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NO PLACE TO CALL HOME STATELESS VIETNAMESE ASYLUM-SEEKERS IN HONG KONG

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I. INTRODUCTION

There is no greater sorrow on earth than the loss of one's native land.
— Euripides, 431 B.C.¹

The stateless person has been. . . compared to a vessel on the open sea
not sailing under the flag of any state, or to a bird which flies alone.
— A. Peter Mutharika²

The right to nationality is recognized globally under international law. However, the United Nations High Commissioner for Refugees (the "UNHCR") has estimated that hundreds of thousands of people worldwide may be stateless.³ A small group of ethnic-Chinese migrants from Vietnam currently residing in Hong Kong is part of that number. These migrants have been universally rejected by all countries that could or should claim responsibility for them, and they currently exist in a state of limbo in Hong Kong, as yet unacknowledged stateless persons.

This note will address why these individuals are stateless and what the implications are for them under current international law. Prior to the handover of Hong Kong to Chinese control, Britain had certain obligations under international law to these people by virtue of their statelessness. Today, Vietnam and the international community have certain obligations to these people. These obligations will be analyzed under basic human rights law, the international law of statelessness, and international customary law. Finally, it will be suggested that these individuals should be considered refugees and, as such, are protected under the auspices of the UNHCR.

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1. Cited in UNHCR Public Information Section, *UNHCR and Refugees*, (visited February 20, 1997) <<http://www.unhcr.ch>>.

2. A. PETER MUTHARIKA, *THE REGULATION OF STATELESSNESS UNDER INTERNATIONAL AND NATIONAL LAW* 1 (1989).

3. See UNHCR Public Information Section, *UNHCR and Refugees* [February 20, 1997] <http://www.unhcr.ch/un&ref/who/whois.htm#2040>.

II. BACKGROUND

In the last twenty years, over 200,000 Vietnamese have escaped to Hong Kong seeking asylum.⁴ This process began in the aftermath of the fall of Saigon in 1975, when 3,743 Vietnamese asylum-seekers were rescued from the South China Sea and arrived in Hong Kong aboard the Danish ship, the *Clara Maersk*.⁵ Hong Kong agreed to grant these asylum-seekers first asylum pending their resettlement elsewhere in the world. Britain confirmed this policy in 1979 during the International Convention on Indo-Chinese Refugees, where it was agreed that Vietnamese asylum-seekers would be exempt from normal refugee screening procedures.⁶ In addition, other countries pledged that they would match the rate of arrivals of asylum seekers in Hong Kong through a worldwide resettlement program.⁷ The Vietnamese government agreed to try to deter mass emigration, and to aid those efforts, Hong Kong implemented a policy whereby all asylum-seekers arriving from Vietnam were detained in closed camps pending resettlement.⁸

By 1988, however, it was clear that Hong Kong's plan was not working. Due to what one Hong Kong judge has termed "compassion fatigue," the international community had become less willing to accept Vietnamese refugees for resettlement.⁹ Yet, the number of asylum-seekers fleeing from Vietnam continued to increase. As a result, a massive backlog of immigrants developed in Hong Kong's detention centers, pending resettlement that seemed highly unlikely.¹⁰

After consultation with the UNHCR, Hong Kong decided to cease being a country of first asylum, to begin a screening policy for Vietnamese immigrants, and to repatriate those Vietnamese not screened in as refugees. The UN and the international community formalized this policy in 1989, and it became the Comprehensive Plan of Action for Indo-Chinese Refugees (the "CPA").¹¹ Under the CPA, all Vietnamese migrants were classified as illegal immigrants and detained pending a determination of refugee status. Determination of refugee status was adjudicated according to the guidelines of the UNHCR, the 1951 UN Convention on Refugees and the 1967 Protocol Relating to the Status of Refugees.¹² Under the UN Convention on Refugees,

4. See Simon Buerk, *Boat People on History's Ebb Tide*, S. CHINA MORNING POST, Aug. 17, 1997, at 9. These people came to be known globally as boat people, due to the small rickety boats in which they would travel to reach foreign lands, braving sharks, pirates, starvation, and drowning. See UNHCR, *Hong Kong*, (visited February 20, 1997) <<http://www.unhcr.ch/world/asia/hongkong.htm>>.

5. See LEONARD DAVIS, *HONG KONG AND THE ASYLUM SEEKERS FROM VIETNAM I* (1991).

6. *In Re Chung Tu Quan & Ors.*, 1 HKC 566 (1995) AT 11.

7. See Davis, *supra* note 5, at 7.

8. See *id.*

9. See *Tan Le Lam v. Superintendent of Tai A Chau Detention Center*, 4 ALL ER 256, 2 WLR 963 Hong Kong (P.C. 1996).

10. *In Re Chung Tu Quan*, *supra* note 6, at 12.

