

THE CLOSING OF THE SAGA OF THE VIETNAMESE ASYLUM SEEKERS: THE IMPLICATIONS ON INTERNATIONAL REFUGEES AND HUMAN RIGHTS LAWS

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I. INTRODUCTION

The number of refugees¹ worldwide has dramatically increased over the past decades.² Never before have so many people been forced to flee their homes in search of protection abroad.³ The United Nations High Commissioner for Refugees (UNHCR)⁴ and the international community have increasingly disfavored traditional responses of acceptance and asylum.⁵ Instead, they have adopted new approaches to stem the flow of refugees and displaced persons⁶ to provide durable solutions to the world refugee crises.⁷

1. A refugee is "one who flees to a foreign country or power to escape danger or persecution." WEBSTER'S NINTH COLLEGIATE DICTIONARY 991 (9th ed. 1987). For a definition of refugee as defined by the United Nations (U.N.), see *infra* notes 42-44 and accompanying text.

2. *The World's Shame*, ECONOMIST, Nov. 13, 1993, at 45. A study on the state of the world's refugees published by the Office of the United Nations High Commissioner for Refugees (UNHCR) reports that in 1970, there were 1.2 million refugees in the world. *Id.* In 1980, there were eight million. *Id.* Today, there are over 18 million, and this number is increasing by an average of 10,000 per day. *Id.*

3. *Id.* See also Hella Pick, *World Refugee Crisis 'Out of Control'; A United Nations Report Says That Governments Are Failing to Respond to an All-Time High in the Numbers of Displaced People*, GUARDIAN, Nov. 10, 1993, at 20 (noting that refugees who have fled across international borders include 4.1 million Iraqi and Afghan refugees into Iran, 1.6 million Afghan refugees into Pakistan, and 1 million Mozambique refugees into Malawi).

4. The UNHCR is a subsidiary organ of the General Assembly created by that body under Article 22 of the U.N. Charter in January 1951 with its primary purpose being to provide international protection for refugees under its delegated powers from the U.N. Guy S. Goodwin-Gill, *Towards a Comprehensive Regional Policy Approach: The Case for Closer Inter-Agency Cooperation*, 5 INT'L J. REFUGEE L. 347, 368 (1993) [hereinafter Goodwin-Gill, *Comprehensive Regional Policy*] (paper prepared for the International Organization for Migration and the Office of the UNHCR).

5. *The World's Shame*, *supra* note 2, at 45.

6. Displaced persons are those who have been driven from their homes by internal conflicts, such as ethnic cleansing, but who remain within their country, including those persons in the former Yugoslavia, the republics of the former Soviet Union, and Iraq. Pick, *supra* note 3, at 20.

7. See *Fresh Hope in South-East Asia*, UN MONTHLY CHRON., Sept. 1991, at 53 [hereinafter *Fresh Hope*] (discussing the progress of the Comprehensive Plan of Action (CPA), a multilateral agreement that established a legal framework to resolve the problem of Vietnamese, Cambodian, and Laotian asylum seekers and refugees. The plan calls for reduction of the refugee population through repatriation and deterrence by the countries of origin and first asylum.). See generally Warren Zimmerman, *Addressing the Needs of Refugees: A High*

Though new crises arise, the world has finally checked one twenty-year-old international crisis—the flight of Vietnamese refugees.⁸ “Nations of first asylum”⁹ have been overburdened by the financial demands of providing temporary refuge to masses of Vietnamese boat people.¹⁰ Resettlement countries in the West have experienced “compassion fatigue.”¹¹ They have reduced the quotas of refugees admitted and the monetary aid to Southeast Asian refugee camps.¹² Because the world has grown tired of this chronic problem, it has implemented the harsh measures of the Comprehensive Plan of Action (CPA).¹³

Priority in the Post-Cold War Era, Statement Before the Subcommittee on Foreign Operations of the Senate Appropriations Committee (June 30, 1993), in DEPT ST. DISPATCH, July 12, 1993, available in LEXIS, GENFED Library, DSTATE File (Director of the Bureau for Refugee Programs) (surveying the progress of present global refugee situations and the emphasis on comprehensive solutions and repatriation).

8. Stephen Vines, *The Grass Isn't Greener After All*, BUS. TIMES, Jan. 20, 1993, at 27 [hereinafter Vines, *Grass Isn't Greener*].

9. First asylum nations are those nations in Southeast Asia that provide temporary refuge to Vietnamese refugees. Ann C. Barcher, *First Asylum in Southeast Asia: Customary Norm or Ephemeral Concept?*, 24 N.Y.U. J. INT'L L. & POL. 1253, 1254 (1992). The major first asylum countries are Malaysia, Indonesia, Thailand, the Philippines, and Hong Kong. Shamsul Bari, *Refugee Status Determination Under the Comprehensive Plan of Action (CPA): A Personal Assessment*, 4 INT'L J. REFUGEE L. 487, 490 (1992). The Vietnamese refugees have also sought temporary asylum in Singapore, Brunei, and Macau, but these countries have stopped accepting any arriving asylum seekers. See *infra* note 144.

10. Barcher, *supra* note 9, at 1254.

11. “Compassion fatigue” describes the recent disinterest of Western states in the Vietnamese refugee crisis. After two decades, Western sympathy is difficult to muster. See Malcolm S. Forbes, Jr., *They Call it “Compassion Fatigue,”* FORBES, July 10, 1989, at 27.

12. See Dan Stein, *Making Sense of America's Refugee Policy*, USA TODAY, Sept. 1992, at 13,14. Between 1980 and 1991, the number of internationally recognized refugees rose from eight million to 16 million. *Id.* Despite their growing numbers, a decreasing percentage of refugees has been granted permanent settlement in asylum countries. *Id.* The per capita assistance for persons in refugee camps has also decreased. *Id.* “The [United States] spends less than four cents a day per capita to assist refugees in temporary camps.” *Id.*

13. *Office of the United Nations High Commissioner for Refugees: International Conference on Indo-Chinese Refugees*, U.N. GAOR, 44th Sess., Annex, pt. II, U.N. Doc. A/44/523 (1989) [hereinafter 1989 Conference]. The CPA was approved by the 1989 Geneva Conference on Indochinese Refugees. *Id.* para. 25. It purports to achieve a comprehensive solution to refugee crisis in Southeast Asia. *Id.* para. 2.

Overall, these measures have made significant progress in resolving the sad saga of the Vietnamese refugees.¹⁴

This Comment examines the plight of the Vietnamese asylum seekers and analyzes the steps taken by the international community to end this problem. Part II reviews the history of the flight of the Vietnamese boat people and the reasons they fled from their homeland.¹⁵ Part III discusses the international legal framework established by two international conferences to address the Vietnamese refugee crisis.¹⁶ Part IV examines the progress of the main asylum countries under the present regional CPA.¹⁷ Part V explores the implications of this resolution process and its deterrent effect on international refugee and human rights law.¹⁸

II. HISTORY OF THE PLIGHT OF VIETNAMESE ASYLUM SEEKERS

After the Communist takeover of South Vietnam in 1975, a mass exodus of Vietnamese people began.¹⁹ To date, a total of two million people have fled Vietnam in search of asylum and resettlement.²⁰ The majority were "boat people" who departed illegally on crowded, unseaworthy boats.²¹ By 1992, more than 800,000 Vietnamese travelled the perilous journey

14. Zimmerman, *supra* note 7, at *4. Only 58 Vietnamese boat people arrived in first asylum countries in 1992, compared with over 22,000 the year before. *Id.* Screening of the asylum seekers to determine refugee status is near completion in the region. See *Vietnam: Time and Money Running Out for Repatriating Boat People*, BANGKOK POST, Aug. 3, 1993, at *1, available in LEXIS, WORLD Library, ALLNWS File. Hong Kong, which still houses the largest population of asylum seekers, planned to finish screening by the middle of 1994. See *id.* Many asylum countries wanted to close their refugee camps during 1994, and the Philippines actually planned to close its camps in 1994. See Isagni de Castro, *Refugees: Vietnamese Boat People in No Hurry to Return Home*, Inter Press Serv., Oct. 25, 1993, at *1, available in LEXIS, WORLD Library, ALLNWS File.

15. See *infra* notes 19–39 and accompanying text.

16. See *infra* notes 40–140 and accompanying text.

17. See *infra* notes 141–363 and accompanying text.

18. See *infra* notes 364–461 and accompanying text.

19. Arthur C. Helton, *Asylum and Refugee Protection in Thailand*, 1 INT'L J. REFUGEE L. 20, 22 (1989) [hereinafter Helton, *Asylum and Refugee Protection*].

20. LAWYERS COMM. FOR HUMAN RIGHTS, INHUMAN DETERRENCE: THE TREATMENT OF VIETNAMESE BOAT PEOPLE IN HONG KONG 1 (1989) [hereinafter LAWYERS COMM.].

21. *Id.* at 7–8.

across the South China Sea to neighboring countries that provided temporary refuge.²² Most never made it to safety.²³ The Vietnamese people fled for various reasons, including harsh treatment and suppression of human rights by an authoritative government;²⁴ ethnic, religious, and political persecution;²⁵ political executions of those associated with the former South Vietnamese government;²⁶ "re-education" of persons suspected of being a threat to the new regime;²⁷ forced resettlement in remote rural areas called "new economic zones";²⁸ military conscription to support the new Socialist Republic of Vietnam's (SRV) invasion of Cambodia;²⁹ and deteriorating living condi-

22. See Fauziah Ismail, *United Nations: "Urgent Action Needed to Protect Refugees,"* BUS. TIMES (Malaysia), Nov. 18, 1993, at *1, available in LEXIS, WORLD Library, TXTLNE File. Malaysia received 254,467 Vietnamese boat people; Hong Kong received 191,950; Indonesia received 122,584; and Thailand received 116,883. *Id.*

23. Nguyen Cong Hoan, a former member of the Vietnamese National Assembly, estimated that six out of ten persons who attempted the voyage did not survive. *Vietnam: Under Two Regimes*, DEP'T ST. BULL., Sept. 1985, at *6, available in LEXIS, INTLAW Library, DSTATE File. The United States conservatively estimated that over one million refugees fled South Vietnam by 1985, but that hundreds of thousands had died in the sea. George Shultz, *The Meaning of Vietnam*, Address at the Department of State (April 25, 1985), in DEP'T ST. BULL., June 1985, at *2, available in LEXIS, INTLAW Library, DSTATE File (Secretary of State).

24. Arthur C. Helton, *The Comprehensive Plan of Action for Indo-Chinese Refugees: An Experiment in Refugee Protection and Control*, 8 N.Y.L. SCH. J. HUM. RTS. 111, 112 (1990) [hereinafter Helton, *Experiment in Refugee Protection*].

25. *Vietnam: Under Two Regimes*, *supra* note 23, at *5.

26. *Id.* at *4. After North Vietnam defeated South Vietnam, it arrested all officials, supporters of the old regime, and other suspected opponents. *See id.* at *3-4. Most were either executed or sent to "re-education camps." *See id.* It has been estimated that there were about 65,000 political executions during the period from 1975 to 1985. *Id.* at *3.

27. Helton, *Experiment in Refugee Protection*, *supra* note 24, at 112. Under the communist rule, hundreds of thousands Vietnamese, including Buddhist and Christian clergy, intellectuals, and former political figures, were sent to re-education camps. Shultz, *supra* note 23, at *2. There they were subjected to hard labor, indoctrination of communist principals, starvation, denial of medical care, and violent corporal punishment, which often caused permanent injury or death. *Id.*

28. *Vietnam: Under Two Regimes*, *supra* note 23, at *5. The purpose of these "new economic zones" was to "expand agricultural production and reduce 'unproductive' urban population." *Id.* The government chose persons considered to be politically suspect and therefore unable to obtain employment. *Id.*

29. Helton, *Asylum and Refugee Protection*, *supra* note 19, at 23.

tions brought about by food shortage, flood, and drought.³⁰ By 1979, some 600,000 Vietnamese had fled.³¹

Within four years of the fall of South Vietnam, the surge of Vietnamese boat people reached the level of a major crisis.³² In response to mass arrivals of boat people, countries in the region refused to allow them to land,³³ resulting in the deaths of thousands of Vietnamese in the South China Sea.³⁴ In addition to the natural dangers of the sea, brutal pirate attacks and extreme hardships at sea killed many others.³⁵ In 1978, Hanoi decided to encourage the departure by boat³⁶ and targeted Sino-Vietnamese, dissidents, and other minorities as undesirables for such departure.³⁷ It was no coincidence that the majority of the first major wave of refugees were either -

30. Helton, *Experiment in Refugee Protection*, *supra* note 24, at 112.

31. Barry Wain, *The Indochina Refugee Crisis*, 58 FOREIGN AFF. 160, 166 (1979).

32. Helton, *Experiment in Refugee Protection*, *supra* note 24, at 112; Helton, *Asylum and Refugee Protection*, *supra* note 19, at 21.

33. Helton, *Experiment in Refugee Protection*, *supra* note 24, at 112.

34. JOSEPH CERQUONE, UNCERTAIN HARBORS: THE FLIGHT OF VIETNAMESE BOAT PEOPLE 4 (Virginia Hamilton ed., 1987) (U.S. Committee for Refugee consultant). "A terrifying spectre emerged, of small, ramshackle boats containing thousand of desperate refugees roaming the seas of Southeast Asia, before they either drowned or starved." Helton, *Asylum and Refugee Protection*, *supra* note 19, at 23-24.

35. See Jim McManus, *Pirate Attacks on Vietnamese Refugees Decrease*, NAT'L CATHOLIC REP., Jan. 20, 1989, at 22 [hereinafter McManus, *Pirate Attacks*] (stating that in 1981, approximately 80% of boats arriving in Thailand had been attacked by pirates); Barbara Crosette, *U.N. Ends Protection for Vietnamese at Sea*, N.Y. TIMES, Jan. 12, 1992, at 1 (reporting that in 1981 there were 1444 reports of pirate attacks around the Gulf of Thailand); see, e.g., LAWYERS COMM. FOR HUMAN RIGHTS, REFUGEES DENIED: PROBLEMS IN THE PROTECTION OF VIETNAMESE AND CAMBODIANS IN THAILAND AND THE ADMISSION OF INDOCHINESE REFUGEES INTO THE UNITED STATES 78-82 (1989) (describing the rape of Vietnamese women and girls, murder of boat people, and destruction of boats by Thai pirates); *150 Viet Refugees Slain*, L.A. TIMES, Aug. 30, 1989, at 2 (recounting the story of a girl who was the sole survivor of a Vietnamese refugee boat with 150 occupants, which was attacked, robbed, and rammed by Thai pirates); *Vietnam Boat Women Killed by Pirates*, DAILY TEL., Jan. 17, 1990, at 11 (reporting that the bodies of 13 Vietnamese women and one boy which had washed ashore on a Thai beach were presumed to be victims of Thai pirates who had tied them together and cut them loose one by one).

36. Shultz, *supra* note 23, at 13.

37. Wain, *supra* note 31, at 172. The government used force to drive these groups of people out of the country and confiscated their property if they refused to leave. *Id.*

ethnic Chinese or ethnic Vietnamese from South Vietnam.³⁸ The height of this wave came in the spring of 1979, when the departure rate was over 40,000 per month.³⁹

III. INTERNATIONAL LEGAL FRAMEWORK

A. *International Instruments Relating to Refugees*

The main international legal instruments dealing with refugees are the Convention Relating to the Status of Refugees of 1951 (1951 Convention)⁴⁰ and the Protocol Relating to the Status of Refugees of 1967 (1967 Protocol).⁴¹ The 1951 Convention, originally designed to deal with the mass movement of refugees after World War II, covered only those persons from Europe who had fled their countries "as a result of events occurring before 1 January 1951."⁴² The 1967 Protocol extended the coverage of the 1951 Convention to all refugees.⁴³ These instruments define "refugee" as one who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unwilling or, owing to such fear, is unable to return to it.⁴⁴

38. Dinah PoKempner, *Indefinite Detention and Mandatory Repatriation: The Incarceration of Vietnamese in Hong Kong*, 10 PAC. BASIN L.J. 329, 331 (1992). The Hong Kong government reported that 80.7% of the 68,748 Vietnamese arriving in Hong Kong in 1979 were ethnic Chinese and 14.3% were ethnic Vietnamese from the South. *Id.* at 331 n.6.

39. Shultz, *supra* note 23, at 13.

40. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Convention].

41. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

42. 1951 Convention, *supra* note 40, art. 1(A)(2).

43. 1967 Protocol, *supra* note 41, art. I. The Protocol Relating to the Status of Refugees (1967 Protocol) defines "refugee" as "any person within the definition of article 1 of the Convention [Relating to the Status of Refugees (1951 Convention)] as if the words 'As a result of events occurring before 1 January 1951 and . . . ' and the words ' . . . as a result of such events,' in article 1 A (2) [sic] were omitted." *Id.* art. I(2) (alterations in original).

