Individuals

Refugees

Immigration policy on. Processing of. Australian Practice.

The Minister for Immigration and Ethnic Affairs, Mr MacKellar, was asked the following questions in the House of Representatives on 9 December 1976:

> (1) What persons are presently eligible to migrate to Australia as refugees.
>
> (2) What are the procedures adopted in their processing, and what are the criteria used to determine eligibility as a refugee.

He replied as follows:[53]

> (1) The Government's policy towards the entry of refugees is governed by its obligations as a party to the United Nations Convention on the Status of Refugees and its acknowledgement that as a member of the international community it must accept a share of responsibility in refugee and quasi-refugee situations which often involve personal danger and loss of human dignity, basic rights and means of livelihood.
>
> In accord with this approach the Government is prepared to do what it can to facilitate the resettlement of those refugees who can be integrated into the Australian community as well as others who though not in a strict sense refugees have been displaced and are the victims of severe privation.
>
> The extent to which Australia can participate in these types of projects must allow for special arrangements to be made to interview applicants and must take into account the ability of any particular group of refugees or displaced persons to integrate into the community. Factors to be considered in this regard go well beyond the grant of assisted passages to Australia and include placement in employment in Australia which is significantly difficult at present and an assessment of the degree of reliance which any group may have on continuing social welfare payments and services.
>
> Any proposal to admit refugees must be dealt with on a global basis and does not permit specific groups to be dealt with in isolation to the exclusion of other groups who may be seen as eligible to benefit from Australia's refugee policy. The essential aim, therefore, is to offer optimum assistance and avoid the intrusion of self-defeating factors such as poor employment prospects or the denial of employment opportunities which would otherwise be available to persons already in Australia.[54]

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53. HR Deb 1976, vol 102, 3673-4. For a more general policy statement see Mr MacKellar's Ministerial Statement in HR Deb 1977, vol 105, 1713-6.
54. For statistics on the number of refugees that have arrived in Australia as at 1 May, 1977 see HR Deb 1977, vol 106, 2260.

(2) The procedures adopted for the selection and movement of refugees and displaced persons whose entry has been approved in principle ensure that the standard migrant criteria are not imposed as this could effectively deny to the persons concerned the resettlement opportunities which the Government has offered. Health and character standards are insisted on but allowance is made for the parlous situation in which the refugees find themselves, the degree of support which would be forthcoming in that country, alternative opportunities for resettlement elsewhere more readily on the basis of language or closer association and Australia's ability to integrate the refugees at any given time.

Refugees

'Boat people'. Legal obligations.

Following is a note concerning Australian obligations under international law in relation to refugees:[55]

On 22 January 1954 Australia became a Party to the 1951 Convention Relating to the Status of Refugees, which was limited to persons who became refugees as a result of events and upheavals occurring before 1951. Within the umbrella of this and similar Conventions concluded in the 1930s, Australia accepted as immigrants a large number of people displaced by the events of the Second World War. On 13 December 1973 Australia became a Party to a 1967 Protocol to the Refugee Convention which removed the 1951 time limitation. There are no countries in southern, south-eastern or eastern Asia which are parties to either the Convention or Protocol. Some South East Asian countries, however, have had to bear the brunt of the post-war exodus of refugees from Vietnam.

Who is a Refugee?

States Parties to the Convention have accepted qualifications to the general rule that a State is not obliged to admit aliens into its territory. A refugee is an alien 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 unwilling to return to it.

Entry of Refugees

Before a refugee can receive the benefits of the provisions of the Convention from a Party to it, he must first be physically present in the chosen country of asylum—but this is qualified by a duty not to repel refugees at a frontier.

In the context of Australia, 'frontier' could be taken to include sea ports and airports. If a refugee, however, unlawfully gains entry to the country of asylum directly from the country where his life or freedom was threatened, he must present himself without delay to the appropriate immigration authorities and show good cause for his

55. Text supplied by the Department of Foreign Affairs, Canberra.

illegal entry or presence. If his presence is not legitimized, he must be given a reasonable period and all of the necessary facilities to obtain admission to another country.