11. See DAVIS, *supra* note 5, at 17.

12. See Hong Kong: Immigration, *Topical Information A to Z* (visited March 18, 1997) <<http://www.info.gov.hk/info/fimmigrahtm>>.

a refugee is a person who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion, is outside the country of his nationality and is unable to or, owing to such fear, unwilling to avail himself of the protection of that country."¹³ Detainees classified as refugees then awaited resettlement to other countries.¹⁴

Since 1979, over 143,000 Vietnamese refugees have been resettled overseas through the CPA process. Approximately 1,300 additional refugees await resettlement.¹⁵ The government screened out the remaining 68,300 asylum-seekers as non-refugees, on the basis that they were not facing a well-founded fear of persecution but were instead fleeing economic conditions.¹⁶ The Vietnamese asylum-seekers were repatriated to Vietnam or placed in closed detention camps pending repatriation.¹⁷ Over 66,500 Vietnamese have been repatriated to Vietnam under the CPA.¹⁸

Approximately 1,800 Vietnamese non-refugee asylum seekers remain in Hong Kong.¹⁹ Most are awaiting repatriation. Some, however, cannot be repatriated because Vietnam considers them to be non-nationals and refuses to accept them. This group of people is the focus of this paper. They are Vietnamese asylum-seekers who are stateless, and as such, face a highly precarious position now that the handover of Hong Kong from British to Chinese control is complete.

A. *Stateless Persons in Hong Kong*

A stateless person is a person who does not have a nationality under the law of any state. There are two types of statelessness: *de jure* and *de facto*. *De jure* statelessness may be either original or subsequent. Original statelessness results when a person does not acquire a nationality under the law of any state

13. Convention Relating to the Status of Refugees, adopted July 28, 1951, cited in United Nations Treaty Series, Vol.189, No.2545, (1954).

14. See Tang Lay Lee, *Some Gaps in the Comprehensive Plan of Action for Indo-Chinese Refugees*, MIGRATION WORLD MAG., Jan.- Apr. 1995.

15. See Buerk, *supra* note 4; see also Emma Batha, 'Stateless' Family Eyes New Home Overseas, S. CHINA MORNING POST, June 1, 1997. The CPA ended in July 1996; however special arrangements have been made to continue resettling the remaining refugees in Hong Kong; see *Britain and Hong Kong 1997: Countdown to Handover*, (visited March 18, 1997) <<http://www.fco.gov.uk/hongkong/brief.html#imm>>.

16. See Gary Silverman, *No Exit: Forced Repatriation Looms for Last Boat People*, FAR EASTERN ECONOMIC REVIEW, p. 18 (November 3, 1994).

17. Non-refugee Vietnamese are repatriated to Vietnam under two schemes. The first scheme is known as the Voluntary Repatriation Scheme and is administered by the UNHCR. A Vietnamese who agrees to voluntary repatriation is given financial and administrative assistance by the UNHCR and returned to Vietnam as quickly as possible. Approximately 57,500 Vietnamese from Hong Kong have been repatriated in this manner. The second scheme is known as Orderly Repatriation and is administered by the Hong Kong government. Orderly repatriation is compulsory, and more than 9,000 migrants have been repatriated under this scheme; see Buerk, *supra* note 4; See also UNHCR: Hong Kong, *supra* note 4.

18. See Buerk, *supra* note 4.

19. See UNHCR: Hong Kong, *supra* note 4.

at birth.²⁰ Subsequent statelessness occurs when a person becomes stateless later in life by losing her nationality without acquiring another.²¹ In 1949, the UN expanded the definition of statelessness to include *de facto* stateless persons, or those who, "having left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities, either because these authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals."²² In 1995, the Executive Committee of the UNHCR reaffirmed this two-prong definition of statelessness:

[Statelessness] . . . includes de jure stateless, which according to the 1954 Convention Relating to the Status of Stateless Persons refers to 'a person who is not considered as a national by any State under the operation of its laws; also includes de facto stateless which refers to those persons with an ineffective nationality or those who cannot establish their nationality.'²³

The stateless asylum-seekers in Hong Kong form two groups. The first group consists of approximately 250 ethnic-Chinese who claim Taiwanese nationality.²⁴ They have been screened out as refugees—a decision reinforced in a 1994 Hong Kong Court of Appeals case²⁵—but cannot be repatriated because Vietnam considers them to be non-nationals.²⁶ The second group consists of approximately 300 ethnic Chinese who originally fled or were expelled from Vietnam to China and who eventually found their way to Hong Kong.²⁷ This group was just recently granted refugee status, but is fighting forced resettlement to China.²⁸

The history of the first group began in 1929, when the Nationality Law of the Republic of China granted all ethnic-Chinese living in Vietnam Republic

20. P. WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 161 (1979). This would include, for instance, "children of parents of mixed origin or who are born in a country other than their parents' country of origin, since they do not necessarily gain citizenship of the place where they are born" See UNHCR & Refugees, *supra* note 3.

21. *Id.* at 162. In some countries, for instance, this can occur as a result of a prolonged sojourn abroad, deprivation of nationality as a penalty, or due to territorial changes such as occurred in Bosnia. See UNHCR & Refugees, *Supra* note 3.

22. A STUDY ON STATELESSNESS, United Nations Publication 8-9 (1949).

23. EXCOM Conclusions No.78 (1995) (visited November 22, 1997) <<http://unhcr.ch/refworld/index/stateless/stateless.htm>>.

24. In actuality, they claim the nationality of the Republic of China (ROC), which is now commonly known as Taiwan. The number of migrants claiming ROC nationality may actually be significantly larger. There is evidence that more and more detainees are claiming ROC nationality, but it is unclear whether these later claims are genuine or attempts to avoid detention and repatriation. Director of Immigration & Anor. v Le Tu Phuong & Anor., 1 HKC 263 (1994).

