

VIETNAMESE WOMEN AND CHILDREN REFUGEES IN HONG KONG: AN ARGUMENT AGAINST ARBITRARY DETENTION*

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I. INTRODUCTION

Under an official policy euphemistically entitled “humane deterrence,” the British Crown Colony of Hong Kong has detained tens of thousands of Vietnamese asylum seekers¹ in prison-like conditions.² The stated purpose of this policy is to use Vietnamese

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1. SUBMISSION TO THE UNITED NATIONS WORKING GROUP ON ARBITRARY DETENTION BY THE LAWYERS COMMITTEE FOR HUMAN RIGHTS AND THE WOMEN’S COMMISSION FOR REFUGEE WOMEN AND CHILDREN ON BEHALF OF APPROXIMATELY 40,000 VIETNAMESE DETAINEES, INCLUDING THE FAMILIES OF PHAM NGOC LAM, VUONG SON BACH AND CAM GIA NINH, Apr. 15, 1993, at 1 [hereinafter WORKING GROUP SUBMISSION] (on file with authors). More than 78 percent are women and children; somewhat less than half of the children are under the age of five. DIANA D. BUL, A SNAPSHOT IN TIME: IMPROVEMENTS IN THE CONDITIONS OF REFUGEE WOMEN AND CHILDREN IN DETENTION IN HONG KONG 3 (Women’s Commission for Refugee Women and Children 1991).

2. Beryl Cook, *Policy on Vietnamese ‘Breaches Laws,’* S. CHINA MORNING POST, Apr. 22, 1993, at 5. For a discussion of the illegality under international law of the detention of Vietnamese asylum seekers, see JANELLE M. DILLER, IN SEARCH OF ASYLUM: VIETNAMESE BOAT PEOPLE IN HONG KONG 18-20 (Indochina Resource Center 1988); see also *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., 183d plen. mtg., Supp. No. 16, at 52-53, U.N. Doc. A/6316 (1966); *Universal Declaration of Human Rights*, G.A.

asylum seekers as hostages to deter their fellow citizens from attempting to flee from Vietnam.³ Hong Kong's policy, in which one group is punished to deter potential acts of others who are related solely by national origin, is a particularly cruel form of arbitrary detention in violation of international law.

Currently, there are approximately 45,000 Vietnamese asylum seekers⁴ held in thirteen detention centers scattered throughout Hong Kong.⁵ Thousands of these detainees have been held for three or more years.⁶ Police brutality occurs and virtually no outsiders are permitted to monitor the detention centers.⁷ Women are often raped, and children are routinely exposed to violence.⁸ Schools, health facilities, and social services are practically nonexistent.⁹ Conditions have not improved in five years.¹⁰

The Hong Kong government codified the principle of "humane deterrence" in its immigration law in 1987.¹¹ All Vietnamese asylum seekers are automatically detained upon arrival in Hong Kong and are held indefinitely for prolonged periods of time.¹² This law and practice is defective for at least three reasons. First, it is illegal to detain one person for the sole purpose of altering the behavior of others, i.e., to halt the flow of asylum seekers from Vietnam.¹³ Second, independent of the purpose, indefinite prolonged detention is in itself impermissible.¹⁴ Finally, even though prolonged detention

Res. 217, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

3. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, *INHUMANE DETERRENCE: THE TREATMENT OF VIETNAMESE BOAT PEOPLE IN HONG KONG 8-10 (1989)* [hereinafter *INHUMANE DETERRENCE*].

4. WORKING GROUP SUBMISSION, *supra* note 1, at 1.

5. Larry Kohl, *Plight of the Boat People*, NAT'L GEOGRAPHIC, Feb. 1991, at 133-34. Approximately 23,000 asylum seekers are held in the Whitehead Detention Camp in Hong Kong's New Territories, which, along with other centers, is under the jurisdiction of, and operated by, Hong Kong Correctional Services. See WORKING GROUP SUBMISSION, *supra* note 1, at 1; Immigration Ordinance, LAWS OF HONG KONG ch. 115, pt. IIIA, § 13C(4) (1987).

6. See Cook, *supra* note 2, at 5.

7. DILLER, *supra* note 2, at 35-36, 38-39.

8. See *id.* at 34-41.

9. See *id.*

10. See *id.* at 33. "Until September 1988, government policy prohibited access to all detention centres by any outside organization except UNHCR [United Nations High Commission on Refugees], which received extremely restricted access." *Id.*

11. Immigration Ordinance, LAWS OF HONG KONG ch. 115, pt. IIIA, § 13D(1) (1987).

12. See *INHUMANE DETERRENCE*, *supra* note 3, at 3.

13. *Id.*; see WORKING GROUP SUBMISSION, *supra* note 1, at 2.

14. See *INHUMANE DETERRENCE*, *supra* note 3, at 3; WORKING GROUP SUBMISSION, *supra* note 1, at 2.

is allowable under specific, limited circumstances, there must be an individualized judicial determination that the individual will flee or be a danger to society.¹⁵ Hong Kong has made no such individual determinations.¹⁶

It should be noted that the plight of the Vietnamese in Hong Kong is not solely Hong Kong's responsibility. In the late 1970s and early 1980s, Hong Kong served as a country of "first asylum."¹⁷ It was the policy of the United States and other nations that the Vietnamese be offered permanent resettlement in the West.¹⁸ In the mid 1980s, the increasing reluctance of resettlement countries to absorb the Vietnamese, in combination with international pressure against forcible repatriation, particularly from the United States, led to increasing numbers of asylum seekers being "stranded" in Hong Kong.¹⁹

This Article proposes that Hong Kong's law and policy constitute arbitrary detention of a class of people in violation of international norms and international human rights. Part II reviews the status of the detainees under Hong Kong law, discussing both Hong Kong and United Kingdom law as it applies to the Vietnamese. Part III looks at the international law on detainees in general, and sets forth the minimal standards imposed on states by conventions and customary law. Part IV deals with the jurisdiction of the United Nations in matters such as these. Finally, Part V reviews the appropriate actions to be taken by the governments of Hong Kong or the United Kingdom with respect to the detained Vietnamese asylum seekers.

15. See WORKING GROUP SUBMISSION, *supra* note 1, at 2; see also *infra* note 112 and accompanying text.

16. See WORKING GROUP SUBMISSION, *supra* note 1, at 2.

17. INHUMANE DETERRENCE, *supra* note 3, at 8-10. "Vietnamese boat people who arrived in Hong Kong between July 2, 1982 and June 15, 1988 are given first asylum in Hong Kong." *Id.* at 3.

18. *Id.* at 8.