Refugees, whether their entry is unlawful or not, cannot be deported to the persecuting country, although those who entered unlawfully may be deported to other countries that will accept them. 'Lawful entry' refugees, however, cannot be expelled except on grounds of national security or public order, although there is no obligation to grant them permanent residence status.

Assimilation of Refugees

In respect of employment, the Convention requires that refugees lawfully in the territory shall be given the most favourable treatment accorded to nationals of a foreign country as regards the right to engage in wage-earning employment. In addition, restrictive measures for the protection of the national labour market cannot be applied to a refugee:

(a) who has completed three years residence; or
(b) who is cohabiting with a spouse who possesses the nationality of the country of residence; or
(c) who has one or more children possessing the nationality of the country of residence.

In respect of other matters, such as artistic and industrial property, elementary education, public relief and social security, refugees are to be accorded the same treatment as is accorded to local nationals. On the other hand, the Convention states that a refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

Boat Refugees

In respect of recent arrivals of 'boat refugees', questions have been raised as to whether acts of 'hijacking' or 'piracy' have been committed.

The concept of piracy has been long established in international law and most recently was incorporated into Article 15 of the 1958 Convention on the High Seas. It consists of any illegal acts of violence by the crew or passengers of a ship which are directed against another ship, or against persons or property on board another ship, and in a place outside the jurisdiction of any State. Another country may categorise acts as piratical within its own legal system, but it cannot compel other countries to accept as piracy acts which are not so by international law.

'Hijacking' is not a technical legal term with a precise meaning as is piracy. The word is, in fact, an American colloquialism which, in recent years, has been used as a generic term to describe the offences against aircraft referred to in the Tokyo, Hague and Montreal Conventions. These Conventions themselves do not use the word

'hijacking'. In general terms, 'hijacking' usually refers to an act involving the passengers and crew of an aircraft being held under duress for the purpose of extortion or political blackmail.

Refugees

Definition of. United Nations Convention Relating to the Status of Refugees. Status of Chileans and Lebanese. Australian designation of.

On 18 November 1976 in the House of Representatives the Minister for Immigration and Ethnic Affairs, Mr MacKellar, was asked the following questions:

(1) What criteria does the United Nations High Commissioner for Refugees use in determining whether a people are to be designated as refugees.

(2) Have the displaced peoples of (a) Lebanon and (b) Chile been so designated by the United Nations; if not, can he supply details of why these people have failed to meet the United Nations' criteria.

(3) Does he designate the displaced peoples of (a) Lebanon and (b) Chile as refugees; if not, what criteria does he use in determining whether a people are to be classified as refugees.

(4) In what respects does he see the circumstances of displaced Vietnamese as different from the circumstances of displaced Lebanese and Chileans.

(5) In what respects do the guidelines adopted by the Government towards admittance of displaced Vietnamese differ from the guidelines adopted towards admittance of displaced Lebanese and Chileans.

Mr MacKellar's answers were as follows:[56]

(1) In accordance with Article 1(2) of the general provisions of the United Nations Convention Relating to the Status of Refugees adopted on 28 July 1951, the term 'refugee' applies to 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.'

Under the Convention, the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees.

(2) (a) I understand that the United Nations High Commissioner for Refugees does not recognise displaced Lebanese as coming within Article 1(2) of the United Nations Convention Relating to the Status of Refugees.

(b) The United Nations High Commissioner for Refugees has

56. HR Deb 1976, vol 102, 2928-9.

accorded refugee status to some Chileans outside Chile, presumably because their situation conforms with the terms of Article 1(2).

(3) The Minister for Immigration and Ethnic Affairs has no mandate to so describe a person or a class of persons. Such a designation would not necessarily confer advantage in the matter of entry to Australia. Normally, persons accorded UNHCR refugee status are eligible to be considered for entry but equally so are people from refugee-type situations who have not been recognised by the UNHCR. Each situation is considered on its merits.

(4) Each group is entitled to humanitarian consideration. Australia has accepted people from all three situations.