44. 1951 Convention, *supra* note 40, art. 1(A)(2); 1967 Protocol, *supra* note

The 1951 Convention and its 1967 Protocol express the minimum rights of refugees and define state responsibility to asylum seekers.⁴⁵ Although none of the Southeast Asian first asylum countries has acceded to the 1951 Convention and its 1967 Protocol,⁴⁶ all are bound by the customary norms of international law expounded in those instruments.⁴⁷ Further, these countries agreed to follow both the 1951 Convention and the 1967 Protocol when they assented to the CPA in 1989.⁴⁸

Two other significant instruments on refugees are the Statute of the Office of the United Nations High Commissioner for Refugees of 1951 (Statute of the UNHCR)⁴⁹ and the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook).⁵⁰ The UNHCR Handbook is considered authoritative in interpreting the 1951 Convention and the 1967 Protocol.⁵¹ The UNHCR is charged with two main functions under the Statute of the UNHCR:⁵² to provide international protection of refugees⁵³ and to seek permanent

41, art. I(2).

45. See GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 149-52 (1983) [hereinafter GOODWIN-GILL, REFUGEE].

46. Fernando Chang-Muy, *International Refugee Law in Asia*, 24 N.Y.U. J. INT'L L. & POL. 1171, 1179 (1992).

47. See GOODWIN-GILL, REFUGEE, *supra* note 45, at 163 n.64.

48. See *infra* notes 130-32 and accompanying text.

49. *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428, U.N. GAOR, 5th Sess., Supp. No. 20, at 120, U.N. Doc. A/1775 (1950) [hereinafter *Statute of the UNHCR*].

50. OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR REFUGEES, *HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS* (1988) [hereinafter OFFICE OF UNHCR].

51. *1989 Conference*, *supra* note 13, Annex, pt. II, para. 6(b)-(c).

52. *Statute of the UNHCR*, *supra* note 49, Annex, ch. I, para. 1.

53. Goodwin-Gill has summarized the protective activities as follows:

The Office is concerned with protection generally of the refugee's basic human rights, including, for example, non-discrimination, liberty and security of the person. It is concerned specifically with the following: (1) the prevention of *refoulement* (i.e., the return of refugees to a country or territory in which their life or liberty may be endangered); (2) the determination of refugee status; (3) the grant of asylum; (4) the prevention of expulsion; (5) the issue of identity and travel documents; (6) the facilitation of voluntary repatriation; (7) the facilitation of family reunion; (8) the assurance of access to educational institutions; (9) the assurance of the right to work and the benefit of other economic and social rights; (10) the facilitation of naturalization.

Guy S. Goodwin-Gill, *Entry and Exclusion of Refugees: The Obligations of States and the Protection Function of the Office of UNHCR*, MICH. Y.B. INT'L STUD. 291, 294 (1982).

solutions for refugee problems.⁵⁴ The UNHCR's mandate is extensive. First, it protects groups that are not technically refugees as defined by the 1951 Convention⁵⁵ or the UNHCR Statute.⁵⁶ Second, its "good offices" function⁵⁷ has been utilized in situations of mass influx,⁵⁸ including the situation of the Vietnamese boat people.

B. The 1979 International Meeting on Refugees and Displaced Persons in Southeast Asia

In 1979, the international community made its first concerted effort to address the humanitarian crisis of the Vietnamese boat people.⁵⁹ The Secretary General of the United Nations, prompted by the British Prime Minister, called a meeting to address the problem.⁶⁰ This conference, the Geneva Meeting on Refugees and Displaced Persons in South-East Asia (1979 Conference), was held June 20–21, 1979,⁶¹ and was attended

54. The U.N. General Assembly defined the UNHCR's function to include "seeking permanent solutions for the problem of refugees by assisting governments and, subject to the approval of the governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities." *Statute of the UNHCR*, *supra* note 49, Annex, ch. I, para. 1.

55. See *supra* notes 42–44 and accompanying text.

56. Patricia Hyndman, *Refugees Under International Law with a Reference to the Concept of Asylum*, 60 AUSTL. L.J. 148, 150 (1986). The Statute of the UNHCR states that the UNHCR has the authority to deal with refugees as defined by the 1951 Convention. *Statute of the UNHCR*, *supra* note 49, Annex, ch. II, para. 6(A)(ii); for actual text, see *supra* text accompanying note 44. The UNHCR is to deal with "[a]ny person who has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization." *Statute of the UNHCR*, *supra* note 49, Annex, ch. II, para. 6(A)(i).

57. "[T]he concept of good offices, introduced by the General Assembly in its resolutions from 1957 onward, [permits the] UNHCR to help alleviate the plight of uprooted and displaced persons not strictly within the mandate." *Addendum to the Report of the United Nations High Commissioner for Refugees*, U.N. GAOR, 34th Sess., Supp. No. 12A, Annex, para. 25, U.N. Doc. A/34/12/Add.1 (1979) [hereinafter *Addendum*] (statement of the High Commissioner).

58. Hyndman, *supra* note 56, at 150.

59. Arthur C. Helton, *Judicial Review of the Refugee Status Determination Procedure for Vietnamese Asylum Seekers in Hong Kong: The Case of Do Giao*, 17 BROOK. J. INT'L L. 263, 264 (1991) [hereinafter Helton, *Judicial Review*].

60. *Id.*

61. *Addendum*, *supra* note 57, para. 10.

by sixty-five countries.⁶² The 1979 Conference's goal was to reach a consensus on how the crisis' burdens would be shared among the countries of origin, the countries of asylum, and the countries of final resettlement.⁶³

In his opening statement, the Secretary General emphasized the critical importance of maintaining the principles of "first asylum"⁶⁴ and "*non-refoulement*"⁶⁵ for refugees, whether they arrive by land or by sea.⁶⁶ In addition to seeking endorsement of these two principles, the 1979 Conference also sought to reduce the number of asylum seekers through an increase in resettlement efforts, the development of orderly departure procedures with Vietnam, and the establishment of refugee processing centers.⁶⁷ By its close, the 1979 Conference realized great progress in all these areas.⁶⁸

At the 1979 Conference, the UNHCR negotiated a seemingly reasonable compromise among the nations.⁶⁹ Vietnam, the country of origin, was reminded of its obligation to "respect the right of emigration and family reunification, while avoiding any action leading to the departure of their nationals under dangerous conditions" and to "cooperate with the UNHCR to ensure an orderly outflow."⁷⁰ Vietnam agreed to work with the UNHCR to expand its orderly departure program⁷¹ and to enforce a

62. Barcher, *supra* note 9, at 1254. The countries attending the Geneva Meeting on Refugees and Displaced Persons in Southeast Asia (1979 Conference) included the first asylum countries of Southeast Asia, the Socialist Republic of Vietnam, and resettlement countries such as the United States, the United Kingdom, France, Canada, and Australia. *Id.* The 1979 Conference dealt with Laotian Vietnamese, and Cambodian asylum seekers. *See id.* at 1253-54 (surveying the refugee crisis created by the 1975 Communist takeover of Vietnam and Laos and by the Vietnamese invasion of Cambodia in 1979; the 1979 Conference responded to this crisis). For the purpose of this Comment, the discussion of the 1979 Conference will focus on Vietnamese asylum seekers.

63. Helton, *Asylum and Refugee Protection*, *supra* note 19, at 24.

64. *See* Barcher, *supra* note 9, at 1254, 1259 (describing "first asylum" as the state practice of providing temporary asylum to arriving asylum seekers). *See infra* part VI.C.

65. "*Non-refoulement*" is the principle that "no refugee should be returned to any country where he or she is likely to face persecution or danger to life or freedom." GOODWIN-GILL, *REFUGEE*, *supra* note 45, at 69. *See infra* part VI.B.

66. Helton, *Asylum and Refugee Protection*, *supra* note 19, at 24.

67. *Id.* at 24-25.

68. *Id.* at 25.

69. Barcher, *supra* note 9, at 1254.

70. Helton, *Asylum and Refugee Protection*, *supra* note 19, at 24.

71. Barcher, *supra* note 9, at 1254.

moratorium on illegal departures.⁷² Countries of asylum had the obligation to respect the principles of first asylum and *non-refoulement*.⁷³ These asylum countries agreed to provide temporary asylum to all arriving Vietnamese, pending eventual resettlement in third countries.⁷⁴ Since the first asylum countries were lesser developed countries with limited resources, they could no longer handle the strain of the enormous influx alone.⁷⁵ They demanded the assurance that they would not "bear the eventual burden" and that the refugees would not remain in their territory longer than a specified time.⁷⁶ The main responsibility for final settlement of the refugees, therefore, was placed on the developed Western countries.⁷⁷ These countries pledged to raise admission quotas and to donate more money for refugee relief services.⁷⁸

The plan of 1979 and the concerted efforts by the international community stabilized the situation.⁷⁹ Vietnam's enforcement of the ban on clandestine departures was very effective in reducing the rate of departure.⁸⁰ During the seven months

72. Helton, *Asylum and Refugee Protection*, *supra* note 19, at 25. Secretary-General Kurt Waldheim announced before the end of the conference:

As a result of my consultations, the government of the Socialist Republic of Vietnam has authorized me to inform you that for a reasonable period of time it will make every effort to stop illegal departures. In the meantime the government of Vietnam will cooperate with the UNHCR in expanding the present seven-point program designed to bring departures into orderly and safe channels.

BARRY WAIN, *THE REFUSED: THE AGONY OF THE INDOCHINA REFUGEES* 225 (1981).

73. Helton, *Asylum and Refugee Protection*, *supra* note 19, at 24.

74. Barcher, *supra* note 9, at 1254.

75. Helton, *Asylum and Refugee Protection*, *supra* note 19, at 24.

76. *Id.*

77. *Id.*

78. Barcher, *supra* note 9, at 1254.

79. Helton, *Asylum and Refugee Protection*, *supra* note 19, at 25.

80. Helton, *Judicial Review*, *supra* note 59, at 265. In fulfillment of its promise at the 1979 Conference, the Vietnamese government actively interdicted unauthorized boat departures. *Vietnam: Under Two Regimes*, *supra* note 23, at *6. The consequences for anyone caught fleeing were very grave: U.S. officials estimate that hundreds of people were killed when Vietnamese patrol boats fired upon and sank refugee boats; many people were arrested, jailed, and forced to serve hard labor, including women and children. *Id. See, e.g., Susan Byrnes, West Valley Focus: Canoga Park; Refugee Lets Go of the Past Through Art*, L.A. TIMES, Nov. 12, 1993, at B2 (describing the numerous failed escape attempts and repeated imprisonment of a mother and her three children—persecuted because the father, a former undercover informant for the U.S. embassy, had

prior to the 1979 Conference, approximately 25,000 Vietnamese fled each month.⁸¹ During the five months after the 1979 Conference, this figure fell to approximately 4000 per month.⁸² Arrival rates between 1980 and 1985 continued to decrease and were balanced out by the rate of resettlement.⁸³

The 1979 framework granted first asylum to all Vietnamese who arrived in first-stop countries.⁸⁴ However, this worked smoothly only as long as resettlement opportunities equalled the number of refugees arriving.⁸⁵ The plan broke down in 1986, when a new surge of boat people began to arrive in first asylum countries.⁸⁶ This new surge consisted largely of North Vietnamese who were fleeing economic and social hardships.⁸⁷ Resettlement quotas, which had been cut back as the number of arrivals declined in the early 1980s,⁸⁸ were insufficient to meet the high demand of this new wave.⁸⁹ From 1986 to 1988, the number of Vietnamese asylum seekers arriving in Thailand and Hong Kong more than tripled.⁹⁰ Malaysia and the Philippines

escaped after two years in a detention camp). Other deterrent measures included government reports of executions over the radio, long prison terms, and severe punishment of individuals accused of organizing illegal departures. *Vietnam: Under Two Regimes*, *supra* note 23, at *6. Additionally, property of persons caught trying to leave or those who had left was confiscated. *Id.*

81. Helton, *Asylum and Refugee Protection*, *supra* note 19, at 25.

82. *Id.*

83. Josh Briggs, *Sur Place Refugee Status in the Context of Vietnamese Asylum Seekers in Hong Kong*, 42 AM. U. L. REV. 433, 438 (1993); Helton, *Asylum and Refugee Protection*, *supra* note 19, at 25.

84. Barcher, *supra* note 9, at 1254.

85. See GOODWIN-GILL, REFUGEE, *supra* note 45, at 116 (stating that "generous admission policies were dependent on, if not conditioned by, generous resettlement policies maintained by other countries").

86. Barcher, *supra* note 9, at 1254-55.

87. Sheila Rule, *Hong Kong and Britain Faulted on Boat People*, N.Y. TIMES, Jan. 16, 1990, at A3.

88. Helton, *Experiment in Refugee Protection*, *supra* note 24, at 113.

89. *Id.* The United States and other Western nations had nearly stopped accepting refugees from the first asylum countries. McManus, *Pirate Attacks*, *supra* note 35, at 22. They preferred to take refugees directly from Vietnam under the Orderly Departure Program. Jim McManus, 'Compassion Fatigue' Grows in West, NAT'L CATHOLIC REP., Jan. 20, 1989, at 22 [hereinafter McManus, *Compassion Fatigue*].

90. LAWYERS COMM., *supra* note 20, at 8. In Hong Kong, the number of arrivals increased from 3395 in 1987 to 18,446 in 1988. *Id.* In May 1989, over 8900 asylum seekers arrived in Hong Kong, making a total of over 37,000. *Id.* In Thailand, the number of Vietnamese arriving reached 12,000 in 1987, tripling from 1986. McManus, *Compassion Fatigue*, *supra* note 89, at 22.

also experienced dramatic increases.⁹¹ The Association of South East Asian Nations (ASEAN),⁹² made numerous but unsuccessful appeals to Western countries to increase resettlement efforts.⁹³

The first asylum countries were overwhelmed by the constant influx of boat people to their overcrowded refugee camps. These countries soon responded unilaterally with harsh measures.⁹⁴ For example, Indonesian forces reportedly fired on one refugee boat.⁹⁵ Thailand and Malaysia revoked their 1979 promises to provide first asylum and refused to permit boat people to enter their territories.⁹⁶ Thailand initiated an official policy of "pushing off" boats that attempted to land on its shores.⁹⁷ Malaysia started a "redirection" policy, in which they intercepted boats in their coastal waters and towed them back out to sea.⁹⁸ Hong Kong, in contravention of the 1979 accord, decided to deny automatic resettlement of Vietnamese who

91. See McManus, *Compassion Fatigue*, *supra* note 89, at 22 (stating that Malaysia's increase in new arrivals was similar to that of Hong Kong and Thailand); *Vietnamese Refugee Upsurge Reported in Philippines*, Reuters, May 8, 1989, available in LEXIS, WORLD Library, ALLNWS File (reporting that the 1,286 Vietnamese asylum seekers who had arrived in the Philippines in April 1989 was the highest monthly figure since June 1981, when there were 1434 arrivals).

92. The six Association of South East Asian Nations (ASEAN) members include Thailand, Indonesia, Malaysia, Philippines, Singapore, and Brunei. DEP'T OF STATE, FACT SHEET: ASSOCIATION OF SOUTH EAST ASIAN NATIONS (ASEAN) (1991).

93. Helton, *Asylum and Refugee Protection*, *supra* note 19, at 27.

94. See William McGurn, *No Room at the Inn*, NAT'L REV., June 30, 1989, at 26. "The nations of the region just want the refugees to stop coming, and they don't care what it takes." *Id.*

95. *Id.*

96. See Briggs, *supra* note 83, at 438. "Thailand and Malaysia, the countries closest to Vietnam by boat, publicly announced policies of 'pushing off' asylum seekers who arrived at their shores, or of intercepting boats a few miles off the coast and towing them back out to sea." *Id.*

97. See Helton, *Experiment in Refugee Protection*, *supra* note 24, at 113 (reporting that on January 28, 1988, the Thai Interior Minister announced that no more boat people would be allowed to land until the population in the refugee camps was resettled); U.S. COMM. FOR REFUGEES, *The New Vietnamese Refugee Crisis*, in WORLD REFUGEE SURVEY—1988 IN REVIEW 6 (1988) (noting that in the first few months of the policy's enforcement, 2300 Vietnamese boat people were pushed back out to sea, which resulted in more than 200 deaths).

98. See Briggs, *supra* note 83, at 438. See *infra* notes 144-50 and accompanying text.

arrived after June 16, 1988.⁹⁹ Instead, it implemented a screening procedure to distinguish the genuine refugees from nonrefugees.¹⁰⁰ Persons seeking resettlement for economic reasons were not considered genuine refugees and would be sent back to Vietnam.¹⁰¹ Consequently, the UNHCR, under pressure to allow repatriation, signed an agreement with Vietnam on December 18, 1988.¹⁰² Vietnam would not prosecute those boat people if they returned to their homeland.¹⁰³ The Memorandum of Understanding provided that:

within the framework of its humanitarian policy, the SRV Government will ensure that the voluntary return from the countries of first asylum will take place in conditions of safety and dignity in conformity with national and international law. This would include the waiver of prosecution and of punitive and discriminatory measures.¹⁰⁴

This agreement provided the opportunity in March 1989 for the ASEAN countries to implement a region-wide screening policy and deny automatic resettlement to new arrivals after a certain date.¹⁰⁵

99. Helton, *Experiment in Refugee Protection*, *supra* note 24, at 115.

100. LAWYERS COMM., *supra* note 20, at 10-11. Hong Kong screening procedures were based on the United Nations' criteria in the 1951 Convention and its 1967 Protocol. *Id.* A genuine refugee has a "well-founded fear of persecution." Barcher, *supra* note 9, at 1255.

101. Barcher, *supra* note 9, at 1255 (noting that "Indochinese arriving after June 16, 1988, would no longer be considering 'refugees,' but instead would be classified as 'illegal immigrants' unless they could establish their refugee status during a screening process").