Under the 1979 Geneva Convention, Viet Nam instituted an orderly departure program, which permitted emigration directly from Viet Nam to the West. In 1984 and 1985, legal departures via the program were higher than clandestine departures. As pledged, many countries accepted refugees for permanent asylum. The respite, however, was a brief one. . . . The balance established at the Geneva Conference began to unravel in 1986. On January 1, 1986 Viet Nam suspended its orderly departure program to the United States, which had accepted for resettlement over half of those legally departing. The number of refugees taken for resettlement in third countries dwindled, while the number seeking asylum increased.

Id.

19. INHUMANE DETERRENCE, *supra* note 3, at 8; see Kohl, *supra* note 5, at 136.

II. STATUS OF DETAINEES UNDER HONG KONG LAW AND UNITED KINGDOM LAW

A. History of Treatment of Detainees

Since 1975 more than one million Vietnamese have clandestinely left their homeland, many seeking asylum on the neighboring shores of Southeast Asia, including Hong Kong.²⁰ Those Vietnamese that entered Hong Kong prior to 1982 were allowed to live in open camps and to move freely around the city.²¹ Many even held jobs.²² Those arriving after 1982 lived in closed camps for relatively short periods while waiting to be resettled in a third country.²³ This initial policy shift to closed camps signaled Hong Kong's increasing hostility towards granting the Vietnamese temporary asylum with appropriate legal safeguards.

Since June 16, 1988, Hong Kong has altered its policy toward the Vietnamese drastically. All arriving Vietnamese are now automatically held in detention centers and are subject to a refugee screening process.²⁴ Hong Kong has been intent on creating inhumane conditions for the Vietnamese in order to deter future asylum seekers.²⁵ In fact, the conditions under which the detainees live are worse than those of the prisons in Hong Kong.²⁶ Moreover, violence, including murder, is perpetuated by guards and gangs.²⁷

20. INHUMANE DETERRENCE, *supra* note 3, at 7.

21. DILLER, *supra* note 2, at 54.

22. *Id.*

23. *See* INHUMANE DETERRENCE, *supra* note 3, at 10.

24. *See* UNITED STATES DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1992, REPORT SUBMITTED TO THE SENATE COMM. ON FOR. RELATIONS AND HOUSE COMM. ON FOR. AFFAIRS 967 (Comm. Print 1993) [hereinafter COUNTRY REPORTS]; *see also* DILLER, *supra* note 2, at 18; INHUMANE DETERRENCE, *supra* note 3, at 10-11.

25. LAWYERS COMMITTEE FOR HUMAN RIGHTS, REVIEW OF THE U.S. DEPARTMENT OF STATE'S COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1991, at 426, 427 (1992).

26. Simon Winchester, *Inside the Hong Kong Detention Camp*, GUARDIAN WEEKLY, Jan. 3, 1993, at 10. Although the conditions in the camps raise serious international law questions, neither this Article nor the Working Group Submission directly addresses this issue. Nevertheless, because the conditions of detention serve as a deterrent to Vietnamese coming to Hong Kong, they should be a factor in determining whether detention is arbitrary. *See* INHUMANE DETERRENCE, *supra* note 3, at 3. Furthermore, these harsh conditions emphasize the need for an expeditious end to the mass arbitrary detention.

27. *See* Winchester, *supra* note 26, at 10; *see also* Fiona MacMahon, *Inmates Unprotected in Detention Camps*, S. CHINA MORNING POST, Mar. 4, 1993, at 3 (describing security conditions at the Whitehead Detention Camp).

Children and women are the least protected and most vulnerable portion of the population.

Recent developments in Hong Kong have made the situation worse.²⁸ Since June 1993 all social services have been curtailed.²⁹ Indeed, since August 1993 there have been no medical, social, or educational programs in the camps.³⁰ It is very likely that violence will escalate as a consequence of these actions.³¹ In 1992, when Hong Kong cut basic services, there was a massive riot resulting in the deaths of twenty-four Vietnamese at Sek Kong Camp.³²

1. *The Special Problems of Vietnamese Children.* Perhaps the single most traumatic element for Vietnamese children held in prolonged detention in Hong Kong has been the constant exposure to violence. Studies show that unaccompanied children especially live in constant fear of being harmed.³³ Most children, if not all, have witnessed many serious acts of violence.³⁴ Numerous child psychologists have stated that the long-term impact of violence on children in detention is seriously retarded emotional growth.³⁵

Children in the camps are also vulnerable to serious health problems.³⁶ Overcrowding and unsanitary conditions have caused the uncontrolled spread of communicable diseases.³⁷ A chicken pox epidemic affected a majority of the one thousand children at San Yick Camp in 1988.³⁸ Other childhood diseases such as measles have

28. *Emptying the Camps*, S. CHINA MORNING POST, Mar. 23, 1993, available in LEXIS, Nexis Library, CURRNT File (evaluating the prospects of worsening living conditions).

29. See Memorandum from Duyen Nguyen to Kathy Howe of the Lutheran Immigration and Refugee Service (Mar. 20, 1993) [hereinafter Lutheran Immigration] (on file with authors).

30. *Id.*

31. *Id.*

32. JESUIT REFUGEE SERVICE: LAWYERS FOR REFUGEES, 1992 ANNUAL REPORT 2; see COUNTRY REPORTS, *supra* note 24, at 967.

33. See REFUGEE CONCERN HONG KONG, DEFENSELESS IN DETENTION: VIETNAMESE CHILDREN LIVING AMIDST INCREASING VIOLENCE IN HONG KONG, 52 (1991) [hereinafter DEFENSELESS IN DETENTION]; Lutheran Immigration, *supra* note 29, at 1; Memorandum from Duyen Nguyen to Kathy Howe of the Lutheran Immigration and Refugee Service (Apr. 2, 1993) (on file with author). The evidence also suggests that children accompanied by their parents fare better. See Jane Warburton; *Unaccompanied Minors in Hong Kong Detention Centres*, in FORUM ON UNACCOMPANIED MINORS IN HONG KONG 23-27 (1992).

34. See DEFENSELESS IN DETENTION, *supra* note 33, at 52.

35. See JESUIT REFUGEE SERVICE, *supra* note 32, at 2; DEFENSELESS IN DETENTION, *supra* note 33, at 48-61.

36. See DEFENSELESS IN DETENTION, *supra* note 33, at 105.

37. *Id.* at 106; see DILLER, *supra* note 2, at 40 (describing the potential for epidemics).

