IX INDIVIDUALS

Discrimination - racial discrimination - International Convention on the Elimination of All Forms of Racial Discrimination - Articles 4 and 14 - Australian implementation

On 21 August 1990 the Attorney-General, Mr Duffy, provided the following written answer in part to a question on notice (HR Deb 1990, Vol 172, p 1214):

> The only State which to date has legislated against racial vilification is New South Wales, which did so in 1989.
>
> No. Australia has made a reservation to Article 4. It is still too early to assess the effectiveness of the NSW legislation, and the Government is also awaiting the report of the Human Rights and Equal Opportunity Commission's National Inquiry into Racist Violence.
>
> Article 14 of the Convention provides for States Parties to declare their recognition of the competence of the UN Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals and groups within that State Party who have exhausted all available domestic remedies. Australia has not to date made such a declaration, but the issue is one that is on the agenda of the Standing Committee of Attorney-General for consideration, together with the related issues of the Optional Protocol to the International Covenant on Civil and Political Rights (the ICCPR) and the declaration that may be made under Article 41 of the ICCPR.

On 21 December 1990 the Minister for Foreign Affairs and Trade, Senator Gareth Evans, provided the following written answer in part to a question on notice (HR Deb 1990, Vol 174, pp 4999-5000):

> Since 1983, the Australian Government has undertaken extensive consultations with the State and Territory Governments in relation to accession to the First Optional Protocol, both individually and through the Standing Committee of Attorneys-General. The prospect of making a Declaration under Article 14 of CERD has also been the subject of such consultations.
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> The Australian Government remains committed to accession to the First Optional Protocol and to making a Declaration under Article 14 of CERD, and is hopeful that any remaining objections of States and Territories can be dealt with expeditiously.

On 12 February 1991 the Attorney-General, Mr Duffy, provided the following written answer, in part, in answer to a question on notice (HR Deb 1991, p 417):

> (i) Article 4(a) of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination requires States Parties to enact as criminal offences the dissemination of ideas based on racial superiority or hatred, acts of racist violence, and acts inciting racial discrimination or violence. Australia's reservation to Article 4(a) indicates that Australia does

> not treat as specific offences all the matters covered in the Article. Australia would need to be in a position to observe the requirements of Article 4(a) before withdrawing the reservation. The Government has been considering the question of such legislation, recognising the complexity of finding a balance between freedom of speech and the rights of people to live without fear of racist viòlence or abuse. The Human Rights and Equal Opportunity Commission Inquiry into Racist Violence is due to report in early 1991 and the Government will further consider this matter in the light of the findings of that inquiry.

On 16 October 1991 the Attorney-General, Mr Duffy, provided the following written answer to a question on notice (HR Deb 1991, p 2095):

> The declarations under the International Covenant on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights are two procedures for international monitoring of compliance with human rights obligations. The Government has long held the view that the first Optional Protocol to the International Covenant on Civil and Political Rights is the most significant of such procedures and has indicated in this place its intention to achieve accession to that Protocol before proceeding to consider the related questions of the declarations under the instruments to which the honourable member refers.
>
> As the honourable member may be aware, Australia acceded to the Protocol on 25 September 1991. The Government will now consider the question of the declarations under the International Covenant on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights. That consideration will include consultation with the States and Territories in the forum of the Standing Committee of Attorneys-General.

Discrimination – racial discrimination – Zionism – United Nations General Assembly resolution

On 18 December 1991 Senator Ray, the Minister representing the Minister for Foreign Affairs and Trade, said in the course of an answer to a question without notice (Sen Deb 1991, p 4874):

> The Government welcomes the vote in the United Nations General Assembly on 16 December to rescind the United Nations General Assembly resolution 3379 of 1975, which equated Zionism with racism. The recession motion was adopted overwhelmingly with 111 votes in favour out of the 149 votes cast. There were 25 votes against the motion and 13 abstentions.
>
> This was a fitting demise for a resolution which, as Senator Evans said in the Senate on 12 December, was wrong in itself and a hindrance to the Middle East peace process. As Dr Blewett said in his media release of 17 December:
>
> It is particularly gratifying to see the United Nations remove from its books a resolution which has drawn such world-wide condemnation. This

reflects the growing recognition among UN members of the need to adopt more constructive positions in the organisation and to move away from outdated polemic and rhetoric. The UN will be the major beneficiary of this move.

Australia voted against resolution 3379 in 1975 and, in 1986, the Australian Parliament was the first in the world to pass a resolution calling to overturn 3379. Australia lobbied vigorously for the rescission of 3379 and joined more than 80 other nations in cosponsoring the rescission motion.