102. *Fresh Hope*, *supra* note 7, at 53.

103. *Id.*

104. Bari, *supra* note 9, at 502.

105. H.K. Government Welcome ASEAN Screening Policy for Asylum Seekers, Xinhua Gen. Overseas News Serv., Mar. 15, 1989, available in LEXIS, NEWS Library, ARCNEWS File. See also Vietnamese Denied Resettlement in Malaysia, Xinhua Gen. Overseas News Serv., Mar. 14, 1989, available in LEXIS, NEWS Library, ARCNEWS File (stating that 99 Vietnamese asylum seekers who arrived in Malaysia a few hours after the new policy took effect on midnight March 13, 1989 remained in the refugee camp until a screening plan could be designed and approved in the International Conference on Indochinese Refugees); *Indonesia to Restrict Flow of Vietnamese Refugees*, Xinhua Gen. Overseas News Serv., Mar. 16, 1989, available in LEXIS, NEWS Library, ARCNEWS File (reporting that the Indonesian Foreign Ministry announced that any Vietnamese arriving after March 16, 1989 would be screened; those found to be economic migrants would

C. *The 1989 International Conference on Indochinese Refugees: The Comprehensive Plan of Action*

To address the developments in the Vietnamese refugee crisis since the 1979 Conference, the UNHCR declared a need for an international summit.¹⁰⁶ The summit would resolve four urgent issues: 1) control of clandestine departures; 2) repatriation of those willing to return; 3) increased participation in the Orderly Departure Program; and 4) screening procedures to distinguish "economic migrants seeking a better life."¹⁰⁷ Thus, the International Conference on Indochinese Refugees (1989 Conference) was convened on June 13–14, 1989.¹⁰⁸ Delegations from seventy-five nations attended the meeting in Geneva.¹⁰⁹

The Preparatory Meeting for the 1989 Conference, held March 7–9, 1989, had approved a draft Declaration and CPA.¹¹⁰ The 1989 Conference adopted the Declaration and the CPA by acclamation.¹¹¹ The CPA "address[ed] in a comprehensive manner all aspects of the problems relating to the Vietnamese [b]oat [p]eople."¹¹² The CPA sought to reduce the number of unauthorized arrivals through implementation of "hu-

be detained pending repatriation); *Philippines Announces Cut-Off Date for Vietnamese Asylum Seekers*, Xinhua Gen. Overseas News Serv., Mar. 21, 1989, available in LEXIS, NEWS Library, ARCNWS File [hereinafter *Philippines Announces Cut-Off*] (announcing that the new screening policy would take effect on March 21, 1989, in accordance with the 1951 Convention and 1967 Protocol and with respect for basic human rights).

106. McManus, *Compassion Fatigue*, *supra* note 89, at 22.

107. *Id.*

108. *1989 Conference*, *supra* note 13, para. 10. The goal of the international conference was "to reach concerted and comprehensive international agreements which would resolve long-standing refugee, or refugee-like, problems affecting substantial numbers of people and involving large numbers of countries." Bari, *supra* note 9, at 488.

109. *1989 Conference*, *supra* note 13, para. 10. The governments in attendance specifically 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 a screening." Helton, *Experiment in Refugee Protection*, *supra* note 24, at 115.

110. *1989 International Conference*, *supra* note 13, para. 4. This meeting was held in Malaysia and attended by representatives of 29 governments and other nongovernmental and intergovernmental organizations. *Id.*

111. *Id.* para. 25.

112. Bari, *supra* note 9, at 487.

mane measures."¹¹³ It endorsed the continuation of Vietnam's official measures against unsafe, clandestine departures and called for mass media campaigns to discourage such departures.¹¹⁴ Further, the CPA encouraged the use of the Orderly Departure Program¹¹⁵ and other regular departure procedures and migration programs.¹¹⁶ It sought to make such programs the "primary and eventually sole modes of departure."¹¹⁷

The CPA also reaffirmed the principle of first asylum.¹¹⁸ Countries in the region must allow arriving asylum seekers to land and must provide them temporary refuge until final determination of their status can be made.¹¹⁹ Moreover, the CPA asserted that the UNHCR will have "full and early access to new arrivals."¹²⁰ Since 1975, all Vietnamese asylum seekers were automatically accorded refugee status and were guaranteed resettlement in third countries.¹²¹ The CPA reversed this automatic status for all Vietnamese arriving after March 14, 1988.¹²² Now all Vietnamese asylum seekers must be screened to determine if they qualify as bona fide refugees with an actual, "well-founded fear of persecution."¹²³ As a compromise,

113. 1989 Conference, *supra* note 13, Annex, pt. II, para. 1.

114. *Id.*

115. The Orderly Departure Program was set up in May 1979 as an alternative to the dangerous clandestine flight across the seas. *Fresh Hope*, *supra* note 7, at 53. The program is considered a safe, legal way for Vietnamese to leave their country. *Fact Sheet: U.S. Expands Orderly Departure for Vietnamese Refugees*, DEF'T ST. DISPATCH, Apr. 1, 1991, at 225. Those persons eligible to participate in this program include "Vietnamese immigrants and public interest parolees, refugees, and Amerasian immigrants." *Id.*

116. 1989 Conference, *supra* note 13, Annex, pt. II, para. 2.

117. *Id.* Annex, pt. II, para. 3. One commentator has criticized this measure on the following rationale: "[T]hose who fear persecution may flee from their homeland, sometimes in an irregular and dangerous manner. This human reality was not recognized in the Plan [CPA]." Helton, *Experiment in Refugee Protection*, *supra* note 24, at 115.

118. Chang-Muy, *supra* note 46, at 1178.

119. 1989 Conference, *supra* note 13, Annex, pt. II, para. 5(a).

120. *Id.* Annex, pt. II, para. 5(b).

121. Bari, *supra* note 9, at 490. *See also supra* notes 73-78 and accompanying text.

122. Bari, *supra* note 9, at 490-91. The CPA preserved the cut-off date set by Hong Kong in June 1988. *Id.*

123. *Id.* Some commentators felt that the halt of guaranteed resettlement was the first step in resolving refugee crisis. *See id.* at 490 (hailing the reversal of the automatic grant of refugee status to Vietnamese boat people as the "greatest single factor" behind the implementation of the CPA). There were also critics of

first asylum countries agreed to provide temporary refuge to the Vietnamese, third countries promised to resettle more refugees,¹²⁴ and Vietnam agreed to increase security measures to prevent illegal departures.¹²⁵

The core of the CPA framework is the establishment of a system of region-wide refugee status determination,¹²⁶ which was to be implemented "in accordance with national legislation and internationally accepted practice."¹²⁷ The UNHCR's role in the screening process was in an "observer and advisory capacity."¹²⁸ The UNHCR was responsible for helping the first asylum countries establish refugee determination procedures and for ensuring the uniformity and fairness of screening procedures throughout the region.¹²⁹ Although most of the Southeast Asian states have not signed the 1951 Convention and its 1967 Protocol,¹³⁰ they agreed to incorporate the criteria recognized under these instruments into their screening procedures.¹³¹ They also agreed to use the UNHCR Handbook as an "authoritative and interpretative guide."¹³² The states agreed that genuine refugees would be eligible for resettlement and those denied refugee status would be repatriated to Vietnam.¹³³

On the issue of repatriation of nonrefugees, the CPA declared that "every effort will be made to encourage the volun-

the measure. See, e.g., McGurn, *supra* note 94, at 26 (claiming that the CPA was blindly embracing the "dubious principle that those who flee totalitarian regimes can really be separated into 'economic migrants' and 'political refugees'").

124. See Diane Stormont, *Resettlement a Slow Solution to Asia's Vietnamese Problem*, Reuter Libr. Rep., Dec. 13, 1989, at *1-*2, available in LEXIS, NEWS Library, ARCNWS File. Those Vietnamese who arrived before the cut-off date were still automatically granted refugee status and were eligible for resettlement in Western countries. *Id.* at *1.

125. Kamatchy Sappani, *Asian News; Malaysia Admits Towing Out Boat-People*, Japan Econ. Newswire, July 17, 1989, at *2, available in LEXIS, ASIAPC Library, JEN File [hereinafter Sappani, *Towing Out Boat People*].

126. Helton, *Judicial Review*, *supra* note 59, at 266; Bari, *supra* note 9, at 491; Chang-Muy, *supra* note 46, at 1178.

127. *1989 Conference*, *supra* note 13, Annex, pt. II, para. 6.

128. *Id.* Annex, pt. II, para. 6(a).

129. Bari, *supra* note 9, at 491.

130. Chang-Muy, *supra* note 46, at 1179. The Philippines is the first asylum country that has signed these international instruments. *Id.*

131. *1989 Conference*, *supra* note 13, Annex, pt. II, para. 6(b).

132. *Id.* Annex, pt. II, para. 6(c).

133. Helton, *Judicial Review*, *supra* note 59, at 265.

tary return of such persons."¹³⁴ It also called for wide-spread publicity by Vietnam to assure the safety and dignity of those who choose to go back.¹³⁵ The CPA further stated that "[i]f, after the passage of reasonable time, it becomes clear that voluntary repatriation is not making sufficient progress towards the desired objective, alternatives recognized as being acceptable under international practices would be examined."¹³⁶ Forced repatriation, therefore, was not explicitly ruled out.¹³⁷ After the 1989 Conference, the fate of those denied refugee status remained an unresolved, hotly debated issue.¹³⁸ The United States, which had strongly protested at the 1989 Conference to forced repatriation, maintained this opposition because of conditions in Vietnam.¹³⁹ However, Hong Kong, the United Kingdom, and the ASEAN countries still saw forced repatriation as an option sanctioned by the CPA and as an exercise of sovereign right.¹⁴⁰

134. 1989 Conference, *supra* note 13, Annex, pt. II, para. 12.

135. *Id.* Annex, pt. II, para. 13(a).

136. *Id.* Annex, pt. II, para. 14.

137. Helton, *Experiment in Refugee Protection*, *supra* note 24, at 117.

138. Briggs, *supra* note 83, at 441.

139. Lawrence S. Eagleburger, Statement at the Indochinese Refugees Conference Held in Geneva (June 18, 1989), in DEPT ST. BULL., Oct. 1989, at *3, available in LEXIS, INTLAW Library, DSTATE File (Deputy Secretary of State) (arguing that as long as the harsh economic, social, and political conditions show no drastic improvements, the United States will remain opposed to involuntary repatriation of Vietnamese asylum seekers and "will not consider forced repatriation as falling within the rubric of 'acceptable under international practices'").

140. See Alan Elsner, *Baker Rejects Asian Criticism of U.S. over Boat People*, Reuters, July 26, 1990, at *1, available in LEXIS, WORLD Library, ALLNWS File (describing the threats by first asylum countries to end their commitments to allow boat people to land if the United States does not bend its position against forced repatriation of refugees to Vietnam); Clifford Krauss, *U.S. and Asian Allies Deadlock over Boat People*, N.Y. TIMES, July 30, 1990, at A3 (stating that the ASEAN foreign ministers rejected the United States' modified position on Vietnamese economic refugees that endorses voluntary repatriation only); Henry Kamm, *Amid Discord, Talks on Boat People Are Put Off*, N.Y. TIMES, July 12, 1990, at A3 (reporting that the seemingly unbridgeable impasse between the United States and Vietnam on one side and the Southeast Asian nations and Hong Kong on the other had caused a postponement of an international conference on boat people).

IV. PROGRESS UNDER THE COMPREHENSIVE PLAN OF ACTION:
PRACTICES AND IMPLEMENTATIONS OF THE COMPREHENSIVE
PLAN OF ACTION BY SOUTHEAST ASIAN COUNTRIES

A. *Malaysia*

Malaysia's Foreign Minister was chairperson of the 1989 Conference.¹⁴¹ At that time, Malaysia had more than 22,000 refugees living in its refugee camps¹⁴² and was the first asylum country receiving the most boat people.¹⁴³ Despite its agreement under the CPA to provide temporary refuge, Malaysia maintained an official policy, beginning in May 1989, of pushing back all arriving Vietnamese boats.¹⁴⁴ Shortly after the 1989 Conference, Malaysia admitted to UN officials that its military had towed Vietnamese boats to international waters.¹⁴⁵ Malaysia claimed that these actions were taken only at the request of the asylum seekers themselves.¹⁴⁶ Malaysia reassured the UNHCR that the country intended to fully comply with the CPA.¹⁴⁷ Despite the numerous reports by Vietnamese

141. Arthur C. Helton, *The Malaysian Policy to Redirect Vietnamese Boat People: Non-refoulement as a Human Rights Remedy*, 24 N.Y.U. J. INT'L L. & POL. 1203, 1203 (1992) [hereinafter Helton, *Malaysian Policy*].

142. Sappani, *Towing Out Boat People*, *supra* note 125, at *2.

143. Ismail, *supra* note 22, at *1. From 1976 to 1992, Malaysia accepted 254,467 Vietnamese asylum seekers. *Id.*

144. DEPT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1992, S. REP. NO. 7, 103d Cong., 1st Sess. 613 (1993) (report on Malaysia). Thus far no other signatory state in the region has abandoned its commitment to provide first asylum to the Vietnamese. Barcher, *supra* note 9, at 1255-56. However, the two ASEAN nations that have not signed the CPA, Singapore and Brunei, have also refused to offer first asylum to refugees. DEPT OF STATE, *supra*, at 521, 652 (reports on Brunei and Singapore). Singapore had a policy that allowed Vietnamese refugees to land if the rescuing vessel's next scheduled port of call was Singapore, but required the refugees' removal or a third country's guarantee of resettlement and removal within 90 days. *Id.* at 652 (report on Singapore). Since June 1991, however, Singapore has abandoned this policy because removal has been impossible within 90 days. *Id.* Now Singapore consistently denies entry to the Vietnamese. See *id.* Macau, a Chinese territory run by the Portuguese, has followed an official policy since 1982 of redirecting all Vietnamese boat people from its waters to Hong Kong's waters. *Id.* at 987 (report on Macau).

145. Sappani, *Towing Out Boat People*, *supra* note 125, at *1.

146. *Id.*

147. *Id.* at *2.

refugees,¹⁴⁸ Malaysian officials continued to deny allegations that it refused temporary asylum to the boat people.¹⁴⁹ Finally in February 1991, the Malaysian Prime Minister, for the first time, admitted that since 1989 his country had been redirecting asylum seekers from its territories.¹⁵⁰

The Malaysian government now usually allows Vietnamese asylum seekers to land and then detains them in closed camps¹⁵¹ where they remain for one to three days.¹⁵² The camps are not open to observers.¹⁵³ They are controlled by government officials who "remain unaccountable for their actions by placing tape over their name-plates."¹⁵⁴ Malaysia gives the asylum seekers boats, life jackets, and supplies and then redirects the boats to other countries in the region.¹⁵⁵ According to an official U.S. source, Malaysia has not "responded positively to concerns that this 'redirection' of boat people places them in additional danger,"¹⁵⁶ even though the policy has resulted in nine confirmed deaths.¹⁵⁷

148. See, e.g., *id.* at *1 (reporting that people on 16 boats arriving in Indonesia between May 25, 1989 and July 17, 1989 had told UNHCR officials that Malaysia had forcefully towed them away and that in June 1989 one 23-year-old man drowned after his boat sank during towing); Mary Leigh, *U.N. Prods Malaysia on Refugees*, UPI, April 13, 1990, at *1, available in LEXIS, NEWS File, UPI File (reporting one UNHCR official confirmed that Vietnamese asylum seekers were being denied entry and were thus seeking refuge in Indonesia); Helton, *Malaysian Policy*, *supra* note 141, at 1204 (detailing incident where three people died from exposure and starvation after their boat was intercepted by the Malaysian Coast Guard and towed to sea, where it drifted for four days before reaching Singapore).

149. Sappani, *Towing Out Boat People*, *supra* note 125, at *1; Leigh, *supra* note 148, at *1.

150. *Asian News: Malaysia to Continue Pushing Boat People Back Out to Sea*, Japan Econ. Newswire, Feb. 28, 1991, at *1, available in LEXIS, ASIAPC Library, JEN File.

151. DEP'T OF STATE, *supra* note 144, at 613 (report on Malaysia).

152. Helton, *Malaysian Policy*, *supra* note 141, at 1204.

153. DEP'T OF STATE, *supra* note 144, at 613 (report on Malaysia). According to an official source, there has been abuse in the camps. *Id.*

154. Helton, *Experiment in Refugee Protection*, *supra* note 24, at 139.

155. *Id.*

156. DEP'T OF STATE, *supra* note 144, at 613 (report on Malaysia).

157. Helton, *Malaysian Policy*, *supra* note 141, at 1204. Some relief organizations fear that this number is actually much higher. *Id.* There have also been incidents in which redirected asylum seekers were provided inadequate boats. See DEP'T OF STATE, *supra* note 144, at 613 (report on Malaysia). See also *supra* note 148 and accompanying text.

