INTRODUCTION

Today, there are over eighteen million refugees scattered around the globe.1 They huddle in camps in nearly all parts of the world, including Europe, Africa, Asia, the Middle East, and the Americas.2 Many fled their homelands because of war, famine, or for economic reasons.3 Others fled because of persecution or fear of persecution on account of their race, religion, nationality, political opinion, or membership within a particular social group and currently seek political asylum.4


2. See 1991 WORLD REFUGEE SURVEY, supra note 1, at 32-33 tbl. 1 (noting that Africa contains over 5,000,000 refugees; East Asia and the Pacific 592,100; Europe and North America 737,600; Latin America and the Caribbean 118,950; and the Middle East and South Asia 9,797,200).


This Comment focuses on whether the forced repatriation of certain individuals or subgroups of Vietnamese asylum seekers violates international law. At issue are individuals and subgroups within the larger group of asylum seekers in Hong Kong “first asylum” camps who are “screened out” as “economic migrants” and face forcible repatriation to Vietnam. Part I provides a brief history of the flight of Vietnamese asylum seekers and their current situation in Hong Kong and other countries in Southeast Asia. Part II discusses the principle of “non-refoulement” as it relates to the forced...

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

Id.

6. See 1951 Convention, supra note 4, art. 33, 189 U.N.T.S. at 176, as amended by 1967 Protocol, supra note 4, 19 U.S.T. at 6223, 606 U.N.T.S. at 270 (defining obligation of states to protect rights of refugees under international law). The most important articles contained in these documents are those relating to “refoulement,” or the involuntary repatriation of refugees. Article 33(1) of the 1951 Convention states that “[n]o contracting state shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers or territories where his [or her] life or freedom would be threatened.” 1951 Convention, supra note 4, art. 33(1), 189 U.N.T.S. at 156. The doctrine of non-refoulement does not prohibit a state from expelling a refugee from its territory, but it forbids a state from refouling or returning a refugee to any country or territory where the refugee's life or freedom would be endangered. See Gunnell Stenberg, Non-Expulsion and Non-Refoulement 71 (1989) (stating that to comply with principle of non-refoulement, refugee must not be sent to country where he or she is at risk of political persecution).

7. See Inhumane Deterrence, supra note 3, at 8 (defining country of “first asylum” as country where refugees first arrive seeking temporary asylum); see also Indefinite Detention and Mandatory Repatriation: The Incarceration of Vietnamese in Hong Kong, ASIA WATCH, Dec. 3, 1991, at 3 [hereinafter Indefinite Detention] (establishing that at 1979 Geneva Conference, countries of Southeast Asia agreed to extend temporary asylum to those who fled Vietnam).


9. See U.N. Handbook, supra note 8, para. 62 (defining “economic migrant” as person who does not meet definitional requirements of term “refugee” but who voluntarily leaves his or her native country under exclusive influence of economic considerations to establish residence elsewhere); see also Guy S. Goodwin-Gill, The Refugee in International Law 1 (1983) (noting that economic refugees do not enjoy benefits of protection and assistance provided by international asylum laws because solutions to their problems are related to economic aid and development rather than to institution of asylum).

10. See Abigail D. King, Note, Interdiction: The United States’ Continuing Violation of International Law, 68 B.U. L. Rev. 773, 774 n.5 (1988) (noting that term “non-refoulement” is derived from French word “refouler,” meaning to return, reduct, or send back, and in context of refugee law, “refouler” refers to international prohibition against returning refugees to any
repatriation of Vietnamese asylum seekers. Part III explores the possibility of classifying certain individual or groups of asylum seekers as "refugees sur place"\(^1\) and presents shortcomings inherent in the efforts to monitor the safety of forced and voluntary returnees to Vietnam. Part IV examines problems inherent in the recognition of sur place refugee status. Part V recommends that the United Nations expand the use of its mandate power to recognize asylum seekers as refugees until Hong Kong fully considers sur place refugee claims, thus ensuring that the principle of non-refoulement is not violated. This Comment concludes by urging that the international community, through the United Nations, renew its commitment to the principle that all persons who risk persecution based on their race, religion, nationality, membership in a social group, or political opinion, are provided a safe haven.

I. HISTORICAL REVIEW OF FLIGHT OF ASYLUM SEEKERS FROM VIETNAM

Since 1975, social and political upheavals have caused approximately two million Southeast Asians to cross international boundaries seeking asylum.\(^1\) Over one million persons have left Vietnam alone.\(^3\) Many of these people, mainly of Vietnamese, Cambodian, and Laotian origin, are recognized as refugees under international law.\(^4\) More than one million refugees have been resettled by international aid agencies in the United States,\(^5\) while thousands of others now live in France, Canada, and Australia.\(^6\) Thousands of territory where they are likely to become victims of persecution); see also Goodwin-Gill, supra note 9, at 69 (stating that in context of immigration law, “refoulement” is term of art meaning “summary reconductation to the frontier of those discovered to have entered illegally and summary refusal of admission of those without valid papers”). The principle of non-refoulement is not an absolute principle; indeed, factors such as national security and public order have long been recognized as exceptions to the principle. Goodwin-Gill, supra note 9, at 95.

11. See U.N. HANDBOOK, supra note 8, para. 94 (defining “refugee sur place” as “[a] person who was not a refugee when he [or she] left his [or her] country, but who becomes a refugee at a later date”).

12. INHUMANE DETERRENCE, supra note 3, at 1.


14. See INHUMANE DETERRENCE, supra note 3, at 1-2 (observing that when Vietnamese citizens first began to flee to other Southeast Asian nations, they were treated with compassion and granted asylum, but as more persons emigrated, that compassion changed to abuse and emigres were no longer automatically considered “refugees”).

15. See Jewel S. Lafontant, Crafting a U.S. Refugee Policy for Asia and the World, HERITAGE Found. Rep., No. 239 (1990), available in LEXIS, Nexis Library, Omni File (noting that United States, by resettling over one million Southeast Asian refugees within its borders since 1975, has resettled more refugees from that region of world than rest of world combined); see also id. (stating that in 1990, United States was world’s largest donor of money to international refugee aid agencies).

16. See 1991 World Refugee Survey, supra note 1, at 36 tbl. 9 (indicating that United States, with 1,355,856 refugees resettled, Canada, with 287,225 resettled, France, with
needy Southeast Asians, however, continue to flee their homelands each month, while hundreds of thousands more remain in the numerous detention centers dotting Southeast Asia.\textsuperscript{17}

The longevity of this Southeast Asian crisis has caused despair among "resettlement countries,"\textsuperscript{18} including the United States, Canada, Australia, and France.\textsuperscript{19} The quandary is also deeply troubling for countries of "first asylum," which in Southeast Asia include Thailand, Malaysia, Indonesia, the Philippines, and Hong Kong.\textsuperscript{20} Western resettlement nations have become "compassion fatigued"\textsuperscript{21} as refugee flows that began almost two decades ago continue with little hope for a permanent solution in the foreseeable future.\textsuperscript{22} Furthermore, the historic solution, resettlement, is increasingly less viable because refugee migrations in Eastern Europe and other parts of the world,\textsuperscript{23} combined with a recently relaxed emigration policy in the former Soviet Union,\textsuperscript{24} make competition for entry into the United States and other resettlement countries

186,957, and Australia, with 172,823 refugees resettled, are world's largest recipients of Southeast Asian refugees for permanent resettlement).

17. \textit{See} 1991 \textit{World Refugee Survey}, \textit{supra} note 1, at 33 tbl. 1 (reporting that number and nationality of refugees in detention centers in Southeast Asia are as follows: Hong Kong, 52,000 Vietnamese; Indonesia, 18,700 Vietnamese and 1800 Cambodians; Malaysia, 14,600 Vietnamese; the Philippines, 19,600 Vietnamese; Thailand, 326,000 Cambodians, 67,400 Laotians, 45,000 Burmese, and 15,000 Vietnamese; and Vietnam, 16,700 Cambodians).

18. \textit{See} \textit{Inhumane Deterrence}, \textit{supra} note 3, at 8 (noting that term "resettlement countries" generally refers to Western nations that have accepted refugees for permanent resettlement).


20. \textit{See} Mann, \textit{supra} note 5, at A14 (commenting that more than 110,000 Indochinese are in refugee camps in listed countries).


23. \textit{See} Kalman Kulcsar, \textit{The Refugee Problem and Hungary}, in 1991 \textit{World Refugee Survey}, \textit{supra} note 1, at 72-74 (discussing refugee flows in Romania and Hungary and acknowledging possibility of millions of refugees coming to West as result of events occurring in former Soviet Union and other Eastern Bloc countries).

24. \textit{See} 1988 \textit{World Refugee Survey}, \textit{supra} note 1, at 85 (observing that 1988 refugee admissions from Soviet Union to United States increased over previous year's admissions by 552%, comprising 27% of total United States refugee intake, up from only 6% of total refugees admitted in 1987); \textit{see also id.} (noting that in light of numerical ceiling imposed on resettlement in United States, great influx of Soviet refugees has had detrimental effect on number of refugees coming from Southeast Asia); \textit{id.} (stating that in December 1988, 7000 spaces allocated to refugees from Southeast Asia and Middle East were reallocated to accommodate Soviet emigres).
especially keen. The net result is a deterioration in the commitment of the United States and other countries to resettling Southeast Asian refugees. First asylum countries, on the other hand, are concerned that in light of the withering commitment to the resettlement of Southeast Asian refugees, they will stand alone, saddled indefinitely with the responsibility of caring for and determining the future of asylum seekers within their borders.

A. The Vietnamese

A most pressing humanitarian concern and the focus of this Comment is the plight of the Vietnamese “boat people” currently residing in detention centers in Hong Kong. Since 1975, asylum seekers have secretly and illegally departed from Vietnam, crowded upon tiny, unseaworthy boats, in search of asylum and eventual resettlement in the West. The boat people’s voyages are extremely dangerous. In Hong Kong, officials estimate that about half the asylum seekers who depart Vietnam by boat never reach land, while others estimate that between twenty and thirty percent of those fleeing perish at sea. In addition to the natural obstacles presented by the open sea and the long distances covered, asylum

25. See, e.g., LAWYERS COMM. FOR HUMAN RIGHTS, REFUGE DENIED: PROBLEMS IN THE PROTECTION OF VIETNAMESE AND CAMBODIANS IN THAILAND AND THE ADMISSION OF INDOCHINESE REFUGEES INTO THE UNITED STATES 95 (1989) [hereinafter REFUGE DENIED] (stating that number of spaces allocated to Southeast Asians for resettlement in United States has steadily declined from 169,200 in 1980 to only 53,000 in 1988); Stephen Moore, Flee Market: More Refugees at Lower Cost, HERITAGE FOUND. POL’Y REV., No. 52, at 64 (1990), available in LEXIS, Nexis Library, Omni File (reporting that in 1990, United States admitted roughly one-half total number of international refugees allowed to enter in 1981 and less than one-fifth total number that was admitted at turn of 19th century).

26. See Al Kamen, Cold War Consensus on Refugee Aid Ebbing Despite Relentless Need, WASH. POST, July 20, 1992, at A8 (commenting that because of end of Cold War, United States commitment to relocating refugees has dwindled, and further asserting that improved relations between U.S. and Vietnamese Governments have led to reduced numbers of Vietnamese granted asylum in West); see also Voting with Their Feet, Their Trabants and Their Oars, ECONOMIST, Dec. 23, 1989, at 17, 22 (explaining that while United States has admitted 900,000 Vietnamese since 1975, nation’s hospitality is wearing thin, though not as thin as that of other countries).

27. See INHUMANE DETERRENCE, supra note 3, at 7-8 (stating that since 1975, over one million Vietnamese have escaped from Vietnam by boat in search of asylum in other countries of Southeast Asia and ultimately in West).

28. See Christine Courtney, The Dreams of a Better Life Sail Away for ‘Boat People’, L.A. TIMES, Nov. 10, 1991, at A1, A4 (commenting that travel by “rickety boat” might be cheapest way to leave Vietnam, but is also most hazardous due to natural dangers of sea and attacks by pirates); Seth Mydans, Pirate Attacks on Vietnam Refugees Fall Sharpily, N.Y. TIMES, June 7, 1987, § 1, at 22 (observing that although maritime attacks on boat people have dramatically decreased in number since 1981, violent assaults are still serious problem).

29. See John Saar, Boat People Backlash, NEWSWEEK, June 25, 1979, at 55 (stating that approximate 50% mortality rate reported by Hong Kong officials for asylum seekers is horrifying, considering fact that hundreds of thousands of people are involved, and noting that tragedy is comparable in scale to tragedy of Vietnam War).

30. Id.
seekers also face the danger of pirates who infest the waters of the South China Sea, often raping Vietnamese women and girls, destroying boats, and killing the occupants.  

From 1980 to 1985, the number of Vietnamese asylum seekers arriving by boat in Hong Kong and other countries of first asylum consistently dwindled. The number of arrivals roughly matched the number of Vietnamese sent from Hong Kong to resettlement countries such as the United States, Canada, France, or Australia. By 1986, however, this trend abruptly reversed and the number of arrivals surged upward, while departures from Hong Kong camps simultaneously declined. This tendency continued into the 1990s, resulting in the present situation: 60,000 Vietnamese asylum seekers are crowded into the camps of Hong Kong alone, with tens of thousands more spread throughout other countries of first asylum.

The upsurge in arrivals in the late 1980s produced dour consequences as some countries of first asylum reacted harshly to the influx of new arrivals. Thailand and Malaysia, for example, the countries closest to Vietnam by boat, publicly announced policies of "pushing off" asylum seekers who arrived at their shores, or of intercepting boats a few miles off the coast and towing them back out to sea. Furthermore, the forced repatriation of asylum seekers,

31. See, e.g., Refugee Denied, supra note 25, at 78-82 (recounting abuse, rape, and murder of Vietnamese boat people committed by Thai pirates and fishermen in South China Sea); 130 Are Said to Die in Pirate Attack on Vietnamese Refugees, N.Y. Times, May 7, 1989, § 1, at 11 (detailing massacre of 130 Vietnamese refugees by pirates off Malaysian coast).

32. See Inhumane Deterrence, supra note 3, at 8 (noting that Vietnamese arrivals in Hong Kong dropped steadily from high of 9788 in 1980 to only 1112 in 1985).

33. See Court Robinson, Sins of Omission: The New Vietnamese Refugee Crisis, in 1988 World Refugee Survey, supra note 1, at 6 (calculating that between 1980 and 1985, number of departures of Vietnamese nationals from Hong Kong detention camps was greater than number of arrivals and population in camps actually began to dwindle).