25. Director of Immigration, *supra* note 25.

26. Patricia Young, *Refugees Face Forced-Labor Farms*, S. CHINA MORNING POST, Aug. 12, 1997.

27. *Id.*

28. *Id.*

of China (ROC) nationality and identity papers.²⁹ In 1948, after China overthrew the ROC and the ROC moved to Taiwan, thousands of ethnic-Chinese attempted to move to Taiwan. Most were stopped by the Vietnamese government.³⁰ After the communist victory in Vietnam in 1975, these individuals again asserted their ROC nationality when registering for elections, and in response, the Vietnamese government issued them resident alien papers.³¹ Those individuals who then fled to Hong Kong after the 1979 Chinese-Vietnamese war are now considered by Vietnam to be non-nationals on the basis of their Taiwanese identity papers or resident alien papers.³² Vietnam is refusing to allow them to be repatriated.³³

It would seem that the next logical step would be to repatriate these individuals to Taiwan. However, Taiwan also refuses them. Under the 1973 Domicile Act of the ROC, passports issued to ROC nationals overseas require visas for entry to and residence in Taiwan.³⁴ Many of the detainees in Hong Kong do not have passports, having either Vietnamese resident alien papers or their parents' ROC passports.³⁵ These papers are not sufficient for gaining entry into Taiwan. Furthermore, even for those with ROC passports, very few nationals residing overseas are permitted to permanently reside in Taiwan under the Entry, Temporary and Permanent Residence of Nationals and the Household Registration Procedures Regulations.³⁶

These individuals are *de facto* stateless persons under UN guidelines, and as such are entitled to protection as stateless persons. They no longer enjoy the protection and assistance of a national authority, whether it is Vietnam or Taiwan.

The second group of stateless asylum-seekers, those who originally fled or were expelled from Vietnam to China, are controversially termed ECVIs or Ex-China Vietnamese Illegal Immigrants.³⁷ After the 1979 Chinese-Vietnamese war, Vietnam expelled thousands of ethnic-Chinese, many of whom still live in southwestern China.³⁸ However, none have Chinese identity papers. They are considered by Chinese officials to be "Indo-Chinese refugees," and China would prefer that they return to Vietnam.³⁹

Many of these ethnic-Chinese eventually migrated to Hong Kong. However, until November 1996, Hong Kong law provided that any migrant found to have settled in China *before* coming to Hong Kong was an illegal

29. Director of Immigration, *supra* note 24.

30. *Id.*

31. *Id.*

32. *Staying On?*, THE ECONOMIST, 36, 37 (Jan. 11, 1997).

33. *Tan Le Lam*, *supra* note 9.

34. *Lee*, *supra* note 14.

35. *Id.*

36. *Id.*

37. *Re Chung Tu Quan*, *supra* note 6, at 33.

38. *See Staying On?* *supra* note 32.

39. *Id.*

immigrant from China and would be repatriated to China. At that time, a Privy Council hearing ruled that ECVIIs were entitled to a screening procedure.⁴⁰ In June 1997, the remaining ECVIIs in Hong Kong were screened in as refugees, but the government ruled that they had to be returned to mainland China.⁴¹ China, on the other hand, remains unwilling to accept many of these migrants because they are "Indo-Chinese refugees" or ROC nationals.⁴² The ECVIIs themselves are waging a legal battle not to be returned to China on the grounds that the Chinese government has mistreated them and will continue to do so.⁴³

As with the ethnic Taiwanese of the first group, the ECVIIs fit the definition of *de facto* stateless persons established by the UN because no governmental authority is willing to accept them as nationals and to welcome them home. Although they have been screened in as refugees, they are being told to return to the Chinese mainland where they are not wanted and will not be treated well.

B. *Significance of Statelessness*

Statelessness is a highly undesirable position. Nationality is an essential link between an individual, the state, and international law. This link grants the protection of the State, both at home and abroad, and allows a State to intervene on behalf of an individual under international law. According to one international law hornbook, "the rules of international law relating to diplomatic protection are based on the view that nationality is the essential condition for securing to the individual the protection of his rights in the international sphere."⁴⁴

Being stateless is particularly problematic for the ethnic-Chinese and Taiwanese stateless asylum-seekers. Those screened in as refugees have still not been offered the protection of a state that wishes to assimilate them. Those screened out have no hope of being resettled abroad and no hope of returning to Vietnam, China or Taiwan. Thus, all exist in a state of limbo. In a recent court case, Hong Kong finally acknowledged that these individuals had no hope of returning to Vietnam or China, and released them from many years of detention.⁴⁵

The future of all of these stateless asylum-seekers is still undetermined. Before the handover of Hong Kong to China, they enjoyed a certain amount of protection since Hong Kong, by virtue of having been a British Territory,

40. *Nguyen Tuan Cuong v. Dir. of Immigration*, 1 WLR 68 (Hong Kong P.C. 1996).

41. Young, *supra* note 26.

42. *Staying On?*, *supra* note 32; Lee, *supra* note 14.

43. Young, *supra* note 26.; Neil Western, "Judge Offers Refugees Some Hope," WORLD SOURCES ONLINE, INC., Sept. 16, 1997.

44. L.V. OPPENHEIM, INTERNATIONAL LAW; VOL. I 669 (1955), cited in WEIS, *supra* note 20, at 162.

45. See Tan Le Lam, *supra* note 9.

was party to both the Convention Relating to the Status of Stateless Persons, and the Convention on the Reduction of Statelessness.

China is party to neither Convention and made it very clear that it did not want any asylum-seekers in Hong Kong once it gained control.⁴⁶ In light of China's weak human rights record, the future these people face is tenuous at best if they are not granted the nationality and accordant protection of a state.