Undaunted by criticism by Western countries, threats of trade sanctions by American Congressmen,¹⁵⁸ and a formal protest by the UNHCR,¹⁵⁹ Malaysia continued to push off Vietnamese boat people, summarily claiming that they were merely economic migrants.¹⁶⁰ Since the initiation of Malaysia's redirection policy, 10,473 Vietnamese have been denied first asylum.¹⁶¹ In this manner, Malaysia has achieved its goal of arresting the flow of asylum seekers to its territories.¹⁶² By the middle of 1992, there were no more reports of new landings.¹⁶³ Most of the redirected boat people sought temporary refuge in Indonesia, which has complied with the CPA's temporary asylum requirements.¹⁶⁴

The remaining Vietnamese refugees already in Malaysian camps are continually screened in accordance with the CPA.¹⁶⁵ The screening is conducted by a group of military officials called Task Force VII.¹⁶⁶ UNHCR officials are present at all interviews.¹⁶⁷ Interpreters are also available to both UNHCR and government officials,¹⁶⁸ and refugees have access to UNHCR consultants at all times during the determination process.¹⁶⁹ In disputed cases, the government consults with the UNHCR before making a decision.¹⁷⁰ An administrative appeal to the Refugee Status Review Board (RSRB) is available for all those

158. *Asian News: Malaysia to Close Island Refugee Camp*, Japan Econ. Newswire, Aug. 17, 1991, available in LEXIS, ASIAPC Library, JEN File [hereinafter *Malaysia to Close*]. See also Bob Khan, *Malaysia Fears U.S. Aid Cuts Over Boat People Pushbacks*, UPI, July 15, 1990, at *1, available in LEXIS, NEWS Library, UPI File (quoting the Malaysian Prime Minister's declaration that his country will not succumb to the threats by some U.S. congressmen to cut off \$1 million in military aid and duty-free benefits to Malaysia).

159. Leigh, *supra* note 148, at *1.

160. *Malaysia to Close*, *supra* note 158.

161. DEP'T OF STATE, *supra* note 144, at 613 (report on Malaysia).

162. *Id.*

163. *Id.*

164. Helton, *Malaysian Policy*, *supra* note 141, at 1204. Thailand also received boat people who had been redirected by Malaysia. *More Boat People Arriving in Thailand*, UPI, Jan. 17, 1990, at *1, available in LEXIS, WORLD Library, ALLNWS File.

165. DEP'T OF STATE, *supra* note 144, at 613 (report on Malaysia).

166. Helton, *Experiment in Refugee Protection*, *supra* note 24, at 124.

167. DEP'T OF STATE, *supra* note 144, at 613 (report on Malaysia).

168. Helton, *Experiment in Refugee Protection*, *supra* note 24, at 124.

169. *Id.*

170. DEP'T OF STATE, *supra* note 144, at 613 (report on Malaysia).

denied refugee status.¹⁷¹ To take advantage of the appeal, the asylum seeker must file a formal notice of appeal within seven days of the decisions.¹⁷² The appellant is then given thirty days to prepare for his or her appeal.¹⁷³ The RSRB does not provide an explanation for negative decisions, and there is no judicial review available.¹⁷⁴

One year into the refugee determination program, Malaysia had screened about 9000 asylum seekers¹⁷⁵ and had rejected about ninety percent.¹⁷⁶ The government has detained the Vietnamese in closed camps guarded by police.¹⁷⁷ Despite the high rejection rate, the number of those willing to return to Vietnam is extremely low.¹⁷⁸ The Vietnamese who volunteer to be repatriated receive financial assistance as part of the reintegration process.¹⁷⁹ Diplomats from major resettlement countries have urged the remaining Vietnamese to return home since their chances of being resettled have been "growing slim."¹⁸⁰ Still, many have remained with defiant hope.¹⁸¹ Al-

171. *Id.*; Helton, *Experiment in Refugee Protection*, *supra* note 24, at 124.

172. Helton, *Experiment in Refugee Protection*, *supra* note 24, at 125.

173. *Id.* Although outside legal assistance is not allowed for those persons wishing to appeal, the Review Advice Group, made up of asylum seekers who have some university academic background, is available to help the boat people in their appeal process. *Id.*

174. *Id.*

175. *Malaysian Deputy Premier to Urge Vietnamese to Go Home*, Japan Econ. Newswire, Dec. 2, 1991, at *1, available in LEXIS, ASIAPC Library, JEN File [hereinafter *Malaysian Deputy Premier*].

176. *Malaysia to Close*, *supra* note 158.

177. William Steif, *Trapped on the Border: Vietnamese Refugees Wait and Wait and Wait*, PROGRESSIVE, Jan. 1992, at 23, 25. One of these camps at Pulau Bidong has been closed, and its residents have been transferred to the already overcrowded Sungei Besei camp. *Id.* at 24. The government is planning to convert Pulau Bidong into a tourist resort. *Id.* Malaysia had secretly transferred about 13,000 Vietnamese asylum seekers from Pulau Bidong to Sungei Besi about a year before it closed the island camp. *Malaysia to Close*, *supra* note 158. Three thousand more Vietnamese were to be transferred to Sungei Besi, which was built to hold only 4000 people. *Id.*

178. See, e.g., *Vietnamese Refugees in Malaysia Return Home*, Reuter Libr. Rep., July 28, 1992, available in LEXIS, WORLD Library, ALLNWS File (stating from the beginning of 1989 to July 1992, only 1167 boat people had voluntarily returned to Vietnam).

179. *Malaysian Deputy Premier*, *supra* note 175, at *1.

180. *Resettlement Nations Tell Boat People in Malaysia to Go Home*, Reuter Libr. Rep., May 24, 1991, available in LEXIS, WORLD Library, ALLNWS File. One diplomat stated, "They have been told that unless they pass the screening test they would all have to go home . . ." *Id.*

181. See, e.g., Kamatchy Sappani, *Boat People Restless in Malaysian Island*

though those Vietnamese who are screened as nonrefugees have been assured that the government will not forcibly repatriate them,¹⁸² Malaysian officials have been clear that involuntary repatriation remains a very viable option.¹⁸³

B. Indonesia

Since 1975, Indonesia has granted first asylum to more than 123,000 Indochinese asylum seekers.¹⁸⁴ When the CPA was promulgated in 1989, Indonesia had fewer than 2000 boat people in its refugee camp in Galang.¹⁸⁵ In that same year, Malaysia implemented its redirection policy,¹⁸⁶ and Vietnamese boat people started flooding Indonesia.¹⁸⁷ In the following year, 16,500 boat people arrived in Galang, at a rate of approximately

Camp, Japan Econ. Newswire, Feb. 11, 1991, at *1, available in LEXIS, ASIAPC Library, JEN File [hereinafter Sappani, *Boat People Restless*] (reporting that the government was "stifling news out of the camp in order to avoid fueling the unrest" after they evacuated 60 Vietnamese protesters. The 60 who called themselves the "Struggling Movement for Human Rights," demanded a review of their cases and of screening procedures); *Vietnamese Refugees in Malaysia Threaten Suicide if Forcibly Repatriated*, Summ. of World Broadcasts, June 29, 1992, available in LEXIS, WORLD Library, ALLNWS File.

182. *Malaysian Deputy Premier*, *supra* note 175, at *1.

183. Steif, *supra* note 177, at 24. Malaysia, along with other Southeast Asian countries, has criticized Western countries who oppose forced repatriation, but who are not willing to accept more Vietnamese refugees for resettlement. *Malaysian Deputy Premier*, *supra* note 175, at *1 (reporting that the Deputy Premier of Malaysia called the United States' involuntary repatriation of Haitians and Italy's forced return of Albanians Western "hypocrisy"); Steif, *supra* note 177, at 24 (noting that Malaysia is "not very happy" about the United States' objection to involuntary repatriation because it discourages voluntary repatriation. The Deputy Director of Task Force VII stated, "We are stuck with these people until the international community comes up with a solution. Today we depend entirely on voluntary repatriation.").

184. DEPT OF STATE, *supra* note 144, at 575 (report on Indonesia). The asylum seekers include Vietnamese and Cambodians. Sally Gelston, *U.N. Official Appeals for Funds to Aid Boat People*, UPI, Apr. 11, 1990, at *1, available in LEXIS, NEWS Library, UPI File.

185. Helton, *Experiment in Refugee Protection*, *supra* note 24, at 122.

186. DEPT OF STATE, *supra* note 144, at 613 (report on Malaysia).

187. See Helton, *Experiment in Refugee Protection*, *supra* note 24, at 122 (claiming that the high rate of arrivals was mainly caused by Malaysia's redirection of Vietnamese boats to Indonesia). See also *Malaysia Breaching Pact by Towing Away Refugees—UNHCR*, Reuter Libr. Rep., Oct. 26, 1989, available in LEXIS, WORLD Library, ALLNWS File (noting that more than 2000 Vietnamese asylum seekers were redirected from Malaysia to the Indonesian island of Galang).

100 per day.¹⁸⁸ Despite overcrowding,¹⁸⁹ Indonesia has adhered to its commitment to provide temporary refuge to Vietnamese boat people.¹⁹⁰ The desperate situation has prompted appeals for help from the Indonesian government¹⁹¹ and the UNHCR.¹⁹²

In addition to overcrowding, the conditions in Galang include abuse, rape, intimidation, and beatings by naval police.¹⁹³ There have also been allegations of widespread bribery involving camp officials for grants of refugee status.¹⁹⁴ The UNHCR is responsible for supervising the well-being of the camp's detainees.¹⁹⁵ It admits the existence of such problems in Galang, but its ability to monitor conditions inside the camp is "limited."¹⁹⁶

188. *Indonesia Calls for Help over Boat People*, DAILY TEL., June 9, 1990, at 11 [hereinafter *Indonesia Calls*].

189. *Id.* (noting that the Galang camp was designed to house only 5000 people). See also Jonathan Thatcher, *Boat People Pour into Indonesian Sanctuary*, Reuter, Apr. 11, 1990, available in LEXIS, WORLD Library, ALLNWS File (quoting a UNHCR worker in Indonesia who stated that the situation was "getting a bit out of hand" and that officials were placing asylum seekers "anywhere . . . in temporary barracks, even in the UNHCR office"); Gelston, *supra* note 184, at *1 (describing refugee housing in plastic tents, churches, offices, and schools).

190. Helton, *Experiment in Refugee Protection*, *supra* note 24, at 122. See also, DEPT OF STATE, *supra* note 144, at 575 (report on Indonesia) (praising Indonesia for its continued generosity to the asylum seekers); Thatcher, *supra* note 189 (quoting an UNHCR spokesperson, "Indonesia has been extremely generous in giving accommodation . . . [sic] but we are terrified. If the refugees come at this rate, how are we going to accommodate them?").

191. See *Indonesia Calls*, *supra* note 188, at 11 (noting Indonesia's request for help from the international community to resettle more quickly those already granted asylum and that in the nine months after the 1989 Conference, only 440 refugees in Galang had been resettled to third countries).

192. See Gelston, *supra* note 184, at *1 (recounting the UNHCR's appeal for money, improved capacity, and water supply in Galang). At that time, the screening rate, which was about 100 people a month, could not keep up with the influx of new arrivals. *Id.*

193. See Michael Bociurkiw, *Terrorized in the Camp of Shame*, S. CHINA MORNING POST, June 6, 1993, at 4 (describing degradation of Vietnamese inmates by Galang's camp security officials).

194. *Id.* This bribery inevitably denies fair screening to many who are unable or unwilling to pay. See *id.* (describing the frustration many refugees suffered because they did not win second interviews or appeals after declining extortion. Canadian resettlement officials were aware of such allegations but were not allowed to select from those already screened out).

195. See *id.* (noting that the UNHCR had a protections officer at the camp at all times).

196. *Id.* Indonesian authorities told UNHCR personnel not to stay overnight

The screening procedure in Indonesia began disastrously, as authorities first applied resettlement criteria in determining refugee status.¹⁹⁷ When the mistake was discovered, cases were reviewed again using standard criteria.¹⁹⁸ Finally, the refugee determination process proceeded as established by the CPA.¹⁹⁹ UNHCR personnel conduct an initial interview and form an initial assessment of each asylum seeker.²⁰⁰ Then, the P3V Committee, which consists mainly of Indonesian military officers, conducts an in-depth interview, consults with UNHCR personnel, and makes a final decision.²⁰¹ There is no judicial review for those whose cases are rejected.²⁰²

By September 1993, the screening process was completed for all Vietnamese in Galang,²⁰³ and only 13,000 Vietnamese remained in the camp.²⁰⁴ Of those remaining, only 2534 qualified for asylum and resettlement in the West.²⁰⁵ The rest had not yet chosen to return to Vietnam.²⁰⁶ Voluntary repatriation has been very slow: only 3911 Vietnamese have willingly been

in the camp and that regular staff accommodation for the UNHCR would be terminated. *Id.*

197. Helton, *Experiment in Refugee Protection*, *supra* note 24, at 121. Refugee status was granted if a person "fit profiles of those cases that would likely receive offers of resettlement abroad, including prior ties to those countries in the nature of family and employment." *Id.* at 121-22.

198. *Id.* The main criteria is whether a person has a well-founded fear of persecution. OFFICE OF UNHCR, *supra* note 50, at 11.

199. Helton, *Experiment in Refugee Protection*, *supra* note 24, at 121.

200. *Id.* at 122. The UNHCR has assigned seven legal consultants and seven interpreters to Galang. *Id.* at 123.

201. *Id.* at 122-23.

202. *Id.* at 123.

203. *Indonesia to Repatriate Vietnamese Refugees*, Xinhua Gen. Overseas News Serv., Sept. 21, 1993, available in LEXIS, WORLD Library, ALLNWS File [hereinafter *Indonesia to Repatriate*].

204. *Jakarta to Speed Up Repatriation of 10,000 Vietnamese Boat People*, Agence France Presse, Sept. 14, 1993, available in LEXIS, WORLD Library, ALLNWS File [hereinafter *Jakarta to Speed Up*].

205. *Indonesia to Repatriate*, *supra* note 203. The United States agreed to accept 500 of these refugees. *Indonesia Seeks Quick Return of Vietnam Refugees*, Reuter Libr. Rep., Sept. 15, 1993, available in LEXIS, WORLD Library, ALLNWS File. Canada agreed to take 300, and Australia accepted 1000. Bociurkiw, *supra* note 193, at 4.

206. *Jakarta to Speed Up*, *supra* note 204. At least 12 Galang detainees who had been denied refugee status tried to commit suicide. Bociurkiw, *supra* note 193, at 4.

repatriated from Galang.²⁰⁷ Eager to redevelop the refugee camp into an industrial zone,²⁰⁸ Indonesia sought talks with Vietnam and the UNHCR in mid-1993 to speed up the repatriation process.²⁰⁹ On October 22, 1993, a Memorandum of Understanding was signed between Vietnam and Indonesia that provides for the repatriation of the remaining 8500 Vietnamese economic migrants.²¹⁰ As late as November 30, 1993, however, thousands were still refusing to voluntarily repatriate.²¹¹ Although refugee workers indicate that Indonesia is "wary of international opinion" and that it promises not to forcefully repatriate the immigrants,²¹² the projected rate of repatriation remains low.²¹³ Thus, the Memorandum of Understanding may become the springboard for Indonesia to forcibly repatriate the Vietnamese boat people.²¹⁴

C. Thailand

Since 1975, Thailand has provided temporary asylum to more than one million people from Laos, Cambodia, and Vietnam.²¹⁵ However, the Thai government has not always been

207. *Jakarta to Speed Up*, *supra* note 204.

208. *Indonesia Signs Agreement to Return Boat People*, Reuter Libr. Rep., Nov. 8, 1993, at *1, available in LEXIS, WORLD Library, ALLNWS File [hereinafter *Indonesia Signs Agreement*].

209. *Jakarta to Speed Up*, *supra* note 204.

210. *Indonesia Signs Agreement*, *supra* note 208, at *1.

211. *UPI Spotlight Thousands Boat People Refuse Return to Vietnam* [sic], UPI, Nov. 30, 1993, available in LEXIS, WORLD Library, ALLNWS File.

212. *Indonesia Signs Agreement*, *supra* note 208, at *1-*2.

213. *See id.* at *1 (stating that Indonesian officials estimate that the agreement would increase the flow of repatriation from 300 per month to 300 per week, clearing out the camp by mid-1994).

214. *Cf. International Meeting on Indochinese Refugees Open in Manila*, Xinhua Gen. Overseas News Serv., available in LEXIS, NEWS Library, ARCNWS File (reporting that at a regional meeting sponsored by the U.N., Indonesia had joined Hong Kong and ASEAN countries in asserting the right to forcibly return Vietnamese who do not qualify as refugees); *Indonesian Foreign Minister on the Issue of Vietnamese Refugees*, BBC Summary of World Broadcasts, available in LEXIS, NEWS Library, ARCNWS File (statement of the Indonesian Foreign Minister, Ali Alatas, after an annual meeting of the ASEAN foreign ministers) ("As for the non-refugees, the CPA says they must go home. This is in accordance with international convention. Otherwise people, can enter any country and force that country to allow them to resettle there while in fact they are not refugees and just ordinary immigrants.").

