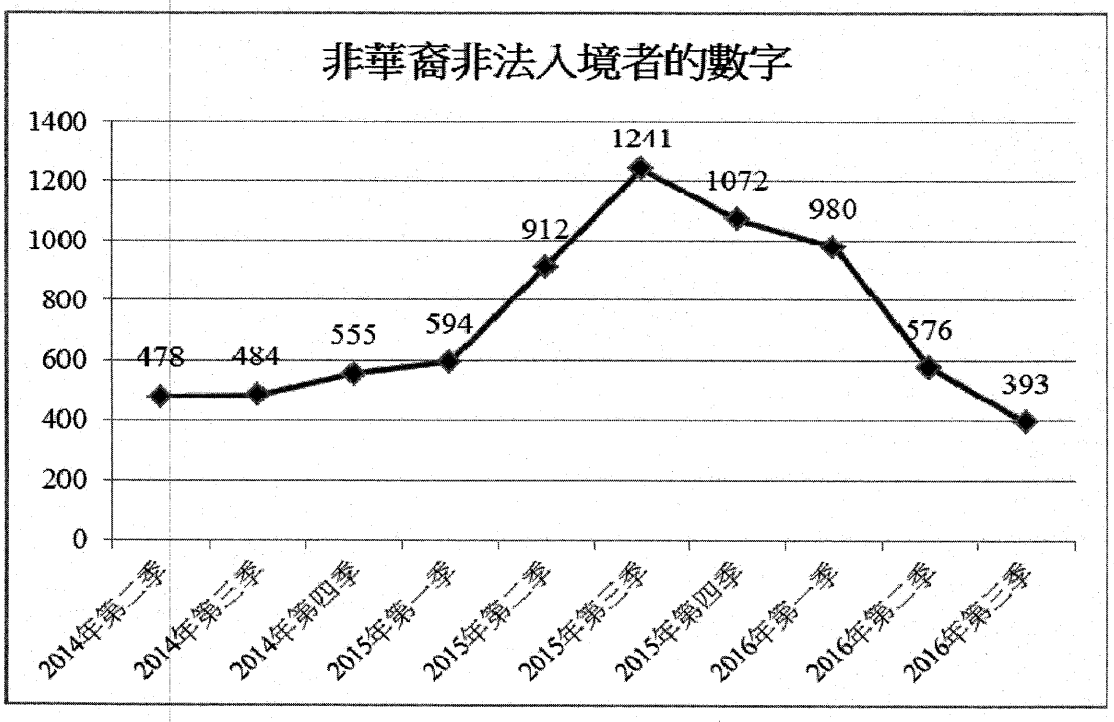
22. 政府計劃實施入境前登記系統，以防止高入境風險的旅客啟程來港，並計劃設立輔助名冊提供公費法律支援，以支援入境處於2017年年初將決定聲請的數目增加75%至每年5 000宗或以上。請委員提供意見。

保安局
2016年11月

附件一

非華裔非法入境者的季度統計

季度	非華裔非法入境者的人數	與對上一季的百分比變化	與去年同一季度的百分比變化
2014 年第二季	478 名	/	/
2014 年第三季	484 名	+1%	/
2014 年第四季	555 名	+15%	/
2015 年第一季	594 名	+7%	/
2015 年第二季	912 名	+54%	+91%
2015 年第三季	1 241 名	+36%	+156%
2015 年第四季	1 072 名	-14%	+93%
2016 年第一季	980 名	-9%	+65%
2016 年第二季	576 名	-41%	-37%
2016 年第三季	393 名	-32%	-68%



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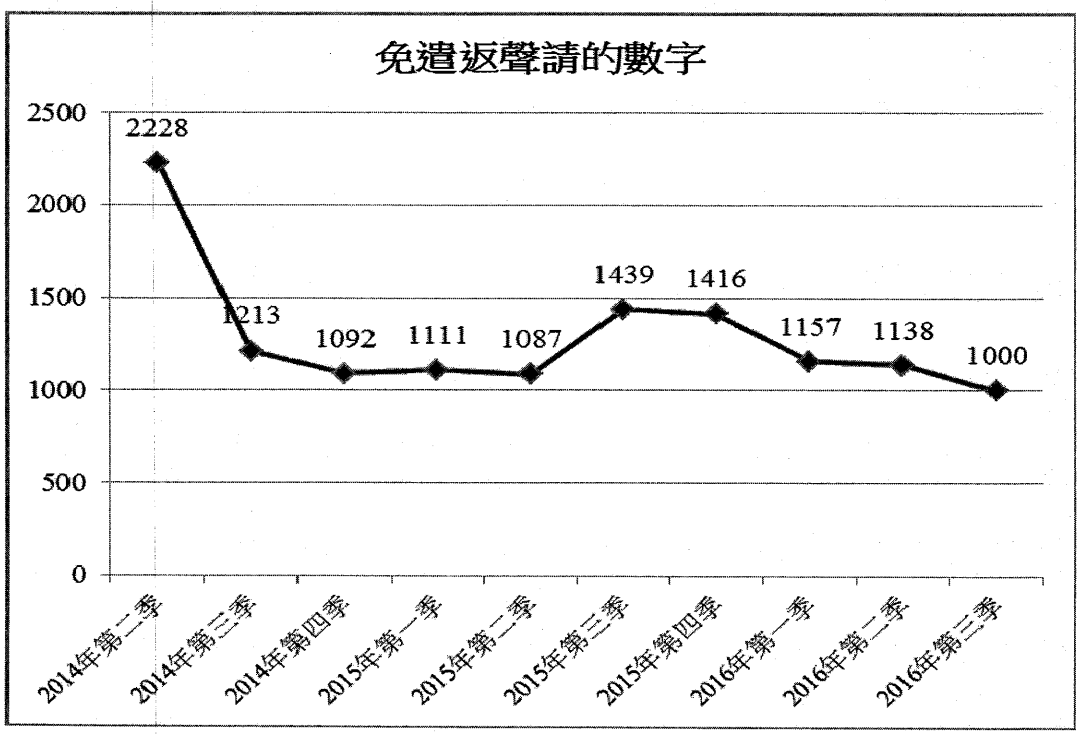
附件二

免遣返聲請的季度統計

季度	接獲聲請數目	與對上一季的百分比變化	與去年同一季度的百分比變化
2014 年第二季	2 228 宗	/	/
2014 年第三季	1 213 宗	-46%	/
2014 年第四季	1 092 宗	-10%	/
2015 年第一季	1 111 宗	+2%	/
2015 年第二季	1 087 宗	-2%	-51%
2015 年第三季	1 439 宗	+32%	+19%
2015 年第四季	1 416 宗	-2%	+30%
2016 年第一季	1 157 宗	-18%	+4%
2016 年第二季	1 138 宗	-2%	+5%
2016 年第三季	1 000 宗	-12%	-31%



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附件三

免遣返聲請人的概況

統一審核機制在2014年3月3日實施。截至2016年10月31日，共有10 675宗免遣返聲請尚待入境處審核。聲請人的概況分析如下：

(a) 性別

男	7 652	71.7%
女	3 023	28.3%

(b) 年齡

<18	556	5.2%
18 – 30	3 720	34.8%
31 – 40	4 191	39.3%
>40	2 208	20.7%

(c) 國籍

印度	2 105	19.7%
越南	2 080	19.5%
巴基斯坦	2 024	19.0%
孟加拉	1 295	12.1%
印尼	1 067	10.0%
菲律賓	484	4.5%
尼泊爾	303	2.8%
斯里蘭卡	294	2.8%
岡比亞	141	1.3%
尼日利亞	138	1.3%
其他	744	7.0%
總數	10 675	100%

(d) 入境身份

非法入境者	5 391	50.5%
逾期居留	4 665	43.7%
其他	619	5.8%

(e) 由進入香港（包括非法入境）至提出聲請的時間

3 個月以下	4 619	43.3%
3 – 12 個月	2 980	27.9%
13 – 24 個月	960	9.0%
兩年以上	1 272	11.9%
資料不詳	844	7.9%

相距時間平均為 11 個月

酷刑／免遣返聲請統計數字
（截至 2016 年 10 月）

年份	接獲聲請	完成審核	撤回或 無法跟進	尚待處理 (截至年底)
2009 年年底				6 340
經改善的行政機制實施時 (其後於 2012 年 12 月成為法定機制)				
2010 年至 2013 年	4 906 *(註 1)*	4 534	3 920	2 792
2014 年(1 月和 2 月)	19	221	89	2 501
行政及法定機制下的酷刑聲請總計	*4 925*	*4 755*	*4 009*	*2 501*
統一審核機制實施時 (自 2014 年 3 月起)				
在統一審核機制實施之前以其他理由提出免遣返聲請，例如受到不人道處遇或受迫害而提出免遣返聲請	4 198			6 699 (=2 501 + 4 198)
2014 年(3 月至 12 月)	4 634	826	889	9 618
2015 年	5 053	2 339	1 410	10 922
2016 年(1 月至 10 月)	3 481	2 483	1 245	**10 675**
統一審核機制實施後總計 *(至 2016 年 10 月底)*	13 168 *(註 2)*	5 648 *(註 3)*	3 544	

註 1： 2010 年至 2013 年，入境處共接獲 4 906 宗酷刑聲請，平均每月 102 宗。統一審核機制實施至 2016 年 10 月底（32 個月），入境處共接獲 13 168 宗免遣返聲請，平均每月 412 宗，上升 304%。

