

# INDEFINITE DETENTION AND MANDATORY REPATRIATION:

The Incarceration of Vietnamese in Hong Kong\*

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## INTRODUCTION

The following report sets forth concerns regarding two aspects of Hong Kong's policy on Vietnamese boat people, namely detention and mandatory repatriation. Hong Kong, unlike other countries in the region, has steadfastly maintained a policy of first asylum for Vietnamese who enter its waters. But once ashore, Vietnamese men, women, and children have been subject to years of detention until an unreliable procedure determines whether or not they merit refugee status. Under recent agreements between Britain and Vietnam, those deemed not to be refugees shall eventually be returned to Vietnam by compulsion. These unpublished agreements do not protect returnees from prosecution or discrimination for political crimes other than the individual's own act of leaving Vietnam illegally, an unpatriotic act according to Vietnam's government. A few returnees have been punished for the vague crime of organizing illegal departures, and more have experienced harassment such as police interrogation. Although Vietnam has agreed to allow the United Nations to monitor all returnees, it is highly doubtful that present arrangements will suffice to protect the human rights of thousands of unwilling returnees.

Approximately 59,000 Vietnamese were held in prison-like detention centers in Hong Kong at the beginning of 1992. About 21,000 have been classified as economic migrants whose detention is still indefinite, and 4,300 have been determined to be refugees and are awaiting resettlement in open camps or transit centers.<sup>1</sup> On November 9, 1991, Hong Kong forcibly repatriated fifty-nine persons.

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1. *Quayle Angers Hong Kong with Stand on Vietnamese Boat People*, Reuters, Feb. 11, 1992, available in LEXIS, Nexis Library, Reuter File.

For the remaining 33,450 still waiting to have their refugee claims heard, the process is exceedingly protracted — Vietnamese must now wait between two and three years for their first interview in the evaluation process. Still others are held indefinitely pending a possible repatriation to China. For all, including the many thousands of children, the conditions of detention are dangerous, squalid and demeaning.

Vietnam's recent agreement to accept involuntary returnees offers one solution to this problem, but it is not a desirable one under present conditions. The experience of voluntary returnees with official surveillance, harassment and threats suggests that those forced back may fare worse. Indeed, party officials in Haiphong recently described persons who had fled to Hong Kong more than once, the so-called double-backers, as "criminals" deserving "punishment."<sup>2</sup>

Hong Kong's assurance that it will return no genuine refugee to Vietnam is belied by serious flaws in the process it established to evaluate refugee claims. The procedures, which came under a barrage of criticism by human rights advocates in 1989 and 1990, were ruled inadequate in November 1990 in the first successful court challenge brought by a Vietnamese plaintiff. Although the government has promised improvements since that case, it has not undertaken to review earlier determinations, relying on the overburdened legal staff of the United Nations High Commissioner for Refugees (UNHCR) to pick up errors. Nor has the government taken steps to protect from repatriation Vietnamese who may be in danger of persecution in Vietnam by virtue of what they have said or done in the relative freedom of Hong Kong.

Alternatives to indefinite detention or forcible repatriation exist. One is to abolish the detention policy altogether, and allow Vietnamese to live and work freely in Hong Kong's chronically labor-short society. Another is to modify the detention policy so as to ameliorate its most abusive effects, especially on children and families. Another is to give the voluntary repatriation program a chance to work now that it has finally begun to attract significant numbers of applicants. In the meantime, Hong Kong should rectify the faults in its refugee status determination procedure and Vietnam should establish a credible system for monitoring the welfare of returnees, to ensure that no one who goes back home has reason to fear.

## BACKGROUND

Hong Kong has borne the brunt of the surge of Vietnamese

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2. Alan Boyd, *Returnees Face Viet Retaliation*, S. CHINA MORNING POST, Oct. 23, 1991, at 1.

fleeing their homeland in boats in 1991. Approximately 59,000 Vietnamese are currently held in the territory, only some 4,300 of whom have refugee status. This year alone saw almost 20,000 new arrivals, almost four times the rate in 1990, and Hong Kong's share of the region's Vietnamese boat people topped ninety-five percent.<sup>3</sup>

This, however, is not the first surge in the mass exodus of Vietnamese since the communist victory in 1975. The period 1975-1979, during which Vietnam set out to eradicate the private sector and purge society of those whose loyalty was suspect, brought 80,292 to Hong Kong's shores.<sup>4</sup> Hong Kong eventually absorbed 14,000 of these persons for permanent resettlement.<sup>5</sup> Until June 16, 1988, Vietnamese were considered *prima facie* refugees, and until 1982 Hong Kong housed them in open camps from which they could go outside for employment and education. The vast majority of this first wave of boat people were ethnic Chinese who fled in 1979, with ethnic Vietnamese from the south comprising the next largest group.<sup>6</sup> At the 1979 Geneva Conference, countries in the South East Asia region agreed to provide temporary asylum, the international community undertook to resettle those who had already fled, and Vietnam established an orderly departure program. New arrivals slowed and resettlement sharply lowered the number of boat people already in the region.

The situation began to deteriorate again in 1987 and 1988, as resettlement quotas filled and arrivals surged again. Some countries refused to grant first asylum. Hong Kong's response was to establish a new policy for all arriving after June 16, 1988. Boat people would be screened to separate refugees from non-refugees, with the understanding that non-refugees would eventually be sent back to Vietnam. To address these developments, a 1989 international conference adopted the Comprehensive Plan of Action, a program which reaffirmed the principle of first asylum, set forth a system for refugee status determination, and raised the options of both voluntary and mandatory return to Vietnam of non-refugees.

Despite these developments, the massive influx of boat people continued throughout 1989, prompting Hong Kong to look for new deterrents. In the pre-dawn hours of December 12, 1989, Hong Kong riot police forced fifty-one asylum seekers, including twenty-

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3. H.K. GOV'T MONTHLY STATISTICAL REP. (1991).

4. *Id.*

5. Hong Kong Government Press Release, Vietnamese Migrants in Hong Kong: What the Hong Kong Government Has Done (Feb. 1991).

6. In 1979, ethnic Chinese comprised 80.7% of the 68,748 Vietnamese arriving that year, with ethnic Vietnamese from the south comprising another 14.3%. For the next three years, total arrivals fell to around 7,500 each year, with ethnic Chinese comprising only 1 to 2% and ethnic Vietnamese from the south between 70 and 80%. H.K. GOV'T MONTHLY STATISTICAL REP., *supra* note 3.

six children, onto a plane headed for Vietnam. The action received worldwide condemnation, and in response Vietnam resumed its previous unwillingness to accept any involuntary returnees. Arrivals in Hong Kong for 1990 again fell off significantly, possibly in response to a concerted effort to publicize the forced returns and Hong Kong's detention policy. Arrivals returned to high levels in early 1991.

## DETENTION

Hong Kong's present detention policy dates from the government's decision to incarcerate all Vietnamese asylum seekers arriving after July 2, 1982. Prior to the present policy, Vietnamese were kept in camps from which they could leave during the day. Since the present policy was adopted, they have been kept in locked compounds managed by the Correctional Services Department (CSD). Following the institution of screening, the policy evolved so that Vietnamese who are accepted as refugees or who had arrived before June 16, 1988 are housed in open camps or transit centers, pending transfer to a holding center in the Philippines. Vietnamese who are rejected or who are still waiting to have their refugee status determined are kept in detention compounds managed by CSD or the police.

### Conditions of Detention

Conditions in the detention centers are overcrowded and dangerous. The compounds generally present a grim picture of rows of metal huts set on concrete or dirt, surrounded by fences topped with concertina wire, and patrolled by uniformed guards. The enormous number of children<sup>7</sup> within give a peculiar impression of concrete and barbed-wire nurseries. In some camps there are no trees, and metal sheet fencing obstructs any view. The larger camps may be divided into locked sections holding several thousand inmates. Movement between sections is permitted only for special purposes, such as medical visits, and is controlled by security guards.

Typical accommodations consist of metal longhouses, one to three stories tall, lined by tight rows of triple-tier bunk beds.<sup>8</sup> Whole families inhabit one bed platform. They typically hang blankets or sheets around their bed to try to enclose some semblance of

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7. The birth rate in Hong Kong detention centers is exceptionally high despite the promotion of birth control. One expert described it as outstripping that of most Third World countries. Louise Hidalgo, *Concern Over Rise in Birth Rate*, S. CHINA MORNING POST, Jan. 4, 1990.

8. In 1991 Shek Kong Detention Centre still housed some inmates in large tents, but these were being phased out as new sections with huts were brought into operation.

private space, and leave someone there during the day to safeguard the family's possessions. Most structures have internal ceiling fans, but the heat in summer is still oppressive. The confined exterior space in each section is typically occupied by toilet and cold-water washing facilities, with cramped areas for recreation such as volleyball or soccer. Camps hold a number of other facilities such as classrooms, voluntary agency offices and religious shrines, although the pressure to accommodate new arrivals poses a threat to their maintenance. The crowded conditions make for poor hygiene. Skin diseases often result from the lack of warm water for washing. Rats and outbreaks of communicable infections are common.<sup>9</sup>

Violence within the camps is endemic, despite the daytime presence of uniformed guards or police. Extreme overcrowding has resulted in a sharp rise in murders and assaults in 1991.<sup>10</sup> Rape and prostitution continue to be serious problems. Female inmates often try to cope with such problems by establishing a sexual relationship with men who can protect them from others, rather than by reporting abuse to the authorities. Fights, both physical and verbal, are common, brought on by the tensions surrounding long-term incarceration, idleness and the screening process. The very confined space makes it difficult for bystanders to avoid fights, or for participants to disengage and cool off. The most recent and worst outbreak of violence in camps erupted on February 3, 1992, the eve of the lunar New Year, when twenty-three inmates were killed and more than 120 were injured.<sup>11</sup>

Depression, child abuse, family breakdown and delinquency are well-documented effects of detention on Vietnamese.<sup>12</sup> Numerous public health specialists have voiced concern that the psychological damage wrought by detention, especially upon children, is long lasting and makes reintegration into normal society problematic.<sup>13</sup> Inmates often complain of unremitting boredom, anxiety or hopelessness, and many wander around listlessly or sleep through

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9. Anthony Flores, *Fear of Plague as Rats Run Rampant Inside Whitehead*, H.K. STANDARD, June 24, 1991, at 3; REFUGEE CONCERN H.K. (a refugee monitoring organization in Hong Kong), DEFENSELESS IN DETENTION: VIETNAMESE CHILDREN LIVING AMIDST INCREASING VIOLENCE IN HONG KONG (June 14, 1991) 105 [hereinafter REFUGEE CONCERN].

10. *Fight for Life After Attack at Centre*, S. CHINA MORNING POST, Aug. 7, 1991, at 2.

