

1990

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### Recommended Citation

Helton, Arthur C. (1990) "The Comprehensive Plan of Action for Indo-Chinese Refugees: An Experiment in Refugee Protection and Control," *NYLS Journal of Human Rights*: Vol. 8 : Iss. 1 , Article 4.  
Available at: [https://digitalcommons.nyls.edu/journal\\_of\\_human\\_rights/vol8/iss1/4](https://digitalcommons.nyls.edu/journal_of_human_rights/vol8/iss1/4)

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# THE COMPREHENSIVE PLAN OF ACTION FOR INDO-CHINESE REFUGEES: AN EXPERIMENT IN REFUGEE PROTECTION AND CONTROL

by Arthur C. Helton\*

## I. INTRODUCTION

Since 1975, the flight of Vietnamese boat people has remained a chronic characteristic of refugee affairs in Asia. An international conference in 1979 on Indochinese refugees initially achieved an equilibrium to control the flow of refugees.<sup>1</sup> This international arrangement provided that countries in the region would give temporary refuge, and assured these nations that the refugees would ultimately be resettled abroad.<sup>2</sup> This plan began to unravel in 1987 when arrivals in the region outstripped diminishing resettlement commitments,<sup>3</sup> resulting in a concerted push-back policy undertaken by the Thai authorities and the initiation of screening and detention policies in Hong Kong.<sup>4</sup>

An effort to reach a new arrangement was made at a conference in 1989 on Indochinese refugees.<sup>5</sup> This conference approved a plan to introduce screening of refugees on a regional basis, countenanced the possibility of detention pending adjudication, and raised the prospect of return, including compulsory return, to Vietnam.<sup>6</sup> Some of the new

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1. Helton, *Asylum and Refugee Protection in Thailand*, 1 INT'L J. REFUGEE L. 20, 26 (1989).

2. *Id.* at 25.

3. *Id.* at 26.

4. *Id.* at 27-28; see also LAWYERS COMMITTEE FOR HUMAN RIGHTS, INHUMANE DETERRENCE: THE TREATMENT OF VIETNAMESE BOAT PEOPLE IN HONG KONG 10-11 (1989) [hereinafter INHUMANE DETERRENCE].

5. *Office of the United Nations High Commissioner for Refugees: International Conference on Indo-Chinese Refugees, Report of the Secretary-General* (Item 111(c) of the Provisional Agenda), U.N. Doc. A/44/523 (1989) [hereinafter *International Conference*].

6. *Id.*

arrangements risk in their implementation being incompatible with international refugee and human rights law. The prospects for resolution of both these protection issues as well as the refugee problem itself remain uncertain. This article will discuss these questions, while defining the utility of legal protection in the search for a comprehensive solution.

## II. THE FLIGHT OF VIETNAMESE BOAT PEOPLE FROM 1975 TO THE PRESENT

Fifteen years after the fall of Saigon, the displacement of the Vietnamese people remains a continuing experience. South Vietnam surrendered on April 30, 1975, and a stream of Vietnamese began to leave.<sup>7</sup> Those who left between 1975 and 1977 included members of the middle class, peasantry and the Saigon military.<sup>8</sup> Reasons for flight included harsh treatment, "re-education" of those associated with the old regime, deterioration of living conditions including food shortage, drought, flood, and a desire to avoid military service under the new regime.<sup>9</sup> In 1978, the subjection of Sino-Vietnamese and other minorities within Vietnam to hardship and deprivation gave new impetus to the flight. By 1979, some 600,000 Vietnamese had left.<sup>10</sup>

## III. ARRANGEMENTS MADE AT THE 1979 CONFERENCE ON INDOCHINESE REFUGEES

The magnitude of the humanitarian crisis for the boat people in Asia in 1979 provided the impetus for the world to address the problem. Reacting to the large numbers of asylum-seekers arriving, countries in the region refused to allow them to land, and thousands of Vietnamese perished in the South China Sea.<sup>11</sup>

On May 31, 1979, the British Prime Minister proposed to the Secretary General of the United Nations that an international conference

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7. Helton, *supra* note 1, at 23.

8. *Id.*

9. *Id.*

10. *Id.* at 22; *see also* Wain, *The Indo-China Refugee Crisis*, 58 FOREIGN AFF. 160, 161-66 (1979). In terms of recent reports of conditions in Vietnam, *see* AMNESTY INTERNATIONAL, VIETNAM: RENOVATION, THE LAW, AND HUMAN RIGHTS IN THE 1980's (1990); *see also* AURORA FOUNDATION, VIOLATIONS OF HUMAN RIGHTS IN THE SOCIALIST REPUBLIC OF VIETNAM: APRIL 1975-DECEMBER 1988 (1990).

11. U.S. COMMITTEE FOR REFUGEES, UNCERTAIN HARBORS: THE PLIGHT OF VIETNAMESE BOAT PEOPLE 4 (1987).

be convened to deal with the problem.<sup>12</sup> The Secretary General and the United Nations High Commissioner for Refugees held consultations with several governments.<sup>13</sup> As a result, a meeting was called, and sixty-five countries attended the conference from June 20-21, 1979.<sup>14</sup> In his opening statement, the Secretary General underlined the crucial importance of maintaining the joint principles of "first asylum" and "non-refoulement" for refugees arriving either by land or by sea.<sup>15</sup> He also recognized that countries of asylum expected reassurance that refugees would be resettled abroad.<sup>16</sup>

As a result of enforcement efforts undertaken by the Vietnamese government to stop unauthorized departures, the rate of departure fell from approximately 25,000 per month from January to July, to about 4,000 per month from August to December.<sup>17</sup> The 1979 arrangement stabilized the situation and established a framework in which to consider the problem. The number of arrivals fell, but governments correspondingly reduced resettlement quotas,<sup>18</sup> and the issue largely dropped out of public discussion.

#### IV. THE BREAKDOWN OF THE 1979 ARRANGEMENTS

The 1979 arrangements began to unravel when arrivals outstripped resettlement in 1987.<sup>19</sup> From 1986 to 1987, the number of Vietnamese boat people arriving in Thailand tripled.<sup>20</sup> In late 1987, Thai government officials announced that no more boat people would be permitted to enter Thailand and that vessels attempting to land would be sent back out to sea.<sup>21</sup> In January, Thai officials presided over a "push

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12. Helton, *supra* note 1, at 24.

13. *Id.*

14. *Id.*

15. *Office of the U.N. High Commissioner for Refugees, Meeting on Refugees and Displaced Persons in South-East Asia, convened by the Secretary-General of the U.N. at Geneva, on 20 and 21 July 1979, and Subsequent Developments, Report of the Secretary-General (Agenda Item 83) para. 15, at 6, U.N. Doc. A/34/627 (1989) [hereinafter Displaced Persons Report].*

16. *Id.*

17. B. WAIN, *THE REFUSED: THE AGONY OF THE INDOCHINA REFUGEES* 8 (1989).

18. Helton, *supra* note 1, at 25.

19. *INHUMANE DETERRENCE, supra* note 4, at 8.

20. *Id.*

21. Helton, *supra* note 1, at 28.

off" of refugees at Khlong Yai port and deputized local fishermen to join the effort.<sup>22</sup> During the first weeks of Thailand's push-back policy, hundreds of asylum-seekers were victimized. Those who managed to evade the naval blockade or ramming by Thai fishing boats were abandoned on barren islands without food, water or medicine.<sup>23</sup> Thai officials estimated that some 1,000 refugees had been forced back to sea.<sup>24</sup>

A Memorandum of Understanding signed in Bangkok on April 20, 1988, between the Thai government and the Office of the United Nations High Commissioner for Refugees (UNHCR) arranged for the provision of shelter for boat people who land in Thailand.<sup>25</sup> Asylum-seekers were to be consolidated in a camp near the Thai-Cambodian border.<sup>26</sup> They were not eligible, however, for resettlement abroad.<sup>27</sup>

In Hong Kong, arrivals began to outstrip resettlement in 1986, when Vietnam suspended its orderly departure program to the United States.<sup>28</sup> As the number of refugees taken for resettlement in third countries dwindled, the number seeking asylum increased.<sup>29</sup> In Hong Kong, the number of arrivals increased from 3,395 in 1987 to 18,446 in 1988.<sup>30</sup> In May of 1989, over 8,900 asylum-seekers arrived in Hong Kong, pushing the total over 37,000.<sup>31</sup> Common reasons for flight included natural disaster, economic devastation, political oppression, discrimination, and persecution.<sup>32</sup> As in the past, asylum-seekers came in unseaworthy, overcrowded boats. A relaxation of relations between Vietnam and the People's Republic of China also heralded greater numbers coming by land through China to Guangdong province, who then made a relatively short trip to Hong Kong by boat.<sup>33</sup>

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22. *Id.*

23. *Id.*

24. *Id.* at 27-28.

25. INHUMANE DETERRENCE, *supra* note 4, at 8.

26. *Id.*

27. Helton, *supra* note 1, at 29.

28. INHUMANE DETERRENCE, *supra* note 4, at 8 (the United States had accepted for resettlement most of those legally departing Vietnam).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 8-9.