註 2： 入境處所接獲的 13 168 宗免遣返聲請中，1 670 宗(13%)由酷刑聲請（或曾向聯合國難民公署提出的庇護申請）已被拒或撤回的人提出，11 498 宗(87%)為新聲請。

註 3： 在 5 648 宗已決定的免遣返聲請中，43 宗獲確立（包括 5 宗在上訴後獲上訴委員會確立）。在其餘 5 605 宗已被拒絕的聲請中，3 925 人已向上訴委員會提出上訴、989 人已離港或正被安排遣離、691 人因其他原因仍然在港（如在囚、被檢控、提出司法覆核等）。

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附件四

全面檢討處理免遣返聲請策略的大綱

入境前管制

為從源頭解決問題，我們須防止經濟移民展開他們的旅程（或阻止他們抵達香港），並阻嚇任何協助他們的人。經仔細分析聲請人的背景及抵港途徑，我們會考慮：

(a) 引入入境前登記的規定；以及在有需要時作其他配套檢查措施，避免可能成為非法入境者的人登機或登船；

(b) 與聲請人的主要來源國家及他們來港途經的國家或地區的有關部門聯繫，加強打擊人蛇集團；及

(c) 按需要檢討簽證或免簽證安排。

2. 除此以外，我們已修訂《入境條例》（第 115 章）第VIIA部下「未經授權進境者」的定義，令偷運來自越南及內地以外任何主要來源國的非法入境者的人蛇集團[16]接受同樣嚴厲的刑罰。

審核程序

3. 針對已進入香港及提出免遣返聲請的人，我們既需要繼續確保審核程序合乎法律要求的高度公平標準，同時也要加快所有個案的審核程序，以及阻嚇明顯濫用程序的人。根據自二零零九年起累積的審核經驗，以及參考其他普通法地區的做法，我們會考慮就以下方面修訂《入境條例》第 VIIC 部：

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[16] 在一九七九年及一九八零年宣布的《入境（未經授權進境者）令》（第115D 章）中，「未經授權進境者」只包括來自內地、澳門及越南的非法入境者。我們已修訂有關條文，令「未經授權進境者」的定義涵蓋範圍擴大至（包括在越南以外）八大主要非法入境者來源國，亦即阿富汗、孟加拉、印度、尼泊爾、尼日利亞、巴基斯坦、索馬里及斯里蘭卡（獲豁免者除外）。

(a) 為現時根據《入境條例》[17]第VIIC部運作的統一審核機制訂立法定程序;

(b) 收緊程序，列明每一步的時限，以及禁止濫用程序的行為；

(c) 盡快拒絕明顯無理據的聲請；

(d) 為公費法律支援訂立合適的適用範圍及上限；及

(e) 改善上訴委員會的運作，增加可處理的個案數量。

4. 入境處亦會改善搜集原居國家資料的能力，以協助審核聲請。入境處已與有關國家的政府及非政府組織聯絡，務求建立客觀及可靠的資料庫，儲存來源國家的地區資訊、專題報道及主要事件等資料[18]。

羈留

5. 現時，只有極少數的聲請人會在等候或正在審核期間被羈留。我們會小心考慮釐清及加強入境處羈留聲請人的法定權力[19]，以羈留等候審核，審核或上訴進行中，或審核已

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[17] 現時，統一審核機制按《入境條例》第 VIIC 部的法定程序，一次過審核所有適用風險，包括酷刑風險，以及《香港人權法案》所述的酷刑風險或殘忍、不人道或侮辱之處遇、懲罰或某項絕對及不容減免的權利所禁止的任何其他傷害，以及一九五一年的《難民公約》第 33 條所指的迫害等（有關工作通過根據《入境條例》第 VIIC 部運作的行政機制執行）。

[18] 聲請人就免遣返聲請提供的資料將予保密。根據一般守則，未經聲請人同意，處方不會向任何存在風險國家的政府披露聲請人曾提出免遣返聲請的資料或任何涉及其聲請的資料。

[19] 根據《入境條例》（第 115 章），入境處可因特定目的而羈留一名非法入境者，相關目的包括考慮是否發出遣送離境令（第 32(2A)條）、以受到第 37U 條所指的酷刑對待為由提出免遣返聲請並等候最終裁定（第 37ZK 條）、等候遣送離境（第 32(3A)條）等。終審法院在 *Ghulam Rbani v Secretary for Justice* (2014) 17 HKCFAR 138 一案中裁定，根據《香港人權法案條例》（第 383 章）第 11 條，非法入境者不可以《香

完成但由於各種理由（如提出司法覆核）仍然滯港的聲請人，以減低他們對社會治安的影響，防止他們非法工作，以及確保審核及遣返工作能有效進行。如有關建議在法律上可行，我們會尋找適當的設施進行翻新，令入境處在有需要時可增加羈留的人數。我們亦會考慮如何為羈留設施的管理提供更有效的支援。

押送及遣返

6. 最後，被拒絕的聲請人應盡快被遣離，我們會加強與有關國家領事館的聯繫，以加快遣送程序。我們亦會加強打擊人蛇集團及相關罪行（如非法工作），以及加強在香港及主要來源國家宣傳香港的相關法律及政策，避免潛在聲請人被人蛇集團誤導。

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港人權法案》第 5 條或《基本法》第 28 條為理由挑戰根據《入境條例》羈留他的決定（該案涉及的條文為《入境條例》第 32 條）。但是，終審法院亦同時裁定相關權力受到普通法，特別是 *Hardial Singh* 原則的限制。概括而言，該原則規定入境處只可拘留某人一段合理時間，以達致某個法定目的。此外，在聲請被拒後，而有其他阻礙將他遣返的因素（例如司法覆核）時，該聲請人究竟可否繼續被拘留，此點亦不清晰。

Reply to UN Special Rapporteurs

Refugee Convention has never been applied

The Hong Kong Special Administrative Region ("HKSAR") is a city located in eastern Asia, on the southern coast of the People's Republic of China ("PRC"), facing the South China Sea. Our boundary on the east, the south and the west is a sea boundary; and we share a land boundary with Shenzhen, another city also of the PRC, on the north. With only 1 106 square kilometers of land and a population of 7.3 million (as at 2015), Hong Kong is a very densely populated city with a population density of about 6 760 people per square kilometer (in some more densely populated districts, the population density is up to over 57 000 people per square kilometer). Within the boundary of the HKSAR, there is also 1 650 square kilometers of seas, and over 260 islands of various sizes, giving us over 730 kilometers of coastline.

2. Being one of the most densely populated jurisdictions in the world (with a population density higher than most of the sovereign states in the world) with long coastlines, a liberal visa regime (nationals of around 170 countries / territories may visit Hong Kong visa free; around 60 to 70 million visitors visit Hong Kong per year) and being a regional transportation hub (over 100 airlines operate flights to and from 190 locations worldwide), we must maintain effective immigration control to ensure security of the region, and safeguard the livelihood and employment opportunities of local workers. Preventing illegal immigrants from seeking to enter and remain and effectively removing them, whilst welcoming and facilitating genuine visitors from around the world, are the primary objectives of our immigration policy.

3. Against this unique background, the 1951 United Nations Convention relating to the Status of Refugees ("the Refugee Convention") and its 1967 Protocol have never been applied to Hong Kong. The HKSAR Government and before 1997, the then Hong Kong Government, has a long-established policy of not granting asylum, and not determining or recognising refugee status, and it has absolutely no plans to consider any change in this policy. Hong Kong's situation is best compared with that of city-states (e.g. Singapore, Monaco, Bahrain, etc.) none of which, according to our research, have a comparable screening mechanism in place to handle asylum seekers / claimants for non-refoulement protection. Also, Hong Kong's policy of not granting asylum is not unique in the region: eight of the ten countries in the Association of Southeast Asian Nations (namely, Brunei, Indonesia, Laos, Malaysia, Myanmar, Singapore, Thailand, and Vietnam) are not signatories to the Refugee Convention.

4. On a related note, although the Refugee Convention has never been applied to Hong Kong, we shouldered a major share of the duties during the Vietnamese Boat People crisis during the 1970s to 1990s, not out of any obligation under the Refugee Convention but under a policy of the then British Government. It should also be noted that almost 20 years after the end of the Comprehensive Plan of Action in respect of Vietnamese boat people, the United Nations High Commissioner for Refugees ("UNHCR") still owes us $1.162 billion in outstanding advances made by the then Hong Kong Government.

5. The Special Rapporteurs have, in the Annex to their letter, referred to a number of instruments that are not binding as a matter of international law. To the extent that the HKSAR Government has not engaged in any conduct which discriminates against illegal immigrants or overstayers on the ground of race, none of the relevant provisions in the relevant instruments quoted in the Annex are considered to be engaged for the purposes of the present discussion. Our observations are set out at **Appendix I**.

Eliminating racial discrimination

6. The HKSAR Government is committed to eliminating racial discrimination and promoting equal opportunities for ethnic minorities. In general, it is believed that, in the interest of social harmony, promotion of integration and public education on equality remain the quintessential vehicles for eliminating prejudice and discrimination. On the other hand, the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ("Basic Law"), the Hong Kong Bill of Rights Ordinance (Chapter 383 of the Laws of Hong Kong) ("HKBORO") (which implements the provisions of the International Covenant on Civil and Political Rights ("ICCPR") as applied to Hong Kong) and the Race Discrimination Ordinance ("RDO") (Chapter 602 of the Laws of Hong Kong) provide the legal framework to prohibit racial discrimination.