Discrimination – women – Convention on the Elimination of All Forms of Discrimination Against Women – Australia's reservations

On 21 August 1990 the Minister for Foreign Affairs and Trade, Senator Gareth Evans, provided the following written answer to a question on notice, setting out the text of Australia's reservations to the Convention first (HR Deb 1990, Vol 172, pp 1207–8):

> Australia is not yet in a position to withdraw these reservations. Since ratifying the Convention, the Government has been progressively working towards amending the policy which would enable the withdrawal of these reservations:
>
> . Paid maternity leave is available to Commonwealth, NSW and Victorian public servants. Federal and State awards and the NSW Industrial Arbitration (Amendment) Act, 1980, provide unpaid maternity leave for almost all women employed in the private sector. All of these women are assured of the right to return to the position and wage level they left in maternity, or one comparable. In this last provision, Australia is one of the world leaders.
>
> . On 30 March 1990, Australia ratified International Labour Organisation Convention No. 156 which recognises the need for a more equitable sharing of family responsibilities and the provision of support services and appropriate working conditions for workers with those responsibilities. Ratifying countries are obliged to take account of the needs of workers with family responsibilities in relation to their terms and conditions of employment, vocational guidance and training, community planning and services and social security. The Government is undertaking to implement comprehensively the terms of ILO Convention No. 156.
>
> . It is Government policy to work for the progressive opening of additional Australian Defence Force (ADF) positions to women, thereby increasing both the scope and quality of their career opportunities. On 30 May 1990, the Minister for Defence Science and Personnel announced that the ADF would no longer apply the exemption under the Sex Discrimination Act which allows women to be excluded from combat related duties, and that ADF women would in future serve in combat-related positions. Combat-related positions are those close to

combat operations and include transport, resupply, medical evacuation, intelligence and communications. Implementation of the new arrangements will be reviewed annually by the ADF and a review of the policy will be undertaken in June 1993.

As a result of these recent changes to Government policy, Australia will be reviewing the status of its reservations to the Convention.

Extradition - amendments to the Extradition Act 1988

On 22 August 1990 the Attorney-General, Mr Duffy, introduced the Extradition Amendment Bill 1990 into Parliament (HR Deb 1990, Vol 172, pp 1307-8), and explained the background and purpose of the Bill as follows:

The modernisation of Australia's extradition laws has been an integral part of this government's strategy in the war against crime. It is no secret that crime is increasingly taking on an international perspective. There is no starker example of the international dimensions of crime than the drug trade. Not only is there an importation of illicit drugs but also there is the associated exportation of money from Australia to pay for this filthy merchandise. Often legitimate international business channels are used to make just such payments.

This government has taken significant initiatives to combat crime within Australia. The Proceeds of Crime Act 1987 provides for a comprehensive regime of freezing and confiscation designed to attack the very motive for crime - profit.

The Cash Transaction Reports Act 1988 establishes regimes for the reporting of significant cash transactions, the reporting of suspect transactions and for the verification of identity of persons opening accounts. These measures will greatly assist law enforcement by producing criminal intelligence and creating a money trail for large amounts of cash.

Having established these measures domestically, the next step is to reach agreements with other nations that will facilitate international cooperation in the fight against crime. The Mutual Assistance in Criminal Matters Act 1987 provides just such a mechanism. Where Australia has a mutual assistance relationship with a foreign nation, many of these domestic remedies regarding the freezing and confiscation of assets in that country may be able to be used by Australian law enforcement agencies. This Government has actively pursued the negotiation of mutual assistance treaties with other nations and to date has concluded nine treaties, with 16 in various stages of negotiations.

Complementary to these measures is the modernisation of Australia's extradition relationships. The Government formed a task force to negotiate modern bilateral extradition treaties or extradition arrangements. So far, treaties or arrangements have been negotiated with 26 countries, with 14 in various stages of negotiations. In 1988 the Parliament passed a modern Extradition Act. In light of the experience with the Act over the past 12

months or so, a need for some technical fine tuning of the legislation has become apparent. The Bill before the House contains those technical amendments.

I propose to deal only briefly with the more significant of these amendments. As section 11 of the Act now stands, it is not possible to list in regulations all countries to which Australia can extradite for crimes created pursuant to multilateral treaties such as the hijacking convention and the convention for the protection of internationally protected persons. It is clearly desirable that all Australians be able to ascertain easily the crimes for which extradition can be considered and all the countries to which Australia can extradite for those crimes. The amendments to section 11 are designed to enable the regulations to comprehensively list the countries to which persons may be extradited for multilateral offences.

Other amendments streamline Australia's extradition relationship with New Zealand where a person consents to being surrendered to New Zealand. Finally, a new provision is inserted in the Extradition Act 1988 which will give police power to arrest, without warrant, a person who is about to abscond.

Extradition - extradition treaty with the Philippines

On 18 January 1991 the Minister for Justice and Consumer Affairs, Senator Tate, issued a news release which read in part:

The Australian Government has moved to close off another safe haven for international criminals, with the signing of a bilateral extradition treaty with the Philippines.

The acting Attorney-General, Senator Michael Tate, said today marked the official commencement date of the treaty, and represented another major step in the law enforcement effort.

"Australia now has similar treaties with a total of 19 countries.

"In addition we have worked in recent years to achieve further international agreements for mutual assistance in criminal matters.

"And at the direct policing level, the Australian Federal Police now has almost 30 overseas liaison officers at posts in Europe, Asia and North and South America