As a result, on June 16, 1988, Hong Kong initiated a screening and detention policy that would permit those who arrived prior to a cutoff date to be examined for purposes of determination of refugee status and ultimate resettlement abroad, with those awaiting screening and those screened out to be held pending return to Vietnam.<sup>34</sup>

V. THE 1989 INDOCHINESE REFUGEE CONFERENCE:  
A COMPREHENSIVE PLAN OF ACTION

On June 13-14, 1989, representatives of seventy-six governments met at the International Conference on Indochinese Refugees in Geneva.<sup>35</sup> The principal purpose of the conference was to endorse a plan to deal with the continuing flight of Vietnamese asylum-seekers.<sup>36</sup> Specifically, the governments sought to establish procedures to screen asylum-seekers on a region-wide basis in order to determine which among them deserve resettlement as refugees, and to organize the detention and possible return, including deportation to Vietnam of those rejected after screening.<sup>37</sup>

The Comprehensive Plan of Action<sup>38</sup> (CPA) seeks to establish in-country departure from Vietnam as "eventually the sole . . . [mode] of departure."<sup>39</sup> The underlying assumption is that refugees will list themselves with their government in order to enroll in an orderly departure program.<sup>40</sup> But those who fear persecution may flee from their homeland, sometimes in an irregular and dangerous manner.<sup>41</sup> This human reality was not recognized in the Plan, nor was an unqualified right of asylum in the receiving countries in the region. Generally, the Southeast Asian countries have grudgingly provided "first" asylum, in return for a promise of eventual resettlement abroad.<sup>42</sup>

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34. *Id.* at 10.

35. *International Conference*, *supra* note 5, at 4.

36. *Id.* at 1.

37. *Id.* at 2-3.

38. *Id.* at 11.

39. *Id.* at 12.

40. *Id.*

41. See UNIVERSAL DECLARATION OF HUMAN RIGHTS arts. 13(2), 14(1), G.A. Res. 217, U.N. Doc. A/810, at 71 (1948). The Declaration provided in pertinent part that "[e]veryone has the right to leave any country, including his own . . . [and] . . . the right to seek and enjoy in other countries asylum from persecution." *Id.*

42. Helton, *supra* note 1, at 45.

As to the treatment of new arrivals, the CPA provides that "temporary refuge" will be given to asylum-seekers and that the UNHCR will have "full and early access to new arrivals."<sup>43</sup> Past experience in the region, however, has belied such commitments. Push-backs have been periodic and, for example, access has not always been provided in Thailand, particularly on the East coast, to officials of UNHCR.<sup>44</sup>

The CPA sought to establish "a consistent region-wide refugee status determination process."<sup>45</sup> But there have been prior problems in the implementation of screening mechanisms in the region.<sup>46</sup> Thailand's program to screen arriving Laotians has had a tradition of corruption and concern with only prospects for resettlement abroad.<sup>47</sup> Asylum-seekers with close family abroad are accepted in this screening procedure, while others, including true refugees, are rejected.<sup>48</sup> More recently, significant problems have plagued the screening program in Hong Kong which from the inception has been distorted by the application of improper criteria and procedural defects.<sup>49</sup> As of April 1989, only 3 of over 1300 Vietnamese cases had been recognized by the Hong Kong authorities as entitled to refugee status under international law.<sup>50</sup>

In terms of repatriation, the CPA calls for return to the country of origin "in accordance with international practices reflecting the responsibility of States toward citizens."<sup>51</sup> Although return in the first

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43. *International Conference, supra* note 5, at 13.

44. Interview with U.N. officials in the branch office of UNHCR in Bangkok (May 1990). The information in this article may be considered sensitive by some government or UNHCR officials, or others. Because it is neither practicable nor appropriate to clear the content of the article with the sources of the information, the author has adopted a convention of referring to the types of persons from which the information was obtained, e.g., "officials," "diplomats," etc. The information is based on interviews conducted by the author during visits to the region.

45. *International Conference, supra* note 5, at 13.

46. LAWYERS COMMITTEE FOR HUMAN RIGHTS, FORCED BACK AND FORGOTTEN: THE HUMAN RIGHTS OF LAOTIAN ASYLUM SEEKERS IN THAILAND 26 (1989) [hereinafter FORCED BACK AND FORGOTTEN].

47. *Id.* at 24.

48. *Id.* at 21-29.

49. AMNESTY INTERNATIONAL, MEMORANDUM TO THE GOVERNMENTS OF HONG KONG AND THE UNITED KINGDOM REGARDING THE PROTECTION OF VIETNAMESE ASYLUM SEEKERS IN HONG KONG 6 (1990) [hereinafter AMNESTY INTERNATIONAL].

50. INHUMANE DETERRENCE, *supra* note 4, at 4. With regard to the background on the introduction of screening in Hong Kong, see Mushkat, *Refugee in Hong Kong*, 1 INT'L J. REFUGEE L. 449 (1989).

51. *International Conference, supra* note 5, at 15.

instance should be "voluntary," forcible return is not precluded as it is "recognized as being acceptable under international practices."<sup>52</sup> A regional holding center under the auspices of the UNHCR was offered for consideration as an interim measure at the Conference.<sup>53</sup>

## VI. THE ELEMENTS OF REFUGEE STATUS DETERMINATION

The emphasis on region-wide screening under the CPA necessitates a discussion of the elements of refugee status determination. In this connection, the subject of the inquiry, the asylum-seeker, is often unacquainted with the legal system under which the inquiry is conducted, and frequently must tell his or her story in a foreign language. Consequently, the asylum-seeker's need for access to information and adequate counsel can be critical. Additionally, adequate interpretation is crucial.<sup>54</sup>

In more general terms, asylum-seekers often arrive with little or no documentation supporting their claims for refugee protection.<sup>55</sup> Adjudicators, therefore, must take into account this customary characteristic in determination proceedings. Because issues of credibility become paramount, cross-cultural differences must be considered.<sup>56</sup> Generally, the adjudicator is to give the benefit of the doubt to the asylum-seeker.<sup>57</sup>

In view of the inherent difficulties in refugee status determination, examination by specialized adjudicators and an appeal or review is generally considered necessary under international standards.<sup>58</sup> Legal assistance is often crucial to effective access to the adjudicatory procedure. According to international principles, ambiguities should be resolved in favor of the claimant asserting the need for refugee protection, and, if necessary, any errors in determinations should be resolved in favor of the recognition of refugees, even though perhaps unwarranted, as

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52. *Id.*

53. *Id.*

54. See OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS para. 190, at 45 (1979) [hereinafter HANDBOOK].

55. *Id.*

56. *Id.* para. 196, at 47.

57. *Id.* para. 190, at 45.

58. *Id.* para. 191.



opposed to their exclusion from protection.<sup>59</sup>

The preparatory meeting for the International Conference on Indochinese Refugees held at Kuala Lumpur from March 7-9, 1989, established a Coordinating Committee under the chairmanship of UNHCR to undertake the task of making arrangements for implementing the CPA.<sup>60</sup> The Coordinating Committee included a Subcommittee on Reception and Status Determination, which met in Hong Kong on April 6-8, 1989.<sup>61</sup> A regular review arrangement was contemplated to assess progress in the implementation of the CPA and consider measures to improve its effectiveness in meeting its objectives.<sup>62</sup>

The CPA foresees the introduction on a region-wide basis of a "consistent, region-wide refugee status determination process to be conducted in accordance with national legislation and internationally accepted practice."<sup>63</sup> Consultations were undertaken by UNHCR with concerned governments with a view toward establishing determination procedures.<sup>64</sup> These deliberations resulted in a Note reflecting several basic principles relating to status determination.<sup>65</sup> Included was recognition that international criteria should govern status determinations, the office of UNHCR should have ready access at all stages of the procedure, and the authorities should cooperate with nongovernmental organizations.<sup>66</sup>

A further Note on fair and efficient procedures was issued in 1990 by the Office of the High Commissioner for Refugees in connection with a judicial challenge brought in the Hong Kong High Court concerning alleged unfairness in the screening and review procedure.<sup>67</sup> The UNHCR described its monitoring role in the Hong Kong procedure as

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59. *Id.* paras. 203-04, at 48.

60. *International Conference*, *supra* note 5, at 2.

61. *Id.*

62. *Note on the Work of the Co-ordinating Committee for the International Conference on Indo-Chinese Refugees*, *Note by the Secretary-General*, U.N. Doc. A/CONF.148/4 at 1-2 (1989) [hereinafter *Co-ordinating Committee*].

63. *Id.* at 3.

64. *Id.*

65. *Id.*

66. *Id.* at 3, 17.