(5) The acceptance of people from refugee or quasi-refugee situations is governed by principles of humanity, equity and compassion and by the Australian people's economic, social and cultural capacity to successfully accept and integrate such migrants.

Individuals

Hijacking. United Nations action.

A resolution on aerial hijacking and other unlawful interference with civil aircraft was adopted by consensus in the General Assembly in 1977. Australia co-sponsored the resolution. Following is a report on the subject:[57]

The first operative paragraph of the resolution condemns acts of aerial hijacking or other interference with civil air travel through the threat or use of force, and all acts of violence which may be directed against passengers, crew and aircraft, whether committed by individuals or by states.

The second and third operative paragraphs are probably the most significant in the resolution. The second paragraph calls upon all states to take all necessary steps to prevent acts of the nature referred to above including the improvement of security arrangements at airports or by airlines, as well as the exchange of relevant information. It calls upon states to take joint and separate action in co-operation with the United Nations and the International Civil Aviation Organisation (ICAO) to ensure that passengers, crew and aircraft engaged in civil aviation are not used 'as a means of extorting advantage of any kind.'

The third operative paragraph deals with the ratification of conventions concerning civil aviation safety. The paragraph appeals to all states which are not already party to those conventions (namely the 1963 Tokyo Convention on Offences and Certain Acts Committed on Board Aircraft; the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft; and the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation) to give urgent consideration to ratifying or acceding to them. Ninety states are parties to the 1963 Tokyo Convention, eighty to the

57. Aust FA Rec, November 1977, 585.

1970 Hague Convention and seventy-four to the 1971 Montreal Convention. Australia is a party to all three conventions.

Operative paragraph four calls upon the ICAO to undertake urgently further efforts with a view to ensuring the security of air travel and preventing the recurrence of violent acts including the reinforcement of Annex 17 to the Convention on International Civil Aviation. The fifth, and final, operative paragraph, appeals to all governments to make serious studies of the 'abnormal situation relating to hijacking'.

After the resolution was adopted by the General Assembly, a number of states explained their position. Cuba stated that it could not take part in the consensus. China approved the terms of the resolution and regretted that it was unable to become a party to the conventions referred to in the third operative paragraph because Taiwan had already signed them.

One of the features of the resolution is that it provides pegs on which to hang further action by the United Nations, the ICAO or both. The ICAO Council has been meeting to discuss as a matter of priority the outcome of the work of the United Nations General Assembly so far. An examination of the problem of terrorism and of the taking of hostages will be made in the Sixth Committee of the General Assembly shortly.

Hostages

Drafting of International Convention against Taking of.

Following are extracts from a statement by the Australian representative, Mr E Lauterpacht QC, in the Sixth Committee of the United Nations General Assembly at the 31st Session on 26 November 1976:[58]

Our approach to the problem stems from our concern for human rights. A hostage is, by definition, an innocent person. (Indeed, and I say this parenthetically, it is unnecessary to introduce the qualifying adjective 'innocent' before the word 'hostage'. The notion of innocency is inherent in the concept of a 'hostage'. In practical terms, there can be no such thing as a 'guilty' or 'hostile' hostage. But the introduction of a requirement that a hostage be 'innocent' could give rise to discussion about his 'innocence' which, so it might be suggested, could be diminished by some form of guilt by association. We would not see this as a desirable development.)

However, to return to my opening point about our concern for human rights. A hostage is, by definition, an innocent person who has no direct individual responsibility for the episode which has occasioned his seizure or the threat to his life. Equally, he is not able by any action of his own to satisfy the demands of those who have seized or threaten him. Yet the hostage has, as much as any other person, rights to life and to freedom; and those rights are fundamentally violated when he is seized, threatened or killed.