34. See Inhumane Deterrence, supra note 3, at 8 (reporting that while number of asylum seekers admitted by resettlement countries began to decrease, number of boat people arriving in Thailand and Hong Kong more than tripled between 1986 and 1988); Still They Come, Economist, May 6, 1989, at 36 (observing that while number of boat people arriving in Hong Kong in 1987 was 65% higher than in 1986, number of refugees departing for resettlement was 42% lower than in 1986).

35. See At the Heart of Vietnam: Old Dogma and New Possibility, L.A. Times, Oct. 24, 1991, at B6 (reporting that 64,000 boat people are currently living in Hong Kong detention camps); Mann, supra note 5, at A14 (stating that more than 110,000 boat people reside in first asylum camps throughout Southeast Asia).

36. See 1991 World Refugee Survey, supra note 1, at 64 (stating that in March 1990, Malaysian navy and marine police pushed off more than 90% of Vietnamese asylum seekers and that in July 1990, not one asylum seeker landed safely); Court Robinson, Sins of Omission: The New Vietnamese Refugee Crisis, in 1988 World Refugee Survey, supra note 1, at 6 (noting that on January 28, 1988, Thai Minister of Interior announced that any Vietnamese asylum seekers arriving in Thailand by boat would be pushed back to sea, and commenting that in following months, 2300 Vietnamese were pushed back, resulting in more than 200 deaths); Mann, supra note 5, at A14 (noting that since March 1989, Malaysia has "redirected" or "pushed off" over 8000 Vietnamese asylum seekers, sending them back out to sea); The Boat People Are Shown the Gang-Plank, Economist, Mar. 18, 1989, at 29 (reporting that Thailand, as
once thought internationally unacceptable, began to be earnestly considered by countries of first asylum.\textsuperscript{37}

In response to the reality of "push offs," the threat of unilateral forced repatriations, and the dilemma of huge numbers of Vietnamese asylum seekers living indefinitely in camps of first asylum, the United Nations convened an international conference in Geneva in June 1989 to search for a solution to the renewed outpouring of asylum seekers from Vietnam.\textsuperscript{38} Sixty countries, including part of its pushback policy, had deliberately rammed and fired on boats of Vietnamese asylum seekers).  

\textsuperscript{37.} See Mann, \textit{supra} note 5, at A14 (explaining that members of Association of Southeast Asian Nations (ASEAN), including Malaysia, Indonesia, Philippines, Thailand, Singapore, and Brunei, agreed that in order to safeguard national security, they would refuse to accept new asylum seekers and would force those already present in ASEAN countries to return to Vietnam and Cambodia unless ASEAN countries received help from United States). Because of this pressure from ASEAN, the United States has acquiesced, for the first time, in the return to Vietnam of persons who "do not object" to repatriation. \textit{Id.} Unfortunately, however, once first asylum governments determine that particular asylum seekers' motivation for emigrating is economic rather than political, the governments are more and more inclined to forcibly repatriate those people. See, e.g., \textit{INHUMAN DETERRENCE}, \textit{supra} note 3, at 20 (commenting that Hong Kong explicitly warns migrants that those found to be economic refugees will be forcibly returned to Vietnam and will not be resettled in Hong Kong). Such a policy is currently being executed by Hong Kong and the United Kingdom with regard to screened-out Vietnamese asylum seekers. See Paul Lewis, \textit{U.S. Pressed To Pay for Boat People in Hong Kong, N.Y. TIMES, Mar. 11, 1990, § 1, at 8} (discussing proposal by United Kingdom to forcibly repatriate Vietnamese asylum seekers residing in Hong Kong who do not qualify as refugees under international law, and noting that United Kingdom intends to implement plan, even without international endorsement, once arrangements are completed with Vietnam, including provisions for monitoring of returned refugees by international agencies); see also \textit{Boat People; Pushed Too Far, ECONOMIST, June 23, 1990, at 32} (commenting that first asylum countries in Southeast Asia want to send Vietnamese asylum seekers back to Vietnam against their will, despite objections from Vietnam and United States). Forced repatriation thus far has taken place on a sporadic basis, however. See William Stewart, \textit{Dashing Their Dreams; Britain Begins the Forced Repatriation of the Boat People, TIME, Dec. 25, 1989, at 26} (detailing forced repatriation of 51 asylum seekers and noting that United Kingdom paid Vietnam $620 for each returning boat person in exchange for promise that returnees would not be persecuted in their native land). In response to this incident, White House spokesman Marlin Fitzwater denounced repatriation as "unacceptable until conditions in Vietnam improve[,]" while the United Kingdom's Labour Party leader, Neil Kinnock, characterized the repatriation as a "shameful episode." \textit{Id.}  

\textsuperscript{38.} See Le Xuan Khoa, \textit{Forced Repatriation of Asylum-Seekers: The Case of Hong Kong, 2 INT'L J. REFUGEE LAW 137, 137-38 (1990)} (explaining that U.N. conference materialized in direct response to growing refugee crisis in Southeast Asia). This conference was the second conference convened by the international community to address refugee flows from Southeast Asia and, in particular, from Vietnam. The United Nations High Commissioner for Refugees (UNHCR) convened the first conference in Geneva on July 20, 1979, to address the plight of 200,000 asylum seekers who had fled Vietnam and arrived in countries of first asylum during 1979. \textit{JANELLE M. DILLER, INDOCHINA RESOURCE ACTION CTR., IN SEARCH OF ASYLUM: VIETNAMESE BOAT PEOPLE IN HONG KONG 9-10 (1988).} At the meeting, representatives of the 65 countries present agreed that resettlement countries such as the United States, Australia, France, Canada, and the United Kingdom would increase the numbers of refugees they would resettle in exchange for a promise on the part of ASEAN and Hong Kong to provide temporary refuge or "first asylum" to refugees arriving at their borders. \textit{Id.} at 10. Vietnam, for its part, agreed to make "every effort to stop illegal departures . . . for a reasonable period of time" and to implement an "Orderly Departure Program," or "ODP." \textit{Id.} ODP allows for the orderly and safe emigration of refugees based on grounds of family unification and other
ing the United Kingdom, the United States, and Vietnam,\textsuperscript{39} agreed during the conference to implement a "Comprehensive Plan of Action" in order to stem the flow of asylum seekers and preserve the principle of first asylum. The plan called for an end to push offs,\textsuperscript{40} allowed for the implementation of systematic screening procedures\textsuperscript{41} by countries of first asylum as a means to determine whether asylum seekers met the legal requirements of refugee status, and produced a renewed commitment on the part of resettlement countries to ensure that persons "screened in" would continue to be resettled.\textsuperscript{42} The plan was ambiguous with respect to persons "screened out," or deemed to be economic migrants,\textsuperscript{43} stating only

humanitarian concerns. \textit{Id.} at 11. In the decade ending January 1990, over 130,000 Vietnamese entered the United States by virtue of the ODP program. 1991 \textit{WORLD REFUGEE SURVEY}, \textit{supra} note 1, at 67.

39. \textit{See Action Plan Set at 60-Nation Parley, FACTS ON FILE, WORLD NEWS DIGEST}, June 23, 1989, at 453, A3 (asserting that primary goal of conference's Comprehensive Plan of Action (CPA) was to stop flow of refugees fleeing from Vietnam to Hong Kong and other Southeast Asian countries).

40. \textit{See STAFF OF SENATE SUBCOMM. ON IMMIGRATION AND REFUGEE AFFAIRS, 101ST CONG., 1ST SESS., INTERNATIONAL CONFERENCE ON INDO-CHINESE REFUGEES 1-2} (Comm. Print 1989) (commenting that CPA called for all asylum seekers to be granted temporary asylum and not be sent back to Vietnam before screening); \textit{Indefinite Detention, supra} note 7, at 3 (stating that CPA reaffirmed principle of first asylum, which calls for grant of temporary asylum and termination of push-offs).

41. \textit{See Goodwin-Gill, supra} note 9, at 20 (observing that design and implementation of procedures for determining refugee status within context of 1951 Convention and 1967 Protocol are left to individual nations); \textit{see also} \textit{AMNESTY INT'L, MEMORANDUM TO THE GOVERNMENTS OF HONG KONG AND THE UNITED KINGDOM REGARDING THE PROTECTION OF VIETNAMESE ASYLUM SEEKERS IN HONG KONG 6} (1990) [hereinafter MEMORANDUM] (stating that screening system must identify all individuals who would be subject to human rights violations if returned to Vietnam and must grant them refugee status); \textit{id.} at 5 (noting Hong Kong's agreement to apply "appropriate humanitarian criteria for determining refugee status" and to follow criteria of \textit{U.N. Handbook} when screening asylum seekers for determination of refugee status); \textit{DILLER, supra} note 38, at 19 (establishing that UNHCR agreed to monitor screening processes and to arrange for procurement of legal advice for those appealing screening determinations); \textit{INHUMAN DETERRENCE, supra} note 3, at 20 (stating that screening procedures of Hong Kong must comply with 1951 Convention, 1967 Protocol, and \textit{U.N. Handbook}; \textit{Indefinite Detention, supra} note 7, at 6 (outlining Hong Kong's screening procedures for determining refugee status).

42. \textit{See Henry Kamm, Britain and Vietnam Still at Odds on Refugees, N.Y. TIMES, June 15, 1989}, at A19 (reporting that CPA received unanimous approval from participating countries, established requirements for screening boat people, and endorsed voluntary repatriation for those who failed screening processes); \textit{see also} \textit{DILLER, supra} note 38, at 15 (noting that June 16, 1988, was last day that persons arriving in Hong Kong would automatically be granted refugee status); Diana D. Bui, \textit{Hong Kong: The Other Story: The Situation of Women and Children in Hong Kong's Detention Centres}, \textit{INDOCHINA RESOURCE ACTION CENTER}, MAR. 1990, at 1 n.1 (explaining that refugee status is conferred on asylum seekers in Hong Kong either by virtue of their arrival in colony prior to June 16, 1988 refugee “cut-off” date or by way of screening process).

43. \textit{See Boat People; Pushed Too Far, supra} note 37, at 32 (commenting that execution of CPA did not end emigration from Vietnam and did not resolve dilemma of thousands of Vietnamese asylum seekers who maintain that they are legitimate refugees and not merely "economic migrants" and therefore refuse to go home); \textit{Kamm, supra} note 42, at A19 (pointing out that CPA did not answer crucial question regarding disposition of persons likely to be refused refugee status yet unwilling to return to their homelands).
that screened-out persons would be returned to Vietnam "in accordance with international practices." The plan did, however, endorse the voluntary repatriation of asylum seekers wishing to return to Vietnam.

After the conference, however, there was disagreement among various competing parties regarding the fate of screened-out asylum seekers. Hong Kong, the United Kingdom, and the Association of Southeast Asian Nations argued that the meeting sanctioned, at least in principle, the forced repatriation of screened-out asylum seekers. The United States rejected the notion that such a consensus was reached and remained strongly opposed to forcibly returning any Vietnamese asylum seekers until conditions in Vietnam improve. Despite the objections by the United States, Hong Kong proceeded to carry out forced repatriations of screened-out asylum seekers, at least on a sporadic basis.

B. Forced Repatriation

The first forced repatriation of screened-out asylum seekers involved fifty-one persons returned to Vietnam in December 1989. As part of an agreement with Vietnam, the United Kingdom paid Vietnam $620 for each boat person Vietnam would accept from the Hong Kong camps. These acts of forcible repatriation received sharp criticism from around the world, particularly from the United

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44. Khoa, supra note 38, at 139 (quoting Comprehensive Plan of Action, 1 IJRL 574 (1989)).
45. See Kamm, supra note 42, at A19 (reporting that CPA endorsed voluntary repatriation for screened-out asylum seekers); see also Khoa, supra note 38, at 139 (observing that although CPA officially endorsed voluntary repatriation, vague wording of endorsement allowed countries dissatisfied with progress of voluntary repatriation to resort to forcible repatriation).
46. See Mann, supra note 5, at A14 (explaining that ASEAN includes countries of Malaysia, Indonesia, Philippines, Thailand, Singapore, and Brunei).
47. See Mann, supra note 5, at A14 (observing that governments of Asian nations and United Kingdom are annoyed with refusal of United States to accept principle that boat people should be returned to Vietnam and Cambodia and noting that members of ASEAN have adopted resolution condemning United States for its refusal).
48. See Lafontant, supra note 15 (indicating that United States objects to forced repatriation of refugees to repressive countries such as Vietnam); Mann, supra note 5, at A14 (noting that Bush administration opposes forced repatriation of Vietnamese boat people).
49. See infra notes 50, 53 and accompanying text (describing forcible repatriations of Vietnamese from Hong Kong).
50. See Stewart, supra note 37, at 26 (noting that on December 12, 1989, 51 Vietnamese boat people, including 17 women and 26 children, were rounded up at 3:00 a.m., loaded into trucks, taken to Kai Tak Airport, and put aboard plane to Hanoi, Vietnam); see also Sheila Rule, Hong Kong and Britain Faulted on Boat People, N.Y. Times, Jan. 16, 1990, at A3 (observing that during forced repatriation on December 12, 1989, Hong Kong officers utilized physical force, including partial strangulation, kicks, and beatings, to subdue asylum seekers so that they would board trucks and planes).
51. See Stewart, supra note 37, at 26 (noting that money paid was in exchange for promise that returnees would not be persecuted).
Despite the outcry, however, the repatriations continued. In November of 1991, pursuant to another agreement between Vietnam and Hong Kong's British Government, fifty-nine Vietnamese, including sixteen women and twenty-three children, were forcibly repatriated to Vietnam. This group consisted of "double-backers," or persons who had previously accepted cash incentive payments and volunteered to return to Vietnam only to again return to Hong Kong. Furthermore, two additional agreements signed in November of 1991 provided each asylum seeker who voluntarily returned to Vietnam $410 to help in his or her reintegration into Vietnamese society, and noting that payments have recently been reduced because they became incentive for citizens to leave Vietnam and "voluntarily" return; see also At the Heart of Vietnam: Old Dogma and New Possibility, L.A. Times, Oct. 24, 1991, at B6 (noting that Vietnam's per capita income is less than $200 per year, which is less than half of $410 that UNHCR pays to asylum seekers who voluntarily return to Vietnam from Hong Kong); Courtney, supra note 28, at A1 (explaining that double-backers are persons who left Hong Kong once and returned again to receive money incentive to leave for Vietnam).