38. INHUMANE DETERRENCE, *supra* note 3, at 12.

caused death among many detained children.³⁹ Due to the conditions in the camps, reinfection is common.⁴⁰ Moreover, when a medical condition necessitates hospitalization, children are routinely separated from their families.⁴¹ Medical personnel treating the children rarely speak Vietnamese, and no one is assigned to protect the best interests of the child.⁴²

The children in the camps lack adequate educational facilities as well.⁴³ Problems with schools in the detention centers include ineffective teachers, inadequate textbook resources, rampant absenteeism among the older students, and study areas that are not conducive to learning.⁴⁴ Since 1983 the government has forbidden Vietnamese children to attend Hong Kong educational institutions.⁴⁵

2. *The Special Concerns of Vietnamese Women.* All detainees, though women in particular, are at risk of violence and other harassment.⁴⁶ The lack of security in the camps makes women easy targets of abuse.⁴⁷ Vietnamese gangs operate freely in the camps.⁴⁸ Police and corrections officers fail to provide adequate protection from the violent minority.⁴⁹ Cases have been reported of government officials themselves harassing and raping Vietnamese women, and offering protection in exchange for sexual favors.⁵⁰ In some camps, the women have asked to live in special units where they can lock themselves in at night, but permission has been refused.⁵¹

Women in the camps also face inhumane conditions during pregnancy.⁵² Pregnant women are moved to the Victoria Prison

39. WOMEN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, EXECUTIVE SUMMARY: A SNAPSHOT IN TIME 14 (1991) [hereinafter WOMEN'S COMMISSION]. A cholera epidemic has also led to increased malnutrition among children. *Id.* at 12.

40. *Id.* at 12.

41. *Id.* at 8.

42. See DEFENSELESS IN DETENTION, *supra* note 33, at 107; WOMEN'S COMMISSION, *supra* note 39, at 8.

43. DEFENSELESS IN DETENTION, *supra* note 33, at 102-04.

44. *Id.*

45. INHUMANE DETERRENCE, *supra* note 3, at 12.

46. *Id.*

47. *Id.* at 10.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. WOMEN'S COMMISSION, *supra* note 39, at 8. There are several cases in which mothers are identified in the camps by number only, and give birth to children similarly designated. *Id.*

Hospital at thirty-six weeks to await delivery.⁵³ During these difficult weeks away from their husbands and children, “[t]hey [Vietnamese women] await their childbirth without emotional support, guidance or, in most instances, someone who speaks Vietnamese to assure them during their labor.”⁵⁴

B. Current Status of Hong Kong Law

1. *Position of the Government of Hong Kong.* The legal basis for Hong Kong’s humane deterrence policy and for holding all incoming Vietnamese asylum seekers in closed centers is The Hong Kong Immigration Ordinance (Ordinance).⁵⁵ The Ordinance, which contains a section specifically regarding Vietnamese asylum seekers, authorizes Hong Kong officials to detain indefinitely “any resident or former resident of Vietnam who arrives in Hong Kong not holding a [valid] travel document.”⁵⁶ Under the Ordinance a person may be detained “in such detention centre as an immigration officer may specify pending a decision to grant or refuse him such permission to remain in Hong Kong or, after a decision to refuse him such permission, pending his removal from Hong Kong.”⁵⁷ In addition, the Ordinance fails to provide even the most minimal procedural safeguards prior to detaining the Vietnamese.⁵⁸ For example, there are no provisions that require that the detention be linked to a reliable and individualized judicial or administrative determination that the asylum seeker is likely to abscond or pose a threat to public order or public health in Hong Kong.⁵⁹

Moreover, the law forbids any challenge to the underlying legality of the detention.⁶⁰ Although nonrefugee Vietnamese may theoreti-

53. *Id.*

54. *Id.*

55. Immigration Ordinance, LAWS OF HONG KONG ch. 115, pt. IIIA, § 13 (1987).

56. See Ordinance (H.K. 52/91), LAWS OF HONG KONG (1991). Only the Vietnamese “screened in” for resettlement in third countries are considered refugees; those awaiting screening, and those “screened out” and detained pending removal to Vietnam, are not refugees. For a discussion of the procedures for determination of refugee status, see DILLER, *supra* note 2, at 83.

57. Immigration Ordinance, LAWS OF HONG KONG ch. 115, pt. IIIA, § 13D(1) (1987).

58. DILLER, *supra* note 2, at 83-89.

59. See *id.* at 91.

60. *Id.* at 99. In addition, asylum seekers cannot challenge their detention based on the Hong Kong Bill of Rights because section 11 of the Bill of Rights expressly exempts from its protection “persons not having the right to enter and remain in Hong Kong.” Hong Kong Bill of Rights Ordinance, LAWS OF HONG KONG ch. 59, pt. III, § 11 (1991).

cally apply for the common law writ of *habeas corpus* in order to challenge the lawfulness of their detention, such challenge would not be effective because:

[t]he most fundamental weakness of the [Hong Kong *habeas corpus*] remedy is that it is parasitic upon the general features of the legal system. If that system confers wide powers of arrest and detention upon the executive then, provided the authorities follow the correct procedure, the writ will avail the applicant of nothing.⁶¹

Because the detention of the Vietnamese is made expressly lawful under Section 13D of the Ordinance, it cannot be remedied through a writ of *habeas corpus*.⁶² The effect, therefore, of automatic detention in combination with these procedural defects is an arbitrary and illegitimate detention which may continue indefinitely without any legal recourse.⁶³

The process which Vietnamese asylum seekers must undergo to qualify for legal status in Hong Kong is long and arduous.⁶⁴ The Vietnamese are subject to a refugee determination process, commonly referred to as the "screening procedure."⁶⁵ To qualify for resettlement in a third country the Vietnamese applicant must demonstrate to the satisfaction of the Hong Kong government and United Nations High Commission on Refugees (UNHCR) officials that he or she is a refugee in accordance with the 1951 United Nations Convention Relating to the Status of Refugees (Convention)⁶⁶ and the 1967 United Nations Protocol Relating to the Status of Refugees (Protocol).⁶⁷

61. David Clark, *Liberty and Security of the Person: Habeas Corpus*, in HUMAN RIGHTS IN HONG KONG 301, 306 (Raymond Wacks ed., 1992).

62. DILLER, *supra* note 2, at 98-100.

63. *See id.* at 90-101.

64. *See* INHUMANE DETERRENCE, *supra* note 3, at 20-26.

65. *Id.* at 20. Under treaty and customary international law, there is a universal obligation for a state to consider an individual's application for refugee status. *See* sources cited *supra* note 2; DILLER, *supra* note 2, at 90-91.

66. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.

67. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267; INHUMANE DETERRENCE, *supra* note 3, at 10, 11. The Convention and the Protocol define a refugee as: any person who[,]. . . 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 nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Protocol Relating to the Status of Refugees, *supra*, art. 1(2); Convention Relating to the Status of Refugees, *supra* note 66, art. 1 A(2).