It would come as a surprise to all of us in this room if we were to be

58. Text supplied by the Department of Foreign Affairs, Canberra.

told that there is any society in which the interference with the person and the act of murder involved in the taking and killing of a hostage is not a punishable crime; and we can as a practical matter dismiss that possibility. But the fact that the taking or killing of hostages may be punishable under the criminal laws of each nation is not by itself sufficient to deal adequately with the situation in which the seizure or killing of a hostage takes place in one State and the violator of the rights of the hostage is subsequently apprehended in another. As in the case of crimes committed on board aircraft or of war crimes, difficulties may arise about the jurisdiction of national courts and the substantive law which they are to apply. Further, since there is at present no obligation upon States to prosecute the takers of hostages, there is an additional need to ensure the possibility of extradition in such cases to the other State or States in which the unlawful act took place, and where, we may assume, prosecution will take place.

These limitations of the international legal system are only partially and inadequately touched by existing instruments. We may look at each of them in turn.

First, the United Nations Declaration and Covenants on Human Rights, while they prescribe a standard which covers the situation, are directed primarily towards the conduct of States; and there is no machinery which can effectively secure the prosecution of individual violators of those rights.

Second, the prohibition on the taking of hostages in the Geneva Convention of 1949, relative to the Protection of Civilian Persons in Time of War, operates only in conditions of war or armed conflict as defined in the Convention. Moreover, there is no effective provision for the extradition of the wrongdoer if he is not prosecuted in the country of his wrongdoing.

Third, the Tokyo Convention of 1963 on offences and other acts committed on board aircraft is basically an enabling Convention, expanding and establishing the jurisdiction of States in respect of such offences. Only Article 11 has any bearing on our present problem. It requires Parties to take appropriate measures to restore control of an aircraft to the lawful commander when a person on board has unlawfully committed by force or threat of force an act of interference or seizure on an aircraft in flight. The scope of operation of the Tokyo Convention is thus limited because it is applicable only to offences on aircraft in flight; and it imposes no requirement upon Parties to prosecute or extradite.

Fourth, the Hague Convention of 1970 for the Suppression of the Unlawful Seizure of Aircraft is likewise limited to episodes occurring in aircraft; and, fifth, the same is true of the Montreal Convention of 1971, which makes into an offence an act of violence if that act is likely to endanger the safety of the aircraft.

Sixth, there is the UN Convention of 1973 on the Prevention and

Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. This, however, is limited in its operation to the protection of the persons described in its title.

This patchwork of international provisions which may be applicable to the taking of hostages leaves many situations uncovered—namely, the seizure of hostages not being internationally protected persons, on land or on the sea; and the effective punishment of those who seize hostages in aircraft. The need for additional international provisions is, therefore, evident.

But, what is to be done? One may contemplate that any convention which is to be effective would need to provide (i) that the taking of hostages is an offence which every Party is entitled and bound to treat as a crime, wherever it may have been committed; and (ii) that if a prosecution is not initiated within an appropriate period, the detaining State must extradite the wrongdoer to a Party within whose territory the crime has been committed.

However, it is clear that if these arrangements are themselves to be effective it will be necessary to grapple with at least one major concept commonly associated with extradition: the concept of the non-extradition of political offenders.

It is to be noted that the effectiveness of Article 11 of the Tokyo Convention is limited because it is not applicable to offences against penal laws of a political nature. Also, the obligation to permit extradition established in the Hague and Montreal Conventions, as well as in the UN Convention of 1973 on Crimes against Internationally Protected Persons, is qualified by the requirement that 'extradition shall be subject to the other conditions provided by the law of the requested State'. This requirement would, it seems, enable the requested State to refuse extradition in cases which it considered to be political offences.

Here is a problem of some difficulty. At this stage, we can only suggest that it should not be approached on the basis that the concept of political offences represents some theologically sacrosanct limitation on the extradition process.

We should bear in mind that the non-prosecution of such internationally reprehensible acts as war crimes, genocide and other violations of human rights—for which so many Members of this Committee are prepared to see States as well as individuals held responsible—cannot be justified by reference to whatever political character such offences may possess. And there is also a widespread view that such political character should not prevent extradition. This is actually written into the Genocide Convention.