The United States is receiving criticism because of a perceived double standard regarding the forced repatriation of Haitian asylum seekers who have sought refuge in the United States. See, e.g., Lawyers Comm. for Human Rights, Refugee Repoulement: The Forced Return of Haitians Under the U.S.-Haitian Interdiction Agreement 7 (1990) [hereinafter Refugee Repoulement] (concluding that screening procedures used by United States are inadequate to evaluate asylum claims of Haitians and as a result, Haitians' forced return to their native land violates principles of international law); Britain, Vietnam to Hold Talks on More Repatriations, Agence France Presse, Nov. 19, 1991, available in LEXIS, Nexis Library, Wires File (reporting that UNHCR provided each asylum seeker who voluntarily returned to Vietnam $410 to help in his or her reintegration into Vietnamese society, and noting that payments have recently been reduced because they became incentive for citizens to leave Vietnam and "voluntarily" return); see also The Heart of Vietnam: Old Dogma and New Possibility, L.A. Times, Oct. 24, 1991, at B6 (noting that Vietnam's per capita income is less than $200 per year, which is less than half of $410 that UNHCR pays to asylum seekers who voluntarily return to Vietnam from Hong Kong); Courtney, supra note 28, at A1 (explaining that double-backers are persons who left Hong Kong once and returned again to receive money incentive to leave for Vietnam).

The issue of forced repatriation of Haitians has sparked disagreement among courts in the United States. See Al Kamen, Lawyers Comm. for Human Rights, Refugee Repoulement: The Forced Return of Haitians Under the U.S.-Haitian Interdiction Agreement 7 (1990) [hereinafter Refugee Repoulement] (concluding that screening procedures used by United States are inadequate to evaluate asylum claims of Haitians and as a result, Haitians' forced return to their native land violates principles of international law); Britain, Vietnam to Hold Talks on More Repatriations, Agence France Presse, Nov. 19, 1991, available in LEXIS, Nexis Library, Wires File (reporting that UNHCR provided each asylum seeker who voluntarily returned to Vietnam $410 to help in his or her reintegration into Vietnamese society, and noting that payments have recently been reduced because they became incentive for citizens to leave Vietnam and "voluntarily" return); see also At the Heart of Vietnam: Old Dogma and New Possibility, L.A. Times, Oct. 24, 1991, at B6 (noting that Vietnam's per capita income is less than $200 per year, which is less than half of $410 that UNHCR pays to asylum seekers who voluntarily return to Vietnam from Hong Kong); Courtney, supra note 28, at A1 (explaining that double-backers are persons who left Hong Kong once and returned again to receive money incentive to leave for Vietnam).

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by Vietnam and Hong Kong provide for the repatriation of all asylum seekers whose claims for refugee status are rejected. Hong Kong plans to continue the policy of forcibly repatriating to Vietnam all screened-out asylum seekers, who comprise the majority of the 60,000 or so Vietnamese residing in Hong Kong.

II. PRINCIPLE OF NON-REFOULEMENT


three ruling of Supreme Court on emergency petition filed by Bush administration; see also High Court: U.S. Can Ship Out Haitians, Chi. Trib., Feb. 2, 1992, at C22 (explaining that Supreme Court ruling provides Bush administration legal authority to begin repatriating Haitians while repatriation issue is being argued before U.S. Court of Appeals for Eleventh Circuit in Atlanta). The Haitian controversy has focused international attention on the issue of forced repatriation. See Refugees from Haiti, supra, at 33 (commenting that UNHCR has criticized U.S. policy of forced repatriation of Haitian asylum seekers, and noting that Venezuela, Honduras, Belize, and Trinidad and Tobago have been willing to accept some Haitian asylum seekers).

56. On October 29, 1991, Hong Kong and Vietnam signed an agreement providing for the repatriation of all screened-out Vietnamese who arrived in Hong Kong on or after that date. Refugees at Risk, supra note 53, at 1 n.2. On May 12, 1992, these nations concluded a final agreement with the United Kingdom providing for the repatriation of all screened-out asylum seekers taking refuge in Hong Kong prior to October 29, 1991 as well. Id.

57. See Memorandum, supra note 41, at 1 (reporting that Hong Kong's Government plans to forcibly return asylum seekers that are screened out); Stewart, supra note 37, at 26 (indicating that United Kingdom announced that mass forced repatriations of Vietnamese boat people will transpire); Lewis, supra note 37, § 1, at 8 (commenting that United Kingdom will proceed with plan to forcibly repatriate boat people despite lack of international approval).

58. See 1951 Convention, supra note 4, art. 3-34, at 6264-76 (addressing issues relating to refugees, such as discrimination, continuity of residence, access to courts, employment, and expulsion, in effort to increase and guarantee protection of refugees); see also 1991 World Refugee Survey, supra note 1, at 31 (noting that signatories to 1951 Convention and 1967 Protocol include: Algeria, Angola, Argentina, Australia, Austria, Belgium, Belize, Benin, Bolivia, Botswana, Burkina Faso, Burundi, Brazil, Cameroon, Central African Republic, Chad, Chile, China, Colombia, Congo, Costa Rica, Cyprus, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Ethiopia, Fiji, Finland, France, Gabon, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Haiti, Hungary, Iceland, Iran, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Kenya, Lesotho, Liberia, Luxembourg, Malawi, Mali, Malta, Mauritania, Morocco, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Portugal, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, Spain, Sudan, Suriname, Sweden, Tanzania, Togo, Tunisia, Turkey, Tuvalu, Uganda, United Kingdom, Uruguay, Yemen, Yugoslavia, Zaïre, Zambia, and Zimbabwe; that nonmembers of United Nations who have signed include Vatican, Liechtenstein, and Switzerland; and that signatories to Convention and not Protocol include Madagascar, Monaco, Mozambique, Samoa, and Western Samoa).

59. See 1967 Protocol, supra note 4, arts. I-II, 19 U.S.T. at 6225-26, 606 U.N.T.S. at 268-70 (amending 1951 Convention to include persons who become refugees as result of events occurring after January 1, 1951); see also 1991 World Refugee Survey, supra note 1, at 31 (listing Canada, Cape Verde, Swaziland, United States, and Venezuela as countries that are signatories to Protocol only and not to 1951 Convention).
Refugees Status (U.N. Handbook), published by the Office of the United Nations High Commissioner for Refugees (UNHCR), is considered the authoritative document interpreting the 1951 Convention and 1967 Protocol. The most important articles contained in these documents are those related to refoulement, or the involuntary repatriation of refugees.

Article 33(1) of the 1951 Convention asserts that "[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where [the refugee's] life or freedom would be threatened." This doctrine of non-refoulement does not prohibit a nation from expelling a refugee from its territory, but rather forbids the refoulement or return of a refugee to any country or territory where the refugee's life or freedom would be endangered.

The principle of non-refoulement applies to Hong Kong, even though Hong Kong is not bound as a signatory to the 1951 Convention or the 1967 Protocol, because non-refoulement is a customary norm of international law. Norms of international law evolve as
the result of general and consistent practices followed by states out of a sense of legal obligation. All states, unless they persistently object to a norm of customary law during its formation, are bound by such norms. Hong Kong, as a member of the international community that has not persistently opposed the norm of non-refoulement, is obligated to observe the principle. Additionally, Hong Kong explicitly agreed in the context of the Comprehensive Plan of Action to conduct its policy regarding Vietnamese asylum seekers under principles embodied in the 1951 Convention, the 1967 Protocol, and the U.N. Handbook.

Hong Kong has not taken the position that it is not bound under international law to respect the principle of non-refoulement. Rather, Hong Kong argues that because non-refoulement applies only to persons who meet the legal definition of "refugee," persons
deemed to be economic migrants are not entitled to such protection. Thus, Hong Kong contends that returning to Vietnam screened-out asylum seekers, those determined to be economic migrants, does not constitute *refoulement* and is not a violation of international law.

**A. Screening by Hong Kong**

Before June of 1988, all Vietnamese boat people who fled to Hong Kong were automatically presumed to meet the legal requirements for recognition as a refugee. As a result, these “refugees” became protected under international law from *refoulement* to Vietnam and were eligible for resettlement in third countries. On June 15, 1988, however, in response to dramatic increases in boat arrivals, Hong Kong officials began to screen asylum seekers on a case-by-case basis to determine whether they should be recognized, under international law, as “refugees.”

In the screening interviews of asylum applicants, Hong Kong examiners ask questions focusing primarily on the applicant’s motive.

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74. See *Adrift on a Sea of Principle*, *Economist*, Jan. 20, 1990, at 35 (reporting Hong Kong’s policy of separating economic migrants to be returned to Vietnam from genuine refugees who are entitled to asylum); Dan Thomas, *Lawyers Attack Hong Kong’s System for Screening Asylum Seekers*, Reuter Libr. Rep., Dec. 10, 1991, available in LEXIS, Nexis Library, Wires File (indicating that Hong Kong defends its policy of returning economic emigres on grounds that such emigres do not suffer politically based persecution and thus are ineligible for resettlement). *See generally U.N. Handbook*, supra note 8, para. 62 (establishing that persons leaving their homelands for economic reasons are considered economic migrants and not refugees).

75. See Denise Young, *H.K to Resume Forced Deportation of Vietnamese*, Reuter Libr. Rep., May 12, 1999, available in LEXIS, Nexis Library, Wires File (reporting Hong Kong’s practice of returning economic migrants to Vietnam as permitted by 1989 Geneva International agreement stipulating that those not meeting refugee criteria must be returned home); *see also* Dan Thomas, *Hong Kong Deports 28 More Vietnamese Boat People*, Reuter Libr. Rep., Dec. 10, 1991, available in LEXIS, Nexis Library, Wires Files (discussing intention by Hong Kong Government to continue forcible return of asylum seekers who do not qualify as refugees). *See INHUMANE DETERRENCE*, supra note 3, at 3 (stating that asylum seekers who arrived in Hong Kong between July 2, 1982 and June 15, 1988 were presumed to be refugees, while those arriving on or after June 16, 1988 are considered illegal immigrants who must be individually screened to determine refugee status); *see also Diller*, supra note 38, at 15 (noting that as of June 16, 1988, asylum seekers would not be considered refugees until determined to be so by individualized screening process); *Still They Come*, *Economist*, May 6, 1989, at 36 (reporting that Hong Kong’s legislature decreed that asylum seekers arriving later than June 15, 1988 are no longer presumed political refugees but must undergo screening to determine their status).

76. *See Memorandum*, supra note 41, at 5.

77. *See Memorandum*, supra note 41, at 13 (describing procedure by which asylum seekers initially screened out can become “mandate refugees,” persons deemed by UNHCR to fit 1951 Convention definition of “refugee,” and thus avoid forced repatriation by Hong Kong Government); 1991 *World Refugee Survey*, supra note 1, at 62 (reporting that between June 1988 and December 1990, Hong Kong authorities screened in 3800 Vietnamese as “refugees” and screened out 14,100 as economic migrants, who immediately became subject to repatriation to Vietnam); id. (noting existence of 20% screening approval rate after appeal process). *See generally supra* note 4 and accompanying text (providing international legal definition of “refugee”).
for departing Vietnam. The examiners are most interested in assessing whether the applicant was persecuted in the past by the Vietnamese Government for reasons described in the 1951 Convention.\textsuperscript{79} Toward this end, examiners inquire into prior military service, the cultural, geographic, and political background of the applicant and family members, involvement in political organizations or resistance groups, religious activities, and any other evidence that indicates past persecution by Vietnamese Government officials.\textsuperscript{80} If the applicant can establish a motive for leaving based on persecution, such as governmental denial of employment, education, or a business license, forced relocation to a "New Economic Zone,"\textsuperscript{81} internment in a re-education camp, prison, or torture, and if the applicant shows that such persecution took place because of the applicant’s race, religion, political opinion, social group, or nationality, then there is a chance that the applicant will be recognized as a refugee.\textsuperscript{82} If past persecution cannot be established, however, the examiner will conclude almost invariably that the asylum seeker’s flight was motivated by economic considerations.\textsuperscript{83} Where economic betterment motivates an applicant’s departure, the applicant is classified by Hong Kong as an economic migrant and refugee status is denied.\textsuperscript{84}

\textsuperscript{79} See Diller, supra note 38, app. D (reproducing interview form and questions asked during screening interviews; questions relate almost exclusively to activities within Vietnam of applicant and applicant's family members).

\textsuperscript{80} See Diller, supra note 38, app. D (presenting questions asked during screening); see also Memorandum, supra note 41, at 8 (noting that interview format allows for interviewee's input as to "any other points not covered" by standardized questions focusing on activities in Vietnam, which may allow asylum seeker limited opportunity to discuss activities engaged in since departure from Vietnam).

\textsuperscript{81} See Diller, supra note 38, at 9 (defining New Economic Zone as government-created agricultural zone where former property owners whose property has been confiscated by government are relocated to work).

\textsuperscript{82} See U.N. Handbook, supra note 8, para. 45 (discussing presumption of well-founded fear of persecution based on either actual past persecution or on perceived threat of persecution); Stenberg, supra note 6, at 67 (explaining that previous persecution of individual combined with individual's membership in group that is subject to persecution establish definitive ground for well-founded fear of persecution, and noting that showing of risk of persecution can also be sufficient to establish well-founded fear). See generally Amnesty Int'l, Country Dossiers, Vietnam: Renovation (Doi Moi), The Law and Human Rights in the 1980s 2-24 (1990) (hereinafter Vietnam: "Renovation") (describing various forms of persecution that exist in Vietnam and evaluating recent legal reforms and government policies that address persecution); Diller, supra note 38, at 9 (discussing use of re-education camps and New Economic Zones by Vietnamese Government); U.S. Dep't of State, Country Report on Human Rights Practices for 1987—Vietnam 828 (1987) (discussing persecution of Vietnamese citizens, including political, economic, and cultural repression).

\textsuperscript{83} Cf. Indefinite Detention, supra note 7, at 7 (reporting persistent complaint that interviewers approach asylum seekers with presumption that applicants are economic migrants, contravening UNHCR guidelines that require giving asylum seekers benefit of doubt where applicant's statements are difficult to substantiate).

\textsuperscript{84} See Indefinite Detention, supra note 7, at 7 (distinguishing refugees from economic mi-
Unfortunately, this analysis ignores the fact that many individuals or subgroups of asylum seekers, having initially departed Vietnam for economic reasons, may become political refugees during their absence from Vietnam. People fitting this description are known as "refugees sur place," or people whose technical refugee status arises while they are away from their country of origin as a result of circumstances often different from those initially triggering emigration. The U.N. Handbook, interpreting the 1951 Convention and the 1967 Protocol, mandates that recognition under a refugee sur place theory be fully considered. Because Hong Kong immigration practice disregards this factor in most cases, the determination of refugee status under the policy represents an overly narrow application of the definition of "refugee" under the 1951 Convention and 1967 Protocol. Critics of forced repatriation argue that because of this substantial flaw in Hong Kong's screening process, many refugees and defining economic migrant as person who flees his or her homeland not in response to persecution but as result of economic considerations.