A determination of refugee status by the Hong Kong government and the UNHCR under this screening procedure is in large measure *pro forma*.⁶⁸ According to the Hong Kong government, "all Vietnamese migrants arriving in [the Colony] are treated as illegal immigrants unless they are determined . . . to be refugees."⁶⁹ Statistics demonstrate Hong Kong's reluctance to recognize the Vietnamese as refugees.⁷⁰ In March 1993, 94 percent of the 44,301 Vietnamese in Hong Kong either had been screened out and retained their classification as illegal immigrants or were still awaiting a status determination and hence were presumptively illegal.⁷¹ All these individuals are presently being held in detention centers for the indefinite future.⁷² Even those Vietnamese who have been officially determined to be refugees remain in detention pending their movement to a resettlement country, a process which may take weeks or months.⁷³

2. *Position of the Government of the United Kingdom.* The Hong Kong government's policy of prolonged detention of Vietnamese asylum seekers directly implicates the government of the United Kingdom. Hong Kong, of course, is not an independent, sovereign state; rather, it is a dependency of the United Kingdom. As such, the United Kingdom, as a sovereign state and the colonial power, has ultimate international responsibility for the actions of the Hong Kong government.⁷⁴

Because Hong Kong is a dependent territory, the British Secretary of State for Foreign and Commonwealth Affairs is constitutionally responsible to the British Parliament for the actions

68. See, e.g., INHUMANE DETERRENCE, *supra* note 3, at 23 (describing examples of the inadequacies of screening); DILLER, *supra* note 2, at 21-26 (noting problems in the screening process).

69. HONG KONG GOVERNMENT ECONOMIC AND TRADE OFFICE, FACT SHEET 1 (Dec. 1992).

70. DILLER, *supra* note 2, at 83.

71. See Lutheran Immigration, *supra* note 29.

72. DILLER, *supra* note 2, at 90.

73. See Immigration Ordinance, LAWS OF HONG KONG ch. 115, pt. IIIA, § 13 (1987). Vietnamese refugees are entitled to certain procedures relating to their detention pursuant to sections 13A and 13B of the Ordinance, concerning conditions of detention and appeal. These provisions, however, are applicable only during the relatively brief period between determination of refugee status and resettlement.

74. See *Letters Patents and Royal Instructions to the Governor of Hong Kong*, reprinted in NORMAN MINERS, THE GOVERNMENT AND POLITICS OF HONG KONG app. 3(C) at 327 (1981) [hereinafter *Letters Patents*].

of the Hong Kong government, and has substantial authority to give directions to Hong Kong's Governor.⁷⁵ Pursuant to the Letters Patent, the British government also has international responsibility for Hong Kong's actions under international conventions and agreements that the United Kingdom has extended to Hong Kong.⁷⁶

The United Kingdom has acceded to the International Covenant on Civil and Political Rights (Covenant),⁷⁷ and has extended the Covenant to Hong Kong.⁷⁸ The United Kingdom is also a signatory to the 1989 Comprehensive Plan of Action,⁷⁹ which established systematic refugee screening procedures for Vietnamese and other Southeast Asian asylum seekers by countries of first asylum such as Hong Kong.⁸⁰ The British government's decision to grant considerable autonomy to Hong Kong, including Hong Kong's treatment of asylum seekers, does not absolve the United Kingdom, as the colonial power, of its international responsibility to ensure that its dependency fulfills these and other international law obligations.⁸¹

75. However, according to a Hong Kong government publication, "such formal directions have not been issued in living memory, and Hong Kong conducts its affairs with a high degree of autonomy in all domestic matters." GOVERNMENT INFORMATION SERVICES HONG KONG 1993, at 25 (H. Witt ed., 1993). "[I]n the day-to-day conduct of external affairs, Hong Kong in practice enjoys a considerable degree of autonomy." *Id.*

76. See *Letters Patents*, *supra* note 74, at 328.

77. *International Covenant on Civil and Political Rights*, *supra* note 2.

78. The United Kingdom became a party to the Covenant in 1976, without reservations with respect to Article 9 regarding arbitrary detention. In its instrument of ratification, dated May 20, 1976, the United Kingdom extended application of the Covenant to Hong Kong. See DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 308 (1991). On June 8, 1992, Hong Kong enacted the local enabling statute, the Bill of Rights Ordinance. Ordinance (H.K. 59/91), LAWS OF HONG KONG pt. I, § 2(3) (1991). This legislation incorporated the Covenant, including Article 9, into Hong Kong law. *Id.* A section of the Ordinance, however, purports to exempt from the Covenant's scope immigration legislation or its application regarding "persons not having the right to enter and remain in Hong Kong." *Id.*, pt. III, § 11.

The European Convention for the Protection of Human Rights and Fundamental Freedoms, to which the United Kingdom is a signatory, has not been extended to Hong Kong. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 63, 213 U.N.T.S. 221 (requiring an affirmative act for extension of the European Convention "to all or any of the territories for whose international relations it is responsible"). Thus, the European Commission on Human Rights and the European Court of Human Rights do not have jurisdiction over claims against the Hong Kong government.

79. For further discussion of the Comprehensive Plan of Action, see Josh Brigg, Comment, *Sur Place Refugee Status in the Context of Vietnamese Asylum Seekers in Hong Kong*, 42 AM. U.L. REV. 433, 439-41 nn.38-49 (1993).

80. See *id.* at 440 nn.41-45, nn.60-67, and accompanying text.

81. See *Letters Patents*, *supra* note 74, at 328, 337-38. Neither the Working Group's ability to bring violations to the attention of the governments of Hong Kong and the United Kingdom nor the substantive right of the Vietnamese under international law to be free of arbitrary

The Hong Kong government, however, may not avoid its own obligations and duties under international law on the ground that it is not a sovereign state. Although the United Kingdom is clearly complicit and ultimately responsible for Hong Kong's actions, the indefinite detention of all Vietnamese asylum seekers is carried out as the official policy of the Hong Kong government. The Hong Kong legislature established the detention policies,⁸² the Hong Kong authorities administer the refugee screening process,⁸³ and the Hong Kong Department of Corrections runs the detention centers.⁸⁴ Thus, Hong Kong itself, having chosen to exercise the authority granted to it by the United Kingdom as it has, should be held accountable for its failure to conform its policies and practices to international law, including the right of all persons under its jurisdiction to be free from arbitrary detention.

III. INTERNATIONAL LAW ON DETAINEES

A. The Illegality of Indefinite, Prolonged, and Arbitrary Detention

The detention prescribed in the Ordinance violates both customary international law and treaty prohibitions against prolonged arbitrary detention.⁸⁵ The first and most critical condemnation of this sort of state action is found in the language of the Universal Declaration,⁸⁶ the document that forms the legal cornerstone of international human rights. The Universal Declaration states: "No one shall be subjected to arbitrary arrest, detention or exile."⁸⁷ It further provides: "All are equal before the law and are entitled without any discrimination to equal protection of the law."⁸⁸ The Universal Declaration clearly states that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as . . . national or social origin . . . birth

detention should turn on the complexities of the juridical relationship between the United Kingdom and Hong Kong, or on their respective relations with the international community.