III. BASIC HUMAN RIGHTS LAW

Any analysis of international law on statelessness must begin with, and build upon, basic principles of human rights law. The Universal Declaration on Human Rights (the "Universal Declaration"), adopted by the UN General Assembly on December 10, 1948, is the cornerstone of human rights law.⁴⁷ The two other cornerstone documents are the International Covenant on Civil and Political Rights (the "ICCPR") and the International Covenant on Economic, Social, and Cultural Rights (the "ICESCR").⁴⁸

Although it is not a binding covenant under international law, the Universal Declaration was adopted almost unanimously by the UN General Assembly and is recognized by the international community. The Universal Declaration sets forth the basic universal standards regarding individual human rights. The primary right is the right to a nationality. The Universal Declaration states, in Article 15, that "[e]veryone has the right to a nationality," and that "[n]o one shall be arbitrarily deprived of his nationality."⁴⁹ Under the Universal Declaration therefore, signatory states are constrained from the arbitrary denial of a citizen's nationality. But the Universal Declaration does not protect the stateless asylum-seekers.

Vietnam arguably has violated the constraint against arbitrary denial of a citizen's nationality by arbitrarily claiming that the stateless asylum-seekers are non-nationals. According to China and Taiwan, Vietnam is therefore responsible for the stateless asylum-seekers' status. Vietnam counters that any such stateless status stems from the Chinese and Taiwanese governments' refusal to recognize their nationality. In short, the Chinese, Taiwanese, and Vietnamese governments each eschew the constraint against arbitrary denial of nationality by claiming that the duty rests with the others.

Even Article 13 of the Declaration which states that "[e]veryone has the right to leave any country, including his own, and to return to his country"⁵⁰ is not helpful. The stateless asylum-seekers have availed themselves of the right to leave a country. However, the subsequent right of return is only to the

46. See Silverman, *supra* note 16, p. 19

47. Universal Declaration of Human Rights, Dec. 10, 1948, U.N.G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

48. International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) and International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, 993 U.N.T.S. 3.

49. Universal Declaration of Human Rights, *supra* note 47, art. 15 (1) and (2).

50. *Id.*, at art. 13 (2).

country of one's nationality. Since the stateless asylum-seekers do not have a nationality, they are not entitled to the rights specified in Article 13.

Finally, while the Universal Declaration confers a right of nationality on an individual, it does not confer a complementary duty upon states to grant nationality. Thus, neither Vietnam nor China nor Taiwan has an obligation under the Universal Declaration to grant the stateless asylum-seekers a nationality. Likewise, countries to which the stateless asylum-seekers could resettle have no obligation to grant them nationality under the Declaration.

The two additional human rights documents underlying international human rights law are the ICCPR and the ICESCR. These documents comprehensively enumerate the specific rights of individuals and duties of States with respect to human rights.⁵¹ Vietnam and Hong Kong are parties to both Covenants. China is party to neither Covenant.⁵² Even if China was a party, neither Covenant is particularly helpful in this case. The ICESCR has no provisions regarding nationality or statelessness and the ICCPR only restates the provision regarding nationality found in the Universal Declaration.⁵³

Because the Universal Declaration, the ICCPR and the ICESCR do not provide the necessary tools with which the stateless asylum-seekers could obtain a nationality, one must look beyond basic human rights law for a solution to their statelessness.

IV. INTERNATIONAL LAW REGARDING STATELESSNESS

In 1949, the UN International Law Commission included statelessness in its list of topics selected for codification.⁵⁴ As a result, the Ad Hoc Committee of the Economic and Social Council, which drafted the Convention Relating to the Status of Refugees, drew up a Protocol Relating to the Status of Stateless Persons. A Conference of Plenipotentiaries assembled to address the Protocol and decided the instrument should be in the form of a Convention. On September 28, 1954, the Convention Relating to the Status of Stateless Persons was adopted and opened for signature.⁵⁵ Forty-two (42) States have joined to date.⁵⁶ This convention is particularly important, for it

51. ICCPR, *supra* note 48; ICESCR, *supra* note 48.

52. The Hong Kong Bill of Rights Ordinance (BORO) gives effect to the ICCPR in domestic law, and the Joint Declaration and the Basic Law provide that the provisions of the ICCPR and ICESCR, as applied to Hong Kong, will remain in force after 1997. *Britain and Hong Kong 1997: Countdown to Handover*, *supra* note 15.

53. Article 12 of the ICCPR in part (2) states that "[e]veryone shall be free to leave any country, including his own," and in part (4) that "[n]o one shall be arbitrarily deprived of the right to enter his own country." Article 24 (3) states that "[e]very child has the right to acquire a nationality." ICCPR, *supra* note 48.

54. WEIS, *supra* note 20, at 165.

55. *Id.* at 168-69.

56. Convention Relating to the Status of Stateless Persons, 360 U.N.T.S. 117, entered into force June 6, 1960. The following States are signatories of the Convention: Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Barbados, Belgium, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Colombia, Costa Rica, Croatia, Denmark, Ecuador, El Salvador, Fiji, Finland, France, the former Macedonia, the

lays out both the rights of a stateless person and the obligations of a signatory State toward a stateless person.