67. *Note on the Role of UNHCR in the Hong Kong Procedure for Refugee Status Determination* (1990) (available at *New York Law School Journal of Human Rights*); *see infra* note 195.

involving counselling of asylum-seekers,<sup>68</sup> monitoring of screening interviews,<sup>69</sup> advice on general policy issues to the government,<sup>70</sup> and legal assistance to deserving asylum-seekers who take appeals.<sup>71</sup> Specifically, the UNHCR emphasized the following relevant requirements:

The applicant should receive the necessary guidance as to the procedure to be followed. Given the vulnerable situation of an asylum seeker in an alien environment, it is important that he/she should on arrival receive appropriate information on how to submit his/her application. Such advice is most effective on an individual basis and is provided in many countries by legal counselling services, funded by government, UNHCR or non-governmental sources.

The applicant should be given the necessary facilities, including the services of a competent interpreter for submitting his case to the authorities concerned. This requirement entails, first of all, that the applicant should be given the opportunity to present his/her case as fully as possible. As refugee status is primarily an evaluation of the applicant's statement, the quality of interview is crucial to a proper determination of the claim. Paragraphs 196-205 of the Handbook deal with this aspect of the procedure and make it clear that "while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner" and also that the examiner should "ensure that the applicant presents his case as fully as possible and with all available evidence." The interviewer therefore has a particular responsibility to ensure that the interview is comprehensive and the records reflect accurately what has been said. The reference to "necessary facilities" could, in UNHCR's view, also include legal advice and representation, if the applicant requires these in order to

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68. *Id.* para. 4(a), at 2.

69. *Id.* para. 4(b).

70. *Id.* para. 4(c).

71. *Id.* para. 4(d).

present his case properly.

If the applicant is not recognised, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or different authority, whether administrative or judicial, according to the prevailing system." . . . Although this requirement is phrased in general terms, in UNHCR's view the notion of "appeal for a formal reconsideration" includes some basic principles of fairness applicable equally to judicial or administrative reviews, such as the possibility for the applicant to be heard by the review body and to be able to obtain legal advice and representation in order to make his submission; for the reconsideration to be based on all relevant evidence; and for a consistent and rational application of refugee criteria in line with the guidelines established in the UNHCR Handbook. UNHCR believes that the notion of fairness also requires the review body to provide the grounds for its decision, so that the applicant can be re-assured that he has had a fair hearing and the criteria have been applied properly.

The application should be examined by "qualified personnel having the necessary knowledge and experience, and an understanding of an applicant's particular difficulties and needs." An understanding of the application of refugee criteria as well as a knowledge of the situation in the country of origin are necessary, in particular, for assessing an applicant's credibility and the well-foundedness of his fear of persecution.

The applicant should be granted the benefit of the doubt if his statement is coherent and plausible and does not run counter to generally known facts. Because of problems of obtaining evidence to substantiate a refugee claim, and the serious consequences which could result from an erroneous decision, the evidential requirements should be approached with flexibility.<sup>72</sup>

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72. *Id.* para. 9, at 4-5 (citations omitted); see *supra* note 54, in respect of references to the UNHCR Handbook.

## VII. REFUGEE STATUS DETERMINATION IN THE REGION

In determining whether general principles of refugee protection are satisfied by a particular procedure, several factors must be considered, including the training of adjudicators and interpreters; information about relevant conditions in the country of origin; the role of counsel and UNHCR; and the availability of judicial review. Recruitment and training of adjudicators must be carried out according to sufficient standards. Organizational arrangements and quality control measures, such as the use of questionnaires and monitoring through file review and observation of the proceedings should be present. Given the humanitarian responsibilities involved, the procedure must be insulated from law enforcement and traditional immigration activities. The recruitment and training of interpreters as well as adequate competency standards for interpreters is crucial. The role of counsel, including the provision of advice and counselling in respect of screening and review must also be considered.

Additionally, due regard must be given to the arrangements regarding administrative appeals, including the ability of individuals and/or their counsel to be present during review consideration, and the obligation, if any, of the reviewing authority to state reasons in connection with negative decisions. The availability of judicial review must also be considered, as well as the provision of legal assistance in that connection. The use of the mandate of UNHCR to resettle initially rejected refugees may also be a potential safeguard in a status determination procedure.

A review of current practices in the region will determine whether the principles discussed above are being followed under the CPA.

## A. Indonesia

In Indonesia, screening is on-going after an initial phase in which refugee criteria were misapplied by the authorities.<sup>73</sup> According to UNHCR officials, after a "disastrous" beginning, screening is proceeding as contemplated under the CPA.<sup>74</sup> In the first phase of screening, resettlement criteria were applied to the cases.<sup>75</sup> Boat people had their claims approved based on whether they fit profiles of those cases that would likely receive offers of resettlement abroad, including prior ties to

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73. Interview with UNHCR officials in Jakarta (May 1990).

74. *Id.*

75. *Id.*

those countries in the nature of family or employment.<sup>76</sup> In the second phase, standard refugee status criteria were applied.<sup>77</sup> No decisions are to be announced regarding cases decided in the first phase until they have been reviewed under standard criteria; 780 cases were reviewed in phase one and 340 cases in phase two.<sup>78</sup> The Indonesian authorities have maintained temporary refuge for Vietnamese boat people<sup>79</sup> in the face of relatively high levels of arrivals which is caused, in large part, by Malaysia's policy of redirecting boats to Indonesia.<sup>80</sup>

The military personnel involved in the screening procedure in Indonesia are considered competent.<sup>81</sup> The essential problem is posed by the continuing high level of arrivals which has caused the camp population at Galang to increase from 2,000 to 12,000 over the first half of 1990.<sup>82</sup> It is estimated that by the fall of 1990, there will be 20,000 inhabitants at the Galang Island refugee camp.<sup>83</sup> Only 600 out of this total would be those that arrived prior to the cutoff date under the CPA, and most of those individuals have already been claimed by countries of resettlement.<sup>84</sup> According to the UNHCR, in April of 1990, there were 1,189 arrivals of Vietnamese boat people.<sup>85</sup> In Galang, 10,641 asylum-seekers are being held, and 1,115 cases were pending screening.<sup>86</sup>

UNHCR personnel interview asylum-seekers prior to their contact with the Indonesian authorities.<sup>87</sup> Biographical data are developed as well as an initial assessment of the claim for refugee protection.<sup>88</sup> These materials are not given to the Indonesian authorities.<sup>89</sup> The P3V

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76. *Id.*

77. *Id.*

78. *Id.*

79. Temporary stay may be denied by Indonesia to Cambodians who express a wish to go to Australia. *See generally UN Powers Set to Meet on Cambodia Peace Plan*, South China Morning Post, May 17, 1990, at 14, col. 6.

80. Interview with U.S. officials at the United States Embassy in Jakarta (May 1990).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. Interview with UNHCR officials in Indonesia (May 1990).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

Committee, the screening entity, is composed two-thirds of high ranking military officers.<sup>90</sup> The P3V Committee conducts the main interview and makes decisions after consulting with UNHCR.<sup>91</sup> When the assessments of the P3V Committee and UNHCR conflict, discussions between the interviewers and consultants are possible with a view toward resolution.<sup>92</sup> The UNHCR has seven legal consultants and seven interpreters.<sup>93</sup> The interpreters used by the authorities are considered to be competent.<sup>94</sup>

The P3V Committee conducts seven interviews per day with a corps of rotating officers.<sup>95</sup> Interviews range from two to two-and-a-half hours in length, and follow interviews by the UNHCR personnel of one-and-a-half hours.<sup>96</sup> The UNHCR estimates that, assuming a rate of 250 individuals screened per month, screening of the population currently at Galang would require four years if there are no additional arrivals.<sup>97</sup>

According to UNHCR, there is no legal tradition in Indonesia which would support judicial review by asylum-seekers rejected in the procedure.<sup>98</sup>

## B. Malaysia

Screening in Malaysia has advanced to the point where of the first group of decisions announced in May of 1990, there was an approval rate of thirty-six percent, after factoring in family unity cases.<sup>99</sup> The first set of decisions announced in Malaysia involved the approval of 62 cases (121 individuals) and the rejection of 111 cases (173 individuals).<sup>100</sup> As

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90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. Interview with UNHCR officials in Kuala Lumpur (May 1990). The Comprehensive Plan of Action recognizes "the need to respect the family unit" in refugee status determination. *International Conference, supra* note 5, at 13 (in practice, this means that asylum-seekers should be accorded refugee status if they can show that they are immediate family of previously recognized refugees).