85. See U.N. HANDBOOK, supra note 8, paras. 94-96 (maintaining that person not initially classified as refugee may become refugee when circumstances arise that present possibility of persecution upon return, either because of person's actions outside homeland or because of changes in political landscape of homeland); Daniel Wolf & Shep Lowman, The Boat People Still Deserve Our Help; Hong Kong's "Screening" of Vietnamese Refugees Is a Farce, WASH. POST, Dec. 26, 1989, at A23 (positing that even if Hong Kong's screening process successfully identified refugees, it should not be assumed that economic migrants can be safely returned to Vietnam, as concern is not whether particular individual had good reason to leave but whether, because of events since leaving Vietnam that give rise to potential for persecution, there is good reason for individual to fear persecution upon return); see also Indefinite Detention, supra note 7, at 12-13 (discussing case of Toan, 16-year-old boy who was denied refugee status despite leaving Vietnam because of persecution resulting from his father's history of working for American companies and U.S. Air Force). Toan's case became widely publicized when he was denied refugee status in Hong Kong. Indefinite Duration, supra note 7, at 13. As a result, government officials in Toan's hometown who previously did not know about his family background would probably have learned about it through the media. Id. Therefore, Toan arguably falls within the refugee provisions in paragraphs 94-96 of the U.N. Handbook.

86. U.N. HANDBOOK, supra note 8, para. 94.

87. See U.N. HANDBOOK, supra note 8, para. 96 (mandating thorough consideration of circumstances to determine whether person has attained sur place refugee status); see also Statement of an Understanding Reached Between the Hong Kong Government and UNHCR Concerning the Treatment of Asylum Seekers Arriving from Vietnam in Hong Kong (Sept. 20, 1988), reprinted in DILLER, supra note 38, app. B (hereinafter Statement of Understanding) (noting Hong Kong Government's agreement to apply humanitarian standards in assessing refugee status in accordance with UNHCR, 1951 Convention, and 1967 Protocol guidelines).

88. See Indefinite Detention, supra note 7, at 2 (reporting Hong Kong Government's failure to protect from refoulement Vietnamese who qualify for refugee status because of circumstances arising during absence from Vietnam). But see supra note 87 and accompanying text (indicating Hong Kong Government's agreement to assess refugee status according to international guidelines).

89. See Indefinite Detention, supra note 7, at 7 (stating that Hong Kong's screening process has been attacked by human rights advocates since its inception and that Hong Kong follows neither letter nor spirit of international law); see also INHUMANE DETERRENCE, supra note 3, at 21-26 (discussing Hong Kong's screening process and practice by UNHCR officials of monitoring screening interviews and estimating that such monitoring occurs only 20% of time). A Lawyers Committee for Human Rights report cites "general attitude and bias" as another
gees may be erroneously denied refugee status and subjected to forcible repatriation to Vietnam. Such a result places people at high risk of being persecuted in Vietnam, and consequently, critics assert that the misclassification and return of asylum seekers violates the norm of non-refoulement.

B. Sur Place Refugee Status

According to the U.N. Handbook, an asylum seeker may qualify as a refugee even if his or her initial motivation for leaving is not a well-founded fear of persecution. The critical question is whether there is a risk of persecution if a person is repatriated. While the fact that an applicant for asylum has previously experienced persecution lends greater credibility to a claim of fear of future persecution, past persecution is not a prerequisite for obtaining refugee status under international law. The United Nations, Hong Kong, and the international community, under the 1951 Convention and the 1967 Protocol, have an obligation to ensure that claims of sur place refugee status are thoroughly considered before forcible repatriation.

fundamental problem among immigration examiners in Hong Kong. INHUMANE DETERRENCE, supra note 3, at 22. Other criticisms include (1) the use of immigration enforcement officers as examiners, because these officers lack experience in applying refugee criteria under the 1951 Convention and the 1967 Protocol; (2) an "unimaginative" approach regarding the questionnaire used to categorize asylum seekers; and (3) a flawed questionnaire that focuses more on irrelevant information and less on fundamental questions concerning reasons for flight and fear of persecution. See MEMORANDUM, supra note 41, at 6 (discussing requirement for impartial and effective screening process to adequately protect refugees according to international standards and arguing that Hong Kong fails to meet such standards by mistakenly classifying actual refugees as economic migrants).

91. See MEMORANDUM, supra note 41, at 25 (expressing concern that miscategorized actual refugees will be forcibly returned to Vietnam where they face potential human rights abuses).

92. See DILLER, supra note 38, at 67 (asserting that duty of non-refoulement is not upheld by Hong Kong because of shortcomings in screening process); Indefinite Detention, supra note 7, at 8 (stating that because of apparent egregious errors caused by screening process, refoulement of refugees is likely); INHUMANE DETERRENCE, supra note 3, at 29 (indicating that despite changes in screening process made pursuant to agreement between Hong Kong Government and UNHCR, Hong Kong's screening procedures do not conform to UNHCR standards).

93. See U.N. HANDBOOK, supra note 8, para. 94.

94. See U.N. HANDBOOK, supra note 8, para. 96 (indicating importance of determining, for purpose of gauging risk of persecution upon repatriation, way in which refugee is perceived and treated by governmental authorities in country of origin); see also STENBERG, supra note 6, at 64 (suggesting that conditions in applicant's home country that may give rise to risk of retaliation against returning asylum seeker for actions while away from home country are crucial to determining refugee status).

95. See STENBERG, supra note 6, at 64 (observing that proof of past persecution may give rise to presumption of well-founded fear).

96. See U.N. HANDBOOK, supra note 8, para. 45 (stating that fear of persecution can be based on perceived future possibility of persecution as well as past actual persecution); see also STENBERG, supra note 6, at 64 (asserting that asylum seeker's lack of showing of persecution experienced in native land does not preclude possibility that person is refugee).
triation of Vietnamese asylum seekers occurs. 97

Many countries, including France, Germany, and the United States, currently recognize and extend protection to sur place refugees. 98 Sur place refugee status has been recognized in the asylum claims of diplomats, prisoners of war, students, and migrant workers. 99 The following two cases, decided in the United States, illustrate successful sur place refugee claims and are useful in understanding how sur place refugee criteria might be applied in the context of Vietnamese asylum seekers in Hong Kong.

In Matter of Mogharrabi, 100 the decision of the Board of Immigration Appeals granting an Iranian student asylum in the United States illustrates a court’s recognition of a sur place refugee claim. In 1981, Mogharrabi, an Iranian student, went with a friend to the Iranian Interests Section of the Algerian Embassy in the United States. 101 Mogharrabi sought to document his continuing status as a student so that he could continue to obtain funds from relatives overseas. 102 At the Embassy, Mogharrabi and his friend had a political disagreement with the student-employee who was helping them. 103 The altercation ended with the student-employee telling Mogharrabi’s friend that he and “his kind had better keep their eyes and ears open because ‘their day’ would come soon.” 104 Mogharrabi’s friend responded by insulting the employee, 105 the employee drew a gun, and Mogharrabi and his friend fled the Embassy. 106

The court held that a reasonable person in Mogharrabi’s circum-

97. See U.N. HANDBOOK, supra note 8, para. 96 (mandating careful investigation into possibility of attainment of sur place refugee status prior to sending asylum seeker home against his or her will); see also Statement of Understanding, supra note 87, app. B (indicating Hong Kong Government’s agreement to follow UNHCR guidelines for determination of refugee status as set out in U.N. Handbook interpreting 1951 Convention and 1967 Protocol).

98. See Refugees at Risk, supra note 53, at 2 (stating that recognition and protection of refugees sur place is codified in statutes of many countries, including France, Germany, and United States).

99. U.N. HANDBOOK, supra note 8, para. 95.


102. Id.

103. Id. at 447-48. At the Embassy, Mogharrabi presented the student-employee with a photocopy of his passport and arrival/departure record to facilitate the documentation of his status. Id. at 448. The student-employee informed Mogharrabi that the originals of his documents were necessary because students without originals were assumed to have submitted them to the INS pursuant to political asylum claims. Id. Mogharrabi’s friend consequently asked to see the student-employee’s supervisor. Id. When the supervisor appeared, a fight broke out between Mogharrabi’s friend and the student-employee, who grabbed the friend around the neck. Id.

104. Id.

105. Id. Mogharrabi’s friend replied that the student-employee and “his kind had robbed Iran of all that was worth living for and that they were nothing more than religious fascists stuffing their pockets with the nation’s wealth.” Id.

106. Id.
stances would fear persecution stemming from this incident if he or she were returned to Iran.\textsuperscript{107} Noting that Mogharrabi's account of why he feared persecution based on his political opinions was "plausible, detailed, and coherent,"\textsuperscript{108} the court concluded that Mogharrabi had met his burden of showing a well-founded fear of persecution if returned to Iran.\textsuperscript{109} Mogharrabi, however, did not flee Iran because of a well-founded fear of persecution arising from events transpiring in that country; instead, he feared return to Iran because of a risk of persecution that arose during his absence. The court did not require that Mogharrabi demonstrate past persecution or otherwise show that he fled Iran because of a well-founded fear of persecution.\textsuperscript{110} Instead, the court focused on the applicant's present subjective fear of persecution and whether such a fear was reasonable in light of the objective circumstances.\textsuperscript{111}

Similarly, the judicial recognition of refugee status of two Chinese students who were studying overseas during the Tiananmen Square massacre provides an example of recognition of a \textit{sur place} refugee claim. On June third and fourth of 1989, Chinese troops opened fire on pro-democracy student demonstrators in Tiananmen Square in Beijing, China.\textsuperscript{112} The massacre shocked the international community and enraged many of the thousands of Chinese students studying in the United States and elsewhere around the world.\textsuperscript{113} Consequently, there were protests, demonstrations, and rallies by Chinese students throughout the United States and the world.\textsuperscript{114}

Two Chinese students in particular, Luo Jian Guang and Hoy Yu Yi, joined a rally that lasted for two days outside the Chinese Embassy in Tokyo, Japan, during which time the students signed their

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\textsuperscript{107} Id.

\textsuperscript{108} Id. A finding that a "reasonable" person would fear return to Iran indicates that Mogharrabi's subjective fear was supported by objective circumstances.

\textsuperscript{109} Id. at 448-49.

\textsuperscript{110} Id.

\textsuperscript{111} Id.


\textsuperscript{113} See, e.g., Fox Butterfield, \textit{Crackdown in Beijing; For Students in U.S., Grief and Fury}, \textit{N.Y. TIMES}, June 5, 1989, at A11 (describing demonstrations and protests and virulent expressions of outrage organized or exhibited by Chinese students in United States in response to massacre); Robert D. McFadden, \textit{The West Condemns the Crackdown}, \textit{N.Y. TIMES}, June 5, 1989, at A12 (discussing criticisms by many Western nations of Tiananmen Square massacre).

\textsuperscript{114} See Sandra G. Boodman, \textit{In the U.S., Tears and Defiance; 2,500 Rally Here at Chinese Embassy}, \textit{WASH. POST}, June 5, 1989, at A21 (describing Chinese students' angry reactions throughout United States to killings in Beijing); see also \textit{The West Condemns the Crackdown}, supra note 115, at A12 (reporting global extent of anguished demonstrations condemning massacre).
names to a petition protesting the massacre. The petition was later delivered to Chinese officials. Additionally, Chinese officials photographed the demonstration, and the students received anonymous threatening phone calls after the rally. With the help of students in Hong Kong, Guang and Yi were able to flee from Japan to the United States, where they applied for political asylum. The immigration judge ruling on their applications held that, as members of the pro-democracy foreign student movement, Guang and Yi had a well-founded fear of persecution if returned to China. Like the Iranian student in Mogharrabi, the Chinese students' well-founded fears of persecution did not exist at or before the time they left China, but arose as a result of their membership in a particular social group and expression of their political opinions during their absence from China.

III. THE NEED TO RECOGNIZE SUR PLACE REFUGEE CLAIMS IN THE CONTEXT OF VIETNAMESE ASYLUM SEEKERS

In order to comply with international refugee law as articulated in the 1951 Convention, the 1967 Protocol, and interpreted by the U.N. Handbook, Hong Kong must fully consider sur place refugee claims of Vietnamese asylum applicants. To qualify for sur place refugee status, Vietnamese asylum seekers must meet the requirements set out in the 1951 Convention and the 1967 Protocol. The Convention and Protocol mandate that a person be outside of the person's country of nationality and, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion, be unwilling or unable to return to the person's country. While it is unlikely that most Vietnamese asylum seekers in Hong Kong can qualify as refu-

116. Id.
117. Id.
119. See Chinese Dissident Students, supra note 115 (reporting decision of immigration judge).
120. Cf. U.N. HANDBOOK, supra note 8, para. 45 (stating that well-founded fear of persecution may be assumed not only from past actual persecution but also from perceived threat stemming from political opinion or membership in particular social group).
121. See 1951 Convention, supra note 4, art. 1(2), 189 U.N.T.S. at 152 (defining term "refugee"), as amended by 1967 Protocol, supra note 4, art. 1, 19 U.S.T. at 6225, 606 U.N.T.S. at 268 (amending definition of "refugee" and defining "refugee sur place").
gees *sur place*, there are individuals and subgroups of asylum seekers who face, if forced to return to Vietnam, a significantly greater risk of persecution than the population of asylum seekers as a whole because of the subgroup to which they belong or because of political opinions they have expressed during their absence from Vietnam.

A. Requirement That Asylum Seeker Be Outside Country of Nationality

All Vietnamese asylum seekers in Hong Kong meet the first precondition of recognition as *sur place* refugees because they are outside Vietnam, their country of nationality. If the nationality of an applicant cannot be clearly established then the country of the applicant’s former habitual residence will be considered. This is important because the protections provided by international refugee law do not extend within the boundaries of an applicant’s country of nationality.

B. Requirement That Applicant Has a Well-Founded Fear of Persecution if Returned to Vietnam

Asylum applicants seeking *sur place* refugee status must also demonstrate a well-founded fear of persecution that exists as a result of one or more of the five categories laid out in the 1951 Convention and 1967 Protocol: race, religion, nationality, political opinion, or membership in a particular social group. According to the *U.N. Handbook*, a well-founded fear has both a subjective and an objective element. The subjective element arises from the word “fear,” which implicates “a state of mind and a subjective condition.” The objective element is denoted by the term “well-founded,” which indicates that the subjective fear must both be supported by an “objective situation” and also be “reasonable.”