11. See *infra* text accompanying note 83.

12. REFUGEE CONCERN, *supra* note 9.

13. See, e.g., statements by Dr. Damien Ngabonziza and Guido Mathes in ANNE W. GOW, PROTECTION OF VIETNAMESE ASYLUM SEEKERS IN HONG KONG: DETENTION, SCREENING AND REPATRIATION 8 (Human Rights Advocates, June 1991); by Dr. Leonard Davis, John Torgrimson, the director of Oxfam Hong Kong, and Philip Barker, the field director of Save the Children U.K. for China and Hong Kong, in REFUGEE CONCERN, *supra* note 9, at 48-67, 171-177. A specific example is the case of Dao Vu Nguyen, an unaccompanied minor who suffered from schizophrenic episodes

the day. Only limited schooling is available, particularly for older children and adolescents. The lack of any work for the vast majority of inmates has a particularly debilitating effect on men. Women usually take care of children, wash clothing and, in some camps, reheat and season prepared food that has been distributed. Men are left with virtually no occupation and no ability to protect or provide for their families. In these circumstances, some may resort to gambling, gang activities, or consumption of homemade alcohol. Some who had spent time in Hong Kong's prisons as well as the detention centers voiced a preference for the prisons because their work requirement produced a safer, more orderly atmosphere.<sup>14</sup>

Despite the absence of work and the presence of children, the detention centers are governed by a prison regime of sorts. Inmates are referred to by number and not by name, and live under a curfew and fixed meal schedule. Incoming and outgoing letters are subject to censorship, visitors are restricted, and inmates are subject to periodic searches and may have only those possessions authorized by the camp administration.<sup>15</sup> Inmates are also subject to punishment for "offences against discipline" and may be placed in punitive confinement for a maximum of twenty-eight days at the Superintendent's order.<sup>16</sup> Offenses include not only assault, escape and damaging property, but also treating an officer or visitor "with disrespect," swearing or indecent acts or gestures, committing "any nuisance," possessing unauthorized articles, making "a false and malicious allegation," offending "good order and discipline," or "repeated groundless complaints."<sup>17</sup>

In practice, these rules vest enormous discretion over the basic rights of detainees in camp officers and managers. Complaints of abuses abound,<sup>18</sup> and whether these complaints are justified or not,

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during his three-year detention. Fiona MacMahon, *Brothers' Camp Trauma*, S. CHINA MORNING POST, Aug. 15, 1991, at 21.

14. For corroboration of this conclusion, see Jon Vagg, *Hong Kong, in IMPRISONMENT TODAY AND TOMORROW: INTERNATIONAL PERSPECTIVES ON PRISONERS' RIGHTS AND PRISON CONDITIONS* 307, 307-33 (Dirk van Zyl Smit & Frieder Dunkel eds., 1991).

15. See Detention Centres Rules, Hong Kong Immigration Ordinance (Nov. 3, 1989), cap. 115, § 13H, ¶¶ 9, 15, 26, 27.

16. *Id.* ¶ 37. The detainee may appeal punitive detention to the relevant supervising authority within 48 hours, but is not necessarily entitled to appear before that decision maker.

17. *Id.* ¶ 35.

18. In one camp, a 70-year-old man was sent to segregated detention and not allowed visitors because of troublemaking. In another incident, a community spokesman was briefly detained for allegedly acting disrespectfully to a camp officer when communicating group complaints in private. He was released when hundreds of fellow inmates demonstrated in protest over his treatment. On the other hand, camp officials have allowed inmates to hold mass demonstrations against forced repatriation, and permitted voluntary agencies to help inmates publish magazines and articles.

it is clear that the disciplinary powers wielded by camp officials create an atmosphere of fear and tension. Periodic weapons searches, where officers scatter and sometimes damage the inmates' few possessions, and the use of tear gas in confined quarters, where it is impossible to evade its concentration on the skin, are often cited as especially frightening and humiliating experiences.

Hong Kong has a history of incidents involving the use of excessive force against detainees by police or guards. These incidents involved beatings of persons in custody, the blinding of a girl by a stray baton shell, and cover-ups of injuries in medical records.<sup>19</sup> Vietnamese have also been killed in confrontations with the police.<sup>20</sup> Detainees privately complain of many more incidents, but fear of retribution and the lengthy and often inconclusive investigation process inhibits formal reports. An example is a detainee's allegation that police forced him to drink several liters of water, and then struck his distended abdomen, which though extremely painful, left no marks. A protection officer to whom this was told felt that without physical evidence there was no point in pursuing the complaint.

Conditions in the open camps, where recognized refugees are housed, are better. Families are given small rooms with kitchen facilities, and can go out during the day to work. Nevertheless, high rates of drug addiction and crime have encouraged people to break the rules and move their families out to neighboring villages for safety.<sup>21</sup>

### The Screening Process

Hong Kong's procedure for determining the refugee status of Vietnamese, commonly referred to as screening, consists of the following stages. Immediately upon interception in the colony's waters, Vietnamese are taken to a reception center and interviewed regarding biographical information and place of origin.<sup>22</sup> The asy-

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19. Incidents include the disturbances of July 19, 1988 at Hei Ling Chau Detention Centre, the July 23, 1989 incident at Shek Kong Detention Centre, the December 29, 1989 descent on Chi Ma Wan Detention Centre by riot police, and the May 4, 1990 pre-dawn raid on Whitehead Detention Centre. These incidents and others are described in detail in the following sources: JANELLE M. DILLER, *IN SEARCH OF ASYLUM: VIETNAMESE BOAT PEOPLE IN HONG KONG* 41-48 (Indochina Resource Action Center, Washington D.C., Nov. 1988); Amnesty International (London), Memorandum to the Governments of Hong Kong and the United Kingdom Regarding the Protection of Vietnamese Asylum Seekers in Hong Kong (Jan. 15, 1990); GOW, *supra* note 13.

20. See Viet "Shot in Back" in Camp Incident, H.K. STANDARD, Sept. 25, 1991; Lorna Wong, *Refugee Shot Dead in Attack on Policeman*, S. CHINA MORNING POST, Sept. 23, 1991, at 1.

21. Flora Wong, *Villages Swell as Viets Flee Crime*, H.K. STANDARD, Sept. 18, 1991, at A-6; Wong, *supra* note 20.

22. Place of origin is important because of the different treatment accorded resi-

lum seeker is then detained in one of Hong Kong's camps, and awaits an interview with an immigration officer on the question of refugee status. The wait for this initial interview is now between two and three years. Following the interview, the immigration officer will make a determination, which will be subject to review by a senior immigration officer, particularly when refugee status is recommended.

In the case of rejection, the asylum seeker has twenty-eight days from notice of rejection in which to file all materials for an appeal to the Refugee Status Review Board (the "Review Board"). The Review Board is comprised of four panels of two non-lawyers, headed by a former judge. The asylum seeker is not given any reasons for an initial rejection; however, a copy of his or her file is given to the UNHCR and lawyers from the Agency for Volunteer Service (AVS), a group under contract with the UNHCR. AVS lawyers review the file and help those asylum seekers they consider to have the strongest cases to file an appeal. The vast majority of asylum seekers are left to prepare and submit their appeal on their own, without access to their immigration file. Over ninety percent of appeals are rejected.<sup>23</sup> The rejection of an appeal is the end of the road for most asylum seekers. However, AVS lawyers may select some of those cases which they have rated most highly and submit them for review by the UNHCR as to whether these persons fall within its mandate for protection. The Hong Kong government has agreed to accept such mandate refugees as eligible for resettlement.

Although neither the 1951 Refugee Convention nor the 1967 Protocol apply to Hong Kong, the government explicitly agreed in the Comprehensive Plan of Action to evaluate refugee claims in accordance with these treaties and guidelines such as those given in the 1979 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (the "Handbook"). Under the treaties, a refugee is a person who, owing to a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group, is unwilling or unable to return to his or her country.<sup>24</sup> In contrast, an economic migrant is one who has been moved exclusively by economic considerations to voluntarily leave his or her country, according to the Handbook.<sup>25</sup>

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dents of Vietnam and residents of China. See discussion on "Ex-China" Vietnamese, *infra* in text.

23. Estimate obtained from author's interviews with appeals lawyers in Hong Kong.

24. Convention Relating to The Status of Refugees, July 28, 1951, art. 1, ¶ 2, 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. 1, 19 U.S.T. 6223.

25. OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS ¶ 62 (Jan. 1988) [hereinafter HANDBOOK].

The Handbook recognizes that economic motivations may reflect underlying persecution based on political belief or social group. Persons may be refugees if they suffer serious discrimination that restricts their right to earn a livelihood, practice religion, or attend normally available schools.<sup>26</sup>

From its inception, the screening process came under fire from human rights advocates.<sup>27</sup> Critics charge that in practice neither the letter nor spirit of the above international standards is followed. Some of the many deficiencies reported have been inadequate interpreters, little or no pre-screening counseling for asylum seekers, a hostile or adversarial attitude on the part of immigration interviewers, cursory interviews that prevent asylum seekers from expressing their claims fully, interviewers that neglect to record relevant facts, and the failure of immigration officials to take into account both current and historical conditions in Vietnam. One particularly persistent complaint is that decision makers approach the evaluation with the presumption that the applicant is an economic migrant and do not honor the Handbook direction to give asylum seekers the benefit of the doubt in matters not susceptible to proof.<sup>28</sup>

The substantive fairness of the determination process has come under question as well. Both the government and the UNHCR have declined to explain what in their view constitutes "persecution" or a "well-founded fear" in the context of Vietnam. Judging from written decisions of the Review Board, standards are unusually severe. Common experiences of persecution, such as coerced exile to the wilderness areas that constituted many New Economic Zones, discrimination on the basis of family or political background, or denial of education, employment, residence or civil rights, are typically discounted because they are so prevalent among the population of Vietnamese asylum seekers.

Many Review Board decisions show a willingness to focus on and distort minor issues at the expense of the overall credibility and strength of a claim. In one case, the Review Board rejected the claim of a man who fled imminent arrest for organizing a petition against the government-decreed destruction of a temple. Not disputing those facts, the Board focused instead on the immigration officer's record of the applicant stating he "dare not" take part in

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26. *Id.* ¶ 54.

27. *See, e.g.*, DILLER, *supra* note 19, at 83-89; LAWYERS COMMITTEE FOR HUMAN RIGHTS (New York), INHUMAN DETERRENCE: THE TREATMENT OF VIETNAMESE BOAT PEOPLE IN HONG KONG (1989); Amnesty International (London), *supra* note 19; David Clark, et al., The Flaws in the Vietnamese Refugee Screening Process in Hong Kong (June 28, 1990) (unpublished paper); LAWYERS COMMITTEE FOR HUMAN RIGHTS (New York), UNCERTAIN HAVEN: REFUGEE PROTECTION ON THE FORTIETH ANNIVERSARY OF THE 1951 UNITED NATIONS REFUGEE CONVENTION (Oct. 1991).

28. HANDBOOK, *supra* note 25, ¶ 196.

the work of destroying a temple, and concluded that it was superstition rather than religious faith that motivated his petition. In another case, the Review Board concluded that a young man was unworthy of belief because he inconsistently said he was denied education because of his family background, and because there were no schools at the New Economic Zone to which his family was forced to move. This was despite his clear belief that his family was relocated because of their background.