We should also reflect on the possibility that the solution of this difficulty may in part have to be sought in the development of new techniques taking us beyond our present system of national jurisdiction into the area of internationally initiated and controlled prosecution. More than twenty years ago the United Nations began, but

never completed, its study of the idea of an international criminal court—and we ought perhaps to re-examine the work done in that connection.

Hostages

Drafting of International Convention against Taking of.

Following are extracts from a statement by the Australian representative, Mr H Gilchrist, in the Sixth Committee of the United Nations at its 32nd Session, on 5 December 1977:[59]

> At the outset I wish to repeat what was stated by the Australian delegation last year in the Sixth Committee, namely, that the approach of my Government to this problem arises from a concern for fundamental human rights. A hostage is inherently an innocent person. Nor can a hostage, by his own action alone, satisfy the demands of those who have seized or threaten him. As much as any other person, a hostage has fundamental rights to life and freedom, regardless of his nation, race or religion.
>
> However, where a hostage situation involves more than one country, we are faced with problems of jurisdiction, and the possibility of problems arising from a lack of international cooperation, for there is as yet no *general* obligation upon States either to prosecute or to extradite the taker of a hostage.
>
> There are, of course, as has been frequently mentioned, international instruments which touch on parts of this general problem. These instruments, to all of which Australia is a party, are the United Nations Declaration on Human Rights, the Geneva Conventions of 1949, the Tokyo, the Hague, and the Montreal Conventions dealing with the unlawful use of aircraft, and the United Nations Convention for the Prevention and Punishment of Crimes against Internationally Protected Persons. To these instruments have been recently added the two Protocols to the Geneva Conventions on Humanitarian Law in Armed Conflicts. There is thus an abundance of international instruments illustrating the sentiment of the international community concerning the taking of hostages. Unfortunately, the sum of all these instruments still leaves some situations uncovered by appropriate provisions of international law, and it is our task to try to fill the gaps by means which will command general support.
>
> Mr Chairman, the most recent international instruments and resolutions touching the subject of hostages have been expressed in language which is strikingly imperative in its mood, and far-reaching in its ambit. Let me refer, as others have already referred, specifically to one example, namely, the First Protocol to the Geneva Conventions. *Article 75* of the Protocol identifies the taking of hostages as one of those acts which 'are and remain prohibited *at any time and in any place whatsoever*, whether committed by civilian or military agents'. The *preamble* to the Protocol states that the provisions of the

59. Text supplied by the Department of Foreign Affairs, Canberra.

Protocol (and of the Conventions themselves) must be 'fully applied in *all* circumstances to *all* persons' who are protected by those instruments, 'without any adverse discrimination based on the nature or origin of the armed conflict or on the causes espoused by, or attributed to, the Parties to the conflict'. *Article 1* of the Protocol expressly *includes* armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes in the exercise of their right of self-determination. *Article 75* also institutes certain fundamental guarantees of *minimum protection* of persons in the power of a party to the conflict who do not benefit from more favourable treatment under the Convention or under the Protocol, without *any* adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.

The Second Protocol to the Geneva Conventions contains, in its Article 4, similar language on the subject of hostage-taking. These international instruments were not achieved by any superficial process; they are the fruit of four years of most intensive international discussion and compromise. They are applicable only to armed conflicts, but their principles ought to be given the closest consideration in the framing of measures against the taking of hostages in time of peace.

I turn now, Mr Chairman, to the Report of the Ad Hoc Committee. My delegation has not underestimated the complexity of the task which was entrusted to that Committee, nor would it wish to underestimate the progress which it has made. The Committee succeeded in identifying and clarifying many of the problems inherent in the preparation of a convention which would attract universal support, and the general debate which took place in the Committee was very thorough; indeed, that debate took up seven meetings out of the nineteen held by the Committee. The Committee also examined the relevance of existing international instruments, and discussed a variety of situations in which hostages might be taken, and in which one or more other countries might find themselves involved. More importantly, there was a substantial discussion of the draft convention tabled as a working paper by the Federal German Republic and of various proposed amendments or additions to it.