100. *Id.*

of July 31, 1990, the totals are as follows:<sup>101</sup>

	<u>People</u>	<u>Cases</u>
Number interviewed	2,533	1,429
Positive decisions	591	291
Negative decisions	1,025	677
Positive review (appeal)	18	6
Negative review	42	34

According to UNHCR officials, screening is conducted by a governmental task force that includes navy, police, civilians and army officers, known as Task Force VII.<sup>102</sup> A lengthy questionnaire is used.<sup>103</sup> On any given day, there are six officials interviewing Vietnamese boat people at the rate of eighteen cases per day.<sup>104</sup> Because the interview in Malaysia operates as a joint exercise between UNHCR and the Malaysian authorities, the UNHCR provides its case assessment to the authorities.<sup>105</sup> Interpreters are available to either the UNHCR or government interviewers, and a contract was recently undertaken with the United States-based International Rescue Committee to recruit six foreign interpreters for the interviews.<sup>106</sup> There are seven UNHCR legal consultants in Malaysia.<sup>107</sup> The director of Task Force VII generally will not interview without UNHCR being present.<sup>108</sup> As the interviews are collective, there are ordinarily no problems regarding discrepancies. UNHCR consultants are also available to the boat people after arrival, prior to the initial interview and before and after first instance decisions are given.<sup>109</sup> Diplomats have estimated that it could require up to four years to screen the inhabitants at Pulau Bidong.<sup>110</sup>

In terms of review procedures, a Refugee Status Review Board (RSRB) has been established composed of government officials at a senior

101. UNHCR Statistics on Refugee Status Determination under the CPA (July 20, 1990) [hereinafter UNHCR Statistics].

102. Interview with UNHCR officials in Kuala Lumpur, *supra* note 99.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. Interview with U.S. officials in Kuala Lumpur (May 1990).

level and different from those who conduct interviews and make first instance decisions. The UNHCR is a member of the RSRB in an observer and advisory capacity. The board is chaired by the director of the national Task Force and sits in three-member panels. Boat people have seven days in which to file a formal notice of intent to seek review, and thirty days thereafter to prepare the grounds on which review is being sought. A Review Advice Group has been organized from among asylum-seekers consisting of boat people who have undertaken university studies in various fields, including law. Currently six asylum-seekers in Pilau Bidong camp have been identified as legal resources to assist boat people in presenting their appeals. Legal advice through a separate agency is not available to assist boat people wishing to appeal. No reasons are provided in connection with negative decisions on appeal, although a proposal to the authorities in that regard has been made.<sup>111</sup> The first session of the RSRB took place on July 30, 1990.<sup>112</sup> There is no provision for judicial review.

### C. Thailand

In April of 1990, 932 boat people arrived in Thailand;<sup>113</sup> 1,742 arrived in May.<sup>114</sup> In July of 1990, only about 650 boat people arrived.<sup>115</sup>

Arriving Vietnamese in Thailand are considered according to Thai government documents to be "illegal immigrants" to whom officials "who do not have any duty involved" have no "access."<sup>116</sup> Arrivals are to be transferred within fifteen days to Section S in Phanat Nikhom camp, where they are detained prior to screening.<sup>117</sup> At this juncture, according to the Thai documents, "UNHCR shall have access in order to prepare [the] UNHCR form after notifying [the] Camp Commander each

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111. Interview with UNHCR Officials in Kuala Lumpur, *supra* note 99.

112. *Id.*

113. GOVERNMENT OF HONG KONG, MONTHLY STATISTICAL REPORT (ARRIVALS AND DEPARTURES), Doc. No. SRD 704/1/1, Form V (1990).

114. *Id.*

115. Telephone interview with UNHCR official in Bangkok (Aug. 1990). In August, 500 Vietnamese arrived by boat and 50 by land, making for a total of 7,368 arrivals between January and August. *Id.*

116. *See generally* Helton, *supra* note 1, at 32-38.

117. *Id.* at 27-28.



and every time."<sup>118</sup> Those individuals whose cases are actually under consideration are transferred to a designated place, currently Section O at Phanat Nikhom.<sup>119</sup> A new transit center in Nakhon Ratchasima Province is scheduled to open in September for Vietnamese boat people who have not been accorded status and who are awaiting return.<sup>120</sup> The center will accommodate about one-thousand boat people, and will be established at the remote Si Khiu Camp on the site of an earlier detention center for Vietnamese which had been closed in 1986.<sup>121</sup>

The Screening Committee responsible for status determination is chaired by the Deputy Director of the Operations Centre for Displaced Persons (OCDP) in Bangkok, and includes the Assistant Director of OCDP, the Chiefs of the Foreign Affairs and Border Information Unit, Planning Division, Coordination with International Organizations, Budgetary Division and Operation Division of the Ministry of the Interior (MOI).<sup>122</sup> Committee determinations are forwarded to the director of OCDP for approval and are based on preliminary interviews which are conducted by teams of MOI officers who are assisted by interpreters.<sup>123</sup> A standard questionnaire is utilized.<sup>124</sup> UNHCR participates as an "observer" during Screening Committee deliberations.<sup>125</sup>

New interviewers were added to the process in April of 1990, by the Thai authorities and are to be trained in July.<sup>126</sup> At any one time, seven interviewers are working, drawn from a pool of thirty-five to forty MOI officials.<sup>127</sup> New members of the pool of interviewers must be trained as they are added to the process.<sup>128</sup>

At the beginning, UNHCR had the capacity to sit in on all of the interviews.<sup>129</sup> Now, less than forty percent are monitored, including

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118. *Id.*

119. *Id.*

120. Interview with UNHCR officials in Bangkok, *supra* note 115.

121. *UNHCR Center in Nakhon Ratchasima Planned*, Bangkok Voice of Free Asia, July 18, 1990.

122. Interview with UNHCR officials in Bangkok, *supra* note 115.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

some without interpreters.<sup>130</sup> In the UNHCR office, there are four legal consultants, including three local lawyers, who are assisted by three interpreters.<sup>131</sup> Comprehensive monitoring at the outset was considered to have helped enhance interpretation in the screening process. An interpreter training seminar was held by the UNHCR branch office in June of 1990, which could provide a useful model to the region and elsewhere.<sup>132</sup>

In the status determination procedure, the Thai authorities have first contact with the applicant.<sup>133</sup> The interviewers are generally receptive to discussing marginal cases with UNHCR monitors prior to formal consideration at the Committee meeting.<sup>134</sup>

While screening began slowly in Thailand, it has progressed with an approval rate about twenty percent, including those affected by family unity cases.<sup>135</sup> Through July of 1990, 58 individuals (38 cases) have been approved and 248 (188 cases) have been rejected by the Screening Committee.<sup>136</sup> Appeals had been filed on behalf of 123 individuals (87 cases) of which UNHCR supported 6 (5 cases).<sup>137</sup>

According to UNHCR officials, there is a danger that the Thai interviewers will be restrictive in their application of refugee criteria, presumably to avoid being left with a residue of boat people who are rejected by the countries of resettlement.<sup>138</sup> United States immigration authorities have just begun to interview screened-in Vietnamese in Thailand for purposes of resettlement abroad.<sup>139</sup>

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130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. The interviews by U.S. Joint Voluntary Agency (JVA) personnel raise the so-called "double screening" issue. Will the countries of resettlement re-determine the question of refugee status and reject cases already accepted under the screening and review procedure established under the Comprehensive Plan of Action? In the United States, the Refugee Act of 1980 vests the discretion respecting admission in the Attorney General, as delegated to the Immigration and Naturalization Service. See 8 U.S.C. § 1157 (1988). Differential treatment by the countries of resettlement could be a source of friction between themselves and the countries of first asylum.

Those boat people denied by the Screening Committee are given written notices and advised that appeals may be taken through UNHCR within seven days of a Committee determination with the opportunity within thirty days to submit additional information for reconsideration.<sup>140</sup> An inter-agency Appeals Committee in Bangkok is chaired by the Deputy Permanent Secretary of MOI and includes the Deputy Director and Assistant Deputy Director of OCDP, as well as representatives of the National Security Council, Ministry of Foreign Affairs, Joint Operations Command, Navy, Immigration and Marine Police.<sup>141</sup>

UNHCR has considerable responsibility on appeals. Indeed, the Thai are of the view that only those appeals considered by UNHCR will have a chance of recognition on appeal.<sup>142</sup> As July 1990, UNHCR had supported only five of a total of eighty-seven cases on appeal.<sup>143</sup>

Those Vietnamese who are "screened in" are given a written notice, transferred to Section C, and registered awaiting resettlement.<sup>144</sup> UNHCR is informed of the positive determination in order that it may begin making appropriate arrangements.<sup>145</sup> According to Thai government documents, under the CPA, Vietnamese refugees "have no right to choose the country for resettlement."<sup>146</sup> Those asylum-seekers who are "screened out" are also segregated pending being returned to Vietnam.<sup>147</sup> Absent specific authority, the Thai provide no access to these individuals.<sup>148</sup> There is no provision for judicial review in Thailand for cases denied under this procedure.<sup>149</sup>

#### D. Philippines

The Philippines is the only country among those discussed in this article that has signed the United Nations Convention and Protocol

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140. See *Co-ordinating Committee*, *supra* note 62, at 9.

141. Interview with UNHCR officials in Bangkok (May 1990).

142. Interview with Charoen Wimmattikosol, Assistant Director, Operations Centre for Displaced Persons, Thailand Ministry of Interior, in Bangkok (May 23, 1990).

143. See Interview with UNHCR officials in Bangkok, *supra* note 115.

144. See Helton, *supra* note 1, at 31.

145. *Displaced Persons Report*, *supra* note 15, at 5.