In February 1991, Do Giao, the first of nine Vietnamese plaintiffs who brought challenges to the screening process, won a judgment from the Hong Kong courts that the procedure followed in his case was so unfair as to require a fresh hearing.

Do Giao is the son of a former village chief and soldier under the South Vietnamese government who was publicly denounced, detained for reeducation and tortured. The government confiscated the family's farm in 1976, and sent Do Giao and his siblings to a New Economic Zone without electricity or running water, located in the middle of a mountainous jungle. The New Economic Zone was entirely populated by persons who had ties to the former government or military of South Vietnam. Although armed security forces patrolled the area to prevent escapes, Do Giao eventually managed to flee to Hue, where he was expelled from school and refused permission to be a construction worker because of his background. After he was arrested and severely beaten for alleged complicity in an escape attempt, he was released to return to the New Economic Zone. He instead went into hiding and fled to Hong Kong.

The court found that Do Giao's immigration interviewer incorrectly reported he had been employed by a government factory, while Do Giao asserted that because of his family's political background he had been forced to live an underground life. The judge recommended that asylum seekers be allowed to review the immigration officer's report for inaccuracies, a recommendation that appears neither to have been rejected nor routinely implemented by Hong Kong's Department of Immigration. The other eight plaintiffs settled their case in return for a new interview. However, seven of the nine plaintiffs were rejected again after their second interviews and appeals. Do Giao was among those rejected. They are now under consideration by the UNHCR for protection under its mandate.

Persons who work closely with the screening process are divided on whether it has improved since the judicial review of Do Giao's case. Initial interviews appear to take more time, and asylum seekers have more opportunity to state their case. The Review Board now gives reasons when it rejects an appeal. There is a general sense that initial determinations are more just, although some

informants maintain that though the acceptance rate has risen since Do Giao's case was instituted in February 1990, evaluations are still highly arbitrary.<sup>29</sup> A systematic evaluation of the screening process is clearly needed, and Hong Kong should solicit an evaluation from one of the several groups that have conducted previous evaluations.

What is apparent, however, is that in the past screening has produced such egregious errors that it is difficult to have confidence that repatriation will not result in the rejection of refugees. Examples of persons with strong claims that have been rejected abound:—In February 1990, a group of sixteen underground human rights advocates arrived on a boat from central Vietnam. Under "fast track" procedures, six were screened in, the others were rejected. Following an extremely protracted consideration of their appeal, five more were given refugee status. The five youngest members were rejected on appeal and now await the UNHCR's decision on mandate. In the meantime, a woman died in prison in Danang, severely beaten after being accused of helping members of this "counter-revolutionary" organization escape.

—Nguyen Quang Phuc, an artist, was arrested, expelled from art school, and stripped of his Hanoi residency rights for accepting a commission to carve Madonnas for the Catholic Church. He escaped just as his family was ordered to relocate to a New Economic Zone. He was rejected initially and on appeal.

—Nguyen Manh Hung became a prisoners' rights activist during his seven years in labor camps. Within two weeks of his release, he went to the Indonesian Embassy in Hanoi to ask for help in exposing prison abuses to the United Nations. Immediately thereafter he was arrested and sent back to labor camp, from which he escaped to Hong Kong eight years later. Hung was initially rejected as a refugee, and decided not to appeal. Unknown to Immigration, he had tape-recorded his interview and planned to join his case with Do Giao and others seeking judicial review of the screening process. After the tape recording became public, the Review Board considered his case on its own initiative and granted him refugee status.

—A Catholic lay teacher was arrested and charged with printing "counter-revolutionary" religious tracts. She was raped in custody and suffered a miscarriage, for which she was hospitalized. She escaped from the hospital and lived underground with her family for several years before fleeing to Hong Kong. During her interview, the immigration officer directed all questions at her husband. She did not want to bring up the circumstances of her arrest and miscarriage, because she had never told her husband of the rape, and he

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29. Those who expressed this concern were both persons who thought too many Vietnamese were being given refugee status and those who thought too few were.

already disapproved of her religious activities. She was screened out and lost her appeal.

—Ethnic Nung soldiers, whose fathers had fought for the French until 1954, and who themselves had served the U.S. military until 1973, were exiled to remote, undeveloped New Economic Zones after the communist victory in 1975. In some cases, they were sent to areas with uncleared jungle, and given explosives with which to clear land. Conditions were so primitive and grain rations so meager that they were reduced to foraging in the jungle and eating grass part of the year. Several lost children to malnutrition and disease. They were not permitted to leave, or to engage in any other work. Their rations, compensation, cultivation plans and work hours were completely controlled by government officials. No schooling was available for their children, and they were forbidden to teach them Chinese, their native language. Subjected to expedited screening procedures, they were rejected and lost their appeals.<sup>30</sup>

No process for screening refugee claims will succeed perfectly in identifying all who are at real risk of persecution. Few cases are simple on close examination, and the more care devoted to examining refugee claims, the slower the process becomes. That said, however, the accumulation of questionable decisions like those above suggest the system is not functioning adequately. This seems particularly true for cases determined before the judicial review, and those handled under expedited procedures called the "fast track."

Hong Kong responds to criticism by pointing to the many avenues of appeal, including administrative review, UNHCR review, and potential judicial review of adverse screening decisions. These institutions, however, are not able to compensate for all the deficiencies in the initial immigration evaluation.

In particular, observers of the screening process are concerned with the extent to which the Hong Kong Government relies on the UNHCR's mandate to protect persons rejected when the screening process was at its most inadequate. Government officials, when questioned about particular cases, assert that they are prepared to accept as refugees any number identified by the UNHCR under its mandate. Indeed, AVS lawyers write their submissions to the Review Board with an eye towards the mandate process as an appeal of last resort.

But to characterize the mandate review as another route of appeal is grossly misleading for the vast majority of asylum seekers.

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30. Although the UNHCR has lately taken the position that ethnic Chinese no longer face persecution because of ethnicity in Vietnam due to the warming relations between Vietnam and China, this conclusion has little applicability to Nung soldiers, who were reviled in post-war Vietnam as anti-communist mercenaries for the French and American imperialists. According to Asia Watch estimates, there may be as many as 8,000 or more Nung soldiers or their relatives in Hong Kong's camps.

Although approximately 350 persons had been protected by the UNHCR,<sup>31</sup> the process was intended as an extraordinary measure, not an integral part of refugee status determination. Mandate consideration is not available at the asylum seeker's initiative, but is granted only to a fraction of those cases that AVS lawyers rate most likely to succeed. It is neither politically nor practically feasible for UNHCR to review all potentially meritorious cases. Even limiting its review to the strongest, the UNHCR's legal resources are severely strained, to the point where AVS advocates were used to help make determinations on the backlog of mandate cases this year.

One area that suffers from this diversion of legal resources is counseling for asylum seekers about to undergo screening. UNHCR counselors conduct only large group briefings, and materials printed by UNHCR in Vietnamese have been criticized as uninformative or downright misleading as to what constitutes a refugee.<sup>32</sup> With the cooperation of the UNHCR, the Jesuit Refugee Service has provided up to four lawyers at a time in providing one-on-one counseling. This small group has only been allowed in two camps, High Island and Tai A Chau. Jesuit Refugee Service has also prepared a counseling video to be used in small group counseling sessions, but it has only been put in use at High Island.

The few private lawyers who wish to do pro bono counseling or appeals work face obstacles such as limited access to the detention centers and the short twenty-eight day period for appeals. Although AVS lawyers have immediate access to each rejected asylum seeker's file, a private practitioner may not be able to get the file until more than halfway through the appeals period. The Review Board in the past has helped to accommodate the caseload by allowing appeals lawyers to file papers up to seven days after the deadline, but is now rumored to have discontinued this policy.

For most Vietnamese, the appeals process is not an opportunity for meaningful substantive review. At present there are between 100 and 200 file decisions handed down by approximately seventy immigration officers each week; there are only eleven AVS lawyers and a smaller number of private counselors. The unfortunate majority of asylum seekers who have no legal representation have no access to their immigration files. This means they have no way of answering or challenging the reasons for their rejection. The Review Board will not normally disturb findings of credibility, and appellants as well as lawyers have no right to appear in person before the Review Board.<sup>33</sup>

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31. This is out of a total of 21,330 cases screened at the end of October 1991, with 1,890 screened in and 19,440 screened out.

32. Clark et al., *supra* note 27, at 10-11.

33. The Review Board occasionally will re-interview appellants at its discretion.

Judicial review is not a viable alternative for asylum seekers attempting to challenge the results of screening. The head of Legal Aid recently reported that as of October 1991, 951 Vietnamese had applied for such assistance. Legal Aid, however, had yet to approve a single of the 365 requests it had so far considered. The reason for Legal Aid's unwillingness to take up such a judicial review lies in the case of Do Giao, the only case it has sponsored that directly challenged screening. In that case, the court excluded evidence of human rights conditions in Vietnam, and declined to evaluate the plaintiff's refugee status itself, ordering Immigration to re-interview him instead. Legal Aid concluded that in order for any future case to have a reasonable chance of a successful outcome, it would be necessary to show not only a gross procedural irregularity, but also a likelihood that the plaintiff would be screened in as a refugee. This burden, at least as interpreted by Legal Aid, has defeated every applicant's claim to date.

The case of one applicant illustrates the dilemma this creates for victims of procedural injustice. The applicant is an ethnic Nung, a minority living near the Chinese border that was particularly valued as soldiers by both the French and the Americans during the war. The communists particularly vilified the Nung, and subjected them to discrimination and persecution after 1975. The applicant's father served both the French and the U.S. Special Forces, and the applicant himself became a second lieutenant with the Special Forces stationed in Pleiku. After the war, his family, along with many other Nung who served the Special Forces, had their possessions confiscated and were sent to a particularly brutal New Economic Zone in Dong Nai province.

The applicant was interviewed by an immigration officer days after he arrived in Hong Kong, pursuant to a "fast track" screening policy in place at the time. He said the immigration officer pounded the table, and shouted at him to tell only the truth and only answer the questions he was asked. The immigration officer took the applicant's history up to 1981 and then left, never to continue the interview. The applicant's AVS lawyer interviewed him as to his life up to 1983, and then told him that the new material could not be included in the appeal, as it would damage his credibility. An Asia Watch interviewer was apparently the first person to discuss with him what had happened to him between 1983 and his departure from Vietnam in 1989.

In this case, the omission was particularly damaging. When asked why he left Vietnam, the applicant replied forthrightly it was because government officials confiscated his land and crops. What did not emerge until after hours of questioning was that he had been arrested several times in the process of this confiscation, and had been threatened with a long reeducation sentence. He believed

these threats would be carried out because he had been arrested and jailed without trial in 1983 on suspicion of helping an anti-communist resistance group.

This application for Legal Aid has been pending for many months without reply. The average waiting time for a reply from Legal Aid is now eight months. In light of this backlog of applications, and the failure to identify a single appropriate case, Legal Aid plans to cease accepting correspondence written in Vietnamese, and to phase out routine interviews of all applicants.