My delegation takes this opportunity of recognizing the valuable and positive contributions made by various members of the Ad Hoc Committee, especially the contribution made by the Federal German Republic. The fact that the Committee was unable to complete its task is not a cause for either surprise or discouragement. Nevertheless, in the meantime the urgency of the problem has increased, as well-known events this year have sadly demonstrated.

What, then, are the main difficulties which have prevented the Ad Hoc Committee from completing its task? There were, in the first place, requests by some members for precise definitions, either of

the concept of a hostage or of various kinds of hostage situation, or of the crime of hostage-taking. We must, of course, at all times, respect the need for legal precision. My delegation would point out, in this connection, that this has not prevented the drafting, in other instruments to which I have referred, of generally acceptable provisions regarding hostages, where the political will to do so has existed.

There were also suggestions that the drafting could not be properly considered except in the wider context of international terrorism, and in particular in the context of a study of the causes of terrorism. Well, Mr Chairman, this point of view has already been exhaustively discussed. I will add merely that if the various conventions on humanitarian law in armed conflicts had had to wait until there was a consensus about the causes of war, the international community would probably still be without those humanitarian provisions and safeguards, and the suffering of humanity would have been immeasurably greater as a result.

Reservations were also expressed by some members on the ground that the application of a convention along the lines of working paper A/AC/188/3 could operate to the disadvantage of groups or peoples struggling against colonial or alien or racial oppression. Now, I would not wish to introduce into this present debate unnecessary subjective elements. But it is a matter for serious doubt whether the cause of any oppressed group or people would be in any way either honoured or enhanced by conferring on *anyone* a right to commit an act which is recognized in all countries as a crime against innocent humanity. In this connection, my delegation welcomes the assurance offered in this debate last week by the distinguished delegate of Morocco.

It seems to my delegation to be entirely logical and consistent—indeed most desirable—for all of us to take a strong and persistent stand on behalf of oppressed peoples and at the same time to take an equally strong and persistent stand against hostage-taking in any circumstances. The principle of self-determination of peoples is a cornerstone of the Charter, and a principle which Australia is determined to uphold. The views of my Government in this regard have been set forth this year by the Australian Prime Minister at the meeting of Commonwealth Heads of Government in London, and more recently by the Australian Minister for Foreign Affairs at the Conference against Apartheid at Lagos, and they need no further elaboration here. We are all aware that, unless the just aspirations of oppressed peoples are met, more and more persons will become so frustrated and desperate as to see no alternative to violence. However, my delegation, while profoundly sympathizing with all who find themselves in such a predicament, finds difficulty in accepting that *anyone* has a sacred and inalienable right to take a hostage. My delegation therefore believes that it will be in the interest of all countries, and of all peoples, to avoid language in a

convention which could be construed as granting to *anyone* a licence to take hostages. It hopes that the Ad Hoc Committee will succeed in devising a generally acceptable provision in a draft convention in order to resolve this problem.

My delegation freely concedes that the drafting of the proposed convention does present some real difficulties. The traditionally-recognized right of asylum, for example, needs to be taken into account, and the need to consider how best to protect the lives of hostages and obtain their early release unharmed must also always be borne in mind. Some useful proposals in this context have already been put before the Ad Hoc Committee. A useful suggestion was also made by the distinguished delegate of Trinidad & Tobago in an earlier intervention, when he drew attention to the European Convention drawn up at Strasbourg in November 1976 as an instrument which could be profitably studied by the Ad Hoc Committee.

Provision for punishment of the hostage-taker, as an alternative to extradition, may help to resolve some of the problems. My delegation believes that the proposed convention should contain provisions pertaining to jurisdiction and extradition comparable with those contained in the United Nations Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. It should, in any case, *as a minimum*, provide

firstly, that the taking of hostages is an offence which every party is *entitled* and *bound* to treat as a crime, wherever it may have been committed;

and

secondly, that if a prosecution is not initiated within an appropriate period, the detaining State may extradite the wrongdoer to a State party within whose territory the crime has been committed.