The legal system of HKSAR

7. The National People's Congress of PRC through the Basic Law authorises the HKSAR to exercise a high degree of autonomy directly under the Central People's Government. The HKSAR enjoys executive, legislative and independent judicial power, including that of final adjudication, in accordance with provisions of the Basic Law. Article 8 of the Basic Law stipulates that "[t]he laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the [HKSAR]". The power of final

adjudication of the HKSAR shall be vested in the Court of Final Appeal ("CFA") established in the Region, and final appeals are heard by the full Court consisting of 5 judges comprising the Chief Justice, three permanent judges, and one non-permanent judge; the CFA may as required invite judges from other common law jurisdictions to sit on the court and a number of distinguished judges from the United Kingdom, Australia and New Zealand have sat and continue to sit as members of the court.

Immigration control

8. To ensure effective immigration control, our Immigration Ordinance (Chapter 115 of the Laws of Hong Kong) provides that any foreigner entering Hong Kong must present himself or herself for examination by an immigration officer ("ImmO") and obtain permission to land, and ImmO may impose specific conditions of stay (e.g. that visitors cannot take paid employment or start a business whilst in Hong Kong) and a limit of stay (e.g. that visitors can only remain in Hong Kong for a certain period of time). Failure to obtain such permission to land renders a person an illegal immigrant, and breaching the imposed limit of stay renders a person an overstayer, both of which contravene the law and are criminal offences[1]. This is, we believe, similar to the laws of almost all countries in the world.

9. Illegal immigrants and overstayers would be removed or deported from the HKSAR as soon as possible. During the removal or deportation process, they may provide reasons to ImmOs as to why they should not be removed from Hong Kong. If they claim that they would face a genuine and personal risk of being subjected to ill-treatment including, torture, cruel, inhuman or degrading treatment or punishment ("CIDTP"), arbitrary deprivation of life, or persecution upon return to a State, they would not be removed from the HKSAR to that risk State pending assessment of their non-refoulement claim under a Unified Screening Mechanism ("USM").

10. Illegal immigrants and overstayers who resist removal by way of making a non-refoulement claim under the USM ("non-refoulement claimants") **are not considered to be "asylum seekers" or "refugees"**. There is no truth

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[1] Section 38(1) of the Immigration Ordinance stipulates that any person who, being a person who may not land in Hong Kong without the permission of an immigration officer, lands in Hong Kong without such permission; or having landed in Hong Kong unlawfully, remains in Hong Kong without the authority of the Director shall be guilty of an offence.

Section 41 of the Immigration Ordinance stipulates that any person who contravenes a condition of stay (including remaining in Hong Kong after his limit of stay has expired) shall be guilty of an offence.

in the assertion that the HKSAR Government has referred to non-refoulement claimants as "refugees" (whether genuine or bogus / fake) or "asylum seekers" in any official publication. There is simply no truth or evidence in support of the allegation that the HKSAR Government has used any negative rhetoric towards refugees (or non-refoulement claimants) or migrants, and we reject such allegation vehemently.

Unified Screening Mechanism

11. Procedures under USM are designed to meet the "high standards of fairness" required by the Courts of Hong Kong, which we understand to be the same standard adopted by the Courts of other common law jurisdictions including the United Kingdom, Canada, Australia, and New Zealand for asylum / protection claims[2], and are modelled on the statutory procedures for torture claims set out in Part VIIC of the Immigration Ordinance, which were passed into law in 2012 by the Legislative Council of the HKSAR ("LegCo") –

(a) First, persons seeking non-refoulement protection are required to complete a claim form setting out their personal information and the risks they fear they would face if they are removed. The Immigration Ordinance currently provides that they have 28 days to complete the form. Pursuant to current administrative arrangements, they are generally given an additional 21 days (increasing the total period to 49 days) to ensure that they have enough time to complete the form. The time frame is much longer than most, if not all, jurisdictions handling asylum / protection claims[3]. The Immigration Ordinance provides that further extensions may be allowed where justified in the circumstances.

(b) They would attend an interview with an ImmO to clarify or elaborate on information provided in the claim form.

(c) The ImmO would then make a decision and will inform the claimants in writing with reasons supporting the decision. If aggrieved, there is a right to lodge an appeal, which would be considered by an

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[2] See *Secretary of State for the Home Department v Thirukumar & Ors* [1989] Imm AR 402, *Sethi v. Canada (Minister of Employment and Immigration)* [1988] 2 FCR 537, *Jorge Murillo-Nunez v Minister of Immigration and Ethnic Affairs* [1995] FCA 1526, *BV v Immigration and Protection Tribunal* [2014] NZCA 594, etc.

[3] In Australia, an asylum seeker must submit a complete form when applying for a protection visa. New Zealand requires asylum seeker to submit a written statement of claim one week before a screening interview (which are normally scheduled four weeks after an asylum claim is lodged). Canada gives asylum seekers a maximum of 15 days to complete a claim form.

independent statutory appeal board (the Torture Claims Appeal Board ("TCAB")).

12. Publicly-funded legal assistance is available to all non-refoulement claimants via a scheme presently operated by the Duty Lawyer Service[4]. Under that scheme, non-refoulement claimants do not need to satisfy a merits test to enjoy publicly-funded legal assistance for first tier screening of their claims by the Immigration Department ("ImmD") (i.e. completion of a claim form, attending screening interview(s) and explanation of the decision to the claimant). It is provided by a roster of over 500 barristers and solicitors who have attended relevant training courses and have sufficient experience in the legal field. On average, lawyers spent over 20 hours on each case. In 2015-16, the Government spent $106 million in provision of publicly-funded legal assistance to non-refoulement claimants. Interpretation / Translation services are provided at public funds throughout the screening process by persons who meet the qualifications laid down by our Judiciary. We note that this is at least on par with, if not over and above, what is provided in almost any other jurisdiction in the world.

13. Members of TCAB comprise entirely of former judicial officers or other legally qualified professionals and operate independently of the HKSAR Government. All persons whose non-refoulement claim is rejected by ImmD may lodge an appeal to the TCAB as of right. All appeals are considered afresh on their merits (as opposed to a review on public law grounds only) either by way of paper review or, in most cases, with an oral hearing. According to TCAB's record, oral hearings were held in over 90% of all appeals determined by TCAB under USM. Just like ImmD, TCAB's decisions are given to the relevant claimant in written form with reasons in support of its findings.

14. We consider that under USM, there are sufficient procedural safeguards to guarantee that non-refoulement claimants have all reasonable opportunities to establish their claim, and which also satisfies the requirements for "high standards of fairness".

15. A non-refoulement claim that has already been thoroughly assessed pursuant to the aforementioned procedures as provided under USM and is

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[4] The Duty Lawyer Service is an organization fully subvented by the HKSAR Government. It was first established in 1978. It is managed by the Hong Kong Bar Association and the Law Society of Hong Kong through a governing council and is administered by a legally qualified Administrator. The Duty Lawyer Service offers four legal assistance schemes to complement the legal aid services provided by the Legal Aid Department. The four schemes are (i) the Duty Lawyer Scheme, (ii) the Legal Advice Scheme, (iii) the Tel-Law Scheme and (iv) the Legal Assistance Scheme for Non-refoulement Claimants.

rejected by ImmD (and has not appealed to or is rejected on appeal by TCAB) would be removed or deported from Hong Kong in accordance with the law.

16. All non-refoulement claims are screened under the same procedures under USM. We reject accusations that any class(es) of non-refoulement claimants are being discriminated against under USM.

Claimants with special needs

17. If the physical or mental condition of a non-refoulement claimant is in dispute (between ImmD/TCAB and the claimant) and it is relevant to the consideration of a claim, a medical examination conducted by a qualified medical practitioner may be arranged by us.

18. ImmD's case officers also received suitable training to attend to special needs of vulnerable claimants as necessary[5]. Claimants are reminded from time to time that, if they wish to have their claims processed expeditiously or have any special needs for their screening, they should approach ImmD to make such a request.

19. The concerned medical practitioners and decision makers have received training courses on non-refoulement claims conducted by relevant experts[6]. The training programmes covered topics such as the Istanbul Protocol[7], the UNHCR Procedural Standards, psychological evidence of violence and handling of survivors of violence and claimants with special needs including minors / children.

Threshold

20. A non-refoulement claim would be substantiated if there are substantial grounds for believing that the claimant would be in danger of being subjected to ill-treatment including torture, CIDTP, arbitrary deprivation of life,

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[5] Examples of assistance by ImmD include: female case officers for those female claimants who allege to have been sexually abused or so request on religious grounds; relative / guardian to accompany minors or incapacitated claimants in interview(s); barrier-free access for disabled claimants; extra accommodation when interviewing children, elderly, or the infirmed; assistance from a social worker or other trained professionals where necessary, etc.

[6] Including medical experts from the Department of Health and the Hospital Authority, representatives from the UNHCR, the United Kingdom Border Agency (now replaced by the United Kingdom Visas and Immigration of the Home Office) and other overseas competent experts.