### Particular Victims of the Detention Policy

Two groups suffer particularly from the delays and uncertainty that characterize detention in Hong Kong. These are unaccompanied minors (children under sixteen who arrive without a parent) and Vietnamese, who in the opinion of Immigration, were once settled in China. The first group is supposed to benefit from an evaluation process that takes into account not only refugee criteria, but also the best interests of each child. The second group does not have the benefit of screening at all and is supposed to be summarily repatriated to China. In both cases, what is meant to be an expedited process often turns into a protracted or indefinite period of detention.

### Unaccompanied Minors

Children under sixteen who arrive in Hong Kong without a parent are subject to special procedures, intended to result in a durable solution that takes into account not only refugee status but also the best interests of each child. In February 1990 a procedure was implemented whereby a social worker would interview each minor and report to a panel of legal consultants and social workers. This panel, the Special Committee, would in turn make a recommendation to Immigration as to whether the child was a refugee and whether it was in the child's best interest to be resettled abroad.

This procedure, intended to give humane and expedited treatment to the most vulnerable detainees, came under widespread criticism from various advocates and the Hong Kong government when it resulted in minors being processed more slowly than any other group.<sup>34</sup> By November 1990, only around 100 of the 2,500 known cases had been processed.<sup>35</sup> As a result, the Special Committee was

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34. See, e.g., *Bunglers in the Camps?*, S. CHINA MORNING POST, July 20, 1991, Saturday Review sec. at 1; Fiona MacMahon, *UN Processing of Minors Under Fire*, S. CHINA MORNING POST, Nov. 27, 1990, at 6; REFUGEE CONCERN H.K., POSITION PAPER ON UNACCOMPANIED MINORS (Jan. 8, 1991).

35. MacMahon, *supra* note 34.

reconstituted in mid-1991, to allow for its fourteen members<sup>36</sup> to perform the interviews as well as make recommendations.

The new Special Committee, in operation since July 1991, got off to a rough start when its head was dismissed in late October 1991. However, it reportedly has made substantial inroads into the backlog of cases from 1988 to 1990, although decisions based on its recommendations have yet to be announced. There is no firm figure on how many unaccompanied minors have arrived to date in Hong Kong; estimates range between 4,000 and 7,000. Of these, approximately 2,000 children have waited so long in detention that they are now too old to benefit from the special procedure for minors. Special procedures only apply to children who are under sixteen years of age at the time of their interview. In practice, this means that children who were twelve and one-half-years old on arrival in June 1988 may now be too old to be considered under the standards for minors.

The procedure has been criticized on various points, in addition to the unconscionable delay in processing cases. The definition of "minors" as persons under sixteen years does not accord with the international standard of under eighteen years, as set forth in the 1989 Convention on the Rights of the Child and the UNHCR's 1988 Guidelines for Refugee Children. In many cases the special procedure has separated minors from screened-in immediate relatives who may have served as substitute parents over the years. There is also evidence that deterring parents from sending their children out is a major aim of the UNHCR's policy on unaccompanied minors.<sup>37</sup> Detering parents is not necessarily relevant to a child's best interests; indeed, parents may have sent their children away because in their judgment the child faced insurmountable discrimination at home. There is also no appeals process for recommendations of the Special Committee, no public guidelines as to what constitutes best interests, and no indication that the panel takes into account the length of time a child has been separated from his or her family in Vietnam.

The case of a sixteen-year-old boy named Toan illustrates some of these problems. Toan arrived in Hong Kong shortly after the cut-off date of June 16, 1988; his older brother Tien had arrived just before and therefore was considered a refugee. Tien was offered resettlement with a Vietnamese foster family in the U.S., and reluctantly agreed to leave Toan only when he was promised that everyone would do all they could to help Toan join him. Tien has

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36. The Special Committee is theoretically composed of three teams of social workers and lawyers, with five members each, but it was operating with only 14 members at the end of 1991.

37. Christine Mougne, *Difficult Decisions*, REFUGEES, Nov. 1989, at 37.

excelled in school, and his foster family indicated their eagerness to have Toan join them.

According to the social worker who interviewed him, Toan and his brother had been taunted and harassed by teachers and classmates because of their father's history of working for American companies and the U.S. Air Force. They were assigned twice as much manual labor as other children, and given to understand they could not advance beyond a certain point in schooling. Their parents could not work legally, but managed to survive because their father was a very skilled mechanic and those who needed his services sometimes risked employing him.<sup>38</sup> Nevertheless, the whole family lived in fear that his illegal work would be discovered and punished by the authorities. Given the remote prospects for Toan in finishing his education, his family decided he should try to leave the country.

The social worker concluded her report with a recommendation that Toan be given refugee status and that his best interests would be served by joining his brother in the United States. The Special Committee rejected both recommendations, which were never included in the file forwarded to Immigration. A lower court reversed Immigration's rejection of Toan, on the grounds that the failure to consider the opinion of the person who interviewed him was prejudicial. The government appealed the widely-publicized case, and the rejection of Toan was upheld.

Toan has now spent three of his most formative years in detention, where he will stay until the government finds an opportunity to deport him to Vietnam. His family there wishes him to stay abroad, and there is a foster family and brother awaiting him in the United States. After the wide publicity his case attracted, any officials in his hometown who did not know of his family background surely know it by now. Given all these circumstances, it is difficult to understand how his best interests have been served by refusing him resettlement abroad.

Detention exacts a particularly heavy toll on children who lack a parent to shelter them from the violence and fears of camp life.<sup>39</sup> Dao Vu Nguyen, his two brothers and sister were sent out of Vietnam by their father, a former second lieutenant in South Vietnam's army; their mother was in prison at the time. Locked up from the time of his arrival in July 1988 until 1990, the sixteen-year-old began to suffer schizophrenic delusions for which he was hospitalized

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38. Immigration's conclusion that he should be returned to his family rested largely on the fact that the father could find employment.

39. According to one social worker, "[s]ome of the kids have been traumatized by the bad journey and the ill treatment in the camps and some have become mentally subnormal." Emily Lau, *The Anchor Children*, FAR E. ECON. REV., June 14, 1990, at 21.

four times. Each time his symptoms would abate, only to come back after he returned to the camp. His little brother said they slept during the day and stayed awake at night to safeguard themselves from attack. His elder brother explained that to protect themselves from forced repatriation, "we always had a mask and a wet towel for the tear-gas and the plan was that all three of us would hide in a safe place in the dormitory."<sup>40</sup>

#### "Ex-China" Vietnamese

Chinese illegal immigrants, unlike Vietnamese, have no right under Hong Kong law to asylum based on a claim of refugee status, and are not screened under international standards. Under an agreement between Hong Kong and China, Chinese illegal immigrants may be summarily deported following their apprehension in the colony. The Hong Kong government has a policy of treating former residents of Vietnam who spent a significant period of time in China in the same way as Chinese illegal immigrants. Under another agreement, China has agreed to accept former residents of Vietnam it can identify as having settled in China. Unfortunately, in a substantial minority of cases, China fails to identify an individual, leaving that person subject to indefinite detention in Hong Kong until administrative fiat changes his or her status.

Between 1978 and 1979, 250,000 residents of Vietnam, the vast majority ethnic Chinese, fled over the border to China. Most were given residency rights on state farms, although many retain a hope of settling elsewhere and have not tried to acquire Chinese citizenship for themselves or their children. Although the flow of these persons into Hong Kong amounts to only a few hundred per year, it is the prospect of a quarter-million potential immigrants that drives Hong Kong's policy not to extend screening to this group.

Persons are classified as "ex-China" based on an interview conducted immediately after apprehension. Immigration officials pose certain tests to new arrivals who say they are from Vietnam, such as asking them to identify Vietnamese currency, or to quote current Vietnamese market prices. If the authorities suspect an individual was living in China, they will interrogate the suspect until they elicit an address. This information is sent to authorities in China, where Chinese officials attempt to determine whether the individual was registered at that address. If China identifies the individual, he or she is then repatriated. In the rare event that China makes a conclusive determination that the person was not a resident, that person is then treated as a Vietnamese asylum seeker. If any information showing the person was settled in China surfaces in a

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40. MacMahon, *supra* note 13.

screening interview, the authorities cease to treat the person as an asylum seeker and try to repatriate him or her to China.

Until recently there was no procedure to deal with inconclusive cases. Persons had been held as long as four or five years, both in detention centers and prison facilities, as queries were sent to China over and over again. The situation has lately improved according to Hong Kong officials, with China handling most requests within six months. Under an internal policy instituted this year, Hong Kong repeats its request after the first six months, and after twelve months asks China to either identify the person or agree to have him or her treated as a Vietnamese asylum seeker. In the latter case, the individual is then eligible to have his or her refugee claim considered along with other Vietnamese, in the order of date of first arrival in Hong Kong. This year the government cleared a backlog of cases, some dating from 1988, by giving approximately 1,500 "ex-China" persons status as Vietnamese asylum seekers. The government's effort to resolve these cases is admirable. However, the time limit set on detention for "ex-China" cases is purely a matter of administrative discretion, not law.

### The Fancheng Cases

One particular group of Vietnamese who had been held in China vividly illustrates the shortcomings of the screening process and the strain the detention policy places on both Vietnamese and camp workers.

Fancheng is a town and district in Guangdong province, close to the Vietnamese border. Close by the border is the settlement of Dongxing. In both places China established refugee camps for Vietnamese who fled across the border in 1978 and later. These camps were used to house refugees that China was unwilling to settle internally — at first ethnic Vietnamese who had been persecuted because of their ties to Chinese neighbors, and later ethnic Chinese who arrived after China ceased its resettlement policy. Some refugees were resettled from these camps, usually through family reunion with relatives abroad. Most, however, were not.

Dongxing camp, which was not known to international agencies, was particularly harsh. Inmates complained that there was little food or medical attention, and that men were often beaten or punished for small transgressions. The superintendent of the camp was known for cruel acts, such as kicking a pregnant woman which caused her miscarriage. Armed guards prevented anyone from leaving the compound. After one incident where guards shot an escaping refugee point-blank in his belly, the others organized a demonstration and marched out of the camp en masse, only to be brought back by police. Suspected leaders of the demonstration

were tortured, and some forced back across the Vietnamese border. Between 1981 and 1983, the inmates of Dongxing were eventually transferred to a larger guarded compound at Fancheng where conditions were somewhat better, although the Dongxing superintendent was transferred there as well.

Both Dongxing and Fancheng were used by China to recruit and train spies to send to Vietnam. Refugees would be solicited, sometimes with promises, sometimes with threats. The few who agreed to spy were sent across the Vietnamese border; the many who refused were forced across. Being forced across was also a punishment for escape from these refugee camps. Escapees often lost their way and found themselves at the frontier. In any case, Vietnamese officials treated all those caught at the heavily guarded border as spies. They were invariably interrogated, tortured, and held for long periods of time in labor camps. One woman currently detained in Hong Kong described her ordeal:

As I reached the Vietnamese border we were spotted by security patrols through binoculars. I and my three younger brothers were arrested and taken to border post No. 212. Three days later I was taken to Quang Ninh security station No. 14. I was given two sentences, one for four months and the other for eight months. There I was tortured by means of electric shock to my breasts. A square wooden box was placed on me covering my breasts before the shock was delivered. My whole body jumped out of control and collapsed. It's the last thing I knew. Moments later I woke. I found my whole body wet. I didn't know why. Later I asked the other inmates who shared my cell. I told them I had been taken to the interrogation room and woke up like that. I asked, do you know why? The answer: "You were tortured by electricity."<sup>41</sup>

When these alleged spies were released, they were usually placed under security police surveillance and deprived of all rights of citizenship, including the right to work, to register their marriages, to get education, or to travel. At this point, some tried escape again and made it to Hong Kong.