In brief, my delegation believes that the political character of such a universally reprehensible offence as hostage-taking should not, in itself, be seen as a sacrosanct limitation on punishment and the extradition process.

Humanitarian Law

Application in armed conflict. Diplomatic Conference on.

At its final session, held from 17 March to 10 June 1977, the Diplomatic Conference adopted two Protocols to supplement the four Geneva Conventions of 12 August 1949. The adoption of these Protocols marked the culmination of four years' negotiation. Following is a report on the final session:[60]

Protocol I, which deals with international wars, and Protocol II, which deals with non-international wars, contain a number of provisions which are of considerable political and legal interest.

The object of the Conference was to study two draft Additional

60. Aust FA Rec, July 1977, 374.

Protocols prepared, after official and private consultations, by the International Committee of the Red Cross and intended to supplement the Four Geneva Conventions of 12 August 1949, namely:

- the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;
- the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;
- the Geneva Convention relative to the Treatment of Prisoners of War; and
- the Geneva Convention relative to the Protection of Civilian Persons in Time of War.

The United Nations General Assembly supported the efforts of the Diplomatic Conference by adopting over a period of years successive resolutions relating to human rights in periods of armed conflict. At the fourth, and final, session of the Conference 109 states were represented.

In addition, representatives of national liberation movements, recognised by the regional inter-governmental organisations concerned, and of inter-governmental and other organisations also participated in the Conference but without the right to vote.

One of the most significant provisions in Protocol I is Article I, which was originally adopted at the first session (1974) of the Conference. Under that Article, the Protocol is to apply not only to international armed conflicts, as traditionally understood, but also to armed conflicts 'in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination . . .' In other words, wars involving national liberation movements will henceforth attract the detailed rights and duties applicable to each party to the conflict which, until now, have been traditionally reserved to sovereign states. This development echoes United Nations General Assembly Resolution 3103 (XXVIII), paragraph 3 of which declares that '. . . armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions . . .' This Resolution was adopted by the General Assembly on 12 December 1973.

The substance of a number of other provisions in Protocol I was affected by Article 1. For example, under Article 44 of Protocol I, guerrilla fighters are to be considered as combatants and treated as prisoners of war, if they fall into the power of an adverse party provided that, among other things, they carry their arms openly. In contrast to regular members of the conventional forces in a conflict, guerrillas are not required to distinguish themselves from the civilian population other than in the manner already mentioned.

Persons who come within the definition of mercenaries under the

Protocol have no right to be treated as combatants or as prisoners of war upon capture. A 'mercenary' is a person who is not a national of a party to the conflict nor a resident of territory controlled by a party to the conflict and who, among other things, is promised material compensation substantially in excess of that promised or paid to combatants of similar rank in the armed forces of that party. Although they will not enjoy the detailed protection of prisoners of war under the Third Geneva Convention of 1949, mercenaries will still be entitled to the basic human rights and procedural rights provided in Article 75 of Protocol I.

Australia was active in the negotiation of Article 75 (Fundamental Guarantees) which was one of the most important provisions of Protocol I adopted at the last session. The Article provides for a number of minimum guarantees, including criminal procedural guarantees and protection against abusive treatment, to all people who are in the power of a party to the conflict but have not been singled out for special treatment under the 1949 Geneva Conventions or under Protocol I. Such people include nationals of a party to the armed conflict, nationals of states not bound by the Conventions or Protocols and nationals of neutral or co-belligerent states, spies, saboteurs, mercenaries and people not entitled to prisoner of war status or to more favourable treatment under the Geneva Conventions.

Another significant development at the fourth session of the Conference was the adoption of an Article establishing an International Fact-Finding Commission which, as a result of an Australian proposal, will be competent to inquire into any facts alleged to be a 'grave breach' or other serious violation of the Geneva Conventions of 1949 or of Protocol I. However, the International Fact-Finding Commission is to operate only in relation to parties to the Protocol which have declared that they accept the competence of the Commission to inquire into allegations made by other parties. Furthermore, the proposed Commission is not to report its findings publicly unless all the parties to the conflict have requested the Commission to do so.