215. DEPT OF STATE, *supra* note 144, at 665 (report on Thailand).

a willing host.²¹⁶ When the number of Vietnamese arriving in Thailand tripled from 1986 to 1987,²¹⁷ the Thai government instituted a push-off policy, which began in January 1988.²¹⁸ The Thai Marine Police, the "frontline fighters against pirates" in Thai waters,²¹⁹ assumed the duty of redirecting arriving refugee boats back to sea, where Thai pirates eagerly waited.²²⁰

During the first few months of 1988, over 1000 Vietnamese boat people were turned away.²²¹ Enforcement of the push-off policy resulted in more than 150 deaths,²²² not including the unknown number of victims of pirate attacks. Finally, on April 20, 1988, a Memorandum of Understanding was signed between Thailand and the UNHCR that provided for the temporary shelter of arriving Vietnamese boat people.²²³ Under this understanding, the boat people were allowed to land, but were classified as illegal immigrants, thus rendering them ineligible for resettlement.²²⁴

After March 14, 1989, Thailand, as a party to the CPA, began screening Vietnamese asylum seekers.²²⁵ According to an official Thai figure, there were an estimated 14,000 such Vietnamese in Thailand by the end of 1989.²²⁶ Upon arrival,

216. See *supra* note 96 and accompanying text.

217. Helton, *Experiment in Refugee Protection*, *supra* note 24, at 113.

218. See *id.* at 113-14 (reporting that on January 28, 1988, the Thai Interior Minister announced that no more boat people would be allowed to land until the population in the refugee camps was resettled in other countries).

219. McManus, *Pirate Attacks*, *supra* note 35, at 22. The majority of pirates are also Thai fishermen. *Id.*

220. *Id.* One refugee worker stated, "Pirates are sophisticated enough to know that once a boat is redirected, the Thai police won't be as diligent protecting it." *Id.* In January 1988, about nine percent of arriving boats reported pirate attacks. *Id.*

221. Helton, *Asylum and Refugee Protection*, *supra* note 19, at 28.

222. *Id.* at 28-29.

223. Helton, *Experiment in Refugee Protection*, *supra* note 24, at 114.

224. Helton, *Asylum and Refugee Protection*, *supra* note 19, at 29. The UNHCR's agreement did not go uncriticized. See, e.g., McGurn, *supra* note 94, at 26 (criticizing the UNHCR for having "solved" the Thailand push-off problem by signing away the right to resettlement for refugees arriving in Thailand after January 1988").

225. *44 Vietnamese Boat People Fly Home From Thailand*, Reuter Libr. Rep., Nov. 30, 1990, available in LEXIS, NEWS Library, ARCNWS File. About 13,000 Vietnamese arrived in Thailand after the cut-off date. *Id.*

226. *208 Vietnamese Boat People Land in S. Thailand*, Xinhua Gen. Overseas News Serv., Feb. 24, 1990, available in LEXIS, WORLD Library, ALLNWS File.

the Vietnamese were transferred to Section S of the Phanat Nikhom detention camp to await screening.²²⁷

In the screening process, Thai Ministry of the Interior (MOI) officers and interpreters conducted preliminary interviews of the asylum seekers using standardized questionnaires.²²⁸ In marginal cases, the MOI officers would consult with the UNHCR representatives prior to formal deliberations with the Screening Committee.²²⁹ Committee determinations were then sent to the director of the Operations Centre for Displaced Persons in Bangkok for approval.²³⁰ The Screening Committee sent written notices to the Vietnamese who were denied refugee status.²³¹ Those denied had seven days to appeal through the UNHCR.²³² The Appeals Committee²³³ defers greatly to the

In 1990, Thailand saw a sharp increase in arrivals who had been redirected from Malaysia. *More Boat People Arriving in Thailand*, UPI, Jan. 17, 1990, at *1, available in LEXIS, NEWS Library, UPI File. In 1989, the number of Vietnamese arrivals jumped from 170 in October to 695 in November to 1110 in December. *Id.* Despite this increase, Thailand continued to provide first asylum to Vietnamese boat people pursuant to its CPA commitment. *See id.* (stating that the Thai director of Special Affairs of the National Security Council declared that Thailand did not intend to "follow Malaysia's example" by pushing off boat people). *See, e.g.*, DEP'T OF STATE, *supra* note 128, at 665 (report on Thailand) (reporting that although there were isolated cases of Thai pushbacks of Laotian refugees in 1992, there were no reports of such treatment towards Vietnamese boat people).

227. Helton, *Experiment in Refugee Protection*, *supra* note 24, at 125. The Thai government denied international officials immediate access to new arrivals. *Id.* In contrast, UNHCR representatives had to notify the Camp Commander every time they entered camp to prepare initial paperwork on new arrivals. *Id.* at 125-26.

228. *Id.* at 126. Initially, the UNHCR initially monitored all interviews, but by 1990 it monitored less than 40%; some interviews were even conducted without interpreters. *Id.* at 126-27.

229. *Id.* at 127. The Screening Committee consisted of the Deputy Director of the Operations Centre for Displaced Persons (OCDP), the Assistant Director of OCDP, and 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). *Id.* at 126.

230. *Id.* at 126.

231. *Id.* at 128.

232. *Id.*

233. The Appeals Committee consists of the Deputy Permanent Secretary of MOI, the Deputy Director and Assistant Deputy Director of OCDP, and representatives of the National Security Council, Ministry of Foreign Affairs, Joint Operations, Navy, Immigration, and Marine Police. *Id.*

UNHCR and maintains that "only those appeals considered by the UNHCR will have a chance of recognition on appeal."²³⁴ Finally, there is no judicial review for cases denied at the appellate level.²³⁵

The screening process in Thailand moved slowly.²³⁶ By March 1991, however, most of the 25,000 Vietnamese boat people in Phanat Nikhom had failed to qualify for refugee status.²³⁷ Thailand was the last country in the region to begin repatriation of Vietnamese under the UNHCR voluntary repatriation program.²³⁸ In July 1990, Vietnamese and UNHCR officials interviewed the first group of boat people willing to return to Vietnam from Thailand.²³⁹ In 1991, the Thai government began the transfer of nonrefugees from Phanat Nikhom Camp to the Si Kheu Holding Center.²⁴⁰ Thailand initially planned to send all the Vietnamese boat people denied refugee status back to Vietnam by 1993,²⁴¹ but as of August 1992, only 4278

234. *Id.* As of July 1990, out of the 85 cases on appeal, the UNHCR had only supported five. *Id.*

235. *Id.*

236. *Id.* at 127. In mid-1990, an UNHCR official stated that most asylum seekers waited two years for an interview. *Vietnam Talks with Boat People in Thailand on Going Home*, Reuter Libr. Rep., July 17, 1990, available in LEXIS, WORLD Library, ALLNWS File [hereinafter *Vietnam Talks with Boat People*].

237. *Asian News: Vietnamese Stab Themselves in Protest at Repatriation*, Japan Econ. Newswire, Mar. 13, 1991, available in LEXIS, WORLD Library, ALLNWS File [hereinafter *Vietnamese Stab Themselves*]. The rejection rate was 80%. *UNHCR to Set Up Transit for Vietnamese Boat People Repatriations from Thailand*, Xinhua Gen. Overseas News Serv., July 18, 1990, available in LEXIS, WORLD Library, ALLNWS File [hereinafter *UNHCR to Set Up*].

238. See Amina Rahman, *Refugees: More Vietnamese Boat People Choose to Go Home*, Inter Press Serv., July 23, 1990, at *1, available in LEXIS, WORLD Library, ALLNWS File (reporting that Malaysia, Indonesia, and Hong Kong had already started voluntary repatriation by July 1990); *Vietnam Talks with Boat People*, *supra* note 236 (stating that the Philippines had also begun repatriation under the UNHCR program by July 1990).

239. Rahman, *supra* note 238, at *1. At the same time, the UNHCR established a transit center in Nakhon Ratchasima province for repatriating Vietnamese. *UNHCR to Set Up*, *supra* note 237.

240. *Vietnamese Stab Themselves*, *supra* note 237. About 150 Vietnamese at the Si Kheu Center protested the transfer, and some even stabbed themselves with knives. *Id.* There was also unrest and fighting among 10,000 refugees at the Phanat Nikhom Camp. *Id.* See *Thai Soldiers Open Fire on Rioting Refugees*, Reuters, Mar. 4, 1991, available in LEXIS, WORLD Library, ALLNWS File (reporting that Thai soldiers fired shots to stop a riot by 1000 Vietnamese protesting the repatriation plan, and wounded at least three).

241. *Other Reports on South-East Asia: Thailand to Repatriate "Non-Refugee*

boat people had returned home.²⁴² The despair among these asylum seekers in Thailand at their diminishing chances of re-settlement is immense,²⁴³ as immense as the pressure on the Thai government to free itself of the refugee overpopulation problems in its camps—problems that have drained its resources for some nineteen years.

D. Philippines

An average of 3600 Vietnamese boat people arrived in the Philippines per year from 1979 to 1990.²⁴⁴ The Philippines has a reputation as the "most hospitable and open country in the region for refugees."²⁴⁵ The government runs two spacious Vietnamese refugee camps at Morong on the Bataan Peninsula and at Puerto Princesa on the island of Palawan.²⁴⁶ The Vietnamese refugees live in an open environment²⁴⁷ and the government attempts to make life in the camps as normal as possible for the detainees.²⁴⁸ Unlike the closed camps in other first asylum countries in which the refugees are kept idle and forced to languish aimlessly,²⁴⁹ the Philippine refugee center

Vietnamese" "Within Three Years," BBC Summ. of World Broadcasts, Jan. 25, 1990, available in LEXIS, NEWS Library, ARCNEWS File.

242. 200 Vietnamese Refugees to Be Sent to Vietnam: Thai Official, Xinhua Gen. Overseas News Serv., Aug. 17, 1992, available in LEXIS, NEWS Library, ARCNEWS File. Some returnees had waited more than 10 years in the camp for resettlement that never materialized. Rahman, *supra* note 238, at *1. Others chose to leave rather than wait for the long screening process. *Refugees Return Home*, Agence France Presse, Sept. 9, 1991, available in LEXIS, NEWS Library, ARCNEWS File.

243. See Rahman, *supra* note 238, at *2 (quoting a UNHCR official working with refugees in Thailand as saying, "Some commit suicide, others resort to domestic violence and still others just have nervous breakdowns").

244. De Castro, *supra* note 14, at *1.

245. Keith B. Richburg, *Philippines Tiring of Boat People; Confrontation with U.S. over Vietnamese on Navy Ships Defused*, WASH. POST, June 16, 1990, at A20.

246. *Id.*

247. DEP'T OF STATE, *supra* note 144, at 643 (report on the Philippines).

248. See Uli Schmetzer, *Refugees Cherish Past, Await Uncertain Future*, CHI. TRIB., Mar. 8, 1990, at 27.

249. See *Manila Rejects Asylum for 2,000 Boat People*, Agence France Presse, Nov. 15, 1991, available in LEXIS, NEWS Library, CURRNT File [hereinafter *Manila Rejects*] (quoting a UNHCR official who stated that unlike in Hong Kong, refugees in the Philippines were not "confined to their camp, but were allowed to move freely among the local population"). See also *infra* notes 296-306 and accompanying text.

tries to keep the inmates busy until they depart for either resettlement in a Western country or back to Vietnam.²⁵⁰ The Philippine government requires both adults and children to go to school.²⁵¹ The detainees are allowed to earn their own income,²⁵² engage in the development of social processes within the camp community,²⁵³ and elect leaders every six months by democratic vote.²⁵⁴

Until recently the government generally did not consider the boat people a burden on the Philippines since the refugee program boosted the economy by \$25 million in fund assistance annually.²⁵⁵ Furthermore, the program created at least 4000 jobs for Filipinos.²⁵⁶ As the influx of Vietnamese continued, however, this open and hospitable country grew tired of accepting open-ended cases and became aware of the West's reluctant commitment to resettlement.²⁵⁷ As a result, the Philippines joined the regional trend of attacks on the first asylum policy.²⁵⁸ The Philippines adopted a new policy of refusing to accept Vietnamese boat people rescued at sea unless the flag state of the rescuing ship gave a written guarantee of their

250. Schmetzer, *supra* note 248, at 27.

251. *Id.*

252. *Id.* (describing how inmates of the camps in the Philippines are allowed to work, set small businesses, and even take their families on vacations to beach resorts); de Castro, *supra* note 14, at *2 (stating that small businesses owned by detainees at the first asylum camp in Palawan include bakeries, restaurants, and goldsmith shops, and attract both Vietnamese and Filipino patrons).

253. See Schmetzer, *supra* note 248, at 27 (explaining that the refugees run their own security system, banks, courts, and even their own prison).

254. *Id.*

255. *Refugee Program Pumps into Philippine Economy 25 Million Dollars Annually*, Xinhua Gen. Overseas News Serv., June 21, 1990, available in LEXIS, WORLD Library, ALLNWS File (explaining that fund assistance comes from the United Nations, donor countries, and international organizations).

256. *Id.*

257. Richburg, *supra* note 245, at A20. See also *Philippines Grants Asylum to 255 Refugees*, UPI, June 14, 1990, available in LEXIS, NEWS Library, UPI File [hereinafter *Philippines Grants Asylum*] (describing the first asylum countries' complaints of the strain on their resources by "open-ended" operation of refugee camps).

258. Richburg, *supra* note 245, at A20. See Rene Pastor, *U.N. Urges Philippines Not to Abandon Asylum for Boat People*, Reuter Libr. Rep., June 21, 1990, at *1, available in LEXIS, WORLD Library, ALLNWS File [hereinafter *U.N. Urges Philippines*] (stating that the Philippines' refusal to automatically accept rescue-at-sea cases was a protest against the United States' opposition to forced repatriation).

resettlement by December 31, 1992.²⁵⁹ Over a period of two weeks, the policy left 255 Vietnamese asylum seekers stranded on U.S. warships before the government finally reversed the policy and allowed the boat people to come ashore.²⁶⁰ The decision to grant automatic and temporary asylum to rescue-at-sea cases came only after numerous appeals by the United States, the UNHCR, and the Roman Catholic archbishop of Manila.²⁶¹ Furthermore, the UNHCR had to promise to resettle the 255 boat people in three years.²⁶² To date, the Philippines is the only country in the region that still accepts rescue-at-sea cases after the adoption of the CPA.²⁶³

Since March 1989, when the Philippines implemented their screening program, more than 8000 Vietnamese asylum seekers have arrived.²⁶⁴ The new arrivals stopped, however, in 1992²⁶⁵ because of the successful implementation of the CPA.²⁶⁶

Before the adoption of the CPA, the Philippines, as the only signatory nation in the region to the 1951 Convention and the 1967 Protocol in the region,²⁶⁷ acknowledged its commitment to respect the 1951 Convention and 1967 Protocol criteria regarding the screening of the Vietnamese.²⁶⁸ Its refugee sta-

259. Helton, *Experiment in Refugee Protection*, *supra* note 24, at 130 (stating that the Philippine Department of Foreign Affairs allowed 90 Vietnamese rescued by the Canadian HMCS provider to disembark only after the Canadian government acquiesced to its demand for the guaranteed transfer of an equal number of boat people by December 31, 1992); *Manila Seeks U.S. Guarantee on Boat People*, CHI. TRIB., June 6, 1990, at 8 (reporting that 101 Vietnamese from two wooden boats rescued by the *USS Beaufort* were stranded in the U.S. Subic Bay naval station when the Philippine government refused for the first time to accept rescue-at-sea cases unless the United States guaranteed their resettlement).

260. *Philippines Will Accept Vietnamese Boat People*, ORLANDO SENTINEL TRIB., June 17, 1990, at A18.

261. *Philippines to Accept Vietnamese Boat People Rescues at Sea*, Reuter Libr. Rep., June 16, 1990, available in LEXIS, WORLD Library, ALLNWS File. See, e.g., Pastor, *supra* note 258, at *1.

262. *Philippines Grants Asylum*, *supra* note 257.

263. Helton, *Experiment in Refugee Protection*, *supra* note 24, at 130.

264. *Philippines, Vietnam Sign Accord on Refugee Repatriation*, Reuter Libr. Rep., Nov. 29, 1991, available in LEXIS, ASIAPC Library, REUWLD File [hereinafter *Philippines, Vietnam Sign Accord*].

265. DEPT OF STATE, *supra* note 144, at 643 (report on the Philippines).

266. *Id.*

267. Helton, *Experiment in Refugee Protection*, *supra* note 24, at 129.

268. *Philippines Announces Cut-Off*, *supra* note 105.

tus determination process currently consists of three stages: reception, status determination, and appeal.²⁶⁹ Local officials register new arrivals and transfer them to the Philippine First Asylum Camp in Palawan.²⁷⁰ Under the supervision of the UNHCR,²⁷¹ a nongovernmental organization staff conducts a predetermination interview with the asylum seekers using standardized questionnaires.²⁷² The Commission on Immigration and Deportation makes the decision on refugee status based on the report of the predetermination interview.²⁷³ The deciding officer, with the assistance of an interpreter, conducts a follow-up assessment with asylum seekers whose cases for asylum are doubtful.²⁷⁴ A written decision is sent to the asylum seeker and to the UNHCR.²⁷⁵ Written decisions rejecting asylum state the basis for rejection and notify the asylum seeker that he has fifteen days to file notice of appeal.²⁷⁶ Those asylum seekers who do not appeal are "deemed to have chosen voluntary repatriation."²⁷⁷ The asylum seeker who chooses to contest the decision submits a written statement in support of his appeal to the Interagency Task Force on Refugee Assistance and Administration in Manila, which serves as the appeal board.²⁷⁸ The UNHCR may also submit its comment on the appeal within seven days after receipt of the asylum seeker's statement.²⁷⁹ The decision of the appeal board is considered final.²⁸⁰

By the end of 1991, about 21,000 boat people were living in the Filipino refugee centers.²⁸¹ Of the 7000 refugees who had been screened, only 1481 qualified as genuine refugees.²⁸² On

269. Helton, *Experiment in Refugee Protection*, *supra* note 24, at 129.

270. *Id.*

271. UNHCR representatives are present during interviews, but they have an observatory role and do not participate in the proceedings. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 129-30.