The ratification process for the Convention relating to the Status of Stateless Persons began during the UN's Fourth Session. During the Fifth Session, the International Law Commission of the UN adopted two separate draft conventions on the Elimination of Statelessness and the Reduction of Future Statelessness, which were then presented to the General Assembly for consideration.⁵⁷ The committee eventually combined these two drafts into one convention, the Convention on the Reduction of Statelessness, adopted at a special conference in New York on August 28, 1961, and entered into force on December 13, 1975.⁵⁸ Currently, only seventeen (17) States have ratified the Convention.⁵⁹ While this Convention looks specifically at ways to prevent future statelessness, it also reiterates and strengthens the provisions of the Convention Relating to the Status of Stateless Persons.

Both the Convention Relating to the Status of Stateless Persons, and the Convention on the Reduction of Statelessness require that state parties fulfill certain affirmative obligations towards stateless persons. For instance, Article 8 of the Convention on the Reduction of Statelessness provides that "a contracting State shall not deprive a person of its nationality if such deprivation would render him stateless."⁶⁰ Under Article 9, a contracting State "may not deprive any person or group of persons of [. . .] nationality on racial, ethnic, religious or political grounds."⁶¹ Even if one could assign responsibility to Vietnam, China, or Taiwan for the stateless asylum-seeker's lack of nationality, since these States have not signed onto the Conventions, they were not obligated by the terms of these Conventions to refrain from depriving the stateless asylum-seekers of their nationality.

The rights of stateless persons in a country of asylum are promising under the Convention Relating to the Status of Stateless Persons. A host country must treat a stateless person on a level equal to that of its other resident aliens. With respect to rights which include freedom of religion, public education, public relief, and social security, the host country must treat the stateless person in the same manner as its nationals.⁶² Rights acquired by a stateless person prior to being stateless, particularly the right to marriage,

Republic of Yugoslav, Germany, Greece, Guatemala, Guinea, Holy See, Honduras, Ireland, Israel, Italy, Kiribati, Republic of Korea, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Luxembourg, Madagascar, Netherlands, Norway, Philippines, Slovenia, Sweden, Switzerland, Trinidad and Tobago, Tunisia, Uganda, United Kingdom, Yugoslavia, and Zambia.

57. WEIS, *supra* note 20, at 165.

58. *Id.* at 166.

59. Convention on the Reduction of Statelessness 989 U.N.T.S. 175, entered into force Dec. 13, 1975. The following states have ratified the Convention: Armenia, Australia, Austria, Bolivia, Canada, Costa Rica, Denmark, Dominican Republic, France, Germany, Ireland, Israel, Kiribati, Latvia, Libyan Arab Jamahiriya, Netherlands, Niger, Norway, Sweden, and the United Kingdom.

60. *Id.* at art. (8).

61. *Id.* at art. (9).

62. Convention Relating to the Status of Stateless Persons, *supra* note 56, at art. (4), (7), (13), (14), (15), (17), (18), (19), (20), (21), (22), (23), (24).

must be maintained.⁶³ All stateless persons are entitled to free access to the courts of law of contracting States.⁶⁴ Contracting States cannot expel a stateless person lawfully in their territory, "save on grounds of national security or public order."⁶⁵

As Britain is a contracting State, when Hong Kong was still a British territory the stateless asylum-seekers were treated, for the most part, in accordance with the guidelines outlined above. For example, in *Tan Te Lam & Others v. Superintendent of Tai A Chau Detention Center*, the Hong Kong Privy Council held that it was unreasonable to hold those whom Vietnam considered non-nationals in detention pending repatriation.⁶⁶ The Council released almost three hundred and fifty people from the detention centers.⁶⁷ They were permitted to move around freely and work in the city, and to live in the city or in half-way houses.⁶⁸ While the Privy Council did not specifically recognize these individuals as stateless, they were treated on a level equal to other legal aliens in Hong Kong.

Moreover, the Convention Relating to the Status of Stateless Persons binds contracting parties to facilitate, to the fullest extent possible, the assimilation and naturalization of stateless persons. Britain failed to honor this obligation when Hong Kong was still its territory. The British government relied on the fact that neither Convention had been incorporated into British municipal law and, thus, was not legally binding on Britain.⁶⁹ This argument is disingenuous because, while not formally bound under international law, Britain was obligated by other factors to uphold the provisions of the Conventions and because principles of justice demanded such an outcome.

First, Britain failed to acknowledge that, by signing onto the Conventions, it was agreeing to their contractual obligations and signaling its willingness to abide by their provisions and incorporate them into domestic law. Second, Britain gave insufficient recognition to the diplomatic weight of the international community, which could have validly reproached Britain for its failure

63. *Id.* at art. (12).

64. *Id.* at art. (16).

65. *Id.* at art. (31).

66. *Tan Le Lam.*, *supra* note 9.

67. Billy Wong Wai Yuk & Scott McKenzie, *First Day Out of Camps Leaves Boat People Suddenly Confused, Freed Viets to Seek Asylum in Third Countries*, S. CHINA MORNING POST, Apr. 14, 1996; *Hong Kong Releases 130 Vietnamese Migrants*, AGENCE FRANCE PRESSE, Oct. 18, 1996.

68. *Hong Kong Releases 130 Vietnamese Migrants*, *supra* note 67.