146. *Id.*

147. See Interview with Charoen Wimmattikosol, *supra* note 142.

148. See Interview with UNHCR officials in Bangkok, *supra* note 115.

149. *Id.*

relating to the Status of Refugees.<sup>150</sup> The procedure for the determination of refugee status in the Philippines involves three stages: reception, status determination, and appeal.<sup>151</sup>

Upon arrival in the Philippines, an initial registration is conducted by local officials.<sup>152</sup> Asylum-seekers are then transferred to the Philippine First Asylum Camp (PFAC) in Puerto Princesa, Palawan.<sup>153</sup> As of June 30, 1990, 8,095 asylum-seekers were held in the PFAC, and 6,991 of them had arrived after March 21, 1989.<sup>154</sup> Asylum-seekers are interviewed by non-governmental organization staff under the supervision of UNHCR in the PFAC.<sup>155</sup> Standardized questionnaires are used.<sup>156</sup> Reports of the pre-determination interviews are signed by asylum-seekers and presented to the Commission on Immigration and Deportation (CID) for decision.<sup>157</sup>

A decision on refugee status is made by a CID official, who is present at the camp and to whom the pre-determination interview report is submitted.<sup>158</sup> In doubtful cases, including those where a negative decision is foreseen, the asylum-seeker, assisted by an interpreter, is to be present so that the deciding officer can ask follow-up questions and make an assessment of credibility.<sup>159</sup> A UNHCR representative is to observe interviews, but is not permitted to participate in the proceedings.<sup>160</sup> Decisions on refugee status are made in Manila and are to be communicated to applicants in writing and a copy is given to UNHCR.<sup>161</sup> In the case of a negative decision, the basis for the denial is to be stated and an asylum-seeker given fifteen days to file a notice of

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150. *Executive Committee of the High Commissioner's Programme, Status of Accessions to and Ratifications of Multilateral Treaties Concerning Refugees*, U.N. Doc. A/AC.96/INF.172/Rev.2 (1989).

151. F. Feliciano & M. Cerna, *Refugees in Southeast Asia: A Note on Philippine Practice and Recent Developments* 3 n.1 (Aug. 10, 1990) (unpublished manuscript) (available at *New York Law School Journal of Human Rights*).

152. *Id.*

153. *Id.*

154. *Id.* at 2, 4.

155. *Id.* at 3 n.1.

156. *Id.* at 4 n.1.

157. *Id.*

158. *Id.*

159. *Id.* at 5 n.1.

160. *Id.*

161. *Id.*

appeal.<sup>162</sup> If no appeal is taken, "the asylum seeker shall be deemed to have chosen voluntary repatriation."<sup>163</sup> As of June 1990, 774 individuals had been screened and were awaiting decisions,<sup>164</sup> 18 individuals (12 cases) had been granted refugee status, and 17 individuals (10 cases) had been denied status, in the first instance.<sup>165</sup>

Appeals are to be submitted to an Interagency Task Force on Refugee Assistance and Administration sitting as an appeal board in Manila.<sup>166</sup> The asylum-seeker is given an opportunity to submit a written statement in support of the appeal,<sup>167</sup> and UNHCR has seven days from receipt of the notice or statement to submit its comment on the appeal.<sup>168</sup> A copy of the decision of the Appeal Board is given to UNHCR, and a representative of UNHCR is to serve a copy on the individual.<sup>169</sup> The decisions of the Appeal Board are considered "final."<sup>170</sup> As of June 1990, 17 individuals (10 cases) had been rejected on appeal.<sup>171</sup>

Rescue-at-sea cases have posed a particular dilemma in the Philippines, which is the only country in the region that still accepts such cases subsequent to the promulgation of the CPA.<sup>172</sup>

In dealing with the rescue-at-sea cases, the Philippine Government has adopted the procedure that before any such case will be admitted in any of the refugee centers in the country, a written guaranty should be given by the flag state of the rescuing vessel to the effect that the people rescued will be transferred from the Philippines by 31 December 1992 regardless of their status as refugees or non-refugees, under the responsibility of such flag state. Two specific instances may be referred to in this connection

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162. *Id.* at 6 n.1.

163. *Id.* at 7 n.1.

164. *See* UNHCR Statistics, *supra* note 101, at 1.

165. *Id.*

166. F. Feliciano & M. Cerna, *supra* note 151, at 6 n.1.

167. *Id.*

168. *Id.* at 7 n.1.

169. *Id.*

170. *Id.*

171. *See* UNHCR Statistics, *supra* note 101, at 1.

172. F. Feliciano & M. Cerna, *supra* note 151, at 19.

The first is the case of the USS Beaufort. On 30 May 1990, the USS Beaufort docked at the Subic Naval Base, Olongapo, Philippines, with 101 Vietnamese boat people who had been rescued in the South China Sea on 17-18 May 1990. The Embassy of the United States, in its Notes Nos. 412 and 413, both dated 29 May 1990, requested the Philippine Government to authorize the disembarkation of the rescued boat people and stated that the United States "guarantees the resettlement of all Vietnamese boat people brought to the Philippines by the USS Beaufort."

The Philippine Department of Foreign Affairs sought a more specific guarantee from the United States Government that the boat people brought in by the USS Beaufort will be transferred from the Philippines by *31 December 1992, regardless of whether they are determined to be refugees or not*. Meantime, a second group composed of 154 Vietnamese boat people rescued at sea by the USS Pelelieu in the same area where the 101 boat people had been found, arrived at the Subic Naval Base on 13 June 1990. This brought to 255 the total number of boat people rescued at sea by the two United States warships. After consultations with the United States and the UNHCR, the Philippine Government, for humanitarian reasons, permitted the disembarkation of the 255 boat people upon the assurances *of the UNHCR* that they will be removed from the country by 31 December 1992.

The second illustrative case involved a Canadian warship visiting Manila, the HMCS Provider, which on 22 June 1990 brought to the Philippines 90 Vietnamese boat people rescued at sea. The Canadian Embassy in its Note No. 125-90, dated 20 June 1990, requested the Department of Foreign Affairs to authorize the disembarkation of the boat people on board the warship. Upon request of the Department of Foreign Affairs for a guarantee of transfer, the Canadian Embassy, by its Note No. 135-90, dated 23 June 1990, extended the assurance requested by the Philippine Government that an equal

number of boat people will be transferred from the Philippines by 31 December 1992 whether or not they are determined to be "refugees." On the basis of this assurance, the Department of Foreign Affairs authorized the immediate disembarkation of the boat people on board the HMCS Provider.<sup>173</sup>

#### E. Hong Kong

Upon interception in Hong Kong waters, asylum-seekers are informed that they are illegally entering the territory.<sup>174</sup> If they insist on remaining, a screening procedure is to be carried out in accordance with the strictures of the 1951 Convention<sup>175</sup> and 1967 Protocol<sup>176</sup> relating to the Status of Refugees and the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under a Statement of Understanding between the UNHCR and Hong Kong authorities.<sup>177</sup> The UNHCR is the exclusive source of legal advice and assistance to asylum-seekers in the screening and review procedures, and is to have unrestricted access to the Vietnamese for this purpose.<sup>178</sup>

Interviews are conducted by an Immigration Department officer, who is assisted by an interpreter.<sup>179</sup> The officer completes a questionnaire and makes a recommendation on the case, including an assessment of credibility.<sup>180</sup> Legal counsellors of the UNHCR have unrestricted access in order to be able to monitor the screening interview.<sup>181</sup> The interviewer's recommendation is reviewed by superiors, who make the final decision.<sup>182</sup> If the final decision is negative, the applicant is informed of the denial and of the right to appeal.<sup>183</sup> At the time of notification of the denial, a copy of the

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173. *Id.* at 20-21 (emphasis in original).

174. *See* INHUMANE DETERRENCE, *supra* note 4, at 20.

175. *Id.*

176. *Id.*

177. *Id.*

178. Interview with Michael Hansen, Refugee Coordinator, Security Branch, in Hong Kong (May 24, 1990); *see also* INHUMANE DETERRENCE, *supra* note 4, at 20-21.

179. INHUMANE DETERRENCE, *supra* note 4, at 20.

180. *Id.*

181. *Id.* at 22.

182. *Id.* at 20.

183. *Id.*

Immigration Department file is given to UNHCR and a legal consultant at the Agency for Volunteer Service so that they may consider assisting asylum-seekers with a review.<sup>184</sup> An objection must be lodged with the Immigration Department within fourteen days of notice of the termination.<sup>185</sup> Within four to six weeks, a written statement must be submitted by the applicant for review.<sup>186</sup>

On May 31, 1989, legislation was enacted to establish four panels of a Refugee Status Review Board (RSRB) to handle cases that otherwise would be heard by the Governor in Council.<sup>187</sup> The RSRB is headed by a former judge and is organized in two-person panels whose members are drawn from the civil service and the community at large.<sup>188</sup> A positive decision by one panel member suffices to overturn a negative screening decision.<sup>189</sup> While legal assistance may be offered to some applicants in preparing cases for review, no legal representation is permitted at the review itself.<sup>190</sup> Oral evidence is not given at the review board, although some asylum-seekers are re-interviewed by board members, some of which are monitored by UNHCR.<sup>191</sup>

As of July 1, 1990, the Director of Immigration had completed screening for 14,386 people, of whom 1,611 were screened in (11.2%), including on family unity grounds, and 12,775 were screened out (88.8%).<sup>192</sup> The RSRB has reviewed the cases of 10,440 people.<sup>193</sup> The Director of Immigration's decision has been upheld for 9,539 people and overturned for 901.<sup>194</sup>

The screening procedure in Hong Kong has been very controversial. Worthy cases have been reported rejected, including Vietnamese who had been subjected to harsh re-education and forced

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184. *Id.* at 22.