277. *Id.* at 130.

278. *Id.*

279. *Id.*

280. *Id.*

281. *Manila Rules Out Forced Return of Vietnamese Refugees*, Japan Econ. Newswire, Nov. 29, 1991, available in LEXIS, ASIAPC Library, JEN File [hereinafter *Manila Rules Out*].

282. *Philippines, Vietnam Sign Accord*, *supra* note 264.

November 29, 1991, the Philippines signed an agreement with Vietnam and the UNHCR calling for the repatriation of those asylum seekers denied refugee status who "neither volunteer to return home nor resist repatriation."²⁸³ The orderly repatriation program provided the returnees with a free plane ticket, fifty dollars upon departure from the Philippines, and thirty dollars a month for one year.²⁸⁴ Despite these benefits and improved economic conditions in Vietnam,²⁸⁵ those screened out as nonrefugees have been reluctant to leave.²⁸⁶ As of mid-1993, only 185 Vietnamese had voluntarily repatriated from the Philippines.²⁸⁷ Although the Philippine government has expressly ruled out forced repatriation²⁸⁸ and has opted for a gradual phase-out of the refugee camps,²⁸⁹ the government may force the return of Vietnamese boat people in the future.²⁹⁰ The continuing slow pace of repatriation is making forced repatriation a more pressing option since the Philippines plans to close its refugee centers in 1994.²⁹¹

283. *Id.*

284. *Manila Rules Out*, *supra* note 281.

285. *See de Castro*, *supra* note 14, at *1 (statement of Pham Van Nhat, a Vietnamese asylum seeker in the First Philippine Asylum Camp) ("Yes, the Vietnamese economy has improved, but political freedoms are still restricted.").

286. *See Manila Urges Hanoi to Speed Up Refugee Repatriation*, Xinhua Gen. News Serv., July 27, 1993, available in LEXIS, WORLD Library, XINHUA File [hereinafter *Manila Urges Hanoi*] (explaining that thousands screened out as nonrefugees remain in the Philippines because they do not want to return to Vietnam). *See, e.g., de Castro*, *supra* note 14, at *2 (maintaining that many of the Vietnamese who had opened small businesses in the Philippines were reluctant to return to Vietnam where the average monthly wage is \$30); *Vietnamese Boat People Stage Hunger Strike in Philippines*, Xinhua Gen. Overseas News Serv., Dec. 9, 1992, available in LEXIS, WORLD Library, XINHUA File (describing the hunger strike by 10 Vietnamese asylum seekers in the Palawan camp protesting the denial of their applications for refugee status).

287. *Manila Urges Hanoi*, *supra* note 286.

288. *See Manila Rules Out*, *supra* note 281; *Philippines, Vietnam Sign Accord*, *supra* note 264.

289. *de Castro*, *supra* note 14, at *2.

290. *Manila Rejects*, *supra* note 249.

291. *See Rene Pastor*, *Gloom Seizes Vietnam Refugees over Camp Closure*, Reuters, June 17, 1993, at *1-*2, available in LEXIS, World Library, Allnews File [hereinafter *Gloom Seizes Vietnam*] (stating that Filipino officials at the Palawan camp foresee possible suicide or escape attempts by the inmates as the closing date for the camps draws near and official attitudes towards involuntary repatriation gain force); Beryl Cook, *Philippines Set to Close Bataan Transit Centre*, S. CHINA MORNING POST, July 19, 1993, at 2.

E. Hong Kong

The implementation of the Malaysian push-off policy made Hong Kong the leading first asylum port in the region with a twelve-year high of 64,000 Vietnamese in its refugee camps in 1991.²⁹² By January 1993, Hong Kong had received more Vietnamese asylum seekers than all the other first asylum countries put together.²⁹³ Hong Kong was also the first nation in Southeast Asia to take unilateral measures to deter and control the flow of the Vietnamese boat people to its territory.²⁹⁴ Furthermore, Hong Kong was the first country to terminate the bona fide refugee status policy of the pre-CPA legal framework in the 1979 Conference and introduce a procedure for screening out economic refugees from genuine refugees.²⁹⁵

Long before a global strategic move to control the flow of boat people, Hong Kong implemented a policy of "humane deterrence."²⁹⁶ Since July 1982, the Government has detained Vietnamese asylum seekers in five prison-like camps enclosed by chain-link fences²⁹⁷ with barbed wire and uniformed security guards from the Correctional Services Department.²⁹⁸ The camps are extremely overcrowded and sometimes crammed with as many as 2000 people in each hut.²⁹⁹ The massive number of people confined into such a cramped living space makes the camps very unsanitary.³⁰⁰ The camps are usually infested with rats, are extremely hot during the summer, and are prone to

292. *Lawyers Slam Hong Kong Boat People Appeals System*, Reuter Libr. Rep., Mar. 5, 1992, at *1, available in LEXIS, WORLD File, ALLNWS File. This figure was the highest since 1979 when 68,700 Vietnamese boat people flooded into Hong Kong. Vines, *Grass Isn't Greener*, *supra* note 8, at 27.

293. Vines, *Grass Isn't Greener*, *supra* note 8, at 27.

294. See *supra* notes 99-101 and accompanying text.

295. *Id.*

296. Malcom Gray, *In Search of Life Outside the Wire*, MACLEAN'S, Mar. 14, 1988, at 52.

297. *Id.*

298. PoKempner, *supra* note 38, at 332. Before the institution of this detention policy, the Vietnamese asylum seekers stayed in open camps where they were allowed to leave during the day. *Id.*

299. Peter Goodspeed, *A Glimpse into Camps of Despair: Shocking Hong Kong Court Case Produces Tales of Violence, Intimidation, Extortion, Rape, and Bureaucratic Indifference in Camps for Vietnamese Boat People*, TORONTO STAR, July 22, 1992, at A15.

300. PoKempner, *supra* note 38, at 333.

outbreaks of communicable infections.³⁰¹ The effects on the inmates of decaying in long term detention under these conditions include depression, frustration, hostility, and violence.³⁰²

Another humane deterrent measure is propaganda injected back into Vietnam via the mail.³⁰³ Camp officials routinely open mail sent by inmates to family and friends in Vietnam and insert a pamphlet warning those contemplating flight to Hong Kong about the degrading conditions in its camps.³⁰⁴ The grossest example of the debilitating effect of the humane deterrence was a violent riot in the Shek Kong Detention Centre on February 3, 1992, in which twenty-three Vietnamese burned to death in a barricaded hut and more than 120 more were injured.³⁰⁵ The UNHCR complained to the Hong Kong government about the conditions in its refugee camps and ultimately was "satisfied with the remedial action taken," although it did not say what kind of measures were taken to alleviate the situation.³⁰⁶

After Hong Kong instituted its screening program, the government kept all Vietnamese who arrived before June 16, 1988 in open camps or transit centers along with those who

301. *Id.*

302. *See id.* (noting that many detainees complain of "unremitting boredom, anxiety, or hopelessness" as well as insomnia). *See, e.g.,* Heather Stroud, *Hong Kong: Wave of Horror Signals New Look at Detention Policy*, S. CHINA MORNING POST, Feb. 9, 1992, at *2, available in LEXIS, WORLD Library, ALLNWS File (describing the problems of factional conflicts, gangster activities, and alcoholism among the detainees at the Sek Kong Detention Centre); Goodspeed, *supra* note 299, at A15 (noting the reports of frequent knife stabbings, extortion, rape, and intimidation by armed Vietnamese gangs who are granted special status by Hong Kong camp guards).

303. Gray, *supra* note 296, at 52.

304. *Id.*

305. PoKempner, *supra* note 38, at 363. A clash between North and South Vietnamese ended in hundreds of southerners pushing burning blankets through the windows of a hut occupied by some 200 North Vietnamese. Jonathan Braude, *Hong Kong, Unanswered Questions over the Death of 23*, S. CHINA MORNING POST, Feb. 9, 1992, at *4, available in LEXIS, WORLD Library, ALLNWS File. After this incident, an independent commissioner appointed to re-examine camp management made 13 recommendations, most of which have been implemented. DEP'T OF STATE, *supra* note 144, at 967 (report on Hong Kong).

306. Vines, *Grass Isn't Greener*, *supra* note 8, at 27. Robert van Leeuwen, the controversial Hong Kong Chief of Mission for the UNHCR until November 1993, proclaimed, "If you compare their conditions to those refugees in say Somalia or the former Yugoslavia, in these terms, the conditions are very good." *Id.*

passed screening.³⁰⁷ These people qualified for resettlement and remained in Hong Kong until they could be transferred to a holding center in the Philippines and on to a new life in the West.³⁰⁸ Those who were denied refugee status or who were awaiting screening remained confined in the detention centers.³⁰⁹

The refugee determination procedure in Hong Kong is also the subject of much controversy.³¹⁰ Under the Millport policy, which is part of the screening program instituted in June 15, 1988,³¹¹ all Vietnamese boat people arriving in Hong Kong³¹² or intercepted in Hong Kong waters³¹³ are given a warning notice that they are illegally entering its territory.³¹⁴ One warning used states:

There is a new policy in Hong Kong.

Former residents of Vietnam seeking to enter Hong Kong as economic migrants are now treated as illegal immigrants. You are free to leave Hong Kong.

If you choose to continue your journey, you will be given food and water if necessary, your boat will be repaired.

If you do not leave Hong Kong and are found to be an economic migrant, you will be detained as an illegal

307. PoKempner, *supra* note 38, at 332.

308. See Beryl Cook, *Philippines Set to Close Bataan Transit Centre*, S. CHINA MORNING POST, July 19, 1993, at 2 (explaining that under an international agreement, the Philippines offered to establish the Bataan Transit Centre as a staging post for a maximum of 5000 asylum seekers granted refugee status in Hong Kong to help ease the congestion in Kong Kong's detention camps).

309. PoKempner, *supra* note 38, at 332.

310. Helton, *Experiment in Refugee Protection*, *supra* note 24, at 133. See Vines, *Grass Isn't Greener*, *supra* note 8, at 27 (noting the criticism directed at Hong Kong for its screening procedures, treatment of Vietnamese asylum seekers, and "alleged determination to make conditions sufficiently appalling so as to deter new arrivals"). See, e.g., Rule, *supra* note 87, at A3 (describing an Amnesty International report that noted perceived defects in Hong Kong's screening process and accused Hong Kong of ill treatment of the 57,000 Vietnamese detained in its camps).

311. H. Samuels, *The Detention of Vietnamese Asylum Seekers in Hong Kong: Re Pham Van Ngo and 110 Others*, 41 INT'L & COMP. L.Q. 422, 424 (1992).

312. *Id.*

313. Helton, *Judicial Review*, *supra* note 59, at 267.

314. LAWYERS COMM., *supra* note 20, at 20.

immigrant, pending repatriation to Vietnam.³¹⁵

A successful court challenge in 1990³¹⁶ reinforced the right of boat people under the Millport policy to seek assistance from Hong Kong and then continue sailing, provided that they do not stay beyond an unreasonable period of time.³¹⁷

Those boat people who choose to stay and undergo screening face a restrictive screening procedure.³¹⁸ Under a Statement of Understanding between the UNHCR and Hong Kong, Hong Kong's refugee determination process must follow the criteria in the 1951 Convention, the 1967 Protocol, and the UNHCR Handbook.³¹⁹ In addition to allowing the UNHCR access to monitor the refugee determination process,³²⁰ Hong Kong makes the UNHCR the "exclusive source of legal advice and assistance to asylum seekers in the screening and review procedures."³²¹ Immigration Department officers, with the assistance of interpreters, use a questionnaire to conduct screening interviews.³²² The officer then submits a recommendation to superiors who make the final determination of the refugee status of the asylum seeker.³²³ Those denied refugee status are notified of the right to appeal and must file an objection with the Immigration Department within fourteen days after notice of a negative decision.³²⁴ The UNHCR and the Agency for Volunteer Service³²⁵ receive a copy of the Immigration Department file for any negative cases and may also give assistance

315. Samuels, *supra* note 311, at 424.

316. *Re Pham Van Ngo and Others*, 1 H.K.L.R. 499 (1991). For background and scholarly analysis of this case, see generally Samuels, *supra* note 311.

317. See Samuels, *supra* note 311, at 425-26. See also Kathy Griffin, *Boat People Snub HK to Take a Chance on Japan*, S. CHINA MORNING POST, May 25, 1993, at 3 (describing how several asylum seekers took advantage of the Millport policy).

318. Fiona MacMahon, *Hong Kong: Forced Returnees 'Face Persecution'*, S. CHINA MORNING POST, June 2, 1992, available in LEXIS, WORLD Library, ALLNWS File [hereinafter MacMahon, *Forced Returnees*].

319. Helton, *Judicial Review*, *supra* note 59, at 267.

320. *1989 Conference*, *supra* note 13, Annex, pt. II, para. 6(a).

321. Helton, *Experiment in Refugee Protection*, *supra* note 24, at 132.

322. *Id.*

323. *Id.*

324. Helton, *Judicial Review*, *supra* note 59, at 268.

325. The Agency for Volunteer Service is a legal service organization established in Hong Kong by the UNHCR. *Id.*

to asylum seekers in preparation for reviews.³²⁶ Refugees who are denied asylum may not have legal representation at the review hearing before the Refugee Status Review Board.³²⁷ Hong Kong is the only first asylum country which provides judicial review of the administrative rejection of refugee status claims.³²⁸ Although the Review Board cannot order a change in the status of an applicant, it may order that the applicant be re-evaluated to determine if there were irregularities in either the screening procedure or the review itself.³²⁹

Since its implementation, Hong Kong's refugee determination procedure has been criticized for its unreliability and unfairness.³³⁰ Basic flaws include inadequate legal counselling, hostility and doubt among interviewers, insufficient time to file an appeal,³³¹ and the absence of a provision giving appellants written reasons for negative appeal decisions.³³² The flawed screening and review processes may have wrongfully rejected thousands of Vietnamese asylum seekers worthy of refugee status.³³³ However, both Hong Kong and the UNHCR maintain

326. *Id.*

327. *Id.* The Refugee Status Review Board, headed by a former judge, is composed of panels of members from civil service and the general community. *Id.*

328. See Helton, *Experiment in Refugee Protection*, *supra* note 24, at 121-38 (describing the status determination process in various first asylum countries and stating that Indonesia, Malaysia, Thailand, and the Philippines do not provide for judicial review).

329. *Id.* See *infra* notes 336-43 and accompanying text.

330. MacMahon, *Forced Returnees*, *supra* note 318. See e.g., AMNESTY INT'L, MEMORANDUM TO THE GOVERNMENTS OF HONG KONG AND THE UNITED KINGDOM REGARDING THE PROTECTION OF VIETNAMESE ASYLUM SEEKERS IN HONG KONG 6 (1990) (calling for a stop to Hong Kong's return of refugees until steps are taken to remedy flaws in the screening process); *Lawyers Slam Hong Kong Boat People Appeals System*, Reuter Libr. Rep., Mar. 5, 1992, available in LEXIS, WORLD Library, ALLNWS File [hereinafter *Lawyers Slam Appeals System*].

331. *Lawyers Slam Appeals System*, *supra* note 330.

332. AMNESTY INT'L, *supra* note 330, at 51-52.

333. *Lawyers Slam Appeals System*, *supra* note 330. A Lawyers' Committee for Human Rights report states, "The entire screening and review procedures remain seriously flawed. Worthy cases have been rejected, including Vietnamese who have been subjected to harsh re-education programmes and forced labour measures." *Id.* See, e.g., Stephen Vines, *Where the Boat People Come In*, GUARDIAN, Feb. 29, 1992, at 25 [hereinafter Vines, *Boat People Come In*] (describing how a strict Catholic family of Chinese descent experienced a pattern of discrimination by the Vietnamese Government. The family spent years in re-education camps, and were classified as undesirables. The children received no

that the system works because the UNHCR has access to the Vietnamese asylum seekers and it has the right to exercise its mandated power to declare an individual a refugee at any time.³³⁴ However, the UNHCR rarely exercises this mandate.³³⁵

The biggest blow to the integrity of the Hong Kong screening system was a successful judicial challenge in *R v. Director of Immigration and Refugee Status Review Board ex parte Do Giau et al (Ex parte Do Giau)*³³⁶ brought by asylum seekers whose applications for refugee status were rejected by the Review Board.³³⁷ The Hong Kong High Court stated that it has jurisdiction to review the Review Board's decisions in cases involving executive errors that fail "to comply with the requirements of natural justice."³³⁸ This determination will allow future judicial challenges.³³⁹ The court added that "a material or decisive fact will be one which is a condition precedent to jurisdiction; or one which is the only or the primary basis for the decision, or a fact which the tribunal had to take into account in order to reach its decision."³⁴⁰ The court also made several significant observations regarding the refugee determination process, such as the need for the provision of legal counseling,³⁴¹ the difficulties of double interpretation in interviews,³⁴² and the recommendation that the interviewers read back their notes to the asylum seeker in order to avoid the discrepancies in the interview process.³⁴³

educational opportunities. The government denied refugee status at the screening stage and the review.).