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123. *U.N. HANDBOOK*, supra note 8, para. 89.
124. See *U.N. HANDBOOK*, supra note 8, para. 88 (requiring that applicant be outside country of origin to qualify as refugee and mandating that there be no exceptions to rule).
125. See *U.N. HANDBOOK*, supra note 8, para. 65(3)(a) (providing general analysis of five categories and noting ways in which categories factor into determination of well-founded fear of persecution).
126. See *U.N. HANDBOOK*, supra note 8, para. 38 (discussing elements to be considered in determining well-founded fear of persecution); *see also* STENBERG, supra note 6, at 63 (explaining that subjective element refers to applicant’s state of mind, while objective element requires fear of persecution not be product of “free fantasy or after-construction”).
127. See *U.N. HANDBOOK*, supra note 8, paras. 37-38 (explaining that determination of refugee status should focus primarily on statements of particular applicant and not on objective judgments about conditions in country of origin).
128. See *U.N. HANDBOOK*, supra note 8, para. 38 (requiring that asylum seeker’s fears of persecution be based on objective situation and not on imagined events or circumstances).
129. See *U.N. HANDBOOK*, supra note 8, para. 41 (explaining that due to importance placed on subjective element of well-founded fear and because fear must be reasonable, assessment of credibility is crucial where facts are not clear from record).
Thus, a Vietnamese asylum seeker must demonstrate a subjective fear of persecution if he or she is returned to Vietnam, and the fear must be both based on one of the reasons outlined under international law and reasonable under the circumstances. Two of the grounds set forth in the 1951 Convention for establishing a well-founded fear of persecution are particularly relevant to individuals and subgroups of asylum seekers requesting recognition as sur place refugees. These grounds are fear of persecution based on membership in a particular social group and fear of persecution based on one’s political opinion.  

1. Membership in a particular social group as basis for well-founded fear of persecution  

The U.N. Handbook notes that particular social groups are usually comprised of persons with similar backgrounds, habits, or social status. Generally speaking, upon departure from Vietnam, asylum seekers in essence define themselves and are defined as a social group. Their group consists of boat people: people who illegally abandon Vietnam in search of a new life in the West. More importantly for purposes of recognition as sur place refugees, however, are the smaller identifiable subgroups that exist within the larger social group of Vietnamese asylum seekers. For example, a subgroup might include “double-backers,” persons who fled to Hong Kong, voluntarily returned to Vietnam, and then fled to Hong Kong again. This subgroup encompasses persons who have twice re-

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130. See 1951 Convention, supra note 4, art. 1(2), 189 U.N.T.S. at 152 (listing situations in which refugee status may be granted).  
131. See U.N. HANDBOOK, supra note 8, para. 77 (noting that persecution based on membership in particular social group frequently overlaps with persecution based on other grounds such as race, religion, or nationality).  
132. See supra notes 27-31 and accompanying text (describing illegal departures from Vietnam by asylum seekers escaping by boat); see also Courtney, supra note 28, at A1 (describing Hong Kong detainees as comprising part of nearly one million persons fleeing Vietnam in past 15 years, often risking their lives in small boats, and explaining asylum seeker’s desire to obtain freedom and opportunity in America); Stewart, supra note 37, at 26 (quoting senior British diplomat describing Vietnamese asylum seekers as “boat people” who are chasing non-existent and unfulfillable dream); Still They Come, supra note 34, at 36 (reporting that asylum seekers traveling by boat from Vietnam continue to seek temporary refuge in Hong Kong before being resettled in United States, Australia, and other Western countries); Jon Swain, Boat People Go Out Kicking and Screaming, SUNDAY TIMES (London), Nov. 10, 1991, at 30 (describing forced repatriation of boat people as “pitiful end to their dream of a better life in the West”).  
133. See Callo, supra note 54 (citing agreement between United Kingdom and Vietnam to repatriate 222 double-backers who had twice made trip to Hong Kong and quoting Vietnamese officials as saying double-backers travel to Hong Kong second time just to collect money from United Nations); see also Basler, supra note 55, at 4 (observing that first group to be forcibly repatriated to Vietnam since 1989 were 59 double-backers); Swain, supra note 132, at 30 (describing forced return to Vietnam of 20 men, 16 women, and 23 children who were double-backers). The characterization of double-backers as merely desiring a second repatri-
jected Vietnamese society and illegally departed from Vietnam. Groups labeled by Hong Kong authorities as “troublemakers” and “ringleaders” make up other subgroups. Asylum seekers who have publicized their cases through international organizations such as Amnesty International and Asia Watch form an additional subgroup, as do those who organize and participate in the numerous demonstrations, fasts, and protests publicized in the international media. Another subgroup is composed of asylum seekers who attempt legal action, as did nine asylum applicants who appealed their status determination to Hong Kong authorities in an internationally publicized case. Another subgroup might consist of asylum seekers who act as political and religious leaders in the detention camps of Hong Kong. Asylum seekers in each of these circumstances constitute a separate subgroup within the larger category of Vietnamese asylum seekers. Persons within these subgroups often have particularly compelling bases, because of their high profiles, to support the finding of a well-founded fear of persecution if they are forcibly returned to Vietnam.

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ation allowance is contested by both the UNHCR and the double-backers themselves. See Indefinite Detention, supra note 7, at 23 (asserting that double-backers appear to leave Vietnam second time for wide variety of reasons).

134. See supra notes 54, 55 and accompanying text (discussing asylum seekers known as “double-backers”).

135. See DILLER, supra note 38, at 44 (describing transfer of 100 boat people identified by detention center staff as ringleaders and troublemakers to Lai Chi Kok Prison in Kowloon after dispute between boat people and officials regarding food distribution).

136. See generally Indefinite Detention, supra note 7, at 8, 12-13, 16-17 & n.42 (discussing cases of Do Giao, Nguyen Quang Phuc, Toan, Dao Vu Nguyen and his sister and two brothers, and Re Pham Van Ngo).

137. See Christine Courtney, Desperation Grows Among Vietnamese Boat People, VANCOUVER SUN, Nov. 9, 1991, at A20 [hereinafter Courtney, Desperation Grows] (reporting demonstrations of Vietnamese in wake of forced repatriations); Courtney, supra note 28, at A1 (describing frequent protests against forced repatriation in which asylum seekers claim that they would rather commit suicide than live under communism).

138. See Barbara Basler, Hong Kong Agrees to Screen 8 Boat People Again, N.Y. TIMES, Mar. 31, 1991, at 11 (explaining “landmark” challenge to refugee screening process brought by eight Vietnamese boat people and noting that eight were among nine cases prepared by human rights lawyers); Indefinite Detention, supra note 7, at 8 (discussing case of Do Giao, one of nine Vietnamese plaintiffs who gained international recognition by challenging procedures followed by Hong Kong in determining asylum seekers’ status); Chris Peterson, Hong Kong Government to Review Boat People Test Case, Reuter Libr. Rep., Mar. 27, 1991, available in LEXIS, Nexis Library, Wires File (discussing test case of eight Vietnamese boat people and noting that they will be able to introduce new evidence to support claim that they fled Vietnam to escape persecution); Ann Scott Tyson, Vietnam Refugee Wins Case Against Repatriation, CHRISTIAN SCI. MONITOR, Mar. 4, 1991, at 6 (reporting victory of Do Giao in decision allowing him to be rescreened after mistake by immigration officer).


140. See Indefinite Detention, supra note 7, at 19 (explaining that publicity may endanger asylum seekers when they return to Vietnam); see also infra notes 144-47 and accompanying
a. Subjective fear of persecution among asylum seekers based on membership in a particular subgroup

Commonly, Vietnamese asylum seekers fear that abandoning Vietnam brands them as unpatriotic or suspect.\textsuperscript{141} As a result, they are afraid that if returned to Vietnam, they will suffer discrimination and harassment from the Vietnamese Government as well as from the society at large.\textsuperscript{142} Such subjective fears of persecution are especially compelling in the case of asylum seekers who are members of subgroups that are outspoken regarding their opposition to the Government in Vietnam or are members of subgroups that Vietnam considers inherently suspect.\textsuperscript{143}

The credibility of such fears is implicitly recognized by Hong Kong authorities and is reflected in their policies. For example, the staff at the Lo Wu detention center in Hong Kong, the only center open to reporters, forbids reporters to identify asylum seekers in the press because it is feared that persons quoted or photographed will be persecuted if returned to Vietnam.\textsuperscript{144} According to Stephen Ho, acting superintendent at Lo Wu, anonymity is important because known asylum seekers may face severe persecution when they return to Vietnam.\textsuperscript{145} In justifying closing other camps to reporters, Hong Kong officials explain that lawyers advised denying the press access to detainees as a precaution against political persecution of persons returned to Vietnam.\textsuperscript{146} Such policies constitute a recognition by text (analyzing policies of Hong Kong authorities that suggest publicity may create danger for asylum seekers).

\textsuperscript{141.} See \textit{Indefinite Detention}, supra note 7, at 21 (explaining that Vietnamese asylum seekers in Hong Kong fear stigma of being labeled unpatriotic and are afraid that stigma could also attach to their children).

\textsuperscript{142.} See \textit{Indefinite Detention}, supra note 7, at 21 (discussing existence of extensive Vietnamese surveillance bureaucracy and institutionalized discrimination directed at those whose loyalty is suspect, and describing incarceration in re-education camps of hundreds of thousands of people associated with military and Government of South Vietnam after unification of Vietnam in 1975).

\textsuperscript{143.} An inherently suspect subgroup might include writers, editors, and publishers of a Hong Kong camp publication that is critical or opposed to the policies of the Vietnamese Government. See \textit{Refugees at Risk}, supra note 53, at 4 (discussing Vietnamese overseas publications "Viet Nam Hai Ngoai" and "Lang Van" and noting that authors of articles in these publications are in danger if returned to Vietnam).

\textsuperscript{144.} See Courtney, supra note 28, at A1 (observing that while Hanoi publicly agreed not to persecute returnees, staff members at Lo Wu nevertheless explain that identifying asylum seekers quoted by press is not allowed because of risk of governmental persecution upon return to Vietnam).

\textsuperscript{145.} See Courtney, supra note 28, at A1 (citing detention center staff’s reasons for closing detention centers to reporters).

\textsuperscript{146.} See Courtney, supra note 28, at A1 (reporting that while Hong Kong officials claim advice of lawyers is reason for denying press access to camps, Rita Fan, member of Hong Kong’s legislature, argues that “real reason” for media restrictions is high volatility of detention centers and fact that Government, under pressure to maintain control, fears admission of reporters would exacerbate situation).
Hong Kong authorities that it is reasonable for asylum seekers, if identified, to have subjective fears concerning persecution if they are forced to return to Vietnam.\textsuperscript{147}

The plausibility of a subjective fear of persecution is further supported by the testimony of refugees resettled in the United States. For example, resettled refugees state that forcibly sending Vietnamese asylum seekers back to Vietnam is the equivalent of delivering them to a jail where they will be relegated to second-class citizenship and discriminated against in school, the workplace, and society at large.\textsuperscript{148} Such testimony, echoed throughout the Vietnamese community, gives credence to the claims of asylum seekers, particularly those who are members of identifiable subgroups, that they fear the consequences of forced repatriation to Vietnam.

Three Vietnamese camp leaders in Hong Kong summed up the subjective fears of many asylum seekers in an interview via secret telephone with Reuters reporters.\textsuperscript{149} Having repeatedly stated that camp residents would prefer death to forcible return to Vietnam, the leaders proclaimed:

\begin{quote}
[W]e were really persecuted by the Vietnamese government so we dare not go back and we believe the international community realizes this . . . we strongly believe that if we go back again we will be persecuted again as we were before . . . we fear that nobody from the international community or UNHCR can have access, conditions or enough staff to monitor or observe what is happening to us (if we are sent back).\textsuperscript{150}
\end{quote}

And in the words of a Vietnamese woman about to be returned to Vietnam, "I will never be free, I am going back to Vietnam . . . . Nobody knows what will happen to us. And can anyone really help

\textsuperscript{147} See Courtney, Desperation Grows, supra note 137, at A20 (stating that since announcement of forced-repatriation agreement, Hong Kong has prevented media from visiting camps whose residents may be sent back to Vietnam); Courtney, supra note 28, at A1 (explaining that Hong Kong Government blocked access of media to detainees out of fear that publicized detainees may face persecution if returned to Vietnam).

\textsuperscript{148} See Thuan Le, Vietnamese Fasters Protesting Refugees' Plight in Hong Kong, L.A. TIMES (Orange County edition), Dec. 21, 1991, at B1 (quoting Vietnamese activists in United States who claim that asylum seekers returned to Vietnam will face discrimination in work and education). Chuyen Nguyen, general secretary of the Vietnamese Community of Southern California, further argues that the problem of refugees should be solved inside Vietnam and not by making those refugees who have already left return to Vietnam. Id.

\textsuperscript{149} See Thomas, supra note 139 (recounting interview between Reuters reporters and three leaders at Whitehead Detention Centre in Hong Kong regarding asylum seekers' concerns over agreement between United Kingdom and Vietnam in which Vietnam agreed to take back boat people denied refugee status).