185. *Id.* at 20.

186. *Id.*

187. *Id.* at 21.

188. AMNESTY INTERNATIONAL, *supra* note 49, at 11.

189. *Id.*

190. *Id.* at 10-11.

191. Interview with UNHCR officials in Hong Kong (May 1990).

192. GOVERNMENT OF HONG KONG FACT SHEET: VIETNAMESE BOAT PEOPLE IN HONG KONG (July 1990).

193. *Id.*

194. *Id.*



labor measures.<sup>195</sup> Amnesty International has criticized the procedure as having "critical flaws" and made recommendations to enhance the procedure, including the provision of more systematic legal counselling and requiring the RSRB to state reasons for negative decisions on appeal.<sup>196</sup>

Perhaps the most eloquent criticism is that offered by different asylum-seekers themselves:

Our family arrived in Hong Kong on April 25, 1989, after a long and dangerous journey. We were interviewed in August of the same year. The interview was very brief and I was not allowed enough time to elaborate on the persecutions that we underwent in Vietnam. The interviewing officer said that there would be another interview. We waited for that other interview but, after a month, received notice from the Immigration office of our being denied refugee status.

I then saw a lawyer to submit our request for appeal. The lawyer received me for only 30 minutes, asked me a few superficial questions, handed out a form for me to fill on my own, and left in a rush to tend to (his/her) personal affairs. I knew we were doomed. I spent many sleepless nights worrying about my family's fate. Within days, I lost weight and grew old beyond recognition.

In December 1989, I received notice of the rejection of my appeal. I slumped into depression, lying in my bunk all day long, thinking of my family: this is the end of our lives. Nothing is left after a death sentence.<sup>197</sup>

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195. See Basler, *Boat People to Fight Hong Kong in Court*, N.Y. Times, Feb. 25, 1990, at A3, col. 4; see also Basler, *Hong Kong Facing Refugee Lawsuit*, N.Y. Times, Jan. 18, 1990, at A11, col. 1 [hereinafter *Refugee Lawsuit*]. On February 18, 1991, a judge of the Hong Kong High Court ruled that a Vietnamese boat person was entitled to new administrative proceedings in view of error in the screening and review procedures in his case. Basler, *Hong Kong Court Rules on a Refugee*, N.Y. Times, Feb. 19, 1991, at A3, col. 1.

196. See AMNESTY INTERNATIONAL, *supra* note 49, at 51-52.

197. Letters from Vietnamese asylum-seekers to either Refugees International or the Lawyers Committee for Human Rights (1990) [hereinafter Letters from Vietnamese asylum-seekers in 1990] (discussing problems and urging help with the screening process

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At last we fulfilled our wish and escaped to Hong Kong, only to encounter the "screening" process. We are desperately waiting for the judgement of the Hong Kong government and the monitor of the United Nations. But the policy of the screening process is unfair and unjust.

When Immigration officers interviewed us the first time, they forced us to answer certain chosen questions as "yes" or "no." They did not give us any opportunity to tell our background and the harrassment [sic] we received from the Communists. The Immigration officers even forced my mother not to say that. She has a brother at the Sam Yick Camp, Hong Kong. Our interview was one-sided and intentionally manipulated to fit our status into the so-called "economic migrant" category. Therefore we were denied status as political refugees.<sup>198</sup>

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I have not been satisfied with the unfair decisions of [the] Hong Kong Immigration Department and Refugee Status Review Board. My argument [is] as following:

1. The reasons that [the] Immigration Officer cited . . . [are] not sound. He has used the words of my frightened younger brother to reject my claims.
2. The Immigration officer did not understand fully what I declared, maybe because of the difficulties in languages. I was questioned and answered through an Interpreter who was not . . . [proficient] in modern Vietnamese and in his job.

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at the Whitehead detention facility). Translations are not literal and authors' names have been omitted due to the sensitive nature of the information disclosed and to prevent any possibility of retaliation.

198. *Id.*

3. The Immigration [officer exhibited] . . . some threatened behaviours to my younger brother and my husband . . . who were accustom[ed] to be threatened by Vietnamese Communist police, so they . . . [found it] difficult to tell all the truth.<sup>199</sup>

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With limited knowledge, old age, plus the fear of being return to Vietnam, I was not prepared to remember all the details of my past for the immigration officials. And after the long period in detention in the prison-like camp with unguaranteed security reduced my memory and the quickness necessary to answer the immigration officers' questions. I completely lost self control.

When I had to explain that my life was oppressed and repressed by the Communists in Vietnam within a time limit of little more than one hour, I could not concretely explain everything. As a result, the Immigration Office did not believe and did not accept me as a refugee.

Representing the Immigration Office: Mr Hai Sao had a polite attitude, different than the cold and severe attitude of the Vietnamese Communist police, but my conversation had to be done through a translator therefore it became much more difficult. When I was asked the time of the events or my viewpoints, the translator appeared to be irritated and hurried to finish the job. Therefore I could not explain everything clearly, or I could only speak shortly. If I tried to elaborate, I was cut short without being able to explain things.

For example, Mr. Hai Sao asked which religion my family and I observe. I answered, Buddhist. And the question that followed was do we worship our ancestors. Because all Vietnamese worship their ancestors, regardless of religion, therefore I answered 'yes'. After that I was not asked about the oppression of Buddhism in Vietnam. I was ordered to follow the

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199. *Id.*

Immigration Office questions.<sup>200</sup>

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After arriving at Hong Kong, I had met with some Immigration officers. The meeting did not allow me enough time to tell my story and my reasons for leaving Vietnam. After that, I met with a lawyer to prepare the paper work requesting consideration for refugee status. Again, I was neither given a chance to talk, nor did I fill out any application. He only took some papers and said that he would meet with me again two days later. I did not hear from him again since then. In the mean time, I received a second refusal for refugee status.<sup>201</sup>

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At the same time the Hong Kong Government carries out the screening policy, the main purpose of which is to take away our hope and our refugee status. The major aim of this policy is not to select the real refugee but to stop the flow of refugees. Therefore, before we have any interview concerning our status, we were never . . . [given] any legal advice from the Hong Kong Government, The UNHCR or any human rights group to prepare ourselves for the interview. On the other hand, the Hong Kong immigration office use[s] fixed questions in the screening process. They used intimidating behavior such as: yelling at us, pushing their hands on the table, examining our bodies, forcing us to put our hands on the table and not giving us permission to tell our full stories.

The officer for the second screening interview had also simplified the problem. There are people who were denied refugee status within the twenty-eight given days for appeal or before they have a chance to see the lawyers. Most people do not know the face of the

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200. *Id.*

201. *Id.*

officers of the second interview. Twice our refugee status was denied us and we were not told the reason why. The Hong Kong Government way of doing things show that they want to label us as economic refugees and force us to go back. As . . . [a] result, in January and February 1990 because of being rejected from receiving refugee status one woman and eleven men cut open their stomachs to protest against the screening policy and to prove that they are willing to die [rather] than to go back to Vietnam. One man hanged himself.<sup>202</sup>

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On the February 16, 1989 I and my niece, Nguyen Thi Diem, born in 1979, had an interview with Hong Kong Immigration Office. During the interview, an official gave us very rude treatments such as: searching our bodies, yelling at us, slamming on the table, pointing a ruler at our faces, forcing us to face against the wall, etc. I was very upset, confused and terrified because of those treatments. Therefore, I did not understand and answer his questions as clearly as I should.<sup>203</sup>

## VIII. THE APPLICATION OF HUMAN RIGHTS AND REFUGEE LAW

### A. Push-backs: Malaysia

No precept of law is more fundamental than the principle of non-refoulement, which prohibits the return of a refugee in any manner whatsoever to a place where his or her life or freedom would be threatened.<sup>204</sup> In 1977, the governments of the Executive Committee of the UNHCR Programme concluded that the principle of non-refoulement applies to persons at a state's border, whether or not they have been formally recognized as refugees.<sup>205</sup> The Executive Committee reiterated

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202. *Id.*

203. *Id.*

204. See Helton, *supra* note 1, at 39 (quoting G. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* (1983)).

205. *Id.* at 40 n.119.

this fundamental protection precept in 1981 when it concluded that in situations of influx, asylum-seekers should be admitted to the state in which they seek refuge at least on a temporary basis, and that in all cases the principle of non-rejection at the frontier must be scrupulously observed.<sup>206</sup>