Until 1987, persons from Fancheng or Dongxing who escaped to Hong Kong were treated as other "ex-China" Vietnamese, incarcerated until identified by China.<sup>42</sup> Word of this treatment reached

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41. Fiona MacMahon, *UNHCR Might Intervene to Help 13 Viets Ordered to Spy*, S. CHINA MORNING POST, Sept. 21, 1991, at 3.

42. In mid-1987, an influx of over 7,000 Vietnamese from China over a matter of weeks caused the Hong Kong government to make a special arrangement with China to return these persons without waiting for them to be identified as residents. In the middle of the operation, the UNHCR requested that the Fancheng people be taken off the trucks headed to China. The government complied. China subsequently refused to accept them back. This incident became something of a sore spot between UNHCR and the government, as each blamed the other for the difficulty in resettling these persons, who were never granted refugee status in Hong Kong.

those left behind. One man related:

During the journey [to Hong Kong] my friends warned me that I must not tell anyone that I had lived in Fancheng for seven years. They said that if I did then Hong Kong Immigration would put us all into Victoria Prison for two years, then send us back to China. . . . I was less afraid of the two years in Victoria Prison than I was afraid of eventually being sent back to China. We believed that if we were to be deported to China, then China would punish us. China would then force us back across the border into Vietnam as they had our friends. It would mean certain death for us. Vietnam believed that all Vietnamese who lived in China were spies.<sup>43</sup>

A group of at least thirteen former residents of Fancheng and Dongxing and their families are held in Whitehead Detention Centre. They reached Hong Kong after 1987, travelling from both Vietnam and China, and successfully convinced the Hong Kong authorities that they were not "ex-China" cases. Their credibility, however, failed when they tried to convince immigration officials they were refugees. At least nine failed the first stage of the screening process, and six lost their appeals. Four have been recognized as refugees at various stages of the process, and the others are still in the process of evaluation.

A volunteer with the Garden Streams agency in the camps came to know these people through her acquaintance with other former Fancheng inmates who had been waiting over five years for resettlement abroad. Heather Stroud, who helps produce a magazine at Whitehead Detention Centre, compiled the details of each person's history. She sent the fifty-six-page account to the Hong Kong Security Branch, the UNHCR, and the Governor of Hong Kong, expressing her concern that these persons should not be repatriated to either Vietnam or China, where they had suffered persecution. The Security Branch responded that some of the individuals who failed screening never mentioned their sojourn in Fancheng, and that their cases could not be reopened merely because they had changed their story. Of course, had they mentioned their residence in Fancheng, they could have been treated as "ex-China" cases, and sent back to China.<sup>44</sup> Mrs. Stroud replied, trying to draw attention to this dilemma, but without success. As of October 1991, government officials could not say whether any internal investigation had been conducted as to why these cases continued to fail after Mrs. Stroud's submissions.

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43. Unpublished account compiled by Heather Stroud, February 1991, submitted to Hong Kong authorities.

44. This possibility existed for any asylum seeker who revealed himself to be a former resident of China. What these persons would not have known was that China ceased to accept any former residents of Fancheng after 1987, and so the government waived the rule for this special group.

The physical and mental health of some of the Whitehead group, most of whom had been detained over two years, began to suffer as rejections continued to accumulate. Mrs. Stroud and the group decided it was necessary to resort to the media to bring attention to these cases. On September 20, 1991, she released the story to a Hong Kong reporter and a radio station. As an immediate result, Mrs. Stroud was asked to leave Whitehead by a UNHCR field officer. The magazine she helped asylum seekers produce was discontinued. After several days, the magazine was allowed to reopen and Mrs. Stroud returned to the camp. The UNHCR, however, asked her agency to dismiss her, which it so far has declined to do. When asked to explain why he disapproved of her actions, the Chief of Mission of the UNHCR in Hong Kong cited a duty of confidentiality on the part of all camp workers, and said there was no reason to go to the media as each of the persons rejected would be considered for mandate review. But this was no solution for the Vietnamese who had approached Mrs. Stroud. They had asked her to convey their stories to the press, and she did so because of the strain and anxiety they suffered as they waited literally years to reach the stage of UNHCR review, a review not guaranteed asylum seekers by right.

### Hong Kong Government Responses

#### Changing the Law

In November 1990, 111 Vietnamese won a legal challenge to the validity of their detention. In what came to be known as the "Boat 101" case, a damaged boat entered Hong Kong waters, and the captain asked for repairs and provisions to continue the journey on to Japan. Instead, the Hong Kong authorities placed those aboard in a detention center and purportedly destroyed the boat because it was too costly to repair. Judge Sears, in granting habeas corpus, wrote:

The power to detain must be for a reasonable period of time; what that should be depends on the particular facts . . . [the Secretary for Security] says he has limited manpower and specialised training is required; further, there may be financial limitations on this part of the government's programme. As I have said before, Hong Kong may well have a heavy burden thrust upon it by virtue of its international obligation to accept refugees, but, in my judgment, if detention is under § 13(D), then a period of 18 months is unreasonable.<sup>45</sup>

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45. *Re Pham Van Ngo and Others*, [1991] 1 H.K. Law Rep. 409, 508 (High Court, Misc. Proceedings No. 3005 of 1990). Hong Kong Immigration Ordinance No. 52, May 30, 1991, amending cap. 115, § 13D of the Hong Kong Immigration Ordinance, provides:

As from 2 July 1982 any resident or former resident of Vietnam who . . .

The Judge's decision was limited to the facts of this case, namely, the detention of Vietnamese who did not wish to stay in Hong Kong and win refugee status. Nonetheless, the judge noted that the average waiting time for the screening process was approximately two years, which in his opinion was "an inordinately long period."

Immediately following the delivery of judgment in the case, immigration officials arrested the Vietnamese as they left the court, in blatant defiance of Judge Sear's admonishment to the Security Branch that to arrest them for the same offense would constitute contempt. After an international outcry, the government released them on nominal bail from Victoria Prison where they had been held, and moved them to an open camp. Immigration officials said the release was approved based on the likelihood of their absconding.<sup>46</sup> In December 1990, the group was granted refugee status.

A second lawsuit challenging detention imposed on two Vietnamese men failed. Both were suspected of involvement in a disturbance at Whitehead Detention Centre. They were each screened out and known to be politically active, one a teacher and the other an elected hut leader. The authorities transferred the pair to Stanley Prison and then to other detention centers, separating them from their families. The court declined to find any abuse in discretion when Immigration authorities detained Vietnamese who arrived without valid travel documents. Moreover, the court found that the transfers were not for the purpose of punishment, but in furtherance of "good order" and "management" of the detention system, and therefore not subject to review.

In response to these two cases, the government amended the Immigration Ordinance to give officials absolute authority to detain illegally arrived Vietnamese, with or without their consent, and to transfer detainees between any institution designated for the purpose. The amendment stipulates that a period of detention under the ordinance shall not be unlawful if it is "reasonable," taking into account circumstances such as the number of Vietnamese awaiting screening and the "manpower and financial resources allocated" to screening.<sup>47</sup> This can be read as a crude attempt to enforce the argument advanced and rejected in the Boat 101 case, namely, that the government's duty extends only as far as its current commit-

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arrives in Hong Kong not holding a travel document . . . may . . . be detained under the authority of the Director in such detention centre as an immigration officer may specify pending a decision to grant or refuse his permission to remain in Hong Kong . . . .

Judge Sears also noted that Boat 101's occupants had not "arrived" in Hong Kong nor had they requested permission to stay in Hong Kong as refugees.

46. Lindy Course & Simon Macklin, *Boat People Released on Bail of \$1*, S. CHINA MORNING POST, Nov. 14, 1990, at 1.

47. Hong Kong Immigration Ordinance No. 52, *supra* note 45.

ment of resources. In essence, it codifies the rationale derided by Judge Sears, that "it was far cheaper and easier just to lock these people up, rather than help them." A similar effort to foreclose judicial scrutiny marks the new provisions on transfers between detention centers, which provide that a certificate stating that the transfer was for "order or good management" shall constitute proof of the Director of Immigration's intent.<sup>48</sup>

Hong Kong's immigration laws more than ever violate the international prohibition on arbitrary detention.<sup>49</sup> Vietnamese who have no wish to remain in Hong Kong, if intercepted in the territory's waters, may now be detained, separated from their family members, and shuttled between camps at an administrator's discretion. Detention is arbitrary because it is unrelated to any public security interest — indeed, as the Boat 101 case shows, the authorities are willing to release Vietnamese who pose no risk of flight. The government's record of allowing thousands of Vietnamese refugees to live unconfined over the years shows it does not believe most Vietnamese pose a risk to public order. Detention of Vietnamese in Hong Kong is also arbitrary because for the vast majority it remains unlimited by law, notwithstanding the recent agreement on mandatory repatriation. Only "double-backers" and those who arrive after October 29, 1991 will be repatriated for the foreseeable future; others may have to wait another two or three years according to government estimates.<sup>50</sup> Moreover, Vietnam has indicated its unwillingness to comply with a forced repatriation, casting doubt on whether Hong Kong will be able to implement a program of mass forced repatriation in the face of likely physical resistance from asylum seekers.<sup>51</sup>

The Hong Kong government's attitude in manipulating local law with disregard of international human rights standards carried through to the new Bill of Rights. The Bill of Rights, enacted a week after the above amendments to the Immigration Ordinance, contains language identical to that in the International Covenant on Civil and Political Rights prohibiting arbitrary detention.<sup>52</sup> However, the government explicitly excepted the immigration laws from

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48. The certificate "shall be admitted in evidence in any proceedings on its production without further proof and, until the contrary is proved, shall be presumed to have been signed by the Director of Immigration." *Id.*

49. For other critiques, see LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 27, at 35-41; GOW, *supra* note 13, at 16-21.

50. Fiona MacMahon, *All Viets to Be Returned in 3 Years*, S. CHINA MORNING POST, Oct. 30, 1991, at 1.

51. "To view that Vietnam accepts forcible repatriation is not correct." Socialist Republic of Vietnam Permanent Mission to the U.N. Press Release (Nov. 4, 1991).