\textsuperscript{150} Thomas, supra note 139. The article also noted that the refugees were depending on George Bush and his administration to stop their repatriation to Vietnam. Id.
us once we’re back home?’”¹⁵¹ These expressions of fear by asylum seekers themselves, together with existing policies and attitudes of Hong Kong authorities and resettled Vietnamese refugees, indicate that asylum seekers’ claims that they fear return to Vietnam are credible. Further, such claims of fear of persecution are particularly compelling when made by members of subgroups within the larger group of asylum seekers who are outspoken regarding their opposition to the Vietnamese Government or groups that the Vietnamese Government is likely to consider inherently suspect.

b. The political atmosphere in Vietnam supports objective element of well-founded fear based on membership in a particular subgroup

Objective circumstances in Vietnamese society support asylum seekers’ subjective fear of persecution based on their membership in particular subgroups of asylum seekers. Generally speaking, asylum seekers forced to return to Vietnam face persecution related to crimes delineated in Vietnam’s Criminal Code, which became effective in June 1985.¹⁵² Under the heading “Crimes Against National Security,” it is a crime punishable by up to two years in prison to illegally flee or attempt to flee the country.¹⁵³ According to Amnesty International, many people are jailed in Vietnam for trying to leave the country without permission.¹⁵⁴ Since 1989, efforts by the Vietnamese Government to stop unauthorized departures have intensified, resulting in shootings, executions, convictions, and imprisonments of Vietnamese citizens.¹⁵⁵ During the period between

¹⁵¹. Indefinite Detention, supra note 7, at 20-21.
¹⁵². See generally CRIMINAL CODE, arts. 72-83 (Nat’l Technical Info. Serv., JPRS-SEA-85-135, 1985) (Vietnam) [hereinafter CRIMINAL CODE] (including, for example, crimes of fleeing to foreign country, organizing, forcing, or inciting attempted flight to foreign country, opposing or organizing to overthrow socialist state, spreading anti-socialist propaganda, or undermining policy of unity, and providing that these laws apply to acts committed by Vietnamese citizens outside, as well as inside, Vietnam).
¹⁵³. Id. art. 89, at 32.
¹⁵⁴. See VIETNAM: “RENOVATION,” supra note 82, at 42 (discussing cases of three people arrested for attempting to leave Vietnam and noting that whereabouts of forty others, majority of whom were arrested between 1978 and 1983, is unknown); Human Rights in Vietnam, AMNESTY INT’L NEWS RELEASE, Feb. 21, 1990, at 3 (declaring that people who try to leave Vietnam may be sentenced to imprisonment or re-education, and that others are held without trial between six months and two years, and some much longer).
¹⁵⁵. See VIETNAM: “RENOVATION,” supra note 82, at 42 (referring to recent press reports indicating escalation of official attempts to end clandestine departures and quoting Vietnamese official as stating that two persons were executed in first six months of 1989 for illegal departure attempts); Wolf & Lowman, supra note 85, at A23 (reporting that according to U.S. State Department, some Vietnamese citizens caught trying to escape Vietnam have been beaten to death during governmental interrogations, others have been detained in re-education camps, and others, typically organizers of escape attempts, have been executed or given lengthy prison sentences); see also Vietnamese Boat People Repatriated from Hong Kong,
January and June of 1989, Vietnamese officials reported that 413 people were convicted for "illegal departures." Many of these people received prison sentences of up to twelve years. According to Trinh Le, the Vietnamese Social Welfare Ministry official in charge of resettling returnees, persons caught attempting to flee Vietnam are heavily punished when they are discovered, with many receiving sentences of up to fifteen years imprisonment. The imposition of such severe penalties on people who attempt to flee Vietnam is an indicator of the Vietnamese Government's sentiment toward asylum seekers who have successfully fled Vietnam and is also a signpost cautioning against hastily returning screened-out asylum seekers.

Advocates of forced repatriation argue that the central government of Vietnam has agreed not to persecute or harass persons forcibly repatriated to Vietnam, despite their illegal departures from that nation. Such assurances, however, offer little consolation to forced returnees. While Vietnam has agreed not to prosecute

Xinhua Gen. Overseas News Serv., May 12, 1989, available in LEXIS, Nexis Library, Xinhua File (quoting Vietnamese officials who emphasized that boat people must be punished for their attempts to leave their country).

156. VIETNAM: "RENOVATION," supra note 82, at 42.
157. VIETNAM: "RENOVATION," supra note 82, at 42.
158. See William Branigin, Forced Repatriation Sparks New Concerns; Vietnam's Human Rights Policy at Issue, WASH. POST, Nov. 10, 1991, at A46 (stating that Trinh Le described treatment of returning boat people as "lenient" in contrast to Vietnamese Government's punishment of trip organizers, many of whom have been sentenced to 15 years imprisonment). Vietnamese citizens who are convicted of organizing illegal departures have been given very severe prison sentences. See, e.g., Foreign News Briefs, UPI, Dec. 14, 1987, available in LEXIS, Nexis Library, UPI File (stating that Vietnamese court sentenced former school principal to 16 years in prison for helping 19 people try to flee Vietnam by boat and indicating that nine accomplices were also arrested); Indochina, Reuter Libr. Rep., July 19, 1979, available in LEXIS, Nexis Library, Wires File (reporting life imprisonment of organizer found guilty of helping 231 people to leave Vietnam); "Life and Death Sentences" to Stop Illegal Emigration, Vietnam News Agency, Oct. 29, 1991, available in LEXIS, Nexis Library, Wires File (asserting that Vietnamese border patrols have increased and that many organizers and intermediaries of illegal departures have been punished severely, with some being sentenced to death); Vietnamese Official Gets Life Term, UPI, Mar. 22, 1989, available in LEXIS, Nexis Library, UPI File (describing Vietnamese radio report that Vietnamese Supreme Court sentenced senior security official to life imprisonment for arranging three illegal refugee escapes for 260 people; official's aides received sentences from two to ten years).

159. See Indefinite Detention, supra note 7, at 22 (examining agreement between United Kingdom and Vietnam that includes promise by Vietnamese Government to treat returnees fairly and without persecution); see also MEMORANDUM, supra note 41, para. 3(a) (stating that Vietnamese Government's pledge to UNHCR regarding those who return voluntarily includes "waiver of prosecution and of punitive and discriminatory measures"); cf. Charles Wallace, Hardship Awaits "Boat People" Forced Back to Vietnam, L.A. TIMES, Feb. 18, 1990, at A8 (reporting Vietnamese official's statement that two boat people imprisoned upon repatriation were prison escapees who asked to be sent back to jail).

Moreover, while monitors from UNHCR and voluntary agencies report that Vietnam has kept its promise for the most part, they also report a pattern of interrogation and low-level harassment of returnees. Indefinite Detention, supra note 7, at 22. See also Branigin, supra note 158, at A46 (quoting executive director of Asia Watch, who expressed concern that har-
persons residing in Hong Kong for the crime of leaving the country illegally, the Government has not agreed to repeal the departure law altogether.\textsuperscript{161} Thus, returnees fear they will be branded as persons who have criminal records regardless of whether they are actually prosecuted.\textsuperscript{162} Asylum seekers believe this will lead to difficulty in obtaining employment, education for themselves and their children, housing, business licensing, and other services necessary for survival in Vietnamese society.\textsuperscript{163}

Similarly, under the Vietnamese Criminal Code, members of certain subgroups of asylum seekers may be at particular risk of persecution if forced to return to Vietnam. For example, while Vietnam has extended limited amnesty for the physical act of leaving the country, it has not extended such a waiver to persons who organize departures.\textsuperscript{164} The Code provides a sentence of five to fifteen years for anyone who organizes an attempt to flee\textsuperscript{165} and from twelve to twenty years or life in prison in "especially serious" cases.\textsuperscript{166} Various subgroups of asylum seekers currently residing in Hong Kong have organized the departures of family members, neighbors, and friends and could face prosecution under the Criminal Code on that basis. Additionally, it is unclear just how broad an interpretation of the term "organize" the Vietnamese Government will apply if it chooses to enforce this law. Such ambiguity in the law, combined with a lack of clarification by the Vietnamese Government, results in

\textsuperscript{161} See Criminal Code, supra note 152, arts. 85(1), 89, at 31, 32 (defining crime of illegally emigrating to foreign country).

\textsuperscript{162} See Indefinite Detention, supra note 7, at 21 (concluding that problem for returnees is that Vietnam insists that people have committed crime by leaving country and, even though they may not face prosecution for this crime, most Vietnamese in Hong Kong believe they will be treated as if they have criminal records if they return to Vietnam).

\textsuperscript{163} See Indefinite Detention, supra note 7, at 21 (explaining that legal documents of persons considered unpatriotic may be revoked and that without such documents, it is impossible to legally reside or travel anywhere in Vietnam, to vote, to register marriages, births, or deaths, or to obtain employment, education, or public medical care); see also Wolf & Lowman, supra note 85, at A23 (stating that Vietnamese Government impuets political motive to acts of illegal departure and regards emigres as potential political enemies of state; further noting that such attitude results in pervasive discrimination in Vietnamese society against asylum seekers).

\textsuperscript{164} See Indefinite Detention, supra note 7, at 22 (asserting that Vietnam has not extended waiver to persons who commit offenses other than leaving country illegally); see also Diller, supra note 38, at 57 (citing D. Wallen, Hanoi Vows Not to Punish Boat People Who Return, SOUTH CHINA MORNING POST, Oct. 11, 1988, at 1) (noting that returnees not considered to have opposed Government would merely receive warning from Vietnamese officials and concluding that opponents of Government such as emigration organizers risk greater chance of prosecution).

\textsuperscript{165} Criminal Code, supra note 152, art. 85(2), at 31.

\textsuperscript{166} Criminal Code, supra note 152, art. 85(3), at 31. The Criminal Code defines a "serious crime" as a "crime that causes major harm to society and for which the maximum penalty is five or more years in prison, life in prison or the death penalty." Id. art. 8(2), at 5.
a situation in which asylum seekers, comprising the subgroup of those known to have organized departures, are exposed to significant risks of persecution if forcibly returned to Vietnam.167

The Code also provides for up to twelve years in prison for anyone who flees to another country and “remains there with the intent to oppose the People’s Government.”168 Several individuals as well as subgroups of asylum seekers in Hong Kong have engaged in activities clearly in opposition to the Government in Vietnam.169 Because of such activities these individuals and groups face a significant possibility of persecution if forcibly returned to Vietnam.

Article 78 of the U.N. Handbook recognizes the possibility that such persecution may take place. The U.N. Handbook explains that persecution may be the result of a lack of confidence in a group’s loyalty to its nation,170 noting that such a lack of confidence may derive from the “political outlook, antecedents or economic activity of its members.”171 Generally, asylum seekers, in illegally aban-
doning their homeland under extremely dangerous conditions,\(^{172}\) have made known in no uncertain terms the status of their loyalty to the Vietnamese Government.\(^{173}\) More far-reaching and salient, however, are the words and actions of various subgroups within the larger community of asylum seekers in Hong Kong that have expressed a hatred and fear of the Vietnamese Government and a corresponding preference for the U.S. Government, a longtime enemy of Vietnam.\(^{174}\) Vietnam is likely to take notice of the words and actions of such sworn enemies of the Vietnamese State. Consequently, while there is reason to believe that Vietnam will question the loyalty of all asylum seekers in Hong Kong, of particular concern are persons within various social and political subgroups of the population of asylum seekers. These subgroups include, for example, persons who have organized departures of asylum seekers from Vietnam, groups that have demonstrated a clear lack of loyalty to the Vietnamese Government, as well as groups of asylum seekers who remain in Hong Kong camps with the intent to oppose the "People's Government." Persons within such subgroups face a particularly grave risk of persecution if forced to return to Vietnam. It is thus imperative that Hong Kong fully consider applications by members of such subgroups for recognition as *sur place* refugees.

2. **Political opinions expressed by individuals and members of certain subgroups as basis for well-founded fear of persecution if forcibly returned to Vietnam**

A second basis for granting *sur place* refugee status to Vietnamese asylum seekers who may initially have been screened out as economic migrants is a well-founded fear of persecution based on political opinion.\(^{175}\) To claim a well-founded fear on the basis of political opinion, an asylum seeker must show (1) that he or she has a subjective fear of persecution for holding an opinion; (2) that the

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172. *See supra* notes 27-31 and accompanying text (discussing dangers of seeking asylum by boat in South China Sea).

173. *See Indefinite Detention, supra* note 7, at 23 (observing that Vietnamese Government tries to prevent departures by depicting those who leave as unpatriotic).

174. *See Courtney, Desperation Grows, supra* note 137, at A20 (stating that asylum seekers have staged numerous protests proclaiming that they would rather commit suicide than live under communism, and quoting asylum seekers' note from Whitehead camp declaring "you are pushing our fates into the dead end of communist prisons ... We bring to the American Congress a message of blood and tears with cries for urgent help from people who thirst for freedom like we thirst for sunshine. Save us."); *Thomas, supra* note 139 (quoting Vietnamese camp leaders who look for support from United States because it is "generous, reasonable, and anti-communist" country).

175. *See U.N. HANDBOOK, supra* note 8, para. 80(f) (concluding that having political opinions that differ from those of government, alone, is not sufficient ground to claim refugee status; applicant must show fear of persecution because of those opinions).
opinion has come to the attention of the authorities or is attributed by the authorities to the applicant; and (3) that the opinion is not tolerated by authorities from the applicant’s country of origin. Moreover, all factors that indicate that fear is the predominant motive behind an applicant’s claim for asylum must be considered. Pertinent factors include personal and family background, membership in particular racial, religious, cultural, social, or political groups, the personal interpretation of the situation by the applicant, and the applicant’s personal experiences.

a. The political opinions of individuals and subgroups of asylum seekers as basis of claim of a subjective fear of persecution if forced to return to Vietnam

The U.N. Handbook notes that the evaluation of an applicant’s subjective fear cannot be separated from consideration of the personality of the applicant, because psychological reactions differ among individuals in identical situations. While one person may possess political opinions that would make life in the person’s homeland intolerable, another may hold less adamant convictions. As is readily apparent, many asylum applicants in Hong Kong, although initially screened out as economic migrants, possess a genuine subjective fear of persecution if returned to Vietnam because of the political opinions they have expressed during their absence from Vietnam.

As outlined above, to qualify for sur place refugee status on the basis of one’s political opinion, the political opinion held by an applicant must come to the attention of the authorities in some fashion or be attributed by the authorities to the applicant. Generally, the political opinions of asylum seekers with regard to the Vietnamese Government are well known. For example, written criticisms of the Government are persuasive throughout camps of first asylum in Southeast Asia. Many camps display signs painted in large red letters that declare: “After 15 Years in the Shackles of

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176. U.N. HANDBOOK, supra note 8, para. 80(f). The “relative importance” or “tenacity” of the applicant’s opinions, as determined by all the circumstances in the case, is also pertinent to the determination of refugee status. Id.
177. U.N. HANDBOOK, supra note 8, para. 41.
178. U.N. HANDBOOK, supra note 8, para. 41.
179. U.N. HANDBOOK, supra note 8, para. 40.
180. See U.N. HANDBOOK, supra note 8, para. 40 (noting that individual personalities may affect psychological reactions).
181. U.N. HANDBOOK, supra note 8, para. 80(f). The degree of the applicant’s public exposure may be relevant to a determination of refugee status. For example, a writer or a teacher occupying a prominent public position may receive more public exposure for his or her political opinions than persons whose jobs do not require frequent contact with the public. Id.
Communist Regime, We Have Found Freedom in PFAC, [Philippines First Asylum Camp]; Please Do Not Let Us Despair” and “Do Not Abandon Us the POW from South Vietnam.”182

Additionally, articles in the international press, as well as publications, photographs, poems, and artwork by individuals and subgroups of asylum seekers, reflect political views often critical of the Vietnamese Government.183 For example, the University of California at Irvine displayed thirty paintings created by asylum seekers at Hong Kong’s Whitehead Detention Centre.184 The artwork depicted the risks and suffering that boat people endure in seeking freedom.185 Another exhibit of Vietnamese asylum seekers’ paintings toured various cities in both the United States and Europe.186 Much of the artwork reflects the oppressive conditions that asylum seekers are willing to endure in order to escape Vietnam and find freedom.187 Because each painting was accompanied by the name of the artist and a short biography, it is very likely that Vietnamese officials are aware of those persons responsible for the artwork.188

Another example of a subgroup of asylum seekers in Hong Kong that has expressed political opinions and thus is likely to come to the attention of the Vietnamese Government includes thirty-nine asylum seekers that sent a letter to the United States containing a declaration of the organization they had formed, a plan of action they would follow if forcibly returned to Vietnam, their names, 182. Taken from photographs by author during trip to camps in countries of first asylum in Southeast Asia (1989-1990). Other signs displayed by interned Vietnamese asylum seekers read: “Seeking Freedom Through Dangers and Death, We Are Proud To Get Much Humanitarian Help from the Free World,” “I Would Rather Die Than Return to Vietnam,” “The Free World Countries Please Come to Our Rescue,” “After the Hell of Communism, The Philippines Is Heaven,” “Please Don’t Abandon Us and the Children of the Ex-Soldiers Who Had Been Fighting for Freedom.” Id.