In Malaysia, the greatest threat to refugee protection is the continued redirection policy, which, as of May of 1990, had affected almost 8,000 Vietnamese boat people.<sup>207</sup> According to United States diplomats, the policy has also resulted in nine confirmed deaths.<sup>208</sup> As a result of the redirection policy, arrivals in May of 1990 numbered only 27, compared to the 1,730 boat people that arrived in Malaysia in May of 1989.<sup>209</sup> United States diplomats characterize the dialogue with Malaysian officials on the question of the return of screened-out boat people as "sterile."<sup>210</sup> The UNHCR interviews boat leaders in Indonesia regarding "redirections." Ordinarily, boat people are held in camps in the forests of Malaysia by officials who seek to remain unaccountable for their actions by placing tape over their name-plates.<sup>211</sup> The Malaysian authorities sometimes give the asylum-seekers boats, life-jackets (particularly to women and children), a compass, and maps.<sup>212</sup> The boat people are then redirected to Indonesia.<sup>213</sup>

Malaysia's policy and practice of rejecting Vietnamese boat people prior to screening contravenes the basic principle of non-refoulement and should be ended forthwith. According to western diplomats, the Malaysian redirection policy has been formulated in the Prime Minister's office and is estimated to be relatively quite expensive, reflecting the high governmental level of authorization involved.<sup>214</sup> Providing the Vietnamese boat people with new boats costs upwards of

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206. *Id.* (conclusions of the Executive Committee are so-called "soft law" sources that can serve as evidence of state practice or sources to interpret accepted legal obligations).

207. Interview with U.S. consular official in Hong Kong (May 1990).

208. *Id.* Undoubtedly, more than nine refugees have perished as a result of this policy.

209. *Id.*

210. Interview with U.S. officials in Kuala Lumpur (May 1990).

211. *Id.*

212. *Id.*

213. Interview with UNHCR officials in Indonesia, *supra* note 85.

214. Interview with Western diplomats in Kuala Lumpur (May 1990).

\$20,000.<sup>215</sup> Additional costs include fuel, life-jackets and other essential provisions.<sup>216</sup>

B. Detention

1. Hong Kong

Camps in Hong Kong, where about 50,000 Vietnamese are currently being held, are in many instances horrendously overcrowded, terribly inadequate, or both.<sup>217</sup> The inhabitants continue to face considerable violence in the camps, perhaps an inevitable consequence of a brutal detention policy.<sup>218</sup> As one detainee in Hong Kong described the situation:

Nevertheless, the Hong Kong Government has ignored the 1951 Geneva . . . [Convention] and the 1967 Protocol concerning the refugees. They have wrongly held us in these horrible detention centers, similar to the Fascist concentration camps. In this closed camp we live like primitive man. The "family" concept has been destroyed because more than 100 people are forced to live in a small hut of 90 meters. We do not have enough air. We have diseases and sickness, but medical service have been very meager. There is not enough space nor furniture for schooling. Our children have learned almost nothing for the past two years. Furthermore, the Hong Kong Government has encouraged division among the Vietnamese boat people by giving support to the criminal elements in the camps. The criminals continue to stir up trouble among the boat people which then lowers our dignity in the eyes of the community.<sup>219</sup>

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215. *Id.*

216. *Id.*

217. See INHUMANE DETERRENCE, *supra* note 4, at 12; see also Erlanger, *Far Fewer Boat People Coming to Hong Kong*, N.Y. Times, Feb. 7, 1991, at A5, col. 1.

218. *Id.* at 14.

219. Letters from Vietnamese asylum-seekers in 1990, *supra* note 197.

## 2. Malaysia

As of August 1990, 14,000 Vietnamese were being held at Pilau Bidong in Malaysia.<sup>220</sup> The camp has deteriorated greatly because of overcrowding and the inability to obtain permission from the local authorities to effect an expansion.<sup>221</sup> Specifically, the houses at Bidong were designed for an occupancy rate of about six to eight persons per living unit.<sup>222</sup> In September of 1989, the occupancy rate in some living units was twenty-five people.<sup>223</sup> The foundations of many of the houses have been eroded by inhabitants digging underneath in an attempt to create more living space.<sup>224</sup> The danger of collapse is ever-present. Also, unsanitary conditions have been created by a severe shortage of toilets and inadequate sewer lines.<sup>225</sup> The Malaysian Red Crescent Society, the only non-governmental service provider sanctioned by the Malaysian authorities, is experiencing a funding crisis due, in part, to UNHCR's own funding difficulties.<sup>226</sup>

## 3. Thailand

In Thailand, the situation in Phanat Nikhom camp is particularly difficult for Vietnamese asylum-seekers. As of August 1990, there were about 8,000 in section S awaiting screening, and about 1,000 in section O awaiting decisions relating to screening to which their cases have been subjected.<sup>227</sup> There is overcrowding, with up to forty persons in each building in section S, which was built to house twenty-five.<sup>228</sup> Thai authorities have stated that educational activities might be provided to children after the newly contemplated Si Khiu camp was opened to accommodate those who had been screened out.<sup>229</sup>

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220. MALAYSIAN RED CRESCENT SOCIETY, 3RD QUARTERLY REPORT 11 (1989).

221. *Id.*

222. *Id.*

223. *Id.* The occupancy rate in living units is probably even greater now.

224. *Id.*

225. *Id.* There is approximately one toilet per 150 people in the camp at Pilau Bidong.

226. Interview with Datin Paduka Ruby Lee of the Malaysian Red Crescent Society (May 17, 1990).

227. Interview with UNHCR officials in Thailand (May 1990).

228. *Id.*

229. Interview with Charoen Wimmattikosol, *supra* note 142.



## 4. Analysis and Recommendations

The detention policy countenanced for Vietnamese boat people in the region is not only inhumane, it violates accepted tenets of international law. Article 9(1) of the Covenant on Civil and Political Rights<sup>230</sup> prohibits arbitrary detention -- such as that of the Vietnamese -- which has no legitimate purpose related either to eventual removal or considerations of national security.<sup>231</sup> The prohibition against prolonged arbitrary detention has achieved the character of customary international law and is binding on nations irrespective of accession to this treaty provision.<sup>232</sup> The detention policy should be immediately curtailed to the extent it violates these basic precepts.

## C. Screening

A screening procedure that does not accurately determine refugee status runs a risk of returning refugees who fear persecution in violation of Article 33 of the Convention and Protocol relating to the Status of Refugees.<sup>233</sup> Article 33 states:

No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.<sup>234</sup>

A "refugee" is defined as one who has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion" and is unable or unwilling to avail himself or herself of the protection of the country of origin.<sup>235</sup>

230. G.A. Res. 2200, 11 U.N. GAOR Supp. (No. 16) at 170, U.N. Doc. A/6316 (1966).

231. AMNESTY INTERNATIONAL, *supra* note 49, at 3.

232. RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 702(e) (1986).

233. Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 19 U.S.T. 6223, 6259, T.I.A.S. No. 6557, at 37, 189 U.N.T.S. 137, 176 [hereinafter Convention]; *see also* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 6224, T.I.A.S. No. 6577, at 2, 606 U.N.T.S. 267.

234. Convention, *supra* note 233, 19 U.S.T. at 6276, T.I.A.S. No. 6577, at 54, 189 U.N.T.S. at 176.

235. *Id.* at 6261, T.I.A.S. No. 6577, at 39, 189 U.N.T.S. at 152.

The principle of non-refoulement is now considered a norm of customary international law binding even on those states which are not parties to the refugee treaties.<sup>236</sup>

### 1. Hong Kong

The initial refugee screening procedure that Hong Kong has used since June, 1988, has been criticized as cursory and filled with potential for error.<sup>237</sup> Interviewers seemed intent on establishing solely economic reasons for departure from Vietnam. Asylum-seekers who have endured harsh re-education programs or forced labor in Vietnam have been routinely rejected.<sup>238</sup> As the letters from asylum-seekers show, they are unable to fully explain their claims for asylum.<sup>239</sup> Frequently, they have no meaningful way to check disputed facts or to correct translation errors. Poor translation facilities and inadequate records then obstruct appeals.<sup>240</sup>

The screening and review procedures have been the subject of recent improvement, most particularly a recent decision of the Hong Kong authorities to provide particularized reasons to support negative decisions of the Refugee Status Review Board.<sup>241</sup> This important procedural safeguard has yet to be emulated elsewhere in the region. After considerable delay, reasoned decisions began being rendered in the latter half of 1990.<sup>242</sup> Also, Review Board members have reinterviewed many of the boat people who had sought review of negative decisions in the first instance.<sup>243</sup> Appeals are taken in about one third of the cases by lawyers with the Agency for Voluntary Service, expanding somewhat the resources available to boat people at that relatively late stage of the

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236. Helton, *supra* note 1, at 40 & nn.119-20 (citing UNHCR *Conclusions on the International Protection of Refugees adopted by the Executive Committee of the High Commissioner's Programme* 14 (1980); G. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 97 (1983)).

237. See AMNESTY INTERNATIONAL, *supra* note 49, at 4.

238. See INHUMANE DETERRENCE, *supra* note 4, at 31.

239. *Id.* at 32.