52. "No one shall be subjected to arbitrary arrest or detention." H.K. Bill of Rights Ordinance, part II, art. 5(1) (June 6, 1991) [hereinafter Bill of Rights]; Int'l Covenant on Civil and Political Rights, art. 9(1), *opened for signature* Dec. 16, 1966,

the operation of the Bill of Rights, which repeals all prior legislation inconsistent with its rights guarantees.<sup>53</sup>

### Efforts to Ameliorate Detention

Many dedicated civil servants attempt daily to manage Hong Kong's camps humanely, despite the limitations imposed by government policy and existing funds. The government has also made a concerted effort to incorporate improvements in camp management suggested by voluntary agencies and critics of the detention policy. In particular, camp managers have been increasingly receptive to input from Vietnamese community representatives. Although existing detention centers are oppressive, they are an improvement on the squalid ad hoc arrangements of the past. Hong Kong has rectified the most extreme abuses, such as holding Vietnamese on ferries, in the dilapidated San Yick factory building, or in tents on the undeveloped Soko islands, where the lack of sanitation, shelter and adequate food resulted in a cholera epidemic.

In 1991 the Legislative Council, in a defiant mood on the eve of its first elections, declined to allocate further funds for new detention centers. The government was forced to squeeze the 20,000 arrivals into existing quarters, considerably worsening tensions and violence within the camps. However, funds had been allocated for a new detention center on the island of Tai A Chau, which may serve as a model for reform of other camps.

Tai A Chau is managed by the Hong Kong Housing Authority rather than by the police or prison guards. Although accommodations are as cramped as in other detention centers, detainees have free access to the whole island during the day. The police keep a low profile at the camp, and the gates to various sections are manned by private guards in non-military style uniforms. Camp management has made a concerted effort to provide some employment in various construction and physical improvement projects. Children and adults attend the many informal outdoor classes sponsored by other inmates, and recreation such as fishing or swimming is readily accessible.

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999 U.N.T.S. 171, *reprinted in* THE INT'L BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS (Louis Henkin, ed., Columbia Univ. Press 1981).

53. Bill of Rights, part I, art. 3(2) states that "all pre-existing legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency, repealed." Bill of Rights, part III, art. 11, provides that, "as regards persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation." The immigration laws as a whole are also exempted from the operation of the Bill of Rights for a period of up to two years under part III, art. 14, the "freeze" provision for certain laws most likely to be in conflict with the Bill of Right's guarantees.

Although Tai A Chau's physical isolation permits it to be less confining, its advantages could be reproduced elsewhere, especially if Hong Kong refrains from consolidating camps when the inmate population decreases. Voluntary employment programs can be designed for other Vietnamese given Hong Kong's current shortage of unskilled labor. Some detained Vietnamese have even expressed a willingness to volunteer as construction workers for Hong Kong's new airport, a project for which the government now plans to import labor.<sup>54</sup> Private management of camps should be the rule, not the exception, particularly for populations that have yet to be screened. More effort can be made to allow parents and children regular access to education and recreation beyond the confines of the barbed wire fence, to protect unaccompanied minors, and to engage camp inhabitants in enhancing the security of their quarters.

### Isolating Asylum Seekers

Hong Kong's government has sought to restrict media access to the camps, especially coverage of individual stories. Among the rationales given for this policy are that a focus on specific persons interferes with the impartial operation of the screening process, that media coverage encourages demonstrations, and that publicity may endanger individuals who ultimately will have to return to Vietnam. Inevitably, this policy produces stories that focus on arrival and departure rates, the cost of detention to Hong Kong taxpayers, and violence within the camps. This in turn reinforces popular sentiment that the Vietnamese are a dangerous lot that must be gotten rid of as soon as possible.

The arguments for restricting the media appeal more to expediency than to principle. Of all the criticisms lodged against Hong Kong's screening process, it has never been said to be corrupt or overly responsive to outside pressure. Hong Kong residents, who after all pay for the entire system of screening and detention, have a right to know how it is operating. The restrictions on media have not discouraged the most extreme sorts of protests, such as hunger-strikes, attempts at self-immolation or self-mutilation, not to mention the recent demonstrations by thousands since the announcement of mandatory repatriation. Indeed, the difficulty of communicating their views may have led Vietnamese to realize that only the most extreme and physical acts of protest are likely to be heard. Finally, the argument that publicity could condemn Vietnamese in the eyes of their own government casts into doubt the whole premise of mandatory repatriation — that Hong Kong will not return those who may be persecuted. Vietnamese should not

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54. Robert Sherbin, *Hong Kong Quota for Foreign Staff May Be Increased*, ASIAN WALL S. J. WKLY., Oct. 14, 1991, at 20.

lose their basic right to free expression upon arrival in Hong Kong, any more than in Vietnam. To Hong Kong's credit, it has allowed mass demonstrations in the camps, even while it discourages close media coverage. Rather than try to stifle expression on its own soil, Hong Kong would do better to elicit firm guarantees of tolerance from Vietnam.

The UNHCR has cooperated with this policy by requiring all its employees and all voluntary agencies to refrain from making statements to the media. The rationale, preserving the dignity and privacy of the asylum seeker, is generally more defensible. Situations arise, however, when asylum seekers do not wish privacy, as in the case of the Fancheng inmates who asked Heather Stroud to make their plight known. Nor can it be said that confidentiality always serves dignity. Publicity played a role in halting past dangerous and demeaning practices, such as the promotion of an unsafe contraceptive.

Unfortunately, the list of persons asked to leave the camps because of public comment does not end with Mrs. Stroud. A nurse who had documented the practice of injecting Vietnamese women with the contraceptive Depo-Provera without their informed consent was dismissed by her voluntary agency after government complaints. A UNHCR employee who commented on the screening process in a radio interview was summarily dismissed. Both private and legal aid lawyers have had their access to inmates limited or denied by government authorities, and asylum seekers have been questioned by camp officials as to their conversations with non-UNHCR lawyers.

On the other hand, the government has accommodated various human rights groups and academics carrying out research in the camps. Asia Watch was given full cooperation with its requests to Security Branch, and camp authorities were uniformly helpful. Extending similar cooperation to the local media and to community groups would do much to foster understanding between Hong Kong's public and the Vietnamese detained in their midst. Although government spokesmen claim that nothing prevents asylum seekers from sending letters to newspapers, in practice very few such letters get out except through surreptitious means. This may be due to censorship, or may be due to the unwillingness of asylum seekers to identify themselves to camp authorities as troublemakers. Regardless of the cause, the effect is a heightened level of mistrust and desperation on the part of asylum seekers, which could be eased if ready access to the broader community were provided.

## REPATRIATION

On September 22, 1991, Vietnam and Britain agreed to the

mandatory repatriation of "double-backers." This agreement was followed by another, signed on October 29, for the mandatory repatriation of all non-refugees, beginning with those who arrived in Hong Kong on or after October 29, 1991. The first forced repatriation took place on November 9, 1991, during which twenty men, sixteen women and twenty-three children were forced aboard a transport plane and flown to Hanoi.

### Conditions in Vietnam

The vast majority of Vietnamese who have fled to Hong Kong are reluctant to return home, despite the harsh conditions of detention and the very low chance of resettlement in another country. One woman interviewed recently as she awaited return on the voluntary program succinctly expressed the fears of many to a reporter. "I will never be free, I am going back to Vietnam, . . . nobody knows what will happen to us. And can anyone really help us once we're back home?"<sup>55</sup>

The prospect of return to grinding poverty is not the only disincentive, or many more would have accepted the UNHCR's generous offer of US\$360 to voluntary returnees. Although the likelihood of resettlement abroad may not be well understood in Vietnam, it is no secret that leaving the country is a crime. What Vietnamese in Hong Kong fear is being branded upon return as unpatriotic or suspect persons, a stigma that their children could inherit.

After reunification of Vietnam in 1975, the communists incarcerated hundreds of thousands in so-called "reeducation" camps, among them those associated with the military and government of South Vietnam, religious leaders and intellectuals. Many persons returning from such punishment or investigation were stripped of their civil rights through denial of documents such as household registration papers or identity cards. Without such documents, it is impossible to legally reside or travel anywhere, to vote, to register marriages, births or deaths, or to obtain employment, education, or public medical care. Others were punished by banishment to harsh New Economic Zones, often little more than jungle clearings, where survival was difficult and the most basic civil rights and public services lacking. Those who left these areas also lost their legal status. Among those now in Hong Kong are people who could be sent to homes where they never had the rights of legal residents. The UNHCR has tried to address this problem by monitoring the reissuance of these documents to voluntary returnees. But even the res-

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55. John Pomfret, *Futile Plea from Hong Kong's Camps*, Associated Press, Nov. 5, 1991.

toration of proper documents may not cure the effects of a bad record.

Vietnam has an extensive surveillance bureaucracy and a long history of institutionalized discrimination against those whose loyalty is suspect. Most young people are required to produce a three-generational family history (*ly lich ba doi*) detailing the class background and occupations of relatives back to their great-grandparents' generation. This history is kept on file at the local public security office, and can be used for evaluating background when a person applies for education or employment. Local officials also use this information to assess fines and higher taxes against those known to be of "bourgeois" background. All foreign contacts are routinely recorded in a citizen's police dossier as well. In every neighborhood there are people, often party aspirants, designated to report to the security police on the activities of the residents and their comings and goings.

Discrimination against those the party deems undesirable has been the norm. During the period of Sino-Vietnamese hostilities, ethnic Chinese were prohibited from party membership, higher education, and certain occupations. Others who have faced systematic discrimination in education and employment include Catholics, Protestants, and Buddhist monks and nuns, as well as persons in any way associated with the French, the Americans, or the South Vietnamese government. Such persons are particularly vulnerable to abuse by local officials, as they are unlikely to have the social connections or funds to resist harassment or unjustified arrest. The stigma usually extends to the children of such persons. Vietnamese in Hong Kong often feel they have been unjustly denied refugee status when their family history shows a reactionary background — they know that fact alone makes them vulnerable in a way their neighbors are not.

The problem for returnees is that Vietnam insists they have committed a crime by leaving the country. Although the government waives prosecuting or punishing them for that crime, most Vietnamese in Hong Kong believe they will be regarded as persons with a criminal record.

### Mandatory Repatriation

The experience of voluntary returnees raises concerns as to whether Vietnam will be able to enforce its promise to treat even unwilling returnees fairly and without persecution. According to the agreement as announced by Hong Kong's Secretary of Security, Vietnam has pledged not to persecute or harass any returnee.<sup>56</sup> In

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56. John Pomfret, *Agreement Reached in Boat People Forced Repatriation*, Associ-

the context of Vietnam's similar pledge to the UNHCR regarding voluntary returnees, this entails a "waiver of prosecution and of punitive and discriminatory measures" for having illegally left the country, a crime under Vietnam's law.<sup>57</sup>

Although monitors from the UNHCR and voluntary agencies have reported that for the most part Vietnam has kept its pledge, a disturbing pattern of interrogation and low-level harassment of voluntary returnees has emerged. Some returnees have been required to report their activities to their local police station regularly, in some instances as often as weekly. This sort of treatment is typical for persons recently released from prison, or those placed under house arrest. It is common for government authorities to skim the repatriation allowance given to returnees, or to impose various fines once it is in the recipient's hands.