82. Immigration Ordinance, LAWS OF HONG KONG ch. 115, pt. IIIA, § 13D (1987).

83. See INHUMANE DETERRENCE, *supra* note 3, at 10-11.

84. *Id.* at 15-16.

85. DILLER, *supra* note 2, at 90-91.

86. *Universal Declaration of Human Rights*, *supra* note 2, at 71-77.

87. *Id.* art. 9, at 73.

88. *Id.* art. 7, at 73.

or other status.”⁸⁹ These fundamental principles have long been accepted by international bodies and courts.⁹⁰

Additional support for the fundamental right to be free from arbitrary detention is found in the International Covenant on Civil and Political Rights,⁹¹ a treaty which the United Kingdom has extended to Hong Kong.⁹² Article 9(1) of the Covenant provides broadly and without reservation that “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.”⁹³ Moreover, Article 9(4) states that “[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”⁹⁴ This fundamental right to be free from arbitrary detention must, according to the Covenant, be applied to “all individuals within its territory and subject to its jurisdiction . . . without distinction of any kind.”⁹⁵

The prohibitions of arbitrary detention in both the Covenant and the Universal Declaration make no distinction based on citizenship or residency. It is no answer for Hong Kong to argue that the Vietnamese have no right to enter Hong Kong or that their entry is illegal. Whatever their official status, while they are within the territory of Hong Kong, the Vietnamese—who are simply exercising their right to seek asylum from persecution under Article 14(1) of the Universal Declaration⁹⁶—are entitled to the protection of the fundamental

89. *Id.* art. 2, at 72.

90. For example, the International Court of Justice, ruling on the seizure of the United States Embassy in Tehran, Iran, in 1979 and on the subsequent detention of members of the Embassy staff, held as a matter of customary international law that Iran “[w]rongfully . . . deprive[d] human beings of their freedom and . . . subject[ed] them to physical constraint in conditions of hardship.” *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 43 (May 24). Such actions, the Court held, were “manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.” *Id.*

91. *International Covenant on Civil and Political Rights*, *supra* note 2, at 52-60.

92. *See supra* note 78 and accompanying text.

93. *International Covenant on Civil and Political Rights*, *supra* note 2, art. 9(1), at 54.

94. *Id.* art. 9(4), at 54.

95. *Id.* art. 2(1), at 53; *see id.* art. 26 (prohibiting discrimination before the law on the basis of “national or social origin”).

96. *Universal Declaration of Human Rights*, *supra* note 2, art. 14(1), at 74 (“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”).

human rights contained in the Covenant and the Universal Declaration.⁹⁷

In addition to these international instruments, relevant case law has shown that one of the key tests in determining whether detention is "arbitrary" under Article 9(1) is whether the detention is "reasonable," regardless of compliance with domestic laws.⁹⁸ As one panel of the United Nations Human Rights Committee (Committee) wrote:

The drafting history of article 9[(1) of the Covenant] confirms that "arbitrariness" is not to be equated with "against the law," but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest [and detention] must not only be lawful but reasonable in all the circumstances.⁹⁹

The Committee further held that, pursuant to Article 9(1), "remand in custody" must be necessary to prevent certain dangers such as to "prevent flight, interference with evidence or the recurrence of crime."¹⁰⁰

Much of the case law addressing arbitrary detention pursuant to Articles 9(1) and 9(4) of the Covenant involves situations in which a state government is acting in compliance with the local law, but allegedly is in violation of the broader rights contained in the Covenant.¹⁰¹ The principles developed in this case law establish that Hong Kong's "humane deterrence" policy is illegal. In fact, none of the cases where the Committee has found a violation are nearly as egregious as this situation.¹⁰² Most involve one or two individu-

97. UNITED NATIONS, OFFICE OF THE SECRETARIAT, COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES, General Comment 8, at 7, U.N. Doc. HRI/GEN/1 (1992).

98. Hugo van Alphen v. The Netherlands, as cited in *Report of the Human Rights Committee*, U.N. GAOR, 45th Sess., Supp. No. 40 (VII), at 108, U.N. Doc. A/45/45/40 (1990) [hereinafter van Alphen].

99. *Id.* para. 5.8.

100. *Id.*

101. The Human Rights Committee first inquires whether the detention violates local law. If local law has not been followed, the Committee usually finds that the state is in violation of Articles 9(1) and 9(4). See *id.* para. 5.6. In the *van Alphen* case, the Committee also found that continued detention was unnecessary since there was no evidence that van Alphen would flee, harm society, or destroy evidence. *Id.* para. 5.8.

102. Two cases involving Uruguay are particularly instructive. In *David Alberto Campora Schweizer v. Uruguay*, as cited in *Report of the Human Rights Committee*, U.N. GAOR, 35th Sess., Supp. No. 40, at 117, U.N. Doc. A/38/40 (1983) [hereinafter *Schweizer*], the Human Rights Committee found Uruguay to have arbitrarily detained an individual for his political views based on a local law that was not in compliance with the Covenant. Uruguay argued that *Schweizer* was detained under the rules of "Prompt Security Measures," which allowed the government to keep him in prison indefinitely. This rule, the Committee held, as "ordered, maintained and

als.¹⁰³ In no reported instance has a government detained 45,000 people arbitrarily and indefinitely.

B. The Illegality of the Absence of Individualized Review

The cornerstone of any objective determination of whether a government's actions are arbitrary is the availability of an individualized hearing before an independent body.¹⁰⁴ The Committee has made it clear that in order to justify the legitimate continuation of detention, there must be an individualized judicial determination in which the government bears the burden of showing by persuasive evidence that a person will (1) abscond, (2) destroy evidence, or (3) pose a distinct threat to society.¹⁰⁵ These three grounds evidence reasonable and necessary considerations for the continuation of detention. Even in the case of individuals who pose a threat to national security, it is unusual for the Committee to sanction indefinite detention.¹⁰⁶ Under this standard, there are very few

enforced" was arbitrary and did not comply with Article 9. Furthermore, the Committee was concerned that no individualized determination was made regarding such factors as his risk to society, and that there was no remedy under the local law for Schweizer to challenge the legality of his detention. The humane deterrence policy in Hong Kong, which permits the indefinite detention of all Vietnamese without any regard for their individual circumstances, is at least as arbitrary as Uruguay's Prompt Security Measures.