69. Under fundamental British law, all treaties and conventions are non-self executing, and therefore require legislative implementation before they can be enforced. This has not yet happened in Britain. In *R v. Immigration Appeal Tribunal ex parte Anilkumar Ravindrabhai Patel*, the Queen's Bench stated that the Convention Relating to the Status of Stateless Persons was not part of British municipal law. 89 AM. J. INT'L L. 695, 697-698 (1995). In *Yin Xiang Jiang Simon v Director of Immigration*, the Hong Kong Court of Appeal held that while persuasive, the Convention Relating to the Status of Stateless Persons had not been incorporated into Hong Kong municipal law and was, therefore, not binding. 1 HKC 348 (1994). The Convention on the Reduction of Statelessness, likewise, has not been incorporated into Hong Kong or British municipal law. Thus, despite the fact that Britain is a signatory to both Conventions, it is not legally bound by the provisions of the Conventions. Carlos Manuel Vasquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 697-98 (1995).

to facilitate the naturalization of the stateless asylum seekers.⁷⁰ Possibly because of the small number of people at issue, the relative lack of exposure of the problem, or a general reluctance to infringe upon State sovereignty, the international community did little to exert pressure on Britain to do so. The fact remains that Britain had valid obligations to facilitate the naturalization of the stateless asylum-seekers but failed to do so. Nonetheless, since Britain is no longer an actor in this situation, and since neither China, Vietnam nor Taiwan have signed on to either Convention on Statelessness, neither Convention offers a solution for the stateless asylum-seekers.

IV. CUSTOMARY INTERNATIONAL LAW

Like the basic principles of human rights law, and the international law regarding statelessness, customary international law does not provide a solution for the stateless asylum-seekers. The first problem lies in determining just what comprises customary international law. International jurisprudence outlines two conditions necessary for proving the existence of a customary rule of international law. The first condition is evidence of a sufficient degree of state practice.⁷¹ The second is a determination that states see themselves as acting under a legal obligation.⁷² Under these conditions, it is almost impossible to find that international customary law exists regarding statelessness.

First, there is no clear international custom or protocol for the prevention of statelessness. An ongoing report by the UNHCR suggests that hundreds of thousands of people worldwide may be stateless, including citizens of the former East Bloc, Bidoons in Kuwait, Gypsies throughout Central Europe, Kurds and Palestinians.⁷³ Thus, many States make no consistent effort to prevent statelessness. Clearly, the governments of Vietnam, China and Taiwan do not think themselves bound by any such legal obligation.

Determining to what degree States practice the protection and naturalization of stateless persons is also difficult. On the one hand, there are several instances where stateless persons have been recognized and protected as such. Following World War I and World War II, persons rendered stateless as a result of the wars were, for the most part, embraced by the international

70. The international community did castigate Britain for refusing to grant full British citizenship to Hong Kong ethnic minorities holding only British Nationals Overseas (BNO) passports. International watchdogs such as the Commonwealth Human Rights Initiative warned that Britain's intransigence would render thousands of people stateless at the Handover in violation of international law. In February 1997, largely as a result of this pressure, Britain did grant BNO passport holders in Hong Kong full citizenship rights. David Wallen, *Illegal Status Warning; Ethnic Minorities Plight to be Highlighted at Summit*, S. CHINA MORNING POST, Sept. 18, 1995; Jonathan, Braude, *Hopefuls for 78 Countries Seek Papers; More than 8,000 People Eligible at Time of Handover, Immigration Department Projections Show*, S. CHINA MORNING POST, Feb. 5, 1997.

71. Bayefsky, Anne F., General Approaches to Domestic Application of International Law, in HUMAN RIGHTS OF WOMEN 360 (Rebecca J. Cook ed., 1994).

72. *Id.*

73. UNHCR and Refugees, *supra* note 3.

community and quickly absorbed as nationals into the countries in which they sought asylum.⁷⁴ Likewise, in July of 1994, the Lebanese government granted nationality to some 130,000 stateless persons within its territory.⁷⁵

However, statelessness today is a tremendous problem, one which few countries are addressing.⁷⁶ The lack of success on the part of the international community to address statelessness indicates that a valid and binding Customary International Law on statelessness does not exist. In fact, several international and national bodies who have attempted to identify customary international norms in the human rights field have conspicuously left out any norms regarding statelessness.⁷⁷ The solution to the stateless asylum-seekers' dilemma, therefore, must come from other avenues.

V. THE POTENTIAL REFUGEE STATUS AND RESETTLEMENT OF THE STATELESS VIETNAMESE

The stateless asylum-seekers who fled to Hong Kong via China were just recently granted refugee status, while those who fled directly from Vietnam are still considered non-refugees. Granting all of the stateless asylum-seekers refugee status is the first vital step to finding a solution because once refugee status is granted, a suitable resettlement country can and must be found. The organization that has the capability to undertake both of these tasks is the United Nations High Commission on Refugees (UNHCR).

A. *Refugee Status*

The definition of a refugee as accepted under CIL is defined in the 1951 Convention on the Status of Refugees and its 1967 Protocol. Article 1 A (2) of the Convention states that the term refugee shall apply to any person who:

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

74. For example, following World War I, former citizens of Austria-Hungary, Italy, Poland, Yugoslavia, Czechoslovak Republics and the USSR were generally granted nationality of the country in which they resided or wished to reside. Likewise, Russian Jews deprived of nationality in 1921, were given back their citizenship following World War II. A STUDY ON STATELESSNESS, *supra* note 22.

75. E-mail from Peter Barnes, Esq. Pam Baker and Company, (Dec. 20, 1996).

76. For example, neither the European Court of Justice nor the International Court of Justice have addressed the issue of statelessness at all, and the EC Treaty had no provisions for stateless persons within the EC.