Some returnees believe their difficulty in getting jobs or business or fishing licenses is due primarily to their status. One who came back to Hong Kong tried to tell a UNHCR monitor he was unjustly denied a fishing license. A public security official present cut him off, saying, "it's being processed." These problems must be seen against conditions in Vietnam, where unemployment plagues a quarter of the workforce, official corruption is rife, and a highly developed surveillance apparatus keeps tabs on all citizens. Nonetheless, if this is the treatment encountered by willing returnees, many observers fear that those forced back may encounter worse.

Vietnam has never extended its waiver of punishment to persons who commit offenses other than leaving the country illegally. Asia Watch is aware of at least two cases where persons reportedly have been jailed for organizing departures.<sup>58</sup> These prosecutions are disturbing in light of the fact that the International Covenant on Civil and Political Rights, to which Vietnam has acceded, recognizes the right to leave one's country.<sup>59</sup> Nor does Vietnamese law distinguish rapacious "snakeheads," who extract large sums of money in return for transporting people, from fishermen who take their friends and neighbors aboard their vessels for escape. Asia Watch knows of one case this year where a woman accused of selling her boat to a group of "counter-revolutionaries" died under torture in prison.

Vietnam has yet to promise that no punishment awaits persons accused of political crimes, such as "spreading propaganda against

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ated Press, Oct. 29, 1991; British Embassy, Washington, Press Release, Vietnamese Migrants in Hong Kong (Oct. 21, 1991).

57. Memorandum of Understanding between the Socialist Republic of Vietnam and the United Nations High Commissioner for Refugees, Dec. 13, 1988, ¶ 3a.

58. These are the cases of Vo Minh Suu and Van Tien Ka, who were imprisoned upon their return to Vietnam from the Philippines and Hong Kong, respectively.

59. Int'l Covenant on Civil and Political Rights, *supra* note 52, art. 12.

the socialist system," "spreading false rumors and causing panic among the people," or "making, storing or circulating anti-socialist documents or cultural products."<sup>60</sup> Such laws could be applied to the hundreds of Vietnamese in Hong Kong's detention centers who have expressed their opposition to Vietnam's present government in essays and artwork, not to mention the thousands that have protested forced return since the policy was announced.<sup>61</sup>

This problem is all the more urgent as both the Hong Kong government and the UNHCR have been reluctant to apply protection to refugees *sur place*, that is, persons whose claim of refugee status arises at some later point once they have left their own country. According to the Handbook:

A person may become a refugee "*sur place*" as a result of his own actions, such as associating with refugees already recognized, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person's country of origin and how they are likely to be viewed by the authorities.<sup>62</sup>

Recognition of refugees *sur place* is well established in the jurisprudence of state parties to the Refugee Convention and Protocol. The case *Matter of Mogharrabi* set the precedent in U.S. immigration law.<sup>63</sup> Mr. Mogharrabi, an Iranian student, tried to get Iranian government authorities in the U.S. to document his continuing student status. The officials, suspicious that he was applying for asylum in the U.S., threatened him, and Mogharrabi accused them of being religious fascists. This altercation took place in a room where video cameras were present. The Board of Immigration Appeals found that "a reasonable person in the respondent's position would fear that his opposition to that regime has become known to those who are both in a position, and who have the inclination, to punish him for it."

Many Vietnamese in Hong Kong have publicly expressed anger or contempt for their communist government. The news media have published interviews, photographs and film of protests to repatriation that clearly identify protestors critical of the Party.

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60. THE CRIMINAL CODE OF THE SOCIALIST REPUBLIC OF VIETNAM, art. 82 (as ratified June 27, 1985), translated in *Southeast Asia Report Vietnam SRV Criminal Code*, Sept. 3, 1985, microformed on JPRS-SEA-85-135 (Joint Publication Research Serv.) [hereinafter CRIMINAL CODE].

61. CRIMINAL CODE, *id.*, art. 6, stipulates that citizens and permanent residents of Vietnam who commit crimes abroad may be prosecuted for criminal liability within Vietnam.

62. HANDBOOK, *supra* note 25, ¶ 96.

63. *Matter of Mogharrabi*, Interim Decision 3028 (BIA, June 12, 1987).

Vietnamese circulate self-published magazines within the camps which are known to authorities within Vietnam, and sometimes send articles or artwork abroad to overseas Vietnamese publications. News coverage of challenges to the screening system have also identified persons Vietnam may view as potential opponents.

Prior to the 1991 agreements between Vietnam and Britain, anyone forced back to Vietnam would have a *sur place* claim simply because Vietnam imputes a political motive to illegal departure and brands the act as a crime against "national security."<sup>64</sup> Thus, persons who may have left for purely economic reasons would have a well-founded fear of persecution because their flight amounted to a political crime.<sup>65</sup> This problem was addressed by Vietnam's promise not to punish illegal departure for all who return, voluntarily or otherwise.

Persons known to be critics of the Vietnamese government, however, are still at risk upon return to Vietnam.<sup>66</sup> Among the charges they may face are sedition, espionage, anti-socialist propaganda, spreading decadent culture, or causing social divisions.<sup>67</sup> Until Vietnam promises returnees immunity for expression of their views, a right it has pledged to uphold by acceding to the International Covenant on Civil and Political Rights, many asylum-seekers' fear of persecution will be well founded. Hong Kong is obligated to recognize their status as refugees.

Vietnam has extensively interrogated some returnees as to their activities and associations in Hong Kong, with an eye to gathering information on the detention centers. Questions have included identifying camp organizations, troublemakers, guards, voluntary agency staff, and visiting clergy. One woman had photographs she took in Hong Kong confiscated in Hanoi, only to reappear in the hands of an interrogator in Haiphong who asked her to identify all those pictured.

Particularly at risk are the "double-backers," persons who return to Vietnam once voluntarily and then flee again. Both Hong Kong and Vietnam have sought to portray these persons as greedy and in search of a second repatriation allowance. This characteriza-

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64. See CRIMINAL CODE, *supra* note 60, at art. 85 ("the crime of fleeing to a foreign country or fleeing to and remaining in a foreign country with the intent to oppose the people's government") under subheading "The Especially Dangerous Crimes Against National Security," and art. 89 ("the crime of illegally emigrating from, immigrating to or illegally remaining in a foreign country") under subheading "Other Crimes Against National Security."

65. See Daniel Wolf & Shep Lowman, *Toward a New Consensus on the Vietnamese Boat People*, 10 SAIS REV. 101 (1991).

66. Vietnam extends its criminal jurisdiction to Vietnamese citizens who commit crimes outside the country. See CRIMINAL CODE, *supra* note 61.

67. See CRIMINAL CODE, *supra* note 60, arts. 73, 74, 81, 82, 99.

tion is disputed by the UNHCR and the "double-backers" themselves, who appear to have left again for a wide variety of reasons.

Two days after Britain and Vietnam reached the agreement to deport over 200 such persons, a provincial official in Haiphong said to a western reporter, "[t]hese people must be punished for leaving a second time," and discussed prosecution, fines, and denial of jobs and cash assistance.<sup>68</sup> The director of the Foreign Ministry consular department later denied the report,<sup>69</sup> but this was not the first expression of such views by Vietnamese officials. Indeed, in August the deputy head of the Foreign Ministry consular department reportedly described "double-backers" as "too greedy."<sup>70</sup> In explaining why they would be ineligible for the voluntary repatriation allowance and why Vietnam might accept their forced return, he explained, "[t]hey commit a crime intentionally a second time, and it is better if they get different treatment to [sic] the others."<sup>71</sup> A few days later, in the same story which reported Deputy Foreign Minister Tran Quang Co's call for the segregation of bad elements in Hong Kong's detention centers, unnamed officials were said to believe that criminals were behind the phenomenon of multiple departures.<sup>72</sup>

These mixed signals are hardly surprising. Vietnam tries to discourage departures by portraying those who leave as unpatriotic. All returnees go through a few days of reindoctrination in Hanoi where they are told that although they are forgiven for the crime of leaving illegally, they had better not try again. It is a great deal to expect that officials will warmly welcome back those they have vilified for leaving. For this reason, the mechanism for enforcing fair treatment must be something more than vaguely worded assurances.

Ideally, Vietnam will move to eliminate its elaborate surveillance bureaucracy and allow its citizens privacy and security from government discrimination. At some point the legal system may become sufficiently mature and independent to afford relief to victims of discrimination. Until such developments, Vietnam must allow outside observers to freely and confidentially contact those who return, and the government must educate its bureaucracy in the particulars of fair treatment. Although the UNHCR has tried to

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68. Boyd, *supra* note 2.

69. Kathleen Callo, *Vietnam to Take Back Boat People from All Southeast Asia*, Reuters, Oct. 31, 1991 (quoting Nguyen Dinh Bin as saying "there would be no punishment, no persecution of those who voluntarily return or of those who Vietnam will take back."), available in LEXIS, Nexis Library, Reuter File.

70. Alan Boyd & Lorna Wong, *More Vietnamese Refugees Could Face Forced Return*, S. CHINA MORNING POST, Aug. 17, 1991.

71. *Id.*

72. Alan Boyd & Fiona MacMahon, *Gangs a Threat to Return of Boat People - Vietnam*, S. CHINA MORNING POST, Aug. 20, 1991, at 2.

visit many of the returnees, given its limited resources and the requirement that all contacts be arranged through government officials, it may not be able to effectively monitor the tens of thousands more to be returned in the next few years. For this reason, it is essential to involve other international observers, such as human rights advocates and voluntary agency representatives, and give them access to returnees under conditions that preserve the confidentiality of the interview and protect returnees from pressure by local officials.

### Violence and the Use of Force

Following the announcement of Hong Kong's intention to forcibly repatriate Vietnamese, tensions rose markedly in the detention centers. Frequent weapons sweeps have turned up hundreds of home-made knives, spears, catapults, and bombs.<sup>73</sup> One Vietnamese man died from stab wounds a day after over 500 weapons were seized in his section at Whitehead Detention Centre.<sup>74</sup> Five guards were hospitalized after an attack by Vietnamese who thought they were being relocated as a prelude to forced repatriation.<sup>75</sup> Vietnamese have sent desperate messages to the media and to Congress threatening violence and mass suicide.<sup>76</sup>

The agreement on mandatory repatriation does not mention the use of force. Vietnam has consistently said it opposes a forcible repatriation, and will accept its citizens back only on a basis that respects their dignity and provides them with financial assistance.<sup>77</sup> Hong Kong officials, on the other hand, have refused to rule out the use of force should Vietnamese resist.<sup>78</sup> The first deportation since 1989 demonstrated that Vietnamese were not willing to leave without a struggle. On November 8, 1991, men and women were dragged sobbing onto ferries that took them to an airport holding pen. There they spent the night on cots, with televisions and videocassette tapes of "I Love Hong Kong" thoughtfully provided by the government. The next morning, as many as ten policemen were re-

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73. Flora Wong, *Mass Move Follows Viet Camp Raid*, H.K. STANDARD, Nov. 5, 1991; *Guards Fire Tear Gas to Prevent Clash Between Boat People*, ASSOCIATED PRESS, Nov. 2, 1991.