The Committee also determined that another detention scenario under Uruguay's Prompt Security Measures was arbitrary in *Delia Saldias de Lopez v. Uruguay*, as cited in *Report of the Human Rights Committee*, U.N. GAOR, 36th Sess., Supp. No. 40, at 176, U.N. Doc. A/36/40 (1981) [hereinafter *Salidas de Lopez*] (finding the Uruguayan government's abduction of an Uruguayan refugee in Argentina and its later detention of the refugee under Prompt Security Measures constituted arbitrary detention under Article 9(1)). In both these cases, the Committee was concerned with bringing the accused to trial within a reasonable amount of time. Moreover, there had been no hearing by an independent authority, such as a court, to determine the legality of the detention.

103. *E.g.*, *Schweizer*, *supra* note 102; *Salidas de Lopez*, *supra* note 102; *van Alphen*, *supra* note 98.

104. *International Covenant on Civil and Political Rights*, *supra* note 2, art. 14(1), at 54.

105. *See van Alphen*, *supra* note 98, para. 5.8 (stating that remand in custody must be reasonable and necessary, considering the totality of the circumstances).

106. In *V.M.R.B. v. Canada*, as cited in *Report of the Human Rights Committee*, U.N. GAOR, 43d Sess., Supp. No. 40, at 258, 259 U.N. Doc. A/43/40 (1988), the Human Rights Committee found that continued detention, pending deportation, was warranted since Canada had reliable and presentable evidence that V.M.R.B. was "tasked and funded by a foreign political party to carry out certain activities which are prohibited under Canadian law" and in a manner which threatened national security. *See also J.R.C. v. Costa Rica*, as cited in *Report of the Human Rights Committee*, U.N. GAOR, 44th Sess., Supp. No. 40, at 293, U.N. Doc. A/44/40 (1989) (keeping a terrorist detained while deportation is pending may be valid on national security grounds); *Penarrieta v. Bolivia*, as cited in *Report of the Human Rights Committee*, U.N. GAOR, 43d Sess., Supp. No. 40, at 199, U.N. Doc. A/43/40 (1988) (finding an

instances where the Committee has determined that indefinite detention is permissible.¹⁰⁷ There has never been a reported case where indefinite detention is permissible when there has been no individualized hearing.¹⁰⁸

Hong Kong does not provide individualized hearings to Vietnamese detainees.¹⁰⁹ Were Hong Kong to grant them individualized judicial hearings, most (and virtually all women and children) detainees would be found to present neither a serious risk of danger to society nor a risk of absconding.¹¹⁰ Historical evidence shows that when the camps were open, the Vietnamese asylum seekers lived and worked in Hong Kong without conflict with the Chinese in Hong Kong.¹¹¹ Similarly, the risk of flight is remote, since those Vietnamese not yet screened have every reason to appear for their screening hearings with the Hong Kong government, as this is their only possibility of obtaining legal refugee status.¹¹² The risk that the Vietnamese will leave Hong Kong to seek refuge illegally in another country presents no harm to the Hong Kong government, as its goal is to have these people leave the Colony.¹¹³ If the Hong Kong authorities are concerned that individuals might somehow "melt" into Hong Kong society, the burden is on the Hong Kong government to establish in individualized hearings that no reasonable conditions short of continued detention would prevent a particular individual from disappearing.¹¹⁴

C. Illegality of Detention Under Regional Treaties and Accompanying Case Law

Other international conventions, such as the European Convention¹¹⁵ and the American Convention on Human Rights,¹¹⁶ also

Article 9(3) violation of the Covenant because the accused were not processed promptly). Moreover, in both of these cases the complaining individuals had judicial hearings in which the government made a showing of the need for continued detention. Nothing approaching such a procedural safeguard is available in Hong Kong.

107. See cases *supra* notes 102, 106.

108. *Id.*

109. See *supra* notes 52-53 and accompanying text.

110. See INHUMANE DETERRENCE, *supra* note 3, at 3.

111. See *supra* notes 21-22 and accompanying text.

112. See DILLER, *supra* note 2, at 21-32.

113. Immigration Ordinance, LAWS OF HONG KONG ch. 115, pt. IIIA, § 13A(3) (1987).

114. van Alphen, *supra* note 98, para. 5.8.

115. European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S. 221.

116. American Convention on Human Rights, Nov. 22, 1969, O.A.S. Official Records, OEA/Ser. K/XVII/1.1, Doc. 65 (Rev. 1), Corr. 2 (1970).

reflect the customary international law norm which prohibits policies of prolonged indefinite detention of asylum seekers, such as those utilized in Hong Kong.¹¹⁷ For example, Articles 5(1) and 5(4) of the European Convention require that all detention be in accordance with procedures prescribed by law and that every detainee have the right to a speedy challenge to the lawfulness of his or her detention.¹¹⁸ Article 7(3) of the American Convention provides that “[n]o one shall be subject to arbitrary arrest or imprisonment.”¹¹⁹ While the exact provisions in the European Convention differ from those in the Covenant, the cases decided under the European Convention proceed with the same type of analysis as the cases under the Covenant and are useful in explicating the meaning and scope of the fundamental right to be free from arbitrary detention.

The *Affaire Winterwerp*¹²⁰ case is the centerpiece of any legal analysis of arbitrary detention under the European Convention. The European Court of Human Rights noted that for a detention proceeding to be lawful, it must comply with local law and the European Convention.¹²¹ In keeping with the domestic law of a state and the European Convention, where detention is permissible, it must be in conjunction with an evaluation of all the circumstances surrounding the detention, including duration, effect, and manner of implementation.¹²² Additionally, the European Court of Human Rights has evaluated whether an individual’s detention is arbitrary or effected for an “ulterior purpose” contrary to Article 5(1)(e) of the European Convention, when read in conjunction with Article 18.¹²³

In 1976 the Court applied the criteria set forth in the cases mentioned above in a situation similar to, but far less egregious than,

117. Hong Kong is not a signatory to either instrument. M.J. BOWMAN & D.J. HARRIS, *MULTILATERAL TREATIES: INDEX AND CURRENT STATUS* 163, 331 (1984). The United Kingdom is a signatory to the European Convention on Human Rights but it has not given notification under Article 63 that the Convention will apply to Hong Kong. *Id.* at 163. Article 63(1) of the Convention states: “Any state may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall extend to all or any of the territories for whose international relations it is responsible.” European Convention on Human Rights, *supra* note 115, art. 63(1).

118. European Convention on Human Rights, *supra* note 115, art. 5.

119. American Convention on Human Rights, *supra* note 116, art. 7(3).

120. *Winterwerp v. The Netherlands*, 33 Eur. Ct. H.R. (ser. A) (1979).

121. *Id.*; *accord Ashingdane v. United Kingdom*, 93 Eur. Ct. H.R. (ser. A) at 528 (1985).

122. *Ashingdane*, 93 Eur. Ct. H.R. at 528; *see also Engel v. The Netherlands*, 22 Eur. Ct. H.R. (ser. A) at paras. 58-59 (1976).