334. Rule, *supra* note 87, at A3; Vines, *Boat People Come In*, *supra* note 333, at 25.

335. Vines, *Boat People Come In*, *supra* note 333, at 25.

336. *R v. Director of Immigration & Refugee Status Review Bd. ex parte Do Giau et al* (1990 MP No. 570, 622, 623, 624, 636, 931, 932, and 934), Supreme Court of Hong Kong, High Court, Miscellaneous Proceedings (Mortimer, J.) [hereinafter *Ex parte Do Giau*].

337. See Helton, *Judicial Review*, *supra* note 59, at 263.

338. *Id.* (quoting *Ex parte Do Giau*).

339. *Id.* at 289.

340. *Id.* at 279 n.70 (quoting *Ex parte Do Giau*).

341. *Id.* at 283.

342. *Id.* at 282. The court noted that translation errors "should be avoided where possible . . . [but] double interpretations cannot be avoided in any practical way." *Id.* (quoting *Ex parte Do Giau*).

343. *Id.* at 282. The court further noted that the record of the training seminar for interviewers expressly prohibited the disposal of interview records

Hong Kong implemented measures designed to improve its refugee status determination procedure.³⁴⁴ In May 1990, the government instituted pilot projects to provide legal counseling for asylum seekers before their screening interviews.³⁴⁵ In October 1990, the Review Board introduced a measure to provide applicants reasons for the denial of refugee status.³⁴⁶ In response to the decision in *Ex parte Do Giau*, the UNHCR issued a Note on Fair and Efficient Procedures which emphasized several requirements for fair and adequate screening procedures, including individual legal counselling, competent interpreters, reasonable time for appeal of negative decisions, "consistent and rational application" of the refugee criteria in the UNHCR Handbook, and basic principals of fairness.³⁴⁷ These measures, however, have not halted criticism of the screening process.³⁴⁸

By the beginning of 1990, only 13,000 of the 57,000 Vietnamese boat people in Hong Kong qualified as genuine refugees who were eligible for resettlement.³⁴⁹ The percentage of applicants that are approved as refugees fluctuates between a low of fourteen percent³⁵⁰ and a high of twenty-five percent.³⁵¹ In recent years, the approval rate is no more than twenty percent.³⁵² Hong Kong and Britain are currently taking extreme measures to stop new arrivals and send back all those screened out because of increasing pressure from China to solve the crisis before the British colony is returned to China in 1997.³⁵³

and endorsed this provision. *Id.* at 280-81.

344. MacMahon, *Forced Returnees*, *supra* note 318, at *2.

345. Helton, *Judicial Review*, *supra* note 59, at 290 n.113.

346. *Id.* at 290.

347. *Id.* at 287-88.

348. See, e.g., S.Y. Yue, *Hong Kong: Amnesty Criticizes Bill of Rights*, S. CHINA MORNING POST, July 10, 1992, at *1, available in LEXIS, WORLD Library, SCHINA File (quoting Amnesty International's annual report that urged Hong Kong to make improvements to its screening process).

349. Rule, *supra* note 87, at A3.

350. *Lawyers Slam Appeals System*, *supra* note 330, at *1.

351. Helton, *Judicial Review*, *supra* note 59, at 291.

352. Vines, *Boat People Come In*, *supra* note 333, at 25.

353. *Hong Kong; Lu Ping on Key Post-1979 Civil Service Administration Issues for Hong Kong*, BBC Summ. of World Broadcasts, Mar. 10, 1993, at *6, available in LEXIS, WORLD Library, ALLNWS File. The Director of the State Council Hong Kong and Macao Affairs Office has proclaimed:

The Chinese government has made its policy very clear, and we have repeatedly stressed, that the problem of Vietnamese refugees should be solved

Hong Kong took another unprecedented measure on December 12, 1989, when fifty-one Vietnamese boat people, including seventeen women and twenty-six children, were awakened at 3:00 a.m. and forced onto a plane back to Hanoi.³⁵⁴ Hong Kong's first act of involuntary repatriation, caused an international outcry, especially from the United States and refugee rights group.³⁵⁵ Vietnam, concerned with developing good relations with countries of the West, at first refused to take any more forced returnees.³⁵⁶ However, Hong Kong's tough stance sent a message to Vietnam that it would no longer tolerate the unending stream of asylum seekers.³⁵⁷ Vietnam eventually relaxed its opposition to forcible return of boat people and created provisions in cooperation with Britain for the mandatory return of people classified as economic immigrants and the "double-backers."³⁵⁸

by the British government before 1997 . . . [sic] Vietnamese refugees should not be left to the post-1997 SAR government, which has neither the responsibility nor obligation to provide asylum for these refugees.

Id. (statement of Lu Ping). See also *First Boat People Since 1991 Arrive in Hong Kong*, UPI, May 3, 1993, available in LEXIS, NEWS Library, UPI File.

354. William Stewart, *Refugees; Dashing Their Dreams: Britain Begins the Forced Repatriation of the Boat People*, TIME, Dec. 25, 1989, at 26. See also Rule, *supra* note 87, at A3 (reporting that many of the 51 individuals forcibly repatriated were treated brutally).

355. Briggs, *supra* note 83, at 441-42.

356. *Vietnam Endorses East Asia Economic Caucus*, Japan Econ. Newswire, Jan. 20, 1992, at *2, available in LEXIS, ASIAPC Library, JEN File (reporting that Vietnam refused to accept boat people returned by force for humanitarian reasons).

357. See Frank Moan, *Hong Kong Revisited*, AMERICA, Oct. 13, 1990, at 247, 247. During the six months after this incident, the rate of new arrival in Hong Kong fell by 85%. *Id.* Hong Kong attributed this dramatic decrease directly to the first forced repatriation in 1989. *Id.*

358. Raymond Whitaker, *Repatriation of Boat People Awaits Hanoi's Approval*, INDEPENDENT, Feb. 12, 1992, at 11. The agreement with Britain provides for the compulsory repatriation of two small categories of people: 1) screened-out nonrefugees who arrived after October 29, 1991, and 2) the "double-backers." *Id.* The double-backers are those Vietnamese who come back to Hong Kong a second time after they voluntarily repatriated to Vietnam after receiving the cash incentives. Zhao Jiemin, *Yearender: End in Sight for Repatriation of Vietnamese Illegal Immigrants*, Dec. 29, 1993, at *1, available in LEXIS, WORLD Library, ALLNWS File. A later agreement called for the forcible deportation of nonrefugees who arrived before October 29, 1991. *London, Hanoi Sign Vietnamese Refugee Repatriation Accord*, Agence France Presse, May 12, 1992, at *1, available in LEXIS, WORLD Library, ALLNWS File.

Enforcement of involuntary repatriation, along with state efforts, has stopped the flow of boat people from Vietnam.³⁵⁹ The pace of voluntary and involuntary repatriation has gained momentum and is expected to close the Hong Kong refugee camps by 1996.³⁶⁰ At the end of 1993, there were 29,437 boat people still remaining in Hong Kong.³⁶¹ Hong Kong's tough stance has significantly reduced its enormous refugee population in just two years,³⁶² and the UNHCR and Hong Kong officials look forward to an end to this extremely drawn out problem.³⁶³

V. IMPLICATIONS ON INTERNATIONAL REFUGEE AND HUMAN RIGHTS LAW

Overall, the CPA is making significant progress toward a comprehensive solution to the problems of the Vietnamese asylum seekers.³⁶⁴ The success of the CPA stems from an unprecedented effort by the international community to facilitate progress in two basic areas: the prevention of the emigration of the boat people from Vietnam, and the resettlement of genuine refugees and repatriation of nonrefugees.³⁶⁵ The cumulative effect of the CPA's measures is clear in the dramatic decrease in numbers leaving Vietnam³⁶⁶ and the steady increase in numbers returning to Vietnam.³⁶⁷

359. Vines, *Grass Isn't Greener*, *supra* note 8, at 27. The UNHCR helped produce "television programs about conditions in Hongkong's [sic] boat people camps, also spelling out the poor prospects for resettlement of asylum seekers." *Id.* Only 12 people sought refuge in Hong Kong in 1992, compared to 20,000 the year before. *Id.* In 1993, 55 Vietnamese asylum seekers arrived in Hong Kong. *Hong Kong to Close All Vietnamese Migrant Camps by '96*, Japan Econ. Newswire, Nov. 10, 1993, available in LEXIS, ASIAPC Library, JEN File.

360. Beryl Cook, *UNHCR in Warning to Viets; Government Urged to Step Up Forced Repatriation*, S. CHINA MORNING POST, July 8, 1993, at 6. In 1993, there were eight mandatory flights to Hanoi compared with five the year before. *Id.* By mid-1993, the rate of voluntary return was about 800 a month. *Id.*

361. Jiemin, *supra* note 358, at *1.

362. *Id.* at *1-*2.

363. See Vines, *Grass Isn't Greener*, *supra* note 8, at 27 (discussing comments made by the UNHCR and Hong Kong officials concerning the decreased flow of refugees and the problems they experienced in the past).

364. Zimmerman, *supra* note 7, at *4.

365. See *supra* notes 112-33 and accompanying text.

366. Zimmerman, *supra* note 7, at *4. In 1992, merely 58 Vietnamese boat people arrived in first asylum countries. *Id.*

367. *Id.* As of mid-1993, approximately 42,000 had returned to Vietnam under

The resolution of the refugee problem itself seems fairly certain now,³⁶⁸ but unresolved issues remain as to whether the protection of the Vietnamese asylum seekers was adequate under international refugee and human rights law. These issues include the push-offs, detention, refugee status determination, and forced repatriation of the Vietnamese boat people. Another significant issue concerns the effect of emigration deterrent measures on the right to emigrate and seek asylum. These issues will be discussed in light of the relevant principles of international law and the practical considerations in situations of such mass influx.

A. *State Sovereignty and the Right to Asylum*

An examination of a state's obligations to refugees necessarily involves the notion that the state is an entity with both legal rights and legal responsibilities.³⁶⁹ One commentator notes:

The legal framework within which the refugee is located remains characterized, on the one hand, by the principle of state sovereignty and the related principles of territorial supremacy and self-preservation; and, on the other hand, by competing humanitarian principles deriving from general international law (including the purposes and principles of the United Nations) and from treaty.³⁷⁰

A state enjoys sovereignty, an element of control that functions to the exclusion of other authorities³⁷¹ and includes the ability to prescribe, adjudicate and enforce the law to protect its people and its interests within its territory.³⁷² Traditionally, states have the discretionary right to grant asylum within their territory.³⁷³ Asylum is the "protection which a State grants on

the UNHCR voluntary repatriation program. *Id.*

368. See Vines, *Grass Isn't Greener*, *supra* note 8, at 27 (quoting Robert van Leeuwen, the UNHCR Chief of Mission in Hong Kong in early 1993) ("I don't think anyone can say with certainty that's it's over, but I do think so.").

369. Helton, *Asylum and Refugee Protection*, *supra* note 19, at 37.

370. GOODWIN-GILL, *REFUGEE*, *supra* note 45, at 215.

371. *Id.*

372. *Id.*

373. Chooi Fong, *Some Legal Aspects of the Search for Admissions into Other States of Person Leaving the Indo-Chinese Peninsula in Small Boats*, 52 *BRIT.*

its territory or in some other place under the control of its organs to a person who comes to seek it,³⁷⁴ but the grant of protection in a state's territory derives from its sovereignty.³⁷⁵ This notion has been embodied in numerous international instruments as well as in state practice. For example, Article 14 of the International Bill of Human Rights of 1948 states, "Everyone has the right to seek and to enjoy in other countries asylum from persecution."³⁷⁶ An earlier draft of this article included the words "to be granted," but this was replaced by the words "to enjoy."³⁷⁷ Therefore, although every person has the right to seek and enjoy asylum, they do not have the right to be granted asylum, even if they qualify as a refugee fleeing well-founded persecution.³⁷⁸

The notion of an individual right to asylum would mean that a state has a duty to grant asylum to persons fleeing from persecution.³⁷⁹ State practice, however, has not acceded to an obligation to grant asylum to refugees.³⁸⁰ The international community's responses to Vietnamese asylum seekers do not indicate a change in this position.³⁸¹ In fact, many nations indicate a reluctance to respect the U.N. declared right to seek and enjoy asylum.³⁸² The numerous threats by the ASEAN countries and Hong Kong to summarily reject Vietnamese boat people at the border demonstrate their willingness to deny a potential refugee an opportunity to apply for refugee status for the sake of their own national interests.³⁸³ Furthermore, the resettlement countries' reluctance to grant asylum when individuals qualify for refugee status further indicates that the right to enjoy asylum is uncertain even when a person falls within the legal framework for refugee protection.³⁸⁴

Y.B. INT'L L. 53, 63 (1981).

374. GOODWIN-GILL, *REFUGEE*, *supra* note 45, at 103 n.9 (quoting the Institute of International Law's definition of asylum it adopted in 1950).

375. *Id.* at 103.

376. *International Bill of Human Rights*, G.A. Res. 217(III), 3rd Sess., art. 14, U.N. Doc. A/811 (1948).

377. Fong, *supra* note 373, at 64.

378. *Id.*

379. *Id.* at 63.

380. *Id.* at 52.

381. *See id.* at 73.

382. *See id.* at 63.

383. Barcher, *supra* note 9, at 1254.

384. *Id.*

B. *The Principle of Non-Refoulement*

Although there is no legally recognized right to asylum,³⁸⁵ the principle of *non-refoulement*³⁸⁶ protects refugees from being returned to a country where they would face persecution.³⁸⁷ Article 33(1) of the 1951 Convention proclaims that “[n]o Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where [the refugee’s] life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion.”³⁸⁸ *Non-refoulement* is a peremptory norm of international law³⁸⁹ and binds all states regardless of whether they have signed the 1951 Convention or the 1967 Protocol.³⁹⁰

Non-refoulement, however, does not apply to every person seeking asylum. The use of the term “refugee” in Article 33 indicates the drafters’ intention to limit the protection of *non-refoulement* to persons who qualify as “refugees” under the 1951 Convention.³⁹¹ However, very few Vietnamese asylum seekers qualify as “Convention refugees” under the “well-founded fear of persecution” test.³⁹² The majority of the Vietnamese fall in the category of displaced persons, which the refugee determination processes in the first asylum countries fail to acknowledge.³⁹³

The principle of *non-refoulement* may be inapplicable in cases of mass influx.³⁹⁴ However, under customary international law the protective scope of *non-refoulement* may have expanded to cover displaced persons.³⁹⁵ “State practice in cases of

385. GOODWIN-GILL, REFUGEE, *supra* note 45, at 103–04.

386. The term *non-refoulement* is a derivation from the French word *refouler*, which means “to drive back or repel.” *Id.* at 69.

387. *Id.*

388. 1951 Convention, *supra* note 40, art. 33.

389. “The principle of *non-refoulement* . . . ‘leads the way to the adoption of the principle that a State shall not refuse admission to a refugee, *i.e.* it shall grant him at least temporary asylum . . . if nonadmission is tantamount to surrender to the country of persecution.’” GOODWIN-GILL, REFUGEE, *supra* note 45, at 74–75 (internal citation omitted).

390. Helton, *Malaysian Policy*, *supra* note 141, at 1205.

391. Barcher, *supra* note 9, at 1276.

392. *Id.*

393. *Id.* at 1276–77.

394. GOODWIN-GILL, REFUGEE, *supra* note 45, at 73.

395. Barcher, *supra* note 9, at 1277.

mass influx also offers some support for the view that *non-refoulement* applies both to the individual refugee with a well-founded fear of persecution, and to the frequently large groups of persons who do not in fact enjoy the protection of the government of their country of origin.³⁹⁶ The principle of *non-refoulement* is applicable to another pressing issue in the Vietnamese refugee situation, in that hard core Vietnamese criminals and serious offenders remain in Hong Kong camps.³⁹⁷ These individuals arrived before the cut-off date, and thus are technically automatically eligible for resettlement.³⁹⁸ The 1951 Convention rescinds a person's right to refugee status if he or she has committed a major crime while a refugee.³⁹⁹ Customary international law, however, has expanded the principle of *non-refoulement* to protect even the serious criminal against persecution or prejudice by the country of origin.⁴⁰⁰ No resettlement country has been willing to accept this hard core group, and Vietnam has refused to take most of them back.⁴⁰¹ At the end of 1991, Vietnam and Hong Kong signed an agreement to repatriate boat people who served longer than six months in prison.⁴⁰² Despite Vietnam's promise not to persecute returnees for the crime of leaving the country, there is no guarantee that the government will not persecute them otherwise.⁴⁰³

C. *First Asylum Protection: Rejection at the Border*

The concept of first asylum is relatively new, but the state practice of providing temporary admission or refuge for asylum seekers has a long place in history.⁴⁰⁴ The principle of first asylum appears in several international instruments as an alternative to *refoulement*,⁴⁰⁵ but first asylum probably has not

396. GOODWIN-GILL, REFUGEE, *supra* note 45, at 73.

397. Fiona MacMahon, *Hong Kong; Viet Criminals Likely to Stay*, S. CHINA MORNING POST, Apr. 2, 1992, available in LEXIS, WORLD Library, ALLNWS File [hereinafter MacMahon, *Criminals Likely to Stay*].

398. *Id.*

399. 1951 Convention, *supra* note 40, art. 1(F)(a)-(b).