183. See INDOCHINA RESOURCE ACTION CTR., STILL LIVES: ART BY VIETNAMESE BOAT PEOPLE IN HONG KONG 3-12 (1991) [hereinafter STILL LIVES] (depicting political artwork created by Vietnamese asylum seekers in show touring United States); Barbara Basler, Vietnamese Resist Repatriation Plan, N.Y. TIMES, Oct. 19, 1991, at 4 (explaining that while reporters are not allowed inside most detention camps, they can often get close enough to witness political demonstrations and read political protest signs displayed by internees); Kristina Lindgren, Vietnamese Internee Art on Display, L.A. TIMES (Orange County edition), Oct. 31, 1991, at B3 (describing exhibit of paintings by Vietnamese nationals interned at Whitehead Detention Centre in Hong Kong as portraying terrible conditions of life in camp).

184. Lindgren, supra note 183, at B3.

185. Lindgren, supra note 183, at B3 (reporting comments of Anh Hong Do, member of Project Ngoc, University of California Irvine student group that sponsored exhibit).


187. See STILL LIVES, supra note 183, at 5-10 (presenting pictures from boats and detention centers of crying children and people sleeping on floors and in crowded, cramped cubicles). Several of the artists stated that they sought artistic freedom in leaving Vietnam and that they had been persecuted in Vietnam. Id. at 9.

188. STILL LIVES, supra note 183, at 5-10.
camp identity numbers, and a photograph of the group taken during a ceremony commemorating the founding of the group. After reaching the United States, the letter was returned "address unknown" to Vietnam rather than to Hong Kong. Subsequently, the letter was forwarded from Vietnam to Hong Kong without its accompanying documents, indicating that Vietnamese authorities had intercepted its contents. According to Asia Watch, other subgroups of asylum seekers who face risk of persecution based on political opinion if forcibly returned to Vietnam include persons whose claims of persecution at the hands of the Vietnamese Government are extensively publicized, organizers of the demonstrations against forced repatriation, publishers, editors, writers, and artists who have published their works in Hong Kong or abroad that express, explicitly or implicitly, criticism of the Vietnamese Government.

The Vietnamese Government, for its part, has actively sought information about the kinds of activities and opinions held by individuals and subgroups carried on in first asylum camps. According to Asia Watch, the Vietnamese Government has conducted extensive interrogations of some asylum seekers upon their return to Vietnam, in order to obtain information about organized groups within the camps. Questions asked during interrogations include inquiries related to camp organizations and "troublemakers." In one instance, the Government confiscated photographs that a woman had taken in the Hong Kong camps, and the photographs later reappeared when officials interrogated the woman and asked her to identify each person in the pictures. Other returnees are

189. See Refugees at Risk, supra note 53, at 3 (citing Jonathan Braude, U.S. Postmen Put Rebel Viets' Lists at Risk, SOUTH CHINA MORNING POST, Feb. 2, 1992) (describing this case as example of situation where Vietnamese asylum seekers may be imperiled due to their opposition to Vietnamese Government).

190. Refugees at Risk, supra note 53, at 3.

191. Refugees at Risk, supra note 53, at 3. Where, as in this case, the Vietnamese Government is likely to have information regarding asylum seekers, paragraph 96 of the U.N. Handbook requires that "[r]egard 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 those authorities . . . ." Id.


193. Indefinite Detention, supra note 7, at 23.

194. See Indefinite Detention, supra note 7, at 23 (asserting that interrogations conducted by Vietnamese officials of ex-residents of detention camps included questions seeking identification of camp organizations and names of "troublemakers," guards, voluntary agency staff, and visiting clergy).

195. Indefinite Detention, supra note 7, at 23.

196. Id. Particularly at risk in these interrogations are the double-backers. See id. (quoting provincial official in Haiphong as saying, "These people [double-backers] must be punished for leaving a second time.").
asked to identify the origins of any literature they bring back to Vietnam and to reveal the identity of asylum seekers who work with foreigners or volunteer agencies.197

b. Political conditions in Vietnam supporting objective element of well-founded fear based on political opinion

For an asylum applicant's fear of persecution to be deemed "well founded" under international law, the opinions held by the applicant must not be tolerated by the authorities in the applicant's country of origin.198 This determination requires an examination of conditions within the country of origin.199 According to Amnesty International, Vietnam continues to persecute persons who oppose or are suspected of opposing the Government and its policies.200 Indeed, since 1975, Vietnam has been one of the most repressive countries in the world.201 The position of the U.S. Government regarding forced repatriation is that "political conditions in Vietnam are so repressive that it would be unjust at this point to send anyone back against his or her will."202 The use by Vietnam of re-education camps is illustrative of the repression of political dissent and the free exchange of ideas. For example, although Vietnam has done away with Resolution 49/NQ/TVQH,203 which had provided for detention without trial or charge and sentencing to re-education camps to punish persons expressing opinions critical of the Government, the Government continues to confine persons without trial on

197. Refugees at Risk, supra note 53, at 3.
198. See U.N. HANDBOOK, supra note 8, para. 42 (mandating that inquiry into whether fear is well founded requires determination of whether sufficient facts exist "to permit the finding that the applicant would face a serious possibility of persecution" based on political beliefs if returned to his or her country of origin) (emphasis added).
199. See U.N. HANDBOOK, supra note 8, para. 42 (stating that knowledge of conditions in applicant's country of origin, although not primary objective, is important element in assessing applicant's credibility).
200. See VIETNAM: "RENOVATION," supra note 82, at 35 (indicating that some persons held in Vietnamese prisons and re-education camps are prisoners of conscience, detained simply for peaceful expression of their political, religious, or other beliefs).

I have said quite often that Vietnamese (sic) is probably the most repressive country in the world right now, more so than Cuba, more so in some ways even than China—because of the economic collapse; there's still religious persecution; there's as many or more political prisoners pro-rating the population than there is in China with one billion, two hundred and fifty, sixty million people . . . .

Id.
202. Id. (testimony of Rep. Solarz) (explaining that reports state that people in Hong Kong camps are contemplating mass suicide if forced to return to Vietnam).
203. See CRIMINAL CODE, supra note 152, at 1 (stating that new criminal code incorporates all previous criminal laws in Vietnam and leaves out any part of 49/NQ/TVQH).
Those confined to re-education camps include writers, artists, religious persons, and others who are suspected of being critics of government policy. Because of the lack of information available from Vietnam, it is unclear how many people suspected of antigovernment activities are being held without charge or trial in re-education camps. There is, however, at least one central re-education camp in each of Vietnam's forty provinces. These main camps are divided into several subcamps, each reportedly holding up to one thousand prisoners.

Vietnam also makes efforts through intelligence gathering networks to identify persons critical of official government policies and ideology. Once identified, suspect persons are re-educated in camps throughout Vietnam. Many "criminals" are held in jail-like conditions. They are provided meager rations, forced to work long hours, and made to attend political indoctrination meetings. In 1986, Vietnam adopted a policy of doi moi, or "renovation," that called for various legal, economic, and social reforms. Pursuant to this policy, the Government granted amnesty to

204. See, e.g., VIETNAM: "RENOVATION," supra note 82, at 35 (citing State Committee, National Assembly Resolution, No. 49/NQ/TQVH, June 21, 1961) (reporting that Vietnam has caused substantial numbers of people who were not connected with war or previous policies of South Vietnamese Government to be held in re-education camps); see also id. at 36 (explaining that even those who are charged are convicted at trials which fall short of international standards of fairness).

205. See VIETNAM: "RENOVATION," supra note 82, at 35 (stating that decisions as to who will be confined are usually made by local "People's Committees," which imprison those considered to be threat to national security).

206. See VIETNAM: "RENOVATION," supra note 82, at 35 (reporting that Vietnamese Government claims that not more than 130 civilian and military persons from South Vietnam are still held in re-education camps).

207. VIETNAM: "RENOVATION," supra note 82, at 44.

208. VIETNAM: "RENOVATION," supra note 82, at 44.

209. See Indefinite Detention, supra note 7, at 21 (discussing Vietnam's surveillance bureaucracy, designed to collect information on those whose loyalty is suspect); see also infra notes 210-12 and accompanying text (discussing interrogation of asylum seekers upon return to Vietnam); see also Vietnam: Repression of Dissent, ASIA WATCH, Mar. 4, 1991, at 2 (hereinafter Repression of Dissent) (observing that Vietnamese National Assembly provided for repression of those who try to undermine political stability, including those who incite people and rally them to oppose policies of government).

210. See Repression of Dissent, supra note 209, at 1 (stating that government critics are arrested without charge and placed in camps where inmates perform hard labor and are malnourished, abused, and deprived of medical care).

211. See, e.g., VIETNAM: "RENOVATION," supra note 82, at 44-45 (describing prison living quarters as large concrete barracks with corrugated iron roofs and noting that compulsory labor is reputed to be part of regimen of all re-education camps).

212. See Repression of Dissent, supra note 209, at 1 (indicating that government critics are also punished through revocation of their identification documents, which allow citizens to work, travel, and enjoy public services including education and medical care).

213. See Repression of Dissent, supra note 209, at 2 (discussing Vietnam's new policy endorsing (1) gradual reform of economy to favor free market economic theory; (2) amnesty for thousands in re-education camps; (3) promulgation of criminal procedure code; and (4) limited allowance of social criticism).
thousands of ideological prisoners and released them from re-education camps.\textsuperscript{214} In 1989, however, the Government again tightened controls apparently because of nervousness about the reforms taking place in Eastern Europe and the Soviet Union.\textsuperscript{215} This trend culminated in "Decision 135," handed down by the Council of Ministers in December 1989.\textsuperscript{216} The decision, adopted by the National Assembly, mandated a renewed effort to stifle crime, corruption, and persons who seek to undermine the party and state.\textsuperscript{217} These examples illustrate that Vietnam continues to systematically persecute persons who hold viewpoints contrary to those of the Vietnamese Government.

An additional indicia of Vietnam's intolerance for contrary political opinion is apparent in the Vietnamese Criminal Code. The Government has not extended any waiver of prosecution or punishment with regard to asylum seekers for political crimes enumerated in the Criminal Code.\textsuperscript{218} For example, the Code contains vaguely defined crimes including "spreading propaganda against the socialist system," "spreading false rumors and causing panic among the people," and "making, storing or circulating anti-socialist documents or cultural products."\textsuperscript{219} Such crimes could easily be used to prosecute individuals as well as members of numerous subgroups of asylum seekers for a myriad of activities that occur on a daily basis in the detention camps of Hong Kong.\textsuperscript{220} This is particularly true regarding persons who have assumed leadership roles in the camps.\textsuperscript{221} Thus the existence of a re-education system in Vietnam

\begin{itemize}
\item \textsuperscript{214} See Vietnam: "RENOVATION," supra note 82, at 35 (noting that according to Vietnamese governmental announcements, 8300 prisoners were released under 1987 and 1988 amnesties as result of implementation of doi moi program).
\item \textsuperscript{215} See Repression of Dissent, supra note 209, at 2 (stating that in 1989, Party Secretary General Nguyen Van Linh, who in 1987 had urged that social ills be exposed and publicized in media, called on newspaper editors to soften their criticism of Government); see also id. (reporting that during 1989, Vietnamese Government was involved in thousands of arrests of suspects, surrenders of criminals during Decision 135 crime drive, and seizures of contraband literature).
\item \textsuperscript{216} See Repression of Dissent, supra note 209, at 2 (noting that decision was widely publicized).
\item \textsuperscript{217} See Repression of Dissent, supra note 209, at 2 (citing Vietnamese editorial explaining that Decision 135 set precedent for number of future anti-crime campaigns).
\item \textsuperscript{218} Indefinite Detention, supra note 7, at 22.
\item \textsuperscript{219} CRIMINAL CODE, supra note 152, art. 82, at 30.
\item \textsuperscript{220} See Indefinite Detention, supra note 7, at 22 (stating that such laws could be applied to hundreds of Vietnamese asylum seekers who have, through demonstrations, artwork, and essays, expressed their opposition to Vietnamese Government); Refugees at Risk, supra note 53, at 4 (stating that on May 15, 1992, Doan Thank Liem, Vietnamese lawyer, arrested on account of his association with American businessman Mike Morrow, was sentenced to 12 years imprisonment for spreading "anti-socialist propaganda").
\item \textsuperscript{221} See Indefinite Detention, supra note 7, at 23 (explaining that Vietnamese authorities have interrogated returnees in specific attempt to identify camp organizers and troublemakers among asylum seekers in Hong Kong).
\end{itemize}
designed to stifle and punish all forms of political dissent together with vaguely defined laws criminalizing contrary political viewpoints provides objective support for claims by individuals or members of certain subgroups of asylum seekers that they fear persecution if forced to return to Vietnam because of activities and political opinions expressed while absent from Vietnam.

C. Applicant Is Unable or Unwilling To Return to Country of Origin

The final element necessary for recognition as a refugee based on one's social group or political opinion requires that an applicant be unable or unwilling to return to his or her homeland on account of a well-founded fear of persecution. Vietnamese asylum seekers in Hong Kong are clearly unable or unwilling to return to their homeland, as evidenced by their numerous applications for political asylum and appeals when such applications are denied, threats of suicide if forced to return to Vietnam, and rejection of opportunities to voluntarily repatriate to Vietnam. As discussed above, many boat people who may have originally left Vietnam for economic reasons may satisfy the subjective and objective elements necessary to establish a well-founded fear of persecution should they be returned to Vietnam. Because such fears may arise as a consequence of membership in particular subgroups or expressions of political opinions by individuals or subgroups and because such persons are unwilling to return to Vietnam on account of their fear, claims of sur place refugee status must be fully considered by Hong Kong.