123. *Ashingdane*, 93 Eur. Ct. H.R. at 544.

the circumstances in Hong Kong. In *Cyprus v. Turkey*¹²⁴ the Court held that the Turkish government's policy of holding groups of Greek Cypriot refugees in detention centers violated Article 5(1) of the European Convention.¹²⁵ Although the Turkish government presented evidence that most individuals were detained on average for only two or three months,¹²⁶ the Court still found that the detention amounted to "a deprivation of liberty" within the meaning of the European Convention.¹²⁷ The fact that the detentions were carried out in conformance with the Turkish government's military policy did not alter the Court's conclusion that "[t]he confinement to these centers was not ordered in accordance with any procedure prescribed by law."¹²⁸

The European Court of Human Rights has also specifically considered the rights of children in detention. In *Bouamar v. Belgium*¹²⁹ the Court held that in order to satisfy the minimum requirements of Article 5 of the European Convention, any placement of a child in detention "should be resorted to only in exceptional circumstances and [should] be of extremely short duration."¹³⁰ Furthermore, the Court wrote, "The Belgian State . . . was under an obligation to put in place appropriate institutional facilities which met the demands of security and the educational objectives" of the local law regarding children.¹³¹ Placing a youth in detention "in conditions of virtual isolation and without the assistance of staff with educational training cannot be regarded as furthering any educational aim."¹³² The Court further stated that in the case of children "it is essential not only that the individual concerned should have the opportunity to be heard in person but that he should also have the effective assistance of his lawyer."¹³³

124. *Cyprus v. Turkey*, App. Nos. 6780/74, 6950/75, 4 Eur. Comm'n H.R. 482 (1982).

125. *Id.* at 529.

126. *Id.* at 527.

127. *Id.* at 529.

128. *Id.*; see generally *Ashingdane*, 93 Eur. Ct. H.R. at 544 (providing an example of a deprivation of liberty that was not beyond the bounds of Article 5(1)(e) of the European Convention).

129. *Bouamar v. Belgium*, 11 Eur. Ct. H.R. (ser. A) at 1 (1987).

130. *Id.* at 16 (describing the conditions for detention under Belgian law). Belgian law, in turn, must satisfy Article 5 of the European Convention. *Id.*

131. *Id.* at 17.

132. *Id.*

133. *Id.* at 19.

The Court in *Affaire Winterwerp* also emphasized the necessity of predictable procedures when a government seeks to detain an individual. “[I]t is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation, failing which he will not have been afforded the ‘fundamental guarantees of procedure.’”¹³⁴ In particular, detention is unlawful if detainees are not given an individualized judicial hearing.¹³⁵ Moreover, as with cases decided under the European Convention, continued detention may be permissible if a court determines that an individual will abscond or destroy evidence.¹³⁶

IV. UNITED NATIONS JURISDICTION

In the absence of available domestic legal remedies, human rights organizations have now sought international intervention to stop the Hong Kong government’s continued violations of the Vietnamese detainees’ human rights.¹³⁷ Although there is no record of a similar case having been heard by the United Nations’s organs or by any other international judicial body, the case of the Vietnamese asylum seekers has been presented to the United Nations Working Group on Arbitrary Detention (Working Group), which has accepted jurisdiction.¹³⁸ The Vietnamese detainees petitioned for relief to the Working Group not as one of several legal or political avenues to their freedom, but as their last resort.¹³⁹

In 1991 the United Nations Commission on Human Rights (Commission) created the Working Group for the purpose “[o]f

134. *Winterwerp*, 33 Eur. Ct. H.R. at 24; *accord Weeks v. United Kingdom*, 10 Eur. H.R. Rep. 293 (1987) (Commission report) (noting the inadequacy of proceedings violates Article 5(4)); *B. v. United Kingdom*, App. No. 6870/75, 6 Eur. H.R. Rep. 204 (1987) (maintaining the need for adequate proceedings in detaining a mental patient).

135. European Convention on Human Rights, *supra* note 115, art. 5(4) (“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court.”).

136. *Wemhoff Case*, 6 Eur. Ct. H.R. (ser. A) 25 (1968).

137. Of particular note are the actions taken by the Lawyers Committee for Human Rights and the Women’s Commission for Refugee Women and Children in bringing such abuses to the attention of the United Nations Working Group on Arbitrary Detention.

138. The Working Group has made a preliminary determination to accept jurisdiction, and has sent letters to the governments of Hong Kong and the United Kingdom seeking a response to the detainees’ submission. Telephone Interview with Isaac Bitter, Permanent Representative of the U.N. Working Group (June 15, 1993).

139. *See supra* notes 59-74 and accompanying text (describing the absence of domestic and international judicial remedies).

investigating cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards as set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the states concerned."¹⁴⁰ The Commission created the Working Group to address violations of customary international law which are inherent in acts of arbitrary detention, regardless of a state's accession to any particular human rights instrument. The Working Group's mandate of investigating cases of arbitrary detention reflects this decision.¹⁴¹

To date, the Working Group has construed its mandate broadly.¹⁴² First, it has asserted that it has jurisdiction to consider all situations in which governments detain individuals, not merely cases involving criminal charges.¹⁴³ For example, the Working Group has recognized that arbitrary detention may result, as it has here, from the exercise of an individual's right to seek and to enjoy in other countries asylum from persecution under Article 14(1) of the Universal Declaration.¹⁴⁴ Indeed, the intercession of the Working Group is particularly vital in cases where politically powerless asylum seekers have been deprived of rights or remedies under domestic law

140. Commission on Human Rights Res. 42, U.N. ESCOR, 47th Sess., Supp. No. 2, at 8, U.N. Doc. E/CN.4 (1991); *Commission on Human Rights, Report of the Working Group on Arbitrary Detention*, U.N. ESCOR, 48th Sess., Item 10, at 3, U.N. Doc. E/CN.4 (1993) [hereinafter *1993 Report*]; see also *Commission on Human Rights, Report of the Working Group on Arbitrary Detention*, U.N. ESCOR, 48th Sess., Item 10, at 3 U.N. Doc. E/CN.4 (1992) [hereinafter *1992 Report*]. In addition, the Working Group is charged with seeking and receiving "information from Governments and intergovernmental and non-governmental organizations," as well as from the individuals concerned, their families, or their representatives, and with presenting comprehensive reports to the Commission at its annual sessions. *Id.* at 3. The Working Group, however, lacks explicit authority to order governments to conform their behavior to international norms.

141. See *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, G.A. Res. 173, U.N. GAOR, 43d Sess., Supp. No. 49, U.N. Doc. A/43/49 (1988) [hereinafter *Body of Principles*]; *Universal Declaration of Human Rights*, *supra* note 2, art. 9; *1993 Report*, *supra* note 140, at 8-13; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §702(e) (1986) (recognizing that prolonged arbitrary detention violates customary international law).