[7] Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

or persecution if removed to a risk State. In determining each claim, the case officer will take into account all relevant considerations, including the facts and supporting evidence submitted by the claimant and country of origin information, as well as local and overseas jurisprudence.

21. As for the allegation that the threshold for substantiating a claim under USM is "too high", the Special Rapporteurs are invited to note that case officers follow the threshold that was set down by the Courts of HKSAR. In the case of *Ubamaka Edward Wilson v Secretary for Security* (2012)[8], the CFA ruled that a non-refoulement claimant who seeks to "bring himself within the terms of [Article 3 of the Hong Kong Bill of Rights, implementing Article 7 of the ICCPR] on the facts ... must establish (i) that the ill-treatment which he would face if expelled attains what has been called 'a minimum level of severity' and (ii) that he faces a genuine and substantial risk of being subjected to such mistreatment. It is clear that a very high threshold must be surmounted to establish each of those requirements." (paragraphs 171 and 172 of the judgment)[9]. If a claimant considers that his claim has been rejected by ImmD (and/or by TCAB on appeal) applying a wrong threshold, he can challenge the refusal decision by way of judicial review to the Courts. Publicly-funded legal aid is available subject to the same means and merits test applicable to all persons who are in Hong Kong irrespective of their immigration status.

22. Again, the procedures of USM allow all reasonable opportunities for non-refoulement claimants to substantiate their claims, with sufficient procedural safeguards (publicly-funded legal assistance, interpreters, medical examination as required, appeal mechanism, and access to the Courts of HKSAR for redresses, etc.) that are on par with if not more than what are offered in other jurisdictions. Between the commencement of USM in March 2014 to December 2016, 6 383 non-refoulement claims have been determined by ImmD, out of which 49 claims (0.8%) were substantiated. Given the procedural and legal safeguards described above, the alleged "low recognition rate" reflects nothing more than the fact that the unsuccessful non-refoulement claims lodged in Hong Kong are unmeritorious. The situation of Hong Kong, where 80% of non-refoulement claimants originated from South and Southeast Asia (as opposed to, say, the Middle East and Africa), is best compared with other jurisdictions in the region with similar claimant profiles rather than European countries where the geopolitical situations of the neighbouring source

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[8] *Ubamaka Edward Wilson v Secretary for Security*, FACV 15/2011, 21 December 2012.

[9] Citing the judgment of the then House of Lords in *R (Limbuela) v Secretary of State for the Home Department* [2006] 1 AC 396 and the judgment of the European Court of Human Rights in *Al Husin v Bosnia and Herzegovina* [2012] ECHR 232.

countries are completely different. For information, according to UNHCR[10], in 2015, the Republic of Korea made 3 264 determinations (on asylum claims), out of which 24 were recognized (0.7%); whereas Japan made 3 859 determinations, out of which 6 were recognized (0.2%). And, just like Hong Kong, asylum claimants originating from South and Southeast Asia comprise the majority in Japan (79%) and the Republic of Korea (54%). Indeed, it is absurd to accuse the screening procedures as being unfair unless a certain (arbitrarily derived) recognition rate is attained.

Detention

23. When the ICCPR was applied to Hong Kong in 1976, its application to Hong Kong was subject to a reservation relating to immigration legislation governing entry into, stay in and departure from Hong Kong as regards person not having the right to enter and remain in Hong Kong. This reservation has been incorporated into the laws of Hong Kong as section 11 of the HKBORO. Pursuant to the CFA's ruling in *Ghulam Rbani v the Secretary of Justice* (2014)[11], the immigration reservation (as implemented by section 11 of the HKBORO) excludes persons not having the right to enter and remain in Hong Kong from relying on Article 5(1) of the Hong Kong Bill of Rights (implementing Article 9(1) of the ICCPR) to challenge ImmD's detention power under the Immigration Ordinance. That said, in exercising such power, ImmD must observe the common law *Hardial Singh* principles[12]. ImmD's detention policy is publicly accessible on its departmental website. All detention cases are reviewed on a regular basis. As at end of 2016, 435 illegal immigrants (including 53 non-refoulement claimants[13]) were being detained. Over 99% of non-refoulement claimants are released on recognizance pending determination of their claims.

24. It is observed that Hong Kong's policy of releasing illegal immigrants (who has lodged claims for non-refoulement protection) on recognizance is rare among the region; other jurisdictions including Australia, Japan, Thailand, Indonesia, etc. reportedly have in place mandatory detention for illegal

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[10] http://popstats.unhcr.org

[11] *Ghulam Rbani v Secretary for Justice*, FACV 15/2013, 13 March 2014.

[12] The principles have been summarised in *R (I) v Secretary of State for the Home Department* [2003] INLR 196 as follows: "(i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose; (ii) The deportee may only be detained for a period that is reasonable in all the circumstances; (iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention; (iv) The Secretary of State should act with the reasonable diligence and expedition to effect removal."

[13] Pursuant to section 37ZK of the Immigration Ordinance.

immigrants (or certain classes of illegal immigrants) even if they are seeking asylum / international protection[14]. Detention of illegal immigrants (including those seeking asylum / international protection) is also permissible in European countries as provided for under Article 8 of Directive 2013/33/EU[15], as well as the United States[16].

Comprehensive review and consultation with stakeholders

25. The number of non-refoulement claims has surged significantly since the commencement of USM in 2014 – from on average 102 per month between 2010 and 2013 to 463 in 2014 and 421 in 2015 (over 300% increase). Government expenditure arising from the handling of non-refoulement claims in 2016-17 amounts to over $1.1 billion, representing an increase of 260% over the past five years (the expenditure in 2011-12 was $315 million).

26. There are also social implications. In 2016, the Police arrested 1 506 non-ethnic Chinese ("NEC") persons on recognizance (almost all are non-refoulement claimants[17]) for criminal offences including theft, serious drugs offences, and wounding and serious assault etc., representing an increase of 35% over 2015 (1 113) and 126% over 2014 (665). ImmD arrested another 302 NEC persons on recognizance for taking up unlawful employment[18], a 30% increase over 2015 (232) and 82% over 2014 (166). In terms of crime rate, in 2016, there were 88.7 arrests per 1 000 NEC persons on recognizance in Hong Kong, as compared with 4.91 arrests per 1 000 population aged 10 and over and 0.07 arrest per 1 000 visitor arrivals. Such statistics are regularly updated and released to the public upon enquiry.

27. The HKSAR Government certainly welcomes any open discussion on how various statistics shall be interpreted or what further statistics can be collated to inform the community, but we must reject most fiercely accusations against the HKSAR Government for "disseminating misleading statistics" which is made without any specifics as to which numbers released by the

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[14] https://www.globaldetentionproject.org

[15] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=EN

[16] Under the Illegal Immigraton and Immigrant Responsiblity Act, asylum seekers who request protection at U.S. airports and borders or who arrive without travel documents or with false documents are subject to mandatory detention until they are assessed to have a "credible fear".

[17] As at end 2016, amongst all 16 972 non-ethnic Chinese persons who were released on recognizance in Hong Kong, 16 755 (99%) sought to lodge a non-refoulement claim to resist removal.

[18] In breach of section 38AA of the Immigration Ordinance, which prohibits illegal immigrants or persons who are subject to removal or deportation orders from taking any employment or establishing/joining in any business.

HKSAR Government were considered to be misleading, how it misled the community, etc. We also note that law enforcement authorities in other Western countries (e.g. the United Kingdom[19] and the United States[20]) also relied on arrest figures to analyze the crime situation of specific population groups from time to time.

28. To avoid doubt, the term "non-ethnic Chinese illegal immigrants" has been used for decades in Hong Kong, in order to distinguish from ethnic Chinese illegal immigrants who entered Hong Kong illegally from other parts of the PRC.

29. The over 300% increase in the number of persons claiming for non-refoulement is a significant and alarming phenonemon, considering the small size of the HKSAR and our unique circumstances as set out in paragraph 2 above. Hong Kong received three times more claims per square kilometer of land (4.6 claims per square kilometer in 2015) than Germany (1.2 asylum applications per square kilometer[21]) even at the height of its refugee crisis in 2015. The situation has caused considerable public concern. Various district councils passed motions urging the HKSAR Government to take actions. From 2014 to 2016, the LegCo discussed the matter 26 times, including through oral / written questions to the HKSAR Government, motion debates and discussion at the Panel on Security. On 28 October 2016, the House Committee of the LegCo also agreed to form a subcommittee on the subject. These discussions are definitely necessary to inform the public on the nature of the problem and the best ways to address it. As to the specific remarks of LegCo members or other individual members of public, whilst the HKSAR Government is not in a position to respond on their behalf, we trust that the Special Rapporteurs will ensure that any accusations against specific persons or groups are based on true facts before making any findings in this regard.

30. Our latest submission to the Panel on Security of the LegCo in November 2016 is attached at **Appendix II** for your reference.