D. Problems Inherent in Monitoring Forced Returnees in Vietnam Require That Hong Kong Thoroughly Consider Claims for Sur Place Refugee Status

Hong Kong should adopt a liberal policy of recognizing sur place refugee claims in light of the colony's inability to effectively and ac-

222. U.N. HANDBOOK, supra note 8, para. 34.
223. See supra note 142 and accompanying text (expressing fear of Vietnamese asylum seekers that, if forcibly repatriated to Vietnam, they are likely to encounter discrimination from Government and entire society in Vietnam); supra note 152 and accompanying text (indicating that asylum seekers may face criminal prosecution upon return to Vietnam); supra notes 183-91 (reporting attempts by Vietnamese to qualify for political asylum); supra notes 150-51 (noting unwillingness of asylum seekers to return to Vietnam and stating that many would rather die than be forced to return).
224. See supra notes 141-42, 148 and accompanying text (arguing that because boat people fear unfair treatment by Vietnamese Government and society upon return to Vietnam, they satisfy subjective element necessary to establish well-founded fear of persecution); supra notes 152-66 and accompanying text (contending that criminal prosecution that boat people may face upon forced return to Vietnam supports objective element necessary to establish well-founded fear of persecution).
accurately monitor the plight of forced returnees to Vietnam. Proponents of forced repatriation, including Hong Kong, argue that after monitoring voluntary returnees in Vietnam, they have found that the boat people were not badly treated upon their return. Asia Watch, however, reports that “a disturbing pattern of interrogation and low-level harassment of voluntary returnees has emerged.” Such harassment has included making returnees report to the local police station, sometimes as often as weekly. Asia Watch noted that such reporting is typically required of persons recently released from prison or under house arrest. Additionally, according to one Vietnamese source who met several double-backers returned under the voluntary repatriation program, returnees are followed by Vietnamese officials on a regular basis and are denied documents necessary to function in Vietnamese society. Forced returnees, particularly individuals and members of subgroups who have expressed opinion criticizing Vietnam during their stay in Hong Kong camps, are likely to face even greater risks of such persecution.

Further, because of the nature of the monitoring program, the reliability of United Nations and United Kingdom reports that no persecution of returnees has taken place is questionable. Outside contacts with returnees are commonly arranged through govern-
ment officials. For example, when foreign observers interviewed two returnees in one particular instance, a Vietnamese informant disclosed that security police instructed the two boat people as to how to respond. In addition, local officials are typically present at all interviews of repatriates by human rights monitoring personnel. When Vietnamese officials arrange interviews with returnees and “sit in” on such interviews, a coercive atmosphere is created that is likely to inhibit full and frank disclosures of the conditions returnees experience.

An additional problem hindering the monitoring of forced returnees is that UNHCR and other groups have limited resources to put toward the monitoring process. The forced repatriations contemplated by Hong Kong and other countries of first asylum in Southeast Asia involve tens of thousands of persons who would be dispersed throughout Vietnam. Such a situation, coupled with a limited ability to freely access information from Vietnam, precludes the careful monitoring necessary to ensure that returnees will be free from persecution. Furthermore, persecution may take place on a local level, despite guarantees by the central government that it will not persecute returnees.

In summary, there is no reason to believe that Vietnam intends to respect the human rights of asylum seekers residing in Hong Kong if they are forcibly returned to Vietnam. This is particularly true with regard to individuals or members of subgroups of asylum seekers that have openly criticized and opposed the Vietnamese Govern-
ment while residing in Hong Kong. Until recently, the Vietnamese Government refused to accept asylum seekers who were forcibly repatriated. 237 Indeed, only when Vietnam wished to strengthen its ties with the West did it display a reluctant willingness to accept asylum seekers forcibly repatriated to Vietnam. 238 This fact, coupled with the inability of Hong Kong, the United Nations, and other organizations to effectively monitor the conditions endured by forced returnees to Vietnam, demonstrates additional reasons why Hong Kong should thoroughly consider sur place refugee claims.

IV. DIFFICULTIES INHERENT IN RECOGNITION OF SUR PLACE REFUGEES

As a practical matter, there is great difficulty inherent in recognizing sur place refugee claims in the context of Vietnamese asylum seekers. That is, a challenge lies in defining the scope of such a refugee classification. Should the entire class of boat people benefit from the classification, or should only those individuals or subgroups of asylum seekers who face a greater risk of persecution benefit? Before June 15, 1988, the international community automatically recognized all Vietnamese asylum seekers as refugees, and nearly all were resettled in the West. 239 The fact of automatic recognition and resettlement, however, created a magnet effect drawing thousands of asylum seekers out of Vietnam. 240 Thus,
recognition of the entire class of asylum seekers as *sur place* refugees would likely do more to exacerbate the flow of asylum seekers coming to Hong Kong than contribute to a long-term solution to the problem. With regard to asylum seekers whose claims are based on circumstances occurring after their departure from Vietnam, Hong Kong should recognize as *sur place* refugees individuals and members of subgroups who have distinguished themselves through expression of their political opinions or membership in particular subgroups in such a way that they face a significant risk of persecution if forcibly returned to Vietnam.\(^{241}\)

Requiring that an individual or a member of a subgroup must face a significant risk of persecution before *sur place* refugee status is recognized strikes a balance between several competing interests. For example, Hong Kong has an interest in reducing the numbers of asylum seekers occupying Hong Kong detention centers and in curtailing the number of boat people seeking asylum in Hong Kong. This interest is furthered because, under a significant risk requirement, a relatively small number of individuals or members of subgroups of asylum seekers would qualify for *sur place* refugee status. Thus, Hong Kong is able to substantially continue its policy of returning screened-out asylum seekers to Vietnam as well as deterring future asylum seekers from coming to Hong Kong. Similarly, the international community has an interest in ensuring that the principle of *non-refoulement* is respected. This goal is furthered because asylum seekers who would face a significant risk of persecution if returned to Vietnam will be recognized as *sur place* refugees and thus spared *refoulement* to Vietnam. Finally, asylum seekers' interest in having their asylum claims considered with the full benefit of principles articulated in the 1951 Convention and 1967 Protocol is significantly furthered because Hong Kong will thoroughly consider claims for *sur place* refugee status based on circumstances that arose after departure from Vietnam. Fully considering the *sur place* refugee claims of individuals and members of subgroups in this manner would represent a significant step in complying with international refugee law, preserving the principle of *non-refoulement*, and furthering Hong Kong's domestic interests.

Critics may argue that recognizing *sur place* refugees in this way

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\(^{241}\) See Linda D. Bevis, Comment, "Political Opinions" of Refugees: Interpreting International Sources, 63 Wash. L. Rev. 395, 411 (1988) (asserting that in determining *sur place* refugee status, it is important to inquire whether political opinions of asylum seeker have been noticed by potential persecutors).
will encourage asylum seekers to express political opinions and become members of certain subgroups for the purpose of being recognized as refugees. An asylum seeker’s motive for expressing a political opinion should be given little if any weight, however. Under the 1951 Convention, as interpreted by the *U.N. Handbook*, the motivation behind an asylum seeker’s expression of a political opinion is not relevant.\(^{242}\) Paragraphs eighty, eighty-two, and eighty-three of the *U.N. Handbook* describe “political opinion” but make no mention of inquiring into the motivation behind expressions of such opinions.\(^{243}\) By contrast, paragraph eighty-six, which defines the circumstances in which a person committing a criminal act qualifies as a political refugee, specifically states that the motivation behind the criminal act is a relevant factor to be considered in determining refugee status.\(^{244}\) Such an omission indicates that, under the *U.N. Handbook*, the motivation behind an expression of a political opinion should not be considered in deciding whether to recognize *sur place* refugee status, much less be given determinative weight. Rather, the inquiry should remain focused on whether the asylum seeker faces a significant risk of persecution if forcibly returned to Vietnam because of circumstances that arose during the applicant’s absence from Vietnam.

V. RECOMMENDATION THAT THE UNITED NATIONS EXERCISE MANDATE POWER TO SAFEGUARD THE PRINCIPLE OF *NON-REFOULEMENT* UNTIL SCREENING PROCESS ADEQUATELY CONSIDERS *SUR PLACE* REFUGEE CLAIMS

Until Hong Kong adopts a policy of fully considering *sur place* refugee claims, the United Nations should exercise its mandate power\(^{245}\) to recognize those individuals and members of subgroups within the Hong Kong Vietnamese community who are particularly vulnerable to political persecution because of circumstances arising after their departure from Vietnam. If people meet the requirements of *sur place* refugee status under the UNHCR statute, they should qualify for the protection of the United Nations. This is true whether or not they are so recognized by their host country.\(^{246}\)

\(^{242}\) See id. at 411 (explaining that motive is only relevant to determine if there is persecution in prosecution for crime).

\(^{243}\) U.N. HANDBOOK, supra note 8, paras. 80, 82-83.

\(^{244}\) U.N. HANDBOOK, supra note 8, para. 86.

\(^{245}\) See U.N. HANDBOOK, supra note 8, paras. 13-19 (setting forth guidelines for United Nations use of mandate power to grant refugee status).

\(^{246}\) U.N. HANDBOOK, supra note 8, paras. 13-19.
Traditionally, the use of the United Nations mandate power to confer refugee status has been limited to persons of concern to the international community. As of December 1991, the United Nations has extended refugee status under its mandate power to 851 Vietnamese asylum seekers. This process of ad hoc review and recognition of refugee status by the United Nations developed as a result of the efforts of the Agency for Volunteer Service (AVS), which believed that numerous cases fell within the 1951 Convention definition of "refugee" but were not successful in obtaining refugee status before the Refugee Status Review Boards. As a result, AVS and UNHCR officials agreed on a system in which AVS acts as an advocate for cases it feels have been resolved incorrectly by the Review Boards. If the UNHCR official can be convinced that an individual meets the definition of a refugee under the 1951 Convention, then the UNHCR official has the authority to "mandate in" such cases and extend refugee status to that individual. Under an agreement with Hong Kong, such "mandate" refugees are eligible for resettlement and are protected against forced repatriation to Vietnam. Additionally, the Government of Hong Kong has indicated that it is prepared to accept any number of refugees identified by the UNHCR under its mandate. Thus, the United Nations should increase the use of its mandate power to recognize particularly vulnerable individuals and subgroups who qualify as sur place refugees until sur place refugee status is fully considered by Hong Kong officials.

247. *See Goodwin-Gill, supra* note 9, at 6 (noting, however, that over past 30 years, this concept has been broadened considerably).

248. *See Dan Thomas, Lawyers Attack Hong Kong's System for Screening Asylum Seekers, Reuter Libr. Rep., Dec. 10, 1991, available in LEXIS, Nexis Library, Wires File* (stating that 851 is number of asylum seekers recognized as refugees by United Nations under its mandate power, out of total of approximately 19,000 asylum seekers screened out by Hong Kong officials).

249. *See id.* (explaining that Agency for Volunteer Service (AVS) includes group of appeals counsellors funded by UNHCR who advise and represent asylum seekers appealing negative screening decisions).

250. *See Memorandum, supra* note 41, at 9 (discussing international Refugee Status Review Boards set up to review decisions made by immigration officers regarding asylum seekers screened out during first stage of refugee determination processes; *see also* id. at 13 (stating that majority of cases AVS has taken before Refugee Status Review Boards, representing about 10% of 180 cases appealed to Review Boards each week, have been unsuccessful even though many fall clearly within Convention's definition of refugee)).

251. *See Memorandum, supra* note 41, at 13 (characterizing AVS practice as "second look" at strongest cases that failed to be successful in screening process).


Conclusion

Screening officials in Hong Kong apply an excessively narrow definition of "refugee" in the case of individuals and subgroups of Vietnamese asylum seekers because they fail to consider sur place refugee claims adequately. The result is an unwarranted denial of refugee status to many of the Vietnamese asylum seekers screened out as economic migrants. Hong Kong has laid the groundwork for the forcible repatriation of thousands of Vietnamese citizens to Vietnam. Many of those to be forcibly repatriated, including individuals and members of certain subgroups, are likely to experience persecution and violation of their human rights upon return to Vietnam. These circumstances highlight the inadequacy of Hong Kong's present application of the 1951 Convention and 1967 Protocol and consequent failure to safeguard the customary norm of non-refoulement.

The present framework of asylum law, embodied in the 1951 Convention and the 1967 Protocol and interpreted by the U.N. Handbook, requires the examination and recognition of sur place refugee claims. Unfortunately, Hong Kong's refusal to apply such internationally recognized principles in screening asylum seekers creates a dangerous situation for numerous individuals and members of subgroups poised to be forcibly returned to Vietnam. The United Nations, under its mandate power, has the power to intervene and classify many of these asylum seekers as refugees sur place. Consequently, the United Nations should expand the number of asylum seekers so recognized in order to safeguard particularly vulnerable individuals and subgroups from refoulement to a Vietnam in which they face a significant risk of persecution.

255. See supra notes 78-84 and accompanying text (discussing criteria used by Hong Kong officials to determine asylum seekers' refugee status).
256. See supra note 74 and accompanying text (discussing economic migrants as persons not protected under 1951 Convention and 1967 Protocol).
257. See supra notes 49-57 and accompanying text (discussing Hong Kong's planned forced repatriation of majority of boat people still in colony).
258. See supra notes 204-12 and accompanying text (discussing mistreatment of refugees that is likely to occur upon their return to Vietnam).
259. See supra note 90 and accompanying text (discussing inadequacy of Hong Kong's present screening process and arguing that even if process accomplishes stated goal of separating economic immigrants from political refugees, procedure will not fully uphold principle of non-refoulement).
260. See supra note 245 and accompanying text (explaining U.N. mandate power to grant sur place refugees asylum).
262. See supra notes 204-12 and accompanying text (discussing persecution of forced returnees and difficulty of monitoring returnees to ensure their safety).
While thoroughly considering *sur place* refugee claims may impose some hardship on countries of first asylum and present difficulties in the application of *sur place* criteria, it is a price that must be borne by the international community in the interest of protecting the human rights of Vietnamese asylum seekers in Hong Kong. Until conditions in Vietnam are such that individuals expressing contrary political opinions or who are members of particular social groups will not be placed at serious risk of persecution, the international community must respect the rights of Vietnamese citizens to seek asylum in other countries and ensure that claims of *sur place* refugee status are fully considered.