400. GOODWIN-GILL, REFUGEE, *supra* note 45, at 80.

401. MacMahon, *Criminals Likely to Stay*, *supra* note 397.

402. *Id.*

403. Vines, *Grass Isn't Greener*, *supra* note 8, at 27.

404. GOODWIN-GILL, REFUGEE, *supra* note 45, at 115.

405. *Id.* at 116. Examples include "art. 3(3), 1967 Declaration on Territorial

reached the level of customary international law⁴⁰⁶ because it necessarily involves fundamental issues of sovereignty.⁴⁰⁷

Temporary or provisional admission pending movement to another country usually arises in situations of mass influx.⁴⁰⁸ Despite the long practice of providing temporary protection to those in need, the asylum countries' responses to the Vietnamese refugee situation indicate that first asylum as an international legal principle is not viable enough to withstand compassion fatigue and international political pressures.⁴⁰⁹ Threats by all first asylum countries to abandon the protection of first asylum to Vietnamese boat people indicates reluctance against accepting an obligation to admit masses of asylum seekers into their territory on a temporary basis.⁴¹⁰ The Southeast Asian countries are reasserting what they claim is their sovereign right to abandon first asylum.⁴¹¹ These states argue that their obligation to provide temporary refuge stems only from the 1979 Conference and the CPA.⁴¹² The states further claim that their duty is dependent on the repatriation of the nonrefugees or on the promises of Western countries to eventually resettle those deemed refugees.⁴¹³ In essence, the regional countries do not believe that the obligation to provide temporary asylum to boat people is legally binding.⁴¹⁴ Although Hong Kong and the

Asylum; art. 11(5), the 1969 OAU Convention; para. 3, the Council of Europe Res. 14 (1967) on Asylum to Persons in Danger of Persecution; [and] art. 3(3), adopted by the Committee of the Whole of the 1977 United Nations Conference on Territorial Asylum, art. 3(3)." *Id.* n.71.

406. See generally Barcher, *supra* note 9, at 1259 (describing the concept as having "no status under international law. It is essentially a label used to describe the limited character of a host country's obligations to refugees under the compromise effected at the 1979 conference.").

407. *Id.* at 1262.

408. See GOODWIN-GILL, REFUGEE, *supra* note 45, at 114-16.

409. Barcher, *supra* note 9, at 1257.

410. See *id.* at 1254-57.

411. See, e.g., Jonathan Thatcher, *U.S. Receives Stinging Criticism at ASEAN Meeting*, Reuter Libr. Rep., July 24, 1990, at *1, available in LEXIS, ASIAPC Library, REUWLD File (reporting that the foreign ministers of the ASEAN members are reiterating the sovereign right to abandon temporary refuge of Vietnamese in order to protect their state interests).

412. See Barcher, *supra* note 9, at 1268 (stating that first asylum was not considered "to be a binding legal obligation, but rather a concession . . . as part of an international deal").

413. See *id.* at 1268 (stating that "[i]n exchange, the Secretary-General coaxed promises of higher quotas from countries of final resettlement . . .").

414. *Id.* at 1268.

ASEAN members generally follow the principle of first asylum in practice, the sporadic refusals to automatically take in asylum seekers at the border suggest that they have done so for humanitarian or political reasons instead of a sense of legal duty.⁴¹⁵ Other countries have also taken measures which totally disregard any obligation to grant temporary asylum.⁴¹⁶ Thus, first asylum seems to lack the *opinio juris*⁴¹⁷ that would make it a customary principle of law.⁴¹⁸

Technically, Article 33(1) of the 1951 Convention does not forbid the expulsion of a refugee from a state's territories, but only prohibits the return of a refugee to a place where his freedom or life would be endangered.⁴¹⁹ The policy of redirecting or pushing off refugee boats may not violate the 1951 Convention because these countries only expel the asylum seekers with provisions for their safety instead of redirecting them back to Vietnam.⁴²⁰

One commentator argues that *non-refoulement* as a customary principle of international law includes nonrejection at the frontier.⁴²¹ This analysis considers the complexity of mass influx situations in which it is difficult to distinguish the genuine refugees from the nonrefugees.⁴²² A failure to properly identify those individuals with a well-founded fear of persecution would violate the principle of *non-refoulement*, which requires that an asylum seeker denied temporary refuge not be deliberately exposed to danger to life or freedom.⁴²³ Furthermore, the CPA's requirement of refugee determination procedures provides support for the existence of some minimum procedural rights under *non-refoulement*, which necessarily invokes the correlative duty of states to provide temporary admission pending determination of the asylum seeker's status.⁴²⁴ Even if the principle

415. *Id.* at 1268-69.

416. *See supra* notes 382-84 and accompanying text.

417. *Opinio juris* is defined as a legal obligation. Barcher, *supra* note 9, at 1267.

418. *See id.* at 1268.

419. 1951 Convention, *supra* note 40, art. 33. *See Briggs, supra* note 83, at 444.

420. *See* 1951 Convention, *supra* note 40, art. 33(1).

421. GOODWIN-GILL, REFUGEE, *supra* note 45, at 115.

422. *Id.* at 116-17.

423. *See Helton, Malaysian Policy, supra* note 141, at 1206.

424. *Id.* at 1207.

of first asylum can be supported by the duty of *non-refoulement*, there is no corresponding duty to provide a permanent solution under the concept of asylum.⁴²⁵ No refugee has a right to remain in a place of first refuge for an unreasonable period of time.⁴²⁶

D. *The Concept of "Refugee": Refugee Status Determination*

One particular problem area with the refugee determination process under the CPA was the various interpretations and applications of the refugee criteria.⁴²⁷ Most first asylum and resettlement countries favored a strict application of the 1951 Convention definition of "refugee" because a more liberal approach would encourage more Vietnamese to leave and would defeat the purpose of the CPA.⁴²⁸ In contrast, most nongovernmental organizations and overseas Vietnamese argued that the CPA reference to the Universal Declaration of Human Rights and the statement that the refugee criteria to "be applied in a humanitarian spirit"⁴²⁹ called for a broader approach.⁴³⁰ The high rate of asylum rejection indicates that the conservative definition of asylum is being applied in Southeast Asia.⁴³¹ In fact, the trend across the globe is moving towards a more restrictive interpretation of the refugee criteria.⁴³²

A long history of controversy surrounds the meaning of "persecution" in the 1951 Convention.⁴³³ The UNHCR Handbook states that there is no universally accepted definition of "persecution."⁴³⁴ Generally, the threat to life or freedom or serious violations of human rights on the basis of race, religion,

425. GOODWIN-GILL, REFUGEE, *supra* note 45, at 115.

426. 1951 Convention, *supra* note 40, art. 31(2).

427. Bari, *supra* note 9, at 498.

428. *Id.*

429. 1989 Conference, *supra* note 13, para. 6(b).

430. Bari, *supra* note 9, at 498-99.

431. Cf. Chang-Muy, *supra* note 46, at 1175-76 (stating that "[w]here a state makes a unilateral decision to adopt such restrictive measures as curtailing the grant of asylum, through a narrow interpretation of the definition of 'refugee,' and deterring asylum seekers by lowering standards of treatment, however, the burden is simply shifted to neighboring states").

432. Eduardo Arboleda & Ian Hoy, *The Convention Refugee Definition in the West: Disharmony of Interpretation and Application*, 5 INT'L J. REF. L. 66, 78 (1993).

433. *Id.*

434. OFFICE OF UNHCR, *supra* note 50, at 51.

nationality, political opinion, or membership in a particular social group will always be deemed persecution.⁴³⁵ The history and present political and social conditions of Vietnam,⁴³⁶ coupled with the accounts of individuals denied refugee status who had experienced significant abuse by the Vietnamese government,⁴³⁷ indicates that the first asylum countries are utilizing a criteria more restrictive than that expressed in the 1951 Convention. "A screening procedure that does not accurately determine refugee status runs a risk returning refugees who fear persecution in violation of Article 33 [of the 1951 Convention]."⁴³⁸

E. Repatriation as a Permanent Solution

Clearly a person who does not qualify as a genuine refugee cannot claim a right to asylum from any state. Repatriation is one of the permanent solutions to the problem of refugees.⁴³⁹ The other two solutions include resettlement or integration in the local community.⁴⁴⁰

Voluntary repatriation is successful only if significant improvements in the political situation of the country of origin occur first.⁴⁴¹ Although Vietnam's economy has improved in the past few years,⁴⁴² Vietnamese asylum seekers are proclaiming their need for other kinds of freedoms.⁴⁴³ The Vietnamese government has made it publicly clear that they do not expect to see the same kind of change in their political structure.⁴⁴⁴ Even today, there are well documented abuses against individuals by Vietnam.⁴⁴⁵

435. *Id.*

436. See *infra* text accompanying notes 441-45.

437. See generally Helton, *Experiment in Refugee Protection*, *supra* note 24 (describing the screening process in various first asylum countries). In Hong Kong, "[i]nterviewers seemed intent on establishing solely economic reasons for departure," and "[a]sylum-seekers who have endured harsh re-education programs or forced labor in Vietnam have been routinely rejected." *Id.* at 143. See *supra* note 333.

438. Helton, *Experiment in Refugee Protection*, *supra* note 24, at 142.

439. Chang-Muy, *supra* note 46, at 1173.

440. *Id.*

441. *Id.* at 1175.

442. DEPT OF STATE, *supra* note 144, at 678 (report on Vietnam).

443. See de Castro, *supra* note 14, at *1.

444. See DEPT OF STATE, *supra* note 144, at 678 (report on Vietnam).

445. See, e.g., Karen Lowe, *Human Rights Abuse in China, Parts of Asia*,

The question of forced repatriation of refugees is an emerging and significant issue in the international legal community. There is a growing acceptance of forcibly returning asylum seekers back the country of origin, regardless of whether the asylum seekers have been offered the opportunity to prove themselves to be genuine refugees.⁴⁴⁶ Improvements in the screening procedures to better reflect the true fears of persecution will help reduce the risk of the *refoulement* of a person who may be in danger of life and freedom, especially with the implementation of forced repatriation on the rise globally.

F. Human Rights Protection of Non-National Asylum Seekers

Some first asylum countries, such as Thailand and Hong Kong, classify Vietnamese boat people as illegal immigrants in an attempt to alleviate themselves of their legal obligations to refugees.⁴⁴⁷ This distinction between the lawful or unlawful presence of the asylum seeker, however, does not diminish the obligation of a state to observe basic standards of treatment and protection of fundamental individual rights under international law.⁴⁴⁸ The customary law of aliens dictates that no distinction may be drawn between a national and an alien in the protection of inalienable individual rights,⁴⁴⁹ some of which are included in certain provisions of the various covenants on human rights.⁴⁵⁰ For example, under Article 2(1) of the International Covenant on Civil and Political Rights, a state is obligated to ensure and respect the declared rights of "all individuals within its territory and subject to its jurisdiction . . ."⁴⁵¹ This princi-

Agence France Presse, Feb. 1, 1995, at *2, available in LEXIS, WORLD Library, AFP File.

446. See Chang-Muy, *supra* note 46, at 1175.

447. See *supra* text accompanying notes 224, 315.

448. Helton, *Asylum and Refugee Protection*, *supra* note 19, at 41; GOODWIN-GILL, REFUGEE, *supra* note 45, at 137.

449. Helton, *Asylum and Refugee Protection*, *supra* note 19, at 41-43. Fundamental rights that are to be enjoyed by aliens and nationals alike include:

the right to life and security of person; the right to protection against arbitrary or unlawful interference with privacy, family, home or correspondence; the right to be equal before the courts; the right to retain one's own language, culture and tradition; freedom from torture or cruel, inhuman or degrading treatment or punishment; and the right to medical care, social services, education, rest and leisure.

Id. at 43-44.

450. GOODWIN-GILL, REFUGEE, *supra* note 45, at 137.

451. *International Covenant on Civil and Political Rights*, G.A. Res. 2200(XXI),

ple of nondiscrimination allows derogation only in limited circumstances and only if consistent with the state's other obligations under international law.⁴⁵²

Although most Southeast Asian countries are not signatories to international human rights instruments, they are nonetheless bound to respect those rights that have achieved the status of custom.⁴⁵³ This duty to observe customary human rights law has great implications on the various policies of the first asylum countries that push off unseaworthy refugee boats or detain asylum seekers in degrading and abusive conditions as humane deterrence.⁴⁵⁴ Southeast Asian countries are not the only countries that use questionable policies to discourage potential refugees.⁴⁵⁵ A global trend towards unilateral measures that are hostile to asylum seekers is emerging. The United States, a country built by immigrants, followed a closed-door policy of interdicting Haitian boat people attempting to enter its territory and returning them to their militant nation.⁴⁵⁶ Australia has also used a policy of humane deterrence by detaining Indochinese asylum seekers in closed camps.⁴⁵⁷

The compassion fatigue from the rest of the world invokes sympathy for overburdened first asylum countries in Southeast Asia. A durable solution to refugee problems must be multilateral in its approach. The experiences in Malaysia and Singapore prove that restrictive unilateral measures aimed at curbing the influx by either lowering the standard of treatment or curtailing the grant of asylum do not eliminate the problem; instead, the burden of taking in refugees shifts elsewhere.⁴⁵⁸ One commentator states, "[A] nation's obligations to provide humanitarian protection is in no respect dependent on another's refugee or

U.N. GAOR, 21st Sess., Supp. No. 16, Annex, art. 1(1), U.N. Doc. A/6316 (1966) [hereinafter *International Covenant*]. See GOODWIN-GILL, REFUGEE, *supra* note 45, at 137.

452. *International Covenant*, *supra* note 451, art. 4(1). A state is allowed to distinguish between national and alien in a "time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed." *Id.* See GOODWIN-GILL, REFUGEE, *supra* note 45, at 137-38.

453. Helton, *Asylum and Refugee Protection*, *supra* note 19, at 45.

454. *Id.* at 45-46.

455. *Id.*

456. Jean-Pierre Benoit & Lewis A. Kornhauser, *Unsafe Havens*, 59 U. CHI. L. REV. 1421, 1437 (1992).

457. GOODWIN-GILL, REFUGEE, *supra* note 45, at 209.

458. Chang-Muy, *supra* note 46, at 1175-76.

immigration policy, including resettlement abroad. Rather, it is an independent human rights principle.⁴⁵⁹ Thus, no country may violate the basic human rights of asylum seekers within its territory,⁴⁶⁰ and customary international law reinforces this principle with an international standard for the protection of non-nationals.⁴⁶¹

VI. CONCLUSION

The receiving countries of mass refugee influx assert their sovereign right to protect their national interests by limiting their responsibility over asylum seekers.⁴⁶² Many refugee advocate groups criticize policies of deterrence, policies of detention, and conflicting interpretations of the definition of refugees as "barriers purposely created to keep the primarily third world migrants out."⁴⁶³ For international refugee law to be effective in providing protection for those who truly need asylum a nexus must exist between legal abstraction and information about the countries of origin and asylum. An awareness of the conditions in the country of origin and consideration for the overwhelmed and overburdened countries where the masses seek refuge will guide the path towards humanitarian and durable solutions for refugee problems.

The Preamble to the 1951 Convention notes "that the grant of asylum may place unduly heavy burdens on certain countries and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot be achieved without international cooperation."⁴⁶⁴ Through a concerted effort manifested in the CPA, the global community achieved what individual countries could not do for nineteen years: bring the humanitarian crisis of the

459. Helton, *Asylum and Refugee Protection*, *supra* note 19, at 45.

460. *Id.* at 41.

461. GOODWIN-GILL, *REFUGEE*, *supra* note 45, at 137-40. *See, e.g.*, Helton, *Asylum and Refugee Protection*, *supra* note 19, at 41-42 (quoting Barcelona Traction and Light Co., 1970 I.C.J. Rep. 32 (1970)) ("When a State admits into its territory foreign investment or nationals, . . . it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded to them.").

462. *See supra* note 411 and accompanying text.

463. Arboleda & Hoy, *supra* note 432, at 74.

464. 1951 Convention, *supra* note 40, pmb., para. 4.

Vietnamese boat people to a positive resolution.⁴⁶⁵ Vietnam learned to embrace its responsibility to compromise and work with the rest of the world in dealing with global problems. Although there is still room for improvement in the political and social conditions in Vietnam, the government's cooperation in this matter will encourage the rest of the world to develop its human rights protection.

Most of the first asylum countries generally respond very generously to the influx of asylum seekers and have learned a great lesson in patience and humanitarianism. These countries receive much criticism for their treatment of Vietnamese boat people, but today there are over one million Vietnamese refugees living in the United States alone because the asylum countries gave them an opportunity for temporary refuge.⁴⁶⁶ The CPA's attempt to build a multilateral, constructive approach to solving the Vietnamese refugee problem is a model for dealing with the complex issues in mass refugee problems existing today.⁴⁶⁷ Although the CPA model is not perfect, it recognizes that in a world of chaotic movement and displacement of people across the globe, the fundamental notion of respect for human rights binds every state. These realizations are the basic starting and ending points in the search for durable solutions to the refugee problem.

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465. See *supra* notes 364-67 and accompanying text.

466. See Philip Shenon, *20-Year Vietnamese Exodus Enters Its Final, Tragic Phase*, INT'L HERALD TRIB., Mar. 17, 1995, at *3, available in LEXIS, WORLD Library, ALLNWS File.

467. Examples of mass refugee situations today include the Haitian boat people, the Cuban asylum seekers, and the Bosnian Serbs.