Detailed articles were adopted in a number of other significant areas, including the protection of civilians and civilian objects against the effects of hostilities. Special tasks have been assigned, under the Protocol, to civil defence organisations and provision is made for relief actions in matters essential to the survival of the civilian population. Under a special provision of the Protocol journalists engaged in dangerous professional missions in areas of armed conflict may obtain special identity cards and are to be granted the same protection as civilians.

At its first session, in 1974, the Conference established an Ad Hoc Committee on Weaponry to examine, in depth, the question of the prohibition or limitation of the use of conventional weapons likely to cause unnecessary suffering or to produce indiscriminate effects.

This Committee concluded its work at the fourth session and a recommendation was made that an international conference be convened not later than 1979 with a view to searching for agreement on, among other things, prohibition or restrictions on the use of specific conventional weapons.

Protocol II, which deals with non-international conflicts, is much briefer than Protocol I. It applies to armed conflicts, above a certain threshold, which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces. The Protocol provides for basic guarantees to various categories of people and provides, among other things, special protection for the wounded, sick and shipwrecked, medical personnel, medical units and transports.

Both Protocols will be open for signature on 10 December 1977, and subsequent ratification, by parties to the 1949 Geneva Conventions.

Territorial Asylum

UN Conference on.

Following is a report on the Conference held in Geneva 10 January-4 February 1977:[61]

Groups of experts had met in 1971, 1972 and 1975 and it was hoped that the Conference might have been in a position to adopt a convention regulating in what circumstances contracting States should grant asylum in their territory or refrain from arbitrarily rejecting applicants for asylum who are at the frontier or in the territory of the state concerned.

In the event, only three articles out of at least ten which were expected to be considered were adopted at the Conference, but their provisions constituted the major and most controversial parts of the proposed convention.

The first of the articles adopted in committee requires contracting States to endeavour, in a humanitarian spirit, to grant asylum in their territory to persons eligible for the benefits of the convention. The second article sets out in detail the categories of persons who are candidates for asylum; those faced with a definite possibility of persecution for reasons of race, colour, national or ethnic origin, religion, nationality, kinship, membership of a particular social group or political opinion or who face the possibility of prosecution or punishment for reasons directly related to the above matters.

In each case the person concerned must be unable or unwilling to return to the country of his nationality or habitual residence. Persons who are still liable to prosecution or punishment for serious offences do not qualify for asylum.

The third article states that a person who is eligible for the benefits of the convention (in accordance with the second article) shall not be subjected by a contracting State to measures such as rejection at the

61. Aust FA Rec, February 1977, 101.

frontier, return or expulsion from the territory of that State if to do so would compel him to remain in or return to a territory with respect to which he has a well-founded fear of persecution, prosecution or punishment for any of the reasons set out above. The exceptions to this provision are limited to individuals or large influxes of persons which present security problems and to persons who constitute a danger to the community of the country concerned.

Apart from the East Europeans and, with one or two exceptions, the Western European and Others Group (to which Australia belongs), members of the geographical groups did not vote consistently, African and Asian nations were generally divided on issues considered at the Conference. Generally, States were reluctant to adopt provisions which they thought might involve derogations from their sovereignty.

Although Australia is not the subject of territorial asylum applications to the same degree as a number of land-locked and predominantly European States, such as Austria, it has nevertheless displayed a continuous interest in the subject. At the Conference it secured the adoption of a number of amendments to the draft articles. The Government believes there is a need to consolidate and develop, on a universal basis, existing law on territorial asylum and that this can best be achieved by formulating certain basic principles in a single legally-binding instrument. Existing instruments on territorial asylum, such as the 1967 United Nations Declaration on Territorial Asylum, do not meet those conditions.

A number of other draft provisions, such as the question of regulating international co-operation in cases where a contracting state faces a mass influx of persons seeking asylum, will require consideration at a further session of the Conference. It is expected that the question of venue and timing for a final session will be determined at the Thirty-Second Session of the United Nations General Assembly.