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THE RIGHT OF EVERYONE TO LEAVE ANY COUNTRY, INCLUDING
HIS OWN, AND TO RETURN TO HIS COUNTRY

Written statement submitted by Human Rights Advocates,
a non-governmental organization in consultative status
(Category II)

The Secretary-General has received the following communication which is
circulated in accordance with Economic and Social Council
resolution 1296 (XLIV)

[17 August 1989]

FORCIBLE REPATRIATION OR RETURN

1. This year, the Commission on Human Rights expressed in resolution 1989/39 its desire to promote further standard setting in (the) field of the right of everyone to leave any country, including his own, and to return to his country (E/CN.4/1989/86). In addition, in resolution 1989/63, the Commission recognized the role of human rights violations in causing mass exoduses of refugees and displaced persons, and also the causes of such exoduses (E/CN.4/1989/86). In co-operation with the Indochina Resource Action Center in Washington, D.C., Human Rights Advocates submits the following information and urges the Sub-Commission to examine and take appropriate action on the forcible repatriation of persons who have left their own country and would be subjected to substantial risk of human rights violations upon return.

2. One basis for concern arises where procedures for determination of refugee status are not carried out in good faith, thereby greatly increasing the likelihood that genuine refugees will be refouled in violation of the recognized principle of non-refoulement. In addition, where forcible repatriation would subject an individual to substantial risk of human rights abuse, the repatriating country breaches its own international obligations. For example, under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, "no State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." (Article 3 para. 1) In the present context, similar obligations arise under customary law if the right that is threatened is recognized under customary law, or under treaty law if the right is recognized by a treaty to which the repatriating country is a party. In VMRB v. Canada, the Human Rights Committee held that an asylum seeker who feared abuse of his rights to life and liberty (articles 6 and 9 of the International Covenant on Civil and Political Rights (ICCPR), respectively) if he were deported to his native El Salvador did not have his rights violated by deportation in part because Canada agreed to deport him to a country other than El Salvador. Similarly, in Soering v. United Kingdom, the European Court of Human Rights recently prohibited extradition where the subject would likely face inhuman and degrading treatment by the "death row phenomenon" in violation of article 3 of the European Convention on Human Rights.

3. The imminent forcible repatriation of Vietnamese boat people to Viet Nam from countries of first asylum in Asia illustrates the urgency of the challenge to safeguard fundamental human rights of those who have left their own country and are seeking shelter in another country. Without the involvement of the international community, the current situation threatens to result in refoulement of genuine refugees and persons who reasonably fear deprivation of liberty or other punishment upon return for having left.

4. Human Rights Advocates believes that the British crown colony of Hong Kong has already breached its international obligations in this area, and that the countries of first asylum in Southeast Asia will be led to do likewise. The United Kingdom and its colony Hong Kong have agreed in principle with the Socialist Republic of Viet Nam to proceed with non-voluntary repatriation of Vietnamese boat people whom Hong Kong has determined do not qualify as refugees under the 1951 Refugee Convention and 1967 Protocol.

5. In this context, there is a probability that, in light of current refugee status determination procedures, genuine refugees will be repatriated forcibly to the country of persecution in violation of the recognized principle of non-refoulement. The evidence shows that, in many cases, Hong Kong procedures for determination of refugee status are not carried out in good faith. Immigration officers and interpreters regularly use intimidation tactics during interviews, and attempt to ensnare interviewees on recollection of minor facts. Some government-supplied interpreters are of questionable competence. Initial reviews of cases by Hong Kong officials are conducted with great speed, and the UNHCR is unable to provide adequate monitoring due to the speed and number of hearings each day. In addition, on appeal there is no opportunity to be heard orally, and no reasons are required for appeal decisions, leading to conflicting results in similar situations. All such conditions greatly increase the likelihood that genuine refugee claims will not be paid adequate attention, and that genuine refugees will be refouled.

Similarly, in Marafidou v. Sweden, the Human Rights Committee pronounced that expulsion of aliens lawfully present in the territory violated Article 13 of the ICCPR where the interpretation or application of domestic law was not in good faith or constituted an abuse of power.

6. Another major ground for concern arises from the fact that no assurances or mechanism for protection of forcibly repatriated Vietnamese exist at this time. In contrast, the Memorandum of Understanding Between the United Nations High Commissioner for Refugees and the Socialist Republic of Viet Nam which provides for voluntary repatriation contains a waiver by the Socialist Republic of Viet Nam of prosecution and punitive and discriminatory measures against returning individuals for having left illegally. However, the Socialist Republic of Viet Nam has stated publicly its intent to punish those who do not opt for voluntary repatriation and remain illegally in overseas countries, and those who help organize illegal departures. In addition, those who are considered to have fled with the intention of opposing the Viet Nam Government face between three years and life in prison under the Code of Criminal Law. ^{1/} Furthermore, there is no provision for United Nations protection of forcibly returned boat people. No effective mechanism, such as international monitoring, exists because no international consensus has been achieved. Because of the Viet Nam Government's threats against those who do not return voluntarily, and the lack of an effective protection mechanism, all forcibly repatriated Vietnamese may run substantial risk of prosecution and/or punishment under criminal law for exit-related offenses. Prosecution under the Vietnamese measures violates the right to leave one's own country under article 12 of the ICCPR and articles 3, 5 and 7 of the Draft Declaration on the Right of Everyone to Leave Any Country, including His Own, and to Return to His Country ("Draft Declaration"), which is under consideration in this Sub-Commission's session.

7. Human Rights Advocates has mentioned the United Kingdom and Hong Kong not because they are the worst offenders of forcible return under harmful circumstances but because, in the context of Vietnamese forcible repatriation, their action is likely to lead other countries to follow suit. At issue is not the right to immigrate, or even to receive asylum. As the Human Rights Committee noted in General Comment No. 15, "the Covenant does not recognize the right of aliens to enter or reside in the territory of a State party ... However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise." United Nations Document CCPR/C/21/Rev. 1 at 17 (19 May 1989) (emphasis supplied). Human Rights Advocates urges the Sub-Commission to take appropriate action, such as recognizing in the Draft Declaration the right to be free from forcible repatriation which would subject one to threat of persecution or other human rights violations upon return, appointing a special rapporteur to conduct a world-wide study on forcible repatriation, and calling on the Governments concerned to respect their obligations.

^{1/} For a fuller discussion of the penal measures in the Socialist Republic of Viet Nam and other points, see J. Diller, In search of Asylum (Indochina Resource Action Center, 1988), with addenda, available from Human Rights Advocates.