77. The customary international human rights norms that have been identified include freedom from torture, disappearance, arbitrary detention and genocide, the right not to be murdered or enslaved, and freedom from loss of consortium and racial discrimination. Yet even these norms are highly controversial. Bayefsky, *supra* note 72, at 361.

country of his former habitual residence as a result of such events, is unable or, is unwilling to return to it.⁷⁸

The stateless asylum-seekers who have not yet been granted refugee status fit the definition of refugees in two different ways. First of all, a refugee is someone who faces a well-founded fear of persecution in their home country. According to UNHCR guidelines there is both a subjective and objective element to this requirement.⁷⁹

The subjective element is whether the asylum-seeker fears persecution, and should be based only on the asylum-seeker's statements.⁸⁰ Many of the stateless asylum-seekers have indicated that they fear persecution in Vietnam.⁸¹ Therefore, they meet the requirement of the subjective element.

The objective element is whether the asylum-seeker's fear is well-founded.⁸² This determination is based upon an evaluation of the particular circumstances of the asylum-seeker's situation.⁸³ In particular, the basis of the asylum-seeker's fear must be evaluated.

In this case, the asylum-seekers fear persecution in Vietnam on the basis of their race. They are ethnically Chinese, and there is a long history of tension between the Chinese and the Vietnamese, a situation exacerbated by the 1979 Chinese-Vietnamese War. The fact that Vietnam refuses to recognize the stateless asylum-seekers as Vietnamese nationals, and refuses to repatriate them is a strong indication that they would face persecution based on ethnicity if forced to return to Vietnam. Thus, their fear is well-founded.

The fact that these people are stateless because Vietnam refuses to recognize their nationality also qualifies them as refugees. A refugee is also defined as an individual "who, not having a nationality, and being outside the country of his former habitual residence as a result of such events, is unable "to return to it."⁸⁴ 'Former habitual residence', is defined as "the country in which [the asylum-seeker] had resided and where he had suffered or fears he would suffer persecution if he is returned."⁸⁵ Vietnam is clearly the former habitual residence of these asylum-seekers, and as discussed above, they left Vietnam because of a well-founded fear of persecution on the basis of their race. Furthermore, they are unable to return to Vietnam because of Vietnam's intransigence. Therefore, according to the 1951 Convention and UNHCR

78. The definition of a refugee under the Convention Relating to the Status of Refugees only applied to those who became refugees as a result of events occurring before January 1, 1951. The 1967 Protocol revoked the calendar restriction. Convention Relating to the Status of Refugees, *supra* note 13; Protocol Relating to the Status of Refugees (1967).

79. Office of the United Nations High Commissioner for Refugees—Handbook on Procedures and Criteria for Determining Refugee Status, 1992, Chapter II, Art. 38. [hereinafter HANDBOOK].

80. *Id.* at Chapter II, art. 40-41.

81. See *Anor v. Le Tu Phuong*, *supra* note 24 at 2.

82. HANDBOOK, *supra* note 79.

83. *Id.* at Chapter II, Art. 42.

84. HANDBOOK, *supra* note 79, at Chapter II, art. 38.

85. Convention Relating to the Status of Refugees, *supra* note 13.

guidelines, these asylum-seekers in Vietnam should have been granted refugee status.

The stateless asylum-seekers who fled to Hong Kong via China were found to have met the criteria for refugees by the Hong Kong government. It makes no sense that their brethren were denied this status simply because they came straight to Hong Kong without first stopping in China. Nevertheless, they were screened out as refugees under the CPA and Hong Kong guidelines. Thus, they should look beyond the Hong Kong government to have their cases reevaluated. The organization that can reevaluate their situation and has the power to grant them refugee status is the UNHCR.

B. *The UNHCR*

In Hong Kong, the UNHCR has been instrumental in facilitating the CPA and in promoting voluntary repatriation. Thus far, the role of the UNHCR with respect to the stateless asylum-seekers has been to encourage these individuals to return to Vietnam, or to mediate in discussions between Vietnam, China and the UK.⁸⁶ As indicated, these efforts have not been very successful, and it is time for the UNHCR to take a more decisive role.

The UNHCR is in a unique position in that its mandate allows it to recognize the refugee status of all of the stateless asylum-seekers in Vietnam. Usually, there is no need for the UNHCR to engage in the determination of refugee status, as this determination normally depends on one of the Refugee Conventions and rests primarily with the contracting state.⁸⁷ In fact, the High Commissioner has expressed a formal reluctance to assume the sole decision-making responsibility.⁸⁸ Nevertheless, according to the Statute of the Office of the UNHCR, the High Commissioner is called upon to provide international protection to refugees falling under the auspices of her office.⁸⁹

The definition of refugees falling under the High Commissioner's competence is substantially similar to the definition of a refugee under the 1951 Convention, and applicable no matter where the asylum-seeker is currently residing.⁹⁰ In short, even if the asylum-seeker is in a country that is a party to the 1951 Convention and has been screened out as a refugee, if that person meets the criteria of the statute, she becomes a protectorate of the UNHCR as a "mandate refugee."⁹¹

86. *Staying on?*, *supra* note 32; UNHCR: Hong Kong, *supra* note 4.

87. *Note on the Determination of Refugee Status Under International Instruments, Executive Committee on the High Commissioner's Programme*, EC/SCP/5, Aug. 24, 1977. Indeed, in the case of the ECVII, it was the Hong Kong authorities who determined their refugee status.

88. *Follow-up On Earlier Conclusions of the Sub-Committee on the Determination of Refugee Status, Inter Alia, with Reference to the Role of the UNHCR in National Refugee Status Determination Procedure*, Executive Committee of the High Commissioner's Programme, EC/SCP/22/Rev.1, Sept. 3 1982.