74. Fiona MacMahon, *Another Murder at Whitehead*, S. CHINA MORNING POST, Nov. 1, 1991, at 2.

75. Fiona MacMahon & Tommy Lewis, *Repatriation Fears Spark Camp Violence Outbreak*, S. CHINA MORNING POST, Oct. 8, 1991, at 1.

76. *Viet Boat People Warn of Violence in Smuggled Letter*, Reuters, Oct. 13, 1991, available in LEXIS, Nexis Library, Reuter File; *U.S. Reaffirms Opposition to Boat People Forced Repatriation*, Reuters, Oct. 30, 1991, available in LEXIS, Nexis Library, Reuter File.

77. Vietnam News Agency Press Release, *Vietnam's Position Vis à Vis Illegal Departure* (Nov. 5, 1991).

78. Pomfret, *supra* note 56.

quired to subdue some young men, as others were wrapped in blankets or dragged barefoot and shirtless onto the plane.<sup>79</sup> Two Hong Kong policewomen were slightly injured and most of the Vietnamese men returned exhibited bruises.<sup>80</sup>

Although the Hong Kong authorities took precautions to minimize the use of force and to open the operation to media scrutiny, there was clear discomfort in the government at how much was revealed. A press boat was ordered to back off for "security reasons" from the pier where the transfer of Vietnamese to the airport was commencing, just as detainees began to visibly sob and resist. Hong Kong government statements describing the operation as something other than forced repatriation were disingenuous at best.<sup>81</sup>

The Hong Kong government has conducted two more forced repatriations since then, on December 9, 1991 and February 12, 1992, both without incident.<sup>82</sup> The persons being returned on these flights were primarily those who had arrived since the October 29th agreement. These persons have been given "fast track" screening, handled separately from earlier Vietnamese arrivals. While they have returned without struggle, it is likely that confrontation may resume should Hong Kong again begin to force back persons who have been waiting in its camps for years in the midst of a more politically organized community.

Mounting tensions in the camps erupted on February 3, 1992, the eve of the lunar New Year, when a riot at Shek Kong Detention Centre resulted in twenty-three deaths of inmates. The incident began with a fight between North and South Vietnamese housed together in a section of the camp reserved for those who had volunteered for repatriation. Later in the evening, hundreds of South Vietnamese broke through the fence of a neighboring section, and some pushed burning blankets through the windows of a hut where as many as 200 northerners were barricaded. Those who

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79. *Plane Carrying Vietnamese Boat People Leaves for Hanoi*, Reuters, Nov. 9, 1991, available in LEXIS, Nexis Library, Reuter File; John Pomfret, *Boat People Forced Home, Flying to Hanoi*, Associated Press, Nov. 8, 1991.

80. Robert Macpherson, *Governor Wilson Comments*, H.K.A.F.P., Nov. 9, 1991, reprinted in F.B.I.S. DAILY REPORT: CHINA, Nov. 12, 1991, at 68, microformed on FBIS-CHI-91-218 (Foreign Broadcast Info. Serv.); *Protests in Detention Camps*, H.K.A.F.P., Nov. 11, 1991, reprinted in *id.* at 71.

81. Greg Torode & Anthony Flores, *Returnees Transported to Airport*, H.K. STANDARD, Nov. 9, 1991, reprinted in F.B.I.S. DAILY REPORT: CHINA, *supra* note 80, at 67; *Commissioner Admits Use of Force*, H.K. STANDARD, Nov. 11, 1991, reprinted in *id.* at 70.

82. Kathy Chen, *Hong Kong Departs 28 Vietnamese Boat People, But No Protests*, Reuters, Dec. 10, 1991, available in LEXIS, Nexis Library, Reuter File; Kathleen Callo, *Thirty-Six Boat People Return in First Return Since Camp Riot*, Reuters, Feb. 12, 1992, available in LEXIS, Nexis Library, Reuter File.

could not escape perished in the fire.<sup>83</sup>

The causes of the tragedy appear complex. While few professional criminals are thought to be housed in Shek Kong, the prison-like conditions are conducive to the formation of informal gangs and protection alliances among Vietnamese from neighboring regions. Home-brewed alcohol and the heightened emotions of the lunar New Year holiday may have contributed to the outbreak, which apparently began as a quarrel over a hot water tap. Resentment of those who volunteered to return may also have been a contributing factor. What is clear is that the violence was exceptional only in its magnitude and the publicity it received,<sup>84</sup> compared to the murders, pitched battles, and even arson that have occurred in the past. The Hong Kong government quickly agreed to conduct an independent inquiry into the incident, in addition to the criminal investigation.<sup>85</sup> It remains to be seen whether the Hong Kong government will also take swift steps to address the underlying conditions that raised camp violence to this incendiary pitch.

### Voluntary Repatriation

After a slow start, voluntary repatriation has finally exceeded its goal of returning approximately 1,000 Vietnamese per month in late 1991. Over 11,500 persons have returned to Vietnam from Hong Kong since the program's inception in 1989. The reasons for renewed interest in voluntary return appear to be several. A small boost to applications came from those classified as "double-backers," who were actively encouraged to volunteer in the face of the government's plan to deport them. Although "double-backers" are ineligible for the repatriation allowance, family members who arrived in Hong Kong for the first time were given US\$10, as well as a promise that the Vietnamese authorities would know they volunteered to return. Of the original group of 323, only 59 had to be forced back.

Although the voluntary return program may continue to attract persons who fear imminent repatriation, the momentum of the past several months appears to have started from a tighter policy on

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83. Jonathan Braude, *The Night They Torched Hut 6*, S. CHINA MORNING POST, Feb. 9, 1992, at 9.

84. See, e.g., David Stamp, *Official Warns of Violence at HK Boat People Camp*, Reuters, Feb. 10, 1992, available in LEXIS, Nexis Library, Reuter File; Jeanette O'Shea, *Lives Ruled by Violence*, H.K. STANDARD, Feb. 7, 1992; Heather Stroud, *Wave of Horror Signals New Look at Detention Policy*, S. CHINA MORNING POST, Feb. 9, 1992, at 8; David Holley, *18 Killed As Refugees Fight in Hong Kong*, L.A. TIMES, Feb. 4, 1992, at 8; Associated Press, *17 Dead in Violence at Hong Kong Refugee Camp*, N.Y. TIMES, Feb. 4, 1992, at A3.

85. Luisa Tam, *Governor Orders Separate Inquiry on Camp Tragedy*, S. CHINA MORNING POST, Feb. 8, 1992, at 1.

money given to voluntary returnees. Following complaints that its generous US\$360 repatriation allowance was actually drawing Vietnamese to Hong Kong, the UNHCR decided to cut the repatriation allowance for persons arriving after September 23, 1991 to a maximum of US\$50.<sup>86</sup> That decision, coupled with an announcement that the US\$360 allowance may not be maintained indefinitely for those already in Hong Kong, spurred applications to go home. According to the UNHCR, the decision also seems to have reduced the number of people planning to leave, particularly from Haiphong and Do Son.<sup>87</sup> The European Community has also committed US\$93 million in aid programs to improve economic opportunities in Vietnam for all returnees as well as local Vietnamese. This incentive program, which will be heavily publicized,<sup>88</sup> should help sustain the momentum.

The detention center population has begun to diminish since October 1991, as the rate of over 1,000 voluntary returns outpaces arrivals of 30 people a month. Skeptics claim that voluntary return can never provide a complete solution to the problem of Vietnamese migrants. If this is so, it is only for the same reason that mandatory return provokes such resistance, namely, that Vietnamese who flee their country do not believe they will be treated fairly upon return.

## CONCLUSIONS

The costs of detention are high, especially to those who suffer in detention for years. Hong Kong has spent HK\$919 million this year on maintaining detention. The government may soon learn the precise monetary value of the injury it has inflicted through a suit to collect damages on behalf of the occupants of Boat 101.<sup>89</sup> The scars of detention will be borne by Hong Kong as a community as well. On the eve of transition to Chinese sovereignty, Britain will have left its colony the following grim legacy: a territory studded with prisons equipped to hold thousands, a police force and prison guard staff trained in the incarceration of families and civilians accused of no crime, a media policy of restricted access to victims of injustice, and a precedent of rewriting the law to avert legal challenges to human rights abuses.

The initial justification for the detention policy was deterrence, a rationale that is insupportable some 80,000 arrivals later. Now

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86. Fiona MacMahon, *Viet Applications to Go Home Soar*, S. CHINA MORNING POST, Sept. 26, 1991, at 3.

87. "Prize" for Volunteer Number 10,000, S. CHINA MORNING POST, Sept. 27, 1991.

88. Kathy Griffin, *PR Firm Launches \$4.6m Campaign to Boost Viet Repatriation*, S. CHINA MORNING POST, Sept. 9, 1991, at 3.

89. Jon Swain, *Damages Sought for Detention*, S. CHINA MORNING POST, June 17, 1991, at 2.

the rationale has switched to political expediency. The continued presence of Vietnamese migrants is bitterly resented by Hong Kong Chinese, who see their own relatives turned away at the border with China, and who themselves are seeking resettlement abroad in increasing numbers as the transition to Chinese rule draws nigh. But deterrence and political expediency are not reasons under international human rights norms for locking up civilians,<sup>90</sup> or depriving children of safety, health, and education.<sup>91</sup>

Asia Watch has called on the Hong Kong government to abolish the detention policy for all those who pose no genuine risk of escape or risk to the security of the community. This would be the majority of Vietnamese currently detained.

Short of this measure, Hong Kong, by choosing detention as a policy, is obligated to devote the resources necessary to ameliorate its harms. Vulnerable persons, such as families, women, and children, must be protected from physical and psychological abuse. Employment and education must be available for all who wish it. Investigation of official misconduct must be swift and responsive to community fears.

Voluntary repatriation should be given a chance to reduce the population of detention centers. Before a deportation program is employed, Hong Kong should rectify the flaws in its procedure for determining refugee status and invite an independent evaluation. Cases determined earlier should be reopened.

Vietnam must do more to instill confidence in its citizens abroad that they will be treated fairly upon their return. Specific directives mandating equal treatment should be promulgated and publicized, and the doors must be opened to a wide range of international monitors.

None of these steps is beyond the present ability of the governments concerned. Indeed, these measures are absolutely necessary if the human rights of the Vietnamese in Hong Kong are to be protected.

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90. Even if detention of Vietnamese in Hong Kong were not "arbitrary" in violation of Article 9 of the International Covenant on Civil and Political Rights, the present conditions of detention violate UNHCR requirements for space per person in the housing of refugees. See UNHCR HANDBOOK FOR EMERGENCIES, PART ONE: FIELD OPERATIONS (1982). The conditions of detention do not meet even the United Nations Standard Minimum Rules for the Treatment of Prisoners, in terms of bed space (Rule 19), cleanliness (Rule 14), and provision of ventilation, heating and warm water (Rules 10, 13).

91. Convention on the Rights of the Child, U.N. GAOR, arts. 19, 22, 24, 28, U.N. Doc. A/RES 144/25 (1989).