240. *Id.*

241. See generally Griffin, *Legal Counsel for Boat People*, South China Morning Post, May 27, 1990, at 2, col. 1; see also Interview with UNHCR officials in Hong Kong (May 1990).

242. Interview with UNHCR officials in Geneva (Oct. 1990).

243. *Id.*

processing system.<sup>244</sup> The unavailability of individualized legal counselling prior to first instance screening, however, continues to be a serious flaw in the procedure.<sup>245</sup> UNHCR monitoring activities remain severely circumscribed because of limited resources.<sup>246</sup> One UNHCR legal consultant estimated that only about six percent of the cases at the Whitehead detention facility are monitored in the first instance.<sup>247</sup>

## 2. Malaysia

Elsewhere in the region there has been some slowness implementing the screening and review procedures, although the efforts have been serious. In terms of the need for legal services and assistance for asylum-seekers in Malaysia, despite the very close involvement of UNHCR legal officers at all stages of the screening procedure there, additional counselling and legal assistance resources are needed. The UNHCR repeatedly emphasizes the office's role to monitor adjudicators, and not to provide either advocacy on behalf of specific claims or to adjudicate cases.<sup>248</sup> Clearly, more legal assistance is necessary for Vietnamese boat people in Malaysia, and a strong case can be made for the development of self-help materials that would permit asylum-seekers to assist themselves in the screening and review procedures.<sup>249</sup>

## 3. Analysis and Recommendations

Several measures could be taken to respect human rights and refugee law in screening and review procedures under the CPA. In Hong Kong, the government and UNHCR should establish a volunteer pre-screening legal counselling program for Vietnamese boat people. A volunteer project could work in Hong Kong with its western legal system and rich commercial activities, and local lawyers have taken up such an initiative. Funding resources and foreign lawyer support would be forthcoming in such an endeavor.<sup>250</sup> Such a project would benefit the individuals counselled as well as permit a strong case to be made for the

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244. AMNESTY INTERNATIONAL, *supra* note 49, at 17.

245. *Id.*

246. Interview with UNHCR officials in New York (Feb. 1990).

247. *Id.*

248. *See* AMNESTY INTERNATIONAL, *supra* note 49, at 15.

249. *Id.* at 17.

250. *See* Griffin, *supra* note 241, at 2, col. 1.

investment of resources at the outset of the screening procedure. CPA implementation in Hong Kong, to a great extent, has been compromised by the early evolution of an immigration screening procedure before the UNHCR was in a position to monitor the effort adequately.<sup>251</sup> A series of safety net measures have been taken to deal with a procedure that went awry in the first instance, including the establishment of the Refugee Status Review Board,<sup>252</sup> recent improvements in Board procedures,<sup>253</sup> the use of the UNHCR mandate procedure in Hong Kong,<sup>254</sup> and even judicial challenges to the screening and review mechanisms.<sup>255</sup> The need for perhaps inevitably inadequate safety net measures could be reduced by the investment of an appropriate level of resources at the outset of the procedure.

In terms of more general observations, it is worth noting that where UNHCR is most directly involved in the status determination procedure, the process seems more calculated to give the benefit of the doubt to asylum-seekers.<sup>256</sup> Where, on the other hand, immigration enforcement elements are more involved, the procedures are correspondingly more restrictive. Specifically, in Indonesia and Malaysia, where UNHCR is effectively involved in the status determination procedure, results seem to be relatively generous. In Hong Kong, however, where the immigration authorities have taken primary responsibility for determining refugee status in the first instance, results seem more restrictive.

Also, there is a clear need in the region for comprehensive and specific information about current conditions in Vietnam in order to support the various adjudicatory processes. A region-wide approach toward the development of country of origin information is needed for the

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251. See Interview with Michael Hansen, *supra* note 178.

252. See AMNESTY INTERNATIONAL, *supra* note 49, at 9-13.

253. *Id.*

254. According to Refugee Coordinator Michael Hansen, the Hong Kong government has accepted that UNHCR will have an opportunity prior to any deportation of boat people to determine under its mandate whether any are deserving of refugee protection. If so, the Hong Kong authorities will abide by the determination and treat the individuals as refugees. UNHCR branch office officials, however, have expressed reservations about a systematic use of the mandate power given resource limitations. In fact, according to UNHCR, the mandate has been used in a relatively small number of instances, 40 cases involving 105 individuals. Interview with UNHCR officials in Hong Kong (May 1990).

255. See *Refugee Lawsuit*, *supra* note 195, at A11, col. 1.

256. See HANDBOOK, *supra* note 54, paras. 203-04, at 48.

use of advocates and adjudicators. Collection of information would permit the development of group profiles and evidentiary presumptions that could be relied upon to accord status on an expedited basis.<sup>257</sup> Any such project should probably be located outside of the formal structure of the UNHCR in order to avoid institutional concerns about monitoring human rights conditions in the countries of origin of refugees. Additional personnel will be required to organize and implement an information and documentation project, apart from those who are currently working on adjudications in the region.

Consideration should also be given to enhancing the available training on refugee criteria and status determinations.<sup>258</sup> As the procedures and possibilities for UNHCR and nongovernmental interventions vary according to the particular system, it may be necessary to undertake aspects of such an effort on a country-specific basis.

## IX. CONCLUSION

In a statement issued in Manila on May 16, 1990, various countries in Asia announced that after fifteen years of providing temporary asylum to Vietnamese boat people, the "burden has become intolerable and cannot continue."<sup>259</sup> These countries of temporary refuge called for the lifting of a moratorium on forcible repatriation as of July 1, 1990.<sup>260</sup> Vietnamese who have been screened out as "non-refugees" and who do not volunteer to return to Vietnam would be subject to deportation.<sup>261</sup> The statement emphasizes that countries of first asylum "reserve the right to take such unilateral action as they deem necessary to safeguard their national interests, including the abandonment of temporary refuge" failing an agreement on "even an intermediate solution to the . . . problem."<sup>262</sup>

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257. See FED. R. EVID. 301. The United States Immigration and Naturalization Service has used country profiles in refugee admissions determinations. See Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 50 n.80 (1983).

258. See INHUMANE DETERRENCE, *supra* note 4, at 5.

259. Statement by Countries of Temporary Refuge meeting in Manila on 16 May 1990, at 1 [hereinafter Statement]. On the agreement between Vietnam, Great Britain and UNHCR on the repatriation of certain Vietnamese boat people from Hong Kong, see *Some Boat People Will Be Returned*, N.Y. Times, Sept. 23, 1990, at A9, col. 1.

260. Statement, *supra* note 259, at 2.

261. *Id.*

262. *Id.* at 3.

There has been a tremendous investment made by the office of the UNHCR toward the implementation of the CPA.<sup>263</sup> It is too early to tell whether this approach will be successful involving, as it does, the imposition of Western concepts and procedures on systems with few analogous legal traditions. Serious efforts have been undertaken to establish screening mechanisms, and, depending on the particular system, UNHCR has been able to play a positive role in furtherance of these adjudicatory arrangements.<sup>264</sup> However, screening and appeals procedures under the CPA are in urgent need of improvement to ensure that genuine refugees are recognized and offered protection, including better training and a system to collect and disseminate information about current conditions in Vietnam.

There is no easy solution to the refugee crisis in Southeast Asia, and the countries of the region are in a difficult dilemma. There may be many policy options, but there are also constraints under human rights and refugee law. Respect for the fundamental human rights of refugees will surely promote the search for durable solutions.

Western donor and resettlement governments should monitor compliance with the CPA's guidelines for treatment of new arrivals in countries such as Thailand. Ready access is necessary to safeguard and rescue arriving boat people as well as to investigate alleged piracy attacks.

Receiving countries must respect the fundamental human rights of asylum-seekers, including the right to be free from arbitrary, prolonged detention. Currently, for example, about 50,000 Vietnamese boat people languish indefinitely in Hong Kong.<sup>265</sup> Such deterrence measures are inhumane and incompatible with the humanitarian standards that must be achieved in order to address the problem.

The donor and resettlement governments should monitor the screening process in order to ensure that criteria are, indeed, applied according to the "humane measurer" called for in the CPA.<sup>266</sup> As yet, many consider that the UNHCR has been unable to ensure application of reliable and fair procedures in jurisdictions such as Hong Kong.<sup>267</sup> Direct governmental intervention may be needed in order to achieve an appropriate screening mechanism.

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263. See generally *Co-ordinating Committee*, *supra* note 62, at 1.

264. See AMNESTY INTERNATIONAL, *supra* note 49, at 51-54.

265. See Erlanger, *supra* note 217.

266. *International Conference*, *supra* note 5, at 11.

267. See generally AMNESTY INTERNATIONAL, *supra* note 49.

There is much cause for concern, and the improvements proposed in this article could contribute to the establishment of fair adjudication systems. Whether by virtue of gross disregard for arrangements under the CPA, such as the Malaysian redirection policy, or in a more calibrated form of noncompliance, such as the restrictive and unfair Hong Kong screening procedure, the lives of refugees are at stake.