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MORE ON THE BREACH OF INTERNATIONAL LAW

On the 20th June 1993, a Communication was forwarded to the United Nations Human Rights Committee (HRC) on behalf of a Cambodian national detained by the Federal Government in the Port Hedland immigration detention centre.

The applicant had arrived in Australia by boat in 1989. Shortly after his arrival, he made an application for refugee status. His application was rejected in April 1992 (he had been in detention by this stage for three and a half years).

An application was listed before the Federal Court seeking a review of the decision. Before the court had the opportunity to hear the case the Federal Government passed the *Migration Amendment Act* (no. 24 of 1992) which defined boat people as 'designated persons' and provided (s 54R) that 'a court is not to order the release from custody of a designated person'.

Proceedings were then instituted in the High Court seeking a declaration that the relevant provisions in the *Migration Amendment Act* were invalid.

The High Court upheld the right of the Federal Government to detain all aliens under s51(xix) of the Australian Constitution.

Because all available domestic remedies had been exhausted, a Communication to the HRC could then be made.

The Communication claimed that Australia, by detaining asylum seekers, was in breach of the International Covenant on Civil and Political Rights (ICCPR) and Optional Protocol to which Australia is a party. Therefore, it was argued, Australia was in breach of international law.

The Communication claimed that the following Articles had been breached:

9.1 no-one shall be subjected to arbitrary arrest or detention; 'Arbitrariness' has been defined by the HRC as being not merely against the law, but as including elements of 'inappropriateness, injustice and lack of predictability'.

Insofar as asylum seekers are concerned, the UN Convention on Refugees warns against imposing penalties on refugees merely by reason of their illegal entry or presence, and prohibits the application of unnecessary restrictions on the movement of refugees (Article 31).

9.4 all people in detention shall be entitled to take proceedings before a court to determine the lawfulness of that detention;

Under Division 4B of the *Migration Act*, once a person is lawfully declared to be a designated person they are detained and there is no way to have that detention reviewed by the courts.

14. all people in detention should have access to legal advice and trial without undue delay.

The first boat people had been detained for almost a year before they gained access to legal assistance. Furthermore, there was no co-ordinated legal effort until November 1991 when the Refugee Council of Australia were contacted to provide services for the camp at Port Hedland.

A RESPONSE AT LAST

In May 1997 the Human Rights Committee, in response to the Communication, advised that Australia is in breach of the international law on human rights.

RESEARCH QUESTIONS

1. Outline the functions of the United Nations Human Rights Committee (HRC).
2. Explain the restrictions of jurisdiction placed on the HRC.
3. Outline the process involved in petitioning the HRC with a Communication.
4. Of what import is a finding of the HRC?
5. What is likely to happen as a result of the HRC finding?
6. How is the HRC different to the United Nations Human Rights Commission?
7. What are some of the main criticisms of the HRC?
8. Have there been any changes to the Federal Government's detention policy regarding the boat people since the reponse to the Communication?
9. What is the definition of a 'designated person' under the *Migration Act*?