attached to FCO to BGC of 29/5/79

Reqd. 'Exchange of notes with Vietnamese Feb. 1979'.

PRIME MINISTER

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VIETNAMESE REFUGEES

1. At our meeting yesterday you asked for my advice on the legal basis for refusal by the UK Government to accept Vietnamese refugees taken on board vessels on the high seas. More specifically there were four questions, which Bryan Cartledge has since listed to officials in my Department, and I give the answers below. On the fourth question (about contracts for the supply of merchant ships to the Vietnamese Government) I am afraid I can only reply in general terms today and more detailed advice will follow later.

International Agreements

2. You were concerned about international agreements to which the UK is a party which relate to refugees, and the procedure for the UK withdrawing from them if appropriate. These fall into two classes:

3. The first comprises three conventions which do not deal principally with refugees but contain a general obligation, in the UK case, for the masters of UK ships to go to the assistance of persons in distress at sea provided that they do not endanger their own ship as a result. These are the 1910 Brussels Convention on Assistance and Salvage at Sea (Article 11), the 1958 Geneva Convention on the High Seas (Article 12) and the 1960 London Convention on Safety of Life at Sea (Regulation 10 of Chapter V); this Convention is to be succeeded by another, signed in 1974, which contains a similar provision. These requirements are implemented in UK law by section 6 of the Maritime Conventions Act 1911 and Section 22 of the Merchant Shipping (Safety Convention) Act 1949 and it is a criminal offence by the master of an UK ship to fail to render assistance. But I think it is right to say that the draftsmen of these Conventions, in introducing these requirements, did not have the situation of refugees principally in mind.

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4. There are specific provisions in both the 1910 and 1960 Conventions for denunciation, a year's notice being required. There is no specific provision in the 1958 Convention but in the absence of such provision it might be difficult to establish a legal right to denounce; in any event, if such a right could be established reasonable notice would have to be given (which is widely recognised as meaning not less than twelve months' notice). Denunciation is not possible in respect of the single requirement and would have to extend to the whole of each agreement; this would have very unfortunate consequences since each agreement contains detailed and valuable material on safety at sea and of ships and related matters which has no bearing on the problem of refugees. Furthermore denunciation of these agreements would probably be ineffective to remove the basic obligation to render assistance since that obligation is probably one of customary international law.

5. The second class comprises the 1951 (UN) Convention on the Status of Refugees as amended in 1967. The first and important point of this Convention is that it does not oblige any Contracting State to admit a refugee to its territory and its main object is to accord to them the same treatment in specified areas (eg education, social security) as is given to nationals. One year's notice of denunciation is required, as in the case of the 1910 and 1960 Conventions. The 1951 Convention does not apply in Hong Kong. For the purpose of this advice I have had to assume that the people in question do fall within the definition of refugee in Article 1A(2) of the Convention.

Powers to refuse admission

6. You were concerned to know what powers HMG and the Governor-General in Hong Kong had to refuse to admit refugees picked up on the high seas by vessels visiting their respective ports.

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7. As to Hong Kong we have taken advice from the Colony on the legal position there and we are advised that under section 11 of the Shipping and Port Control Ordinance 1978 (No 76) the Director of Marine has powers to refuse permission to any vessel to enter or leave Hong Kong; this would include any vessel carrying unwelcome refugees, whatever its nationality. Furthermore, as to the situation in which a vessel has entered Hong Kong harbour, we are advised that Section 7 of the Immigration Ordinance (c.115) authorises Immigration Officers to refuse permission to land to all persons other than those who have landing rights under other specified provisions of the Ordinance; so far as we can judge none of the latter provisions are relevant and the result appears to be that the refugees could be refused leave to enter Hong Kong from a vessel in harbour.

8. As to the UK, the position is not the same. There is no statutory or other power on the lines of the Port Control Ordinance 1978 of Hong Kong to prevent vessels from entering the national waters of the UK in the circumstances which are envisaged. Apart from this, I am doubtful if the free exercise of this power would always be reconciliable with international law.

9. As to the situation in which a vessel carrying refugees has entered an UK port, I have already said that I do not think that the 1951 Convention as amended in 1967 requires the UK to admit them. The relevant law is in the Immigration Act 1971 and under section 3(1) of that Act a non-patrial person - which would include the Vietnamese refugees - may not enter the UK unless he has leave to do so. Rules made under section 3(2) of the Act, which have to be laid before Parliament and have some legal force, indicate the policy for the administration of the Act.

10. Rules 55 and 65 of the 1973 Rules, made under Section 3(2) and applying to EEC and other non-Commonwealth Nationals, are relevant here. Rule 55 does state that "a passenger who does not otherwise qualify for admission should not be refused leave to enter if the only country to which he can be removed is one to

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which he is unwilling to go owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." Rule 55 is thus very positive in its terms and, while it does not itself implement the 1951 Convention, it is the corollary of it in providing that a refugee in the terms of the Convention shall not be prevented from entering the UK (after which the Convention will begin to apply) if return to his country is, in real terms, unpracticable. It seems to me therefore that we may be on difficult ground in refusing entry while Rule 55 is in effect; Rule 55 could of course be repealed but this would have very serious practical consequences which are being considered separately.

11. Rule 65 provides a limited exception which applies over all the Rules, including Rule 55, with the result that a passenger (except the wife or child of a person settled in the UK) can be refused leave to enter if this would be "conducive to the public good". In my view, this criteria includes "Reasons of State" which would enable the Secretary of State to direct the exclusion of refugees on grounds other than those of their personal qualities, but an argument to the contrary could be presented in the courts, But this would be a very draconian use of the power.

12. In summary, the 1951 Convention certainly does not require leave to enter to be given but some amendment to Rule 55 would be required to place us on entirely safe ground in law in refusing admission in these circumstances.

Powers to direct Governor-General

13. You also asked if HMG could direct the Governor-General to take particular action in these circumstances. It is entirely clear that the Secretary of State at FCO has the right to direct the Governor-General in Hong Kong to do anything which it is in

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his statutory power to do; since the statutory powers are adequate for the purpose (see paragraph 7 above) it is possible to direct the Governor-General not to admit refugees or only to admit limited numbers. However the power has not, to my knowledge, been used since 1945 and in this case it would be controversial and not in accordance with precedent in HMG's dealings with the Colony.

Contracts to supply ships

14. On the final question, about the legal consequences of cancelling the contracts, it would be helpful for you to see the attached letter of 29 May from the FCO to Bryan Cartledge. It summarises the facts which we have obtained so far about the contracts.

[copy attached]

15. The ongoing contracts, four in all, are between Austin and Pickersgill, a subsidiary of British Shipbuilders, and an organ of the Vietnamese Government. If cancellation is decided upon there is an immediate problem in getting British Shipbuilders under Section 4 of the Aircraft and Shipbuilding Industries Act 1977 but I am extremely doubtful whether it would be a valid or proper exercise of the power to direct the repudiation of the contracts.

16. The alternative course is to consider issuing a new amending Order under Section 1 of the Import, Export and Customs Powers (Defence) Act 1939 which would obtain the result that the ships in question or ships of their class could not be exported without a licence; licences could then be refused and in consequence British Shipbuilders could probably claim that the contract was frustrated. In that event, no damages would be payable. However, I must add the cautionary note that this would amount to a very unusual use of powers under the 1939 Act and would require careful study of its implications, legal or otherwise, before being adopted.

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17. I will minute you further on this issue when further information has been obtained.

18. I am copying this minute to all those who attended yesterday's meeting, and to the Secretaries of State for Trade and Industry.

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LAW OFFICERS' DEPARTMENT

30th May, 1979