31. Public concern on the situation is not difficult to understand, and is not aimed at persons on the ground of their race, nationality, or religion. There was never a slightest suggestion in the factual information released by the HKSAR Government that increase in the number of non-refoulement claimants,

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[19] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/219967/stats-race-cjs-2010.pdf

[20] https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-43

[21] According to the Eurostat, Germany, with a land mass of 357 000 square kilometers, received 441 800 asylum applications.

related expenses, relevant crimes situation, etc. are related in any way to any particular race, nationality or religion (other than the fact that they are illegal immigrants or overstayers in Hong Kong). The Special Rapporteurs have, in the Annex to their letter, referred to a number of instruments that are not binding as a matter of international law, and in any event the HKSAR Government has not and does not discriminate against illegal immigrants or overstayers on the ground of race, nationality, or religion. The Special Rapporteurs are invited to note that the Court in *HKSAR v Tarok Das* (2015)[22] raised concern on the cases where a foreign national enters Hong Kong either illegally or lawfully but on a visitor's visa for a limited period, and remains for as long as he can until detected and apprehended, and then makes a non-refoulement claim only after being apprehended by the authorities and in circumstances where on the face of the claim there may be little if any merit to it, for the purposes of avoiding or defying the legal processes and/or to continue to remain in Hong Kong. In this context the Court observed that "[i]t seems more needs to be done to weed out promptly the unmeritorious and unworthy claims. As I (the judge) have previously indicated this is becoming a serious problem for the courts and the legal system in general, as well as for the community, and there is the added risk that the system in place is being abused not only by unmeritorious claimants but possibly by claimants with a more sinister purpose in mind."

32. In response to the situation, the Chief Executive announced in his Policy Address in 2016 that the HKSAR Government would launch a comprehensive review of the strategy for handling non-refoulement claims. In particular, the review will aim to address the situation from four main fronts –

(a) Pre-arrival control: To reduce the number of illegal immigrants or foreigners with high immigration risk from reaching Hong Kong;

(b) Screening procedures: To amend the law to allow more efficient screening of claims, and to strive to speed up screening before the law is amended;

(c) Detention: To consider measures to enhance authorities' capability to detain illegal immigrants; and

(d) Enforcement and removal: To take effective enforcement measures against illegal activities (including unlawful employment) and to

[22] *HKSAR v Tarok Das*, HCMP 1872/2015, 11 August 2015

ensure that rejected claimants are removed from Hong Kong as soon as possible.

33. On (a), law enforcement agencies of the HKSAR have stepped up enforcement actions against human smuggling syndicates and illegal immigration, amended our laws to increase the level of penalties against syndicate members, and introduced an electronic pre-arrival registration system to prevent passengers with high immigration risk from embarking on a voyage to Hong Kong.

34. On (b), we are reviewing the existing screening procedures, taking into account operational experience of USM so far. We note that migrant influxes have presented challenges to many other parts of the world in recent years. Many other governments have introduced legislative measures to address such challenges. Certainly, we will also draw reference to these efforts in our own review.

35. On (c), we will identify suitable facilities and review relevant laws governing the detention of illegal immigrants.

36. On (d), as mentioned in paragraph 8 above, illegal immigrants and overstayers (whether or not they have made a non-refoulement claim) cannot take up employment in Hong Kong. Employing them is also a criminal offence. We have stepped up enforcement against such unlawful employment activities. As regards removal, we are studying ways to more efficiently remove those illegal immigrants and overstayers whose non-refoulement claim has already been thoroughly assessed under USM and is rejected on final determination. Persons whose claim is not yet finally determined will not be removed from Hong Kong.

37. An outline of the review is at **Annex D** to the paper at **Appendix II**.

38. The HKSAR Government has been consulting / briefing relevant stakeholders on specific proposals under the review. The HKSAR Government is now devoting its effort on amending the Immigration Ordinance to improve screening procedures, with a view to introducing an amendment bill to the LegCo within the 2017-18 session. The Special Rapporteurs may rest assured that the HKSAR Government will continue to engage all relevant stakeholders during the comprehensive review. In any event, all enhancement measures must comply with the legal requirement of high standards of fairness laid down by the CFA in screening of non-refoulement claims. There is hence nothing in the Special Rapporteurs' concern that "the comprehensive review ... could lead

to ... insufficient attention for the protection needs" of non-refoulement claimants".

Humanitarian assistance

39. On humanitarian grounds, the Social Welfare Department, in collaboration with a non-governmental organisation, offers in-kind humanitarian assistance to non-refoulement claimants to prevent them from becoming destitute. The assistance programme covers basic needs including accommodation allowance, food coupons, clothing, other basic necessities, transport allowances, and counseling, etc. Claimants in need may be given one-off waiver of medical expenses at public clinics or hospitals, subject to the assessment by the Hospital Authority or the Social Welfare Department. The Education Bureau handles schooling applications from minors who is not expected to be removed from Hong Kong within the near future.

Interrogation by law enforcement agencies

40. As for the allegation that non-refoulement claimants were subject to questioning by individuals in plain clothing purporting to be from the authorities without proof of identity, the Special Rapporteurs are invited to note that all officers of a law enforcement agency shall, if they are in plain clothes, identify themselves and produce their warrant card when they are performing their duties and exercising their powers. Even if they are in uniform, they should do the same upon the request of a member of the public unless the circumstances do not allow or the request is unreasonable. In 2015 and 2016, ImmD and Police have not received any complaint about 'failing to reveal identity' by NEC persons on recognizance in this regard. Little or no weight shall be given to hearsay allegations unless and until substantial facts have been provided.

41. The HKSAR Government expresses our deepest regret to the Special Rapporteurs' predisposed view that the HKSAR Government used "inflammatory rhetoric" and adopted "systematic approach ... to advocate national, racial and religious hatred that constitutes incitement to discrimination and hostility". These prejudices, formed before even hearing the other party, i.e., the HKSAR Government's response, and in any case entirely devoid of factual basis, are certainly not conducive to the Special Rapporteurs' discharge of their mandates.

Enhancing social harmony

42. As stated above, the issue of enhancing tolerance and mutual understanding with ethnic minorities plainly does not arise in the present context as the public concern arising from the influx of non-refoulement claimants is entirely unrelated to (and not aimed towards) their race, nationality, or religion. However, for completeness, the HKSAR Government's effort in promoting racial equality is provided briefly below.

43. The RDO enacted in 2008 provides that it is unlawful to discriminate against a person on the ground of race in specified areas, including employment, education, the provision of goods, facilities or services, and the disposal or management of premises. The RDO also makes racial harassment and vilification unlawful. While the HKSAR Government firmly upholds freedom of opinion and expression, the laws of the HKSAR also contain adequate safeguards and provisions to effectively punish or suppress any racist acts of violence. The RDO further reinforces existing legislation and renders it unlawful for a person, by any activity in public, to incite hatred towards, serious contempt for, or severe ridicule of, another person or members of a class of persons on the ground of race. It also prohibits serious vilification which involves the threatening of physical harm or inciting others to threaten physical harm towards another person, or the property or premises of that other person. Serious racial vilification is a criminal offence under section 46 of the RDO, and carries a maximum penalty of a fine of $100,000 and imprisonment for two years.

44. The HKSAR Government firmly believes that legislation must go hand in hand with public education and support for better integration. In 2002, the Race Relations Unit was set up within the Home Affairs Bureau, both to render secretarial support to the Committee on the Promotion of Racial Harmony and to provide or fund a range of services, such as support service centres for ethnic minorities, community support teams, language courses and radio programmes, to promote racial harmony and facilitate the integration of ethnic minorities in the community. The HKSAR Government also maintains continuing dialogue with ethnic minority groups through regular liaison, the Committee on the Promotion of Racial Harmony and the Ethnic Minorities Forum.

HKSAR Government
February 2017

Appendix I

Observations to instruments referred to by the Special Rapporteurs

- The 1951 Convention relating to the Status of Refugees and its 1967 Protocol have not been applied to the Hong Kong Special Administrative Region ("HKSAR") by the People's Republic of China ("PRC") and the PRC has no obligation whatsoever arising from that Convention vis-à-vis the HKSAR.

- The provisions of the International Covenant on Civil and Political Rights ("ICCPR") referred to by the Special Rapporteurs as applied to HKSAR are subject to the following reservation made by the Government of the United Kingdom when the ICCPR was applied to Hong Kong in 1976: "The Government of the United Kingdom reserve the right to continue to apply such immigration legislation governing entry into, stay in and departure from the United Kingdom as they may deem necessary from time to time and, accordingly, their acceptance of article 12 (4) and of the other provisions of the Covenant is subject to the provisions of any such legislation as regards persons not at the time having the right under the law of the United Kingdom to enter and remain in the United Kingdom. The United Kingdom also reserves a similar right in regard to each of its dependent territories." By a notification on 20 June 1997, the Government of China informed the Secretary-General, *inter alia*, that the provisions of the ICCPR as applied to Hong Kong (including the said reservation) shall remain in force beginning from 1 July 1997.

- With a screening mechanism that meets the high standards of fairness, the HKSAR Government has fully met the obligation imposed by Article 3 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

- The HKSAR Government has not engaged in any "racial discrimination" within the meaning of Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"), and thus we do not consider the relevant provisions of the Convention (particularly articles 2.1, 4, 5, 7) to be engaged in the circumstances. Even if the HKSAR Government has made any public statements which may be interpreted by some as "negative" (which the HKSAR Government vehemently objects), such public statements are for the purposes of engaging in an objective discussion on the situation of illegal

immigrants in Hong Kong resisting to be removed, and not to discriminate against a particular race, nationality, or religion.