142. See *1993 Report*, *supra* note 140, at 4-6 (describing the Working Group's activities); *1992 Report*, *supra* note 140, at 3 (describing the Working Group's mandate).

143. The mandate cites Article 9 of the Universal Declaration of Human Rights, which makes no distinction between criminal detention and other forms of detention. See *1992 Report*, *supra* note 140, at 3.

144. *Id.* at 10.

and where, as here, the international legal system provides no other means of redress.¹⁴⁵

Second, even when a state has adhered to its own domestic law, the Working Group has recognized its obligation to consider "whether this internal law conforms to international standards."¹⁴⁶ Thus, the fact that Hong Kong's policy of prolonged indefinite detention of the Vietnamese may be carried out in accordance with domestic laws¹⁴⁷ is no defense before the Working Group, which is charged to consider whether those domestic laws are "in contradiction with international standards."¹⁴⁸

Third, the Working Group has appropriately refused to take an overly technical view of the application of international law conventions to a state's acts of arbitrary detention. For example, the Working Group has determined that it has jurisdiction to investigate and to report on any state's violations of customary international law because that customary law binds every state, regardless of its status as a signatory of specific international instruments.¹⁴⁹ In addition, the Working Group has recently stated that "the Covenant . . . has a binding effect with respect to party states and a *declaratory effect* with respect to non-party states."¹⁵⁰ The Working Group has adopted the term "accepted declaratory instrument" to describe the Covenant "insofar as states which have yet to ratify it are concerned; and hence to take it into consideration when determining whether a deprivation of freedom is arbitrary."¹⁵¹ This treatment of the Covenant is proper because the Covenant does not itself create a new normative international rule prohibiting arbitrary detention. Instead, that normative rule, expressed in Article 9 of the Universal Declaration and in the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, predates the Covenant and binds all states, regardless of their formal accession to the Covenant.¹⁵² Thus, the Working Group has jurisdiction to investigate

145. See Reed Brody, *The United Nations Creates a Working Group on Arbitrary Detention*, 85 AM. J. INT'L L. 709, 710-15 (1991) (equating the potential of this Working Group with other human rights working groups).

146. See 1992 Report, *supra* note 140, at 3.

147. See *supra* notes 55-70 and accompanying text.

148. See 1992 Report, *supra* note 140, at 3.

149. See *Universal Declaration of Human Rights*, *supra* note 2, art. 9; see also Commission on Human Rights Res. 42, *supra* note 140, at 8 and accompanying text.

150. See 1993 Report, *supra* note 140, at 12.

151. *Id.* at 13.

152. *Id.*; see *supra* text accompanying note 141.

Hong Kong's arbitrary detention of the Vietnamese and to demand that Hong Kong desist from its detention policy, regardless of the technical niceties concerning whether the Covenant "has a binding effect" on Hong Kong with respect to the Vietnamese.¹⁵³

Under the Working Group's broad view of its mandate, case law decided under the Covenant and similar instruments¹⁵⁴ should also be an important tool of the Working Group, whether or not the state in question is a signatory to the Covenant or other binding instruments.¹⁵⁵ Past decisions under Article 9(1) of the Covenant and Article 5 of the European Convention provide one of the few sources that explicate the meaning and scope of the term "arbitrary detention."¹⁵⁶ It makes little sense to foreclose the Working Group from considering this developing body of law to determine the scope and meaning of "arbitrary detention" as a matter of customary international law,¹⁵⁷ regardless of whether Hong Kong is strictly bound by the Covenant or other international treaties with respect to the Vietnamese.

Fourth, the Working Group has appropriately determined "that it is not within its mandate to require local remedies to be exhausted in order for a communication to be declared admissible."¹⁵⁸ Thus, the question of available domestic law remedies for the Vietnamese is not relevant to the Working Group's jurisdiction to investigate this matter. In this particular case, that final legal nuance is moot; there are no effective domestic legal remedies available to the Vietnamese.¹⁵⁹ The Vietnamese are detained upon arrival pursuant to an order of an immigration official, and have no right to come before a court to consider the lawfulness of the detention.¹⁶⁰

V. CONCLUSION

Hong Kong's humane deterrence policy, intended to deter Vietnamese from coming to Hong Kong through the use of prolonged

153. See *Body of Principles*, *supra* note 141 and accompanying text; *Universal Declaration of Human Rights*, *supra* note 2.

154. See *supra* notes 116-37 and accompanying text.

155. See *Universal Declaration of Human Rights*, *supra* note 2.

156. See *supra* notes 121-37 and accompanying text.

157. The fundamental norms upon which decisions concerning arbitrary detention are based may be found in the *Body of Principles*, *supra* note 141. The application of these principles to customary international law has been recognized. See *1993 Report*, *supra* note 140, at 12.

158. *1993 Report*, *supra* note 140, at 10.

159. See *supra* notes 59-74 and accompanying text.

160. *Id.*

arbitrary detention, is cruel, unfounded, and violates international law. The Ordinance singles out the Vietnamese for this inhumane treatment and fails to provide even the most minimal procedural safeguards. The Vietnamese have no right to an individualized determination nor the right to challenge the underlying legality of the detention.

In order to conform to international law, Hong Kong should immediately parole the Vietnamese, allowing them to remain free in the community pending a determination of their future. While the Hong Kong government may deport illegal aliens or provide a temporary haven for refugees who will be resettled, it may not keep the Vietnamese locked in detention indefinitely, pending larger political solutions which history shows may take decades. The Hong Kong authorities must provide an individualized hearing to all the Vietnamese presently being held in detention, and have an obligation to free all those who pose no danger to society and no a risk of flight. Under this standard, the large majority of Vietnamese, and most significantly virtually every woman and child, should be freed from detention and the violence and denigration they presently face. At a minimum, Hong Kong should return to its former policy of open centers, allowing the Vietnamese to be free during the day to work or attend school. Open camps would also permit international organizations to monitor and prevent continuing human rights abuses.

The United Nations Working Group on Arbitrary Detention has recently accepted jurisdiction in a petition filed on behalf of the Vietnamese. The Working Group determined, in a case of first impression, that its jurisdiction was not limited to individual claimants and suggested that its broad mandate included considering whether the prolonged detention of approximately 45,000 Vietnamese asylum seekers is a violation of international law which prohibits arbitrary detention. Hong Kong has been given until December 1, 1993, to defend its policy. Thereafter, the Working Group will issue a decision on the merits. Recently, Hong Kong has granted refugee status to and released two of three named class members in the petition submitted on behalf of all the Vietnamese in detention in Hong Kong. This release may be a harbinger of a truly humane and lawful policy toward the long-suffering Vietnamese detainees.