89. HANDBOOK, *supra* note 79, Introduction (E)(14).

90. *Id.* at Introduction (E)(15).

91. *Id.* at Introduction (E)(16).

As demonstrated above, the stateless asylum-seekers qualify as refugees under the 1951 Convention. While the criteria of the 1951 Convention are not identical to criteria for refugee status under the Statute, they are so substantively similar⁹² that all the stateless asylum-seekers should qualify as refugees under the UNHCR Statute.

While the UNHCR may be reluctant to assume a decisive role in this situation, such action would not be unprecedented. In September 1994, the UNHCR exercised its mandate and granted refugee status to approximately 100 ethnic-Chinese Cambodians in Hong Kong.⁹³ Rather than making individual determinations, the UNHCR granted refugee status to the entire group, which it determined to be facing persecution. The UNHCR has recourse to such a method when it is clear that a particular group deserves international protection.⁹⁴

The stateless Vietnamese in Hong Kong clearly face persecution as a group by virtue of being ethnically Chinese and thus, do fit the definition of refugees under the UNHCR Statute. As such, they fall under the protection and competence of the High Commissioner and like the ECVIIs, should be granted refugee status.

Once granted refugee status, these individuals would have the opportunity to be resettled elsewhere in the world. However, the UNHCR must also take an active role in ensuring that these refugees are resettled in suitable third countries. China, by virtue of the fact that it neither wants these individuals nor has a history of treating these individuals well, is not a suitable resettlement country. However, the United States, Britain, Sweden, and Japan have already indicated a willingness to accept some refugees from Vietnam.⁹⁵ Many of the stateless asylum-seekers have families in these countries, as well as in Canada, Australia, and France.⁹⁶ Resettlement in these countries would be a highly desirable solution, but is not likely to occur unless all of the stateless asylum-seekers are granted refugee status and the potential resettlement countries face continued pressure to accept them.

VIII. CONCLUSION

No country is obligated under international law to accept responsibility for the approximately 550 stateless asylum-seekers in Hong Kong. There are, however, three potential courses of action that can be taken on behalf of these individuals.

92. THE STATUTE OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, Annex to Resolution 428 (V), adopted by the UN General Assembly on Dec. 14, 1950.

93. Lee, *supra* note 14.

94. *Follow-Up On Earlier Conclusions of the Sub-Committee on the Determination of Refugee Status*, *supra* note 88 at art. (30).

95. Takayasu Ogura, *UN Calls on Tokyo to Take Five More Boat People*, MAINICHI DAILY NEWS, Aug. 5, 1997.

96. *Stateless Vietnamese Refugees in Hong Kong Plead for Resettlement*, AGENCE FRANCE PRESSE, Sept. 15, 1997.

The first option is to seek cooperation from Vietnam. Already, Vietnam has faced much pressure to repatriate the stateless asylum-seekers. Britain, in particular, has exerted a great deal of pressure during a series of talks between British and Vietnamese government officials.⁹⁷ However, the latest word from Vietnam's foreign minister was: "We cannot take them. It is simply not in accordance with our laws."⁹⁸ According to a UNHCR official, Vietnam no longer wishes to discuss the issue of non-nationals and thus, there is nothing left to negotiate.⁹⁹ Vietnam's intransigence may be a result of the still lingering tensions between those of Chinese and Vietnamese descent. Yet, whatever the reason, it does not seem likely that Vietnam will be the first to back down in this situation.

The second possible solution is to convince China to grant citizenship to all of the stateless asylum-seekers, despite the fact that it has expressed a reluctance to do so. However, even if China could be convinced, Chinese nationality may not necessarily be a desirable solution for some. In addition to China's poor human rights record, there is evidence that the stateless asylum-seekers in particular would be treated poorly. Those asylum seekers termed ECVIIs spoke of being forced to work in labor camps while in China.¹⁰⁰ They fear this result so much that they are willing to go to court to prevent being sent back to mainland China.¹⁰¹ Another solution must be found.

Thus, the final possibility, and, I argue, the one that should be most vigorously pursued, is to encourage the UNHCR to grant all of the stateless asylum-seekers refugee status and facilitate their resettlement in a suitable third country. They fit the definition of refugees both as individuals and as a group, and thus, fall under the competence of the High Commissioner. Granting them refugee status would allow them to resettle in a third country. But resettlement will only occur if suitable third countries such as the United States, Australia, Britain, France, and Sweden are willing to accept these refugees. Acceptance will hinge on the domestic and international political pressure faced by these States. Already, a coalition of human rights groups has begun lobbying these countries to accept the stateless asylum-seekers.¹⁰² This pressure must be supported by the UNHCR. After all, these individuals number only about 550, a number so small that they could hardly pose a burden to any society. In the words of one human rights activist, "a small amount of political will . . . is all these few families ask so that they can at last have a place which they can call home."¹⁰³

97. Greg Torode, *Rifkind Fails to Gain Pledge on Boat People*, S. CHINA MORNING POST, Feb. 14, 1997.

98. *Id.*

99. Buerk, *supra* note 4.

100. Young, *supra* note 26.

101. Western, *supra* note 43.

102. This coalition includes Refugee Concern, Human Rights Watch Asia, and the International Social Services. Neil Western, *Stateless Claim Denial Puts Illegals in Abode Quandary*, WORLD SOURCES ONLINE INC., Sept. 16, 1997.

103. *Id.*