- The other instruments referred to by the Special Rapporteur, including General Comments of the UN Human Rights Committee, General Recommendations of the UN Committee on the Elimination of Racial Discrimination, Reports of UN Special Rapporteurs, General Assembly Resolutions, Human Rights Council Resolutions, as well as the 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, are not binding as a matter of international law and do not give rise to any international obligation as a matter of international law. In any event, to the extent that the HKSAR Government has not engaged in any conduct which discriminates against illegal immigrants or overstayers on the ground of race, nationality or religion, none of the relevant provisions in the instruments quoted in the Annex of the Special Rapporteurs' letter are considered to be engaged for the purposes of the present discussion.

LC Paper No. CB(2)110/16-17(06)

For discussion on
11 November 2016

Legislative Council Panel on Security

**Comprehensive review of
the strategy of handling non-refoulement claims**

Purpose

This paper updates Members on the latest situation of non-ethnic Chinese illegal immigrants (NECIIs), screening of non-refoulement claims, and progress of the captioned review.

Latest situation

2. The number of NECIIs has surged since 2014, from an average of some 500 to 1 000 per year before 2013 to 1 984 in 2014 and 3 819 in 2015. In the first ten months of 2016, 2 046 NECIIs surrendered or were intercepted, about 33% lower than the same period last year[1]. In particular, following stepped up efforts since early 2016 by the Police and the Immigration Department (ImmD) targeting syndicates who smuggled NECIIs into Hong Kong (see paragraph 6 below), a visible drop was recorded since the second quarter this year. See **Annex A**.

3. As regards non-refoulement claims, in the first ten months of 2016, 3 481 claims were received, about 15% lower than the same period last year[2]. Whilst the monthly average of the number of claims made since implementation of unified screening mechanism (USM) in March 2014 to end August 2016 (30 months) is 426, in September and October 2016, respectively 198 and 186 claims were made. See **Annex B**.

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[1] In the first ten months of 2015, 3 057 NECIIs surrendered or were intercepted.

[2] In the first ten months of 2015, 4 118 claims were made; 5 053 in total for 2015.

4. As at end October 2016, 10 675 claims were pending screening by ImmD, amongst which 7 054 (66%) were new claims lodged for the first time since implementation of the USM in March 2014. In addition, 3 954 appeals by rejected claimants were pending determination by the Torture Claims Appeal Board (TCAB). By immigration status, 51% of pending claimants are NECIIs (top source countries: Vietnam, Pakistan and Bangladesh) and 44% are overstayers (top source country: India)[3]. A summary of claimants' profile and statistics of claim is at **Annex C.**

Comprehensive review

5. As we explained to the Panel on Security in February 2016[4], the comprehensive review will focus on four areas – (a) pre-arrival control; (b) screening procedures; (c) detention and (d) enforcement and removal. Our efforts so far and our plans ahead are set out in the ensuing paragraphs. An outline of the review is at **Annex D.**

Pre-arrival control

6. About half of all non-refoulement claimants pending screening are NECIIs who entered Hong Kong illegally. The majority of them originated from visa-required countries, e.g. Vietnam, Pakistan, Bangladesh, etc. Since many of them sought to enter Hong Kong via the Mainland, our law enforcement agencies (LEAs) have worked with relevant authorities in the Mainland since early 2016 to step up enforcement against syndicates who make arrangements for the passage of these NECIIs to Hong Kong[5]. As shown in paragraph 2 above, initial results are beginning to show. LEAs will continue to keep up with these enforcement efforts to prevent resurgence of NECIIs.

7. The remaining half of the claimants are mainly overstayers, i.e. foreigners who entered Hong Kong legally (as visitors or otherwise on a valid visa) but have overstayed after expiry of their limit of stay. Over 30% of claimants in this category are Indian visitors.

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[3] The rest are mainly persons refused permission to land by ImmD upon arrival in Hong Kong.

[4] See LC Paper No. CB(2)648/15-16(05)

[5] Since February 2016, four large-scale joint-operations have been conducted, during which 264 suspects were arrested in the Mainland and Hong Kong, including 87 core members of smuggling syndicates. At the same time, almost 10 000 NECIIs were arrested in the Mainland.

8. At present, Indian visitors may visit Hong Kong visa-free (for up to 14 days) as long as they possess a valid passport. Once arrived, they may lodge a non-refoulement claim (even if they are refused permission to land at control points). Imposition of a visa requirement on all Indian passport holders would be one option to address this problem, but we have no such plan at this stage considering the strong economic and social ties between the two places. Alternatively, we plan to introduce a new pre-arrival registration (PAR) requirement[6] for Indian passport holders intending to visit Hong Kong in order to prevent those with higher immigration risks (e.g. those likely to overstay/lodge non-refoulement claims) from boarding a plane or ship to Hong Kong.

9. After implementation, Indian passport holders intending to visit Hong Kong must first apply online for a PAR, without which they would not be able to visit Hong Kong visa-free[7]. During online application, PAR applicants would be asked to provide such information as their personal particulars, immigration and travel history, details of their planned visit to Hong Kong, etc. The PAR system would then conduct a risk assessment based on information provided by the PAR applicant[8], and it is envisaged that in most cases the application result can be returned to them in real time. Successful applicants will then be able to print out the PAR approval slip for boarding. Indian passport holders without their PAR (or valid visa) would not be allowed to board a plane or ship to Hong Kong[9].

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[6] Canada and the United States have also implemented similar systems in recent years.

[7] Pursuant to section 5(4) of the Immigration Ordinance (read together with section 2A(1)), any person (other than a permanent resident) being examined upon arrival shall produce a valid travel document. Section 61 stipulates that a document is not a valid travel document unless it bears, or its holder has obtained, a visa, though the Director of Immigration may exempt from the visa requirement any person or any class or description of person. After introduction of PAR, Indian visitors will be exempted from the visa requirement under section 61(2) only if they are "holders of a valid Indian passport who have successfully registered under PAR", or are otherwise exempted as per footnote 9 below.

[8] Based on information provided by the registrant, the PAR system at ImmD will determine whether he or she belongs to the high immigration risk group, based on ongoing analysis of the profile of non-refoulement claimants and overstayers from India. The criteria may be revised from time to time having regard to ongoing trends.

[9] Persons falling into one of the following categories would be exempted from the PAR requirement and can continue to enjoy the existing visa-free arrangements: (a) Holders of diplomatic and official passports; (b) Holders of United Nations Laissez Passer coming to Hong Kong for official United Nations business; (c) Holders of Hong Kong Travel Pass; and (d) Persons enrolled for e-Channel service.

10. We aim to introduce PAR by early 2017. Briefings for relevant stakeholders including the local Indian community, transport operators, the travel and business sectors, etc. will be conducted prior to system roll out to ensure that they are fully familiarized with its requirements. We will also consider suitable measures to publicize PAR in India.

Screening of claims

11. We have initiated the review of legislative provisions under the Immigration Ordinance (Cap 115) governing procedures on screening of claims (including appeal procedures) and related matters. We aim to draw up legislative proposals within 2016-17, taking into account the operational experience of USM and relevant overseas law and practices, and to introduce a bill into the Legislative Council within 2017-18.

12. Before a revamped statutory screening mechanism is in place, we still need to strive to expedite screening as far as possible, in order to curb the growth of, if not to reduce, the number of pending claims. Following implementation of USM in March 2014, ImmD has determined 1 509 claims in 2014-15 and 2 201 claims in 2015-16, and estimates that it can determine about 3 000 claims in 2016-17. At this speed, the backlog will continue to accumulate.

13. To this end, ImmD has completed an internal review on how to further expedite screening. First, additional resources were obtained to inject more manpower to screening claims. Second, ImmD will streamline procedures as far as possible, so as to optimize the use of available resources. ImmD assessed that through the above two measures, its screening capacity can be enhanced starting from early 2017, leading to a 75% increase in output from 3 000 determinations (13 per day) in 2016-17 to 5 000 or more (23 or more per day) in 2017-18.

14. To increase the number of determined claims by 75% to 5 000 or more claims per year, ImmD requires corresponding support on interpretation and publicly-funded legal assistance (PFLA) to claimants. On interpretation, ImmD is recruiting additional full-time in-house interpreters of various languages[10] to support the handling of additional cases.

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[10] The Government has invited the Duty Lawyer Service to consider the same but they decided not to do so.

15. As regards PFLA to claimants, which has been a legal requirement following a court judgment in 2008[11], the Duty Lawyer Service (DLS)[12] has since 2009 been operating the Legal Assistance Scheme for Non-refoulement Claimants (formerly torture claimants) (the DLS Scheme). In 2015, 490 lawyers with relevant training on the DLS roster provided assistance to some 2 500 claimants (on average 5.2 claimants per lawyer). If ImmD's output is to increase to 23 claims per day, the average caseload of each lawyer would increase to about 10 claims per year. We assess that there should be reasonable room for the current roster of lawyers to absorb the increased caseload[13]. At the same time, we will also invite the legal profession to continue to organize relevant training such that other lawyers may join the roster in future.

16. We have approached the DLS on the need to increase handling capacity, and were given to understand that it is facing serious staff (particularly the Court Liaison Officer grade) retention and recruitment problem. Given the circumstances, it is not realistic for DLS to increase the number of cases referred to lawyers from 13 to 23 claims per day starting early 2017.

17. To expedite screening as soon as possible, the Government intends to operate, on a pilot basis, a separate roster of the same pool of lawyers to supplement the DLS Scheme. We will invite all lawyers currently on the DLS roster to join this separate roster, and assignment policy will follow that of DLS as far as possible[14]. The goal of this

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[11] The Court of First Instance ruled in *FB v the Director of Immigration* [2009] 2 HKLRD 346 that "the policy not to provide, at the expense of the (Government), legal representation to a claimant who is unable to afford that legal representation, is unlawful and in breach of the duty of the Government to assess claims in accordance with high standards of fairness."

[12] The Duty Lawyer Service is an organization fully subvented by the Government which offers four legal assistance schemes, including the Duty Lawyer Scheme, the Legal Advice Scheme, the Tel-Law Scheme, and the Legal Assistance Scheme for Non-refoulement Claimants, to complement the legal aid services provided by the Legal Aid Department. It is managed by a governing council whose members are appointed by the Hong Kong Bar Association and the Law Society of Hong Kong, and is administered by a full-time Administrator.

[13] We understand that the DLS has a rule that each lawyer on the roster may concurrently handle not more than 25 claims, which is an upper limit significantly higher than the current or projected average number of claims handled per year.

[14] Under the DLS Scheme, lawyers are assigned cases (primarily) on a roster basis.

supplementary roster is to tap into the pool of trained and experienced lawyers on the DLS roster to provide PFLA to more claimants (an additional 10 claims per day) such that the backlog of cases can be worked down as soon as practicable, whilst ensuring the same quality and standard of legal assistance is rendered.

18. To ensure flexibility in operating the supplementary roster such that it could meet with any unforeseen influx of claims in future, and with the benefit of the experience of the DLS Scheme, we will keep the administration of the pilot as simple as possible and minimize administrative overhead. First, to simplify operation and achieve savings in administrative and accounting costs, we will reimburse lawyers on the supplementary roster a standard legal fee per case (instead of reimbursement by hours spent). Second, legal executive support to lawyers under the supplementary roster will be reimbursed as an allowance in addition to the standard legal fee (instead of being provided by Court Liaison Officers or other staff employed under the pilot). We have already briefed the Hong Kong Bar Association and the Law Society of Hong Kong on the framework, and will continue to engage the two bodies and DLS on implementation details, with a view to launching the pilot by early 2017 to support ImmD to increase the number of determined claims by 75% to 5 000 or more claims per year as soon as possible.

19. Separately, to cater for ongoing increase in workload of TCAB and to prepare for the upcoming further increase in ImmD's caseload output, 24 new members have been appointed to TCAB since July 2016, expanding the membership of TCAB to the current size of 52. We will continue to expand TCAB's membership to cater for anticipated increase in appeal caseload as ImmD makes more determinations per year to ensure that appeals handling would not be another bottleneck[15].

Detention, removal and enforcement

20. ImmD has stepped up enforcement against illegal employment and employers. In the first ten months of 2016, ImmD launched 476 targeted operations against NEC illegal workers (including joint-operations with other LEAs) (a 71% increase over the same period of 2015). 421 NEC illegal workers and 254 local employers have been

[15] To dovetail with ImmD's plan to increase its output to 5 000 decisions or more per annum, it is expected that 4 500 appeals or more will be filed with the TCAB in 2017-18.

arrested, a respective 26% and 44% increase over the same period of 2015. At the same time, we have enhanced publicity to advise employers that they are liable to criminal convictions and immediate imprisonment for employing unemployable persons.

21. Separately, we will consider ways to increase our capacity to detain illegal immigrants (including non-refoulement claimants), taking into account legal, resources and security implications of different proposals, including, amongst others, those to better support the management of detention facilities. ImmD also started to review its removal procedures to ensure that rejected claimants would be removed from Hong Kong as soon as practicable.

Advice Sought

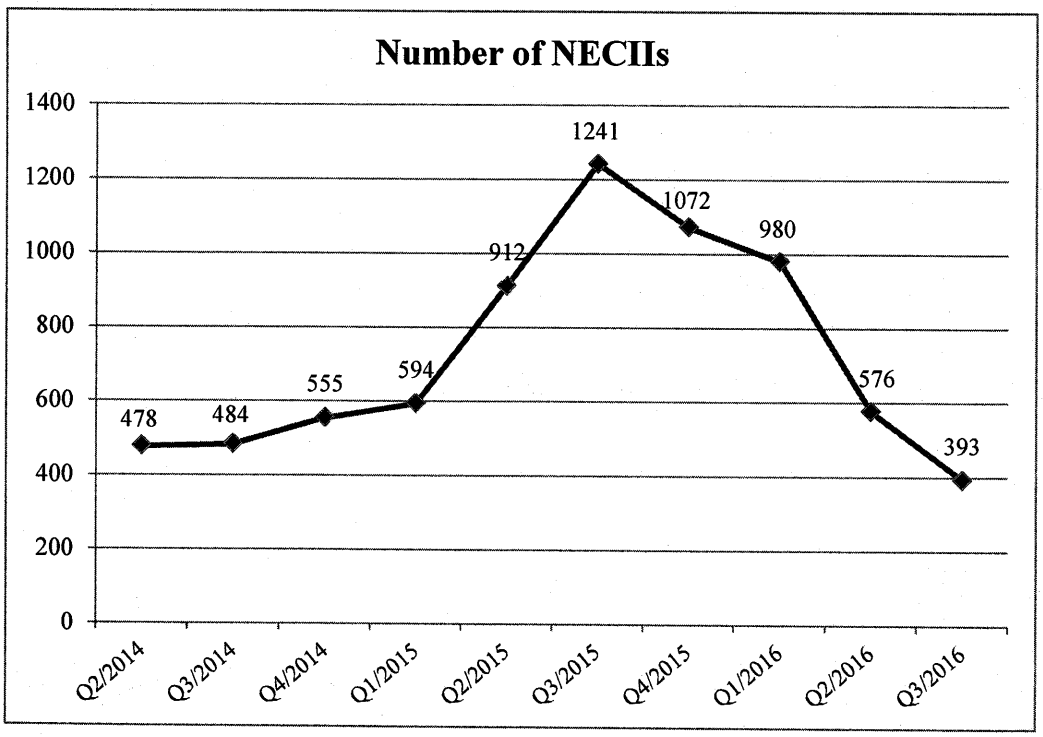
22. Members' views are invited on the plan to introduce the PAR system to prevent visitors of high immigration risks from embarking on their journey to Hong Kong, and to operate a supplementary roster of PFLA to support ImmD to increase the number of determined claims by 75% to 5 000 or more per year in early 2017.

Security Bureau
November 2016

Annex A

Quarterly statistics of NECIIs

Quarter	Number of NECIIs	% change since the quarter before	% change since the same quarter the year before
Q2/2014	478	/	/
Q3/2014	484	+1%	/
Q4/2014	555	+15%	/
Q1/2015	594	+7%	/
Q2/2015	912	+54%	+91%
Q3/2015	1 241	+36%	+156%
Q4/2015	1 072	– 14%	+93%
Q1/2016	980	– 9%	+65%
Q2/2016	576	– 41%	– 37%
Q3/2016	393	– 32%	– 68%



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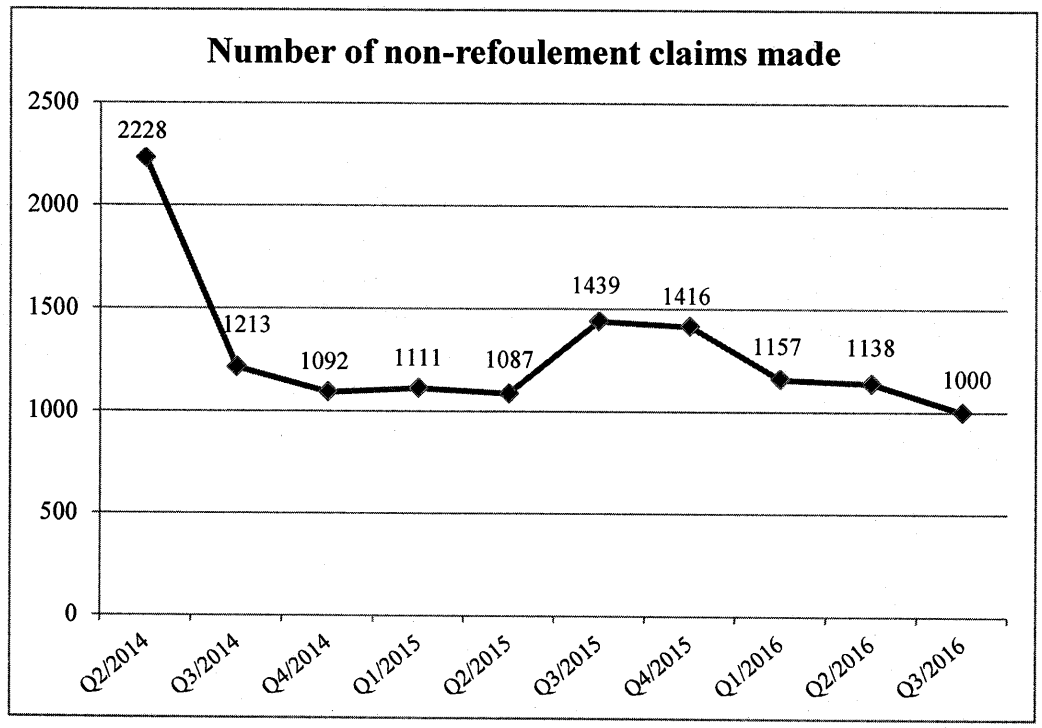
Annex B

Quarterly statistics of non-refoulement claims

Quarter	Number of claims made	% change since the quarter before	% change since the same quarter the year before
Q2/2014	2 228	/	/
Q3/2014	1 213	– 46%	/
Q4/2014	1 092	– 10%	/
Q1/2015	1 111	+2%	/
Q2/2015	1 087	– 2%	– 51%
Q3/2015	1 439	+32%	+19%
Q4/2015	1 416	– 2%	+30%
Q1/2016	1 157	– 18%	+4%
Q2/2016	1 138	– 2%	+5%
Q3/2016	1 000	– 12%	– 31%



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Annex C

Summary of claimants' profile

As at 31 October 2016, there were 10 675 outstanding non-refoulement claims pending determination by ImmD. An analysis on the particulars of the claimants is as follows.

(a) Sex

Male	7 652	71.7%
Female	3 023	28.3%

(b) Age

<18	556	5.2%
18 – 30	3 720	34.8%
31 – 40	4 191	39.3%
>40	2 208	20.7%

(c) Country of origin

India	2 105	19.7%
Vietnam	2 080	19.5%
Pakistan	2 024	19.0%
Bangladesh	1 295	12.1%
Indonesia	1 067	10.0%
The Philippines	484	4.5%
Nepal	303	2.8%
Sri Lanka	294	2.8%
Gambia	141	1.3%
Nigeria	138	1.3%
Others	744	7.0%
Total	10 675	100%

(d) Immigration status

NECII	5 391	50.5%
Overstayer	4 665	43.7%
Others	619	5.8%

(e) Time lag before making claim after entering Hong Kong (including illegal entry)

<3 months	4 619	43.3%
3 – 12 months	2 980	27.9%
13 – 24 months	960	9.0%
>24 months	1 272	11.9%
Information not available	844	7.9%

The average time lag is 11 months.

Statistics on torture / non-refoulement claims made (as at end October 2016)

Year	Claims made	Claims determined	Claims withdrawn or no further action can be taken	Pending claims (at year end)
End 2009				6 340
Enhanced administrative mechanism (which became statutory mechanism since Decmber 2012)				
2010 to 2013	4 906 *(Note 1)*	4 534	3 920	2 792
2014 (Jan to Feb)	19	221	89	2 501
Total torture claims under the administrative and statutory mechanisms	*4 925*	*4 755*	*4 009*	*2 501*
Unified screening mechanism (USM) (since March 2014)				
Claims lodged on other grounds such as CIDTP or persecution before commencement of USM	4 198			6 699 (= 2501 + 4198)
2014 (Mar to Dec)	4 634	826	889	9 618
2015	5 053	2 339	1 410	10 922
2016 (Jan to Oct)	3 481	2 483	1 245	**10 675**
Total non-refoulement claims under USM *(as at end Oct 2016)*	13 168 *(Note 2)*	5 648 *(Note 3)*	3 544	

Note 1: ImmD received a total of 4 906 torture claims from 2010 to 2013, an average of 102 per month. In the 32 months since commencement of USM to October 2016, ImmD received 13 168 non-refoulement claims, an average of 412 per month, an increase of 304%.

Note 2: Amongst 13 168 non-refoulement claims, 1 670 (13%) were lodged by rejected/withdrawn torture claimants (or persons who have lodged an asylum claim to the UNHCR previously), 11 498 (87%) were new claims.

Note 3: Amongst 5 648 non-refoulement claims determined by ImmD under USM, 43 were substantiated (including 5 on appeal). Amongst 5 605 claims rejected, 3 925 has lodged an appeal, 989 has departed Hong Kong or are pending removal arrangements, 691 remained in Hong Kong for other reasons (e.g. in prison, pending prosecution, lodged JR, etc.).

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Annex D

Outline of comprehensive review of the strategy of handling non-refoulement claims

Pre-arrival control

To tackle the problems at source, we need to prevent economic migrants from embarking on their voyage (or from reaching Hong Kong) and deter those who assist them to this end. Guided by detailed analysis of the background and arriving route of new claimants, we will consider –

(a) introducing requirement of pre-arrival registration and, if necessary, complementary checking measures for persons with high immigration risks to prevent them from being boarded;

(b) liaising with authorities of major source countries of claimants and jurisdictions along their usual route to Hong Kong on strengthening enforcement against smuggling syndicates; and

(c) reviewing visa requirement or visa-free arrangement as necessary.

2. Apart from the above, we have amended the definition of "unauthorized entrants" under Part VIIA of the Immigration Ordinance (Cap. 115) so that stiffer penalties can be applied equally and fairly against human smuggling syndicates smuggling illegal immigrants from any top source countries[16] in addition to Vietnam and the Mainland.

Screening procedures

3. For those who manage to enter Hong Kong and make a non-refoulement claim, we need to expedite the screening process for all cases and deter clear abusers, whilst ensuring that screening procedures will continue to meet with the high standards of fairness required by law.

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[16] "Unauthorized entrants" are declared under the Immigration (Unauthorized Entrants) Order (Cap. 115D) between 1979 and 1980 to include only illegal immigrants from the Mainland, Macao and Vietnam. We have amended the declaration so as to include illegal immigrants from eight top source countries, namely, Afghanistan, Bangladesh, India, Nepal, Nigeria, Pakistan, Somalia, and Sri Lanka (in addition to Vietnam) as "unauthorized entrants", subject to appropriate exemptions.

Having accumulated screening experience since 2009 and making reference to the established practices of other common law jurisdictions, we will consider amending Part VIIC of the Immigration Ordinance to –

(a) provide statutory underpinning to Unified Screening Mechanism (USM), the operational procedures of which follow Part VIIC of the Immigration Ordinance[17];

(b) tighten procedures to clearly specify the time allowed for each step and to prohibit abusive behaviour;

(c) screen out manifestly unfounded claims early;

(d) set out the scope and limits, as appropriate, on the provision of publicly-funded legal assistance; and

(e) enhance the operation and capacity of Torture Claims Appeal Board.

4. Immigration Department (ImmD) will also enhance its capability to collect countries of origin information useful for screening purposes. Efforts are ongoing to establish contacts with relevant governmental/non-governmental organisations in those countries for establishing an objective and credible database on information of major localities of source countries, as well as topical issues and details of major events of those countries[18].

Detention

5. At present, only a very small percentage of claimants are

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[17] In essence, USM is a mechanism under which non-refoulement claims are simultaneously assessed on all applicable grounds including torture risk (using the existing statutory scheme under Part VIIC of the Immigration Ordinance) as well as risk of torture or cruel, inhuman, or degrading treatment or punishment or any other harm prohibited by an absolute and non-derogable right under the Hong Kong Bill of Rights and persecution with reference to Article 33 of the 1951 Refugee Convention, etc. (through an administrative scheme which follows Part VIIC of the Immigration Ordinance).

[18] That said, the information the claimant provided for the purpose of his claim will be treated in confidence. As a general rule, neither the information indicating that the claimant has made a non-refoulement claim nor any information pertaining to his claim will be provided to any government of a risk country without the express consent of the individual concerned.

detained pending or during screening. We will carefully consider the feasibility of clarifying and strengthening ImmD's legal power[19] to detain claimants pending screening, whilst screening or appeal is underway, and/or after their screening is complete but they are remaining in Hong Kong for some other reasons (e.g. they have lodged a judicial review), so as to minimise their security impact, to prevent them from taking up unlawful employment, and to ensure more efficient screening and subsequent removal. If this proposal is considered legally feasible, we will identify suitable facilities for refurbishment to expand immigration detention capacity as necessary. We will also consider proposals to better support the management of detention facilities.

Removal and enforcement

6. Finally, unsubstantiated claimants should be removed as soon as possible. We will strengthen liaison with local Consulates General concerned to expedite the removal process. We will also step up enforcement against syndicates and related criminal activities (e.g. unlawful employment), including close collaboration with Mainland authorities, and enhance publicity in Hong Kong and in major source countries on our applicable law and policies to avoid potential claimants from being misguided by syndicates.

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[19] Under the Immigration Ordinance, Cap.115, ImmD may detain an illegal immigrant for such specific purposes as pending consideration of a removal order (section 32(2A)), pending final determination of a non-refoulement claim on the ground of torture within the meaning of section 37U (section 37ZK), pending removal (section 32(3A)), etc. In *Ghulam Rbani v Secretary for Justice* (2014) 17 HKCFAR 138, the CFA ruled that section 11 of the Hong Kong Bill of Rights Ordinance, Cap.383, precludes reliance by an illegal immigrant on Article 5(1) of the HKBOR or Article 28 of the Basic Law to challenge a decision to detain him or her in accordance with the Immigration Ordinance, Cap. 115 (the case in point was section 32 of the Ordinance). However, the CFA ruled that these detention powers are subject to common law restrictions, particularly the *Hardial Singh* principles, which, in gist, require that ImmD may detain a person only for a period of time reasonable for the statutory purposes for which that person was detained. On the other hand, it remains unclear whether a claimant may be detained after his claim has been rejected but there are other impediments (e.g. judicial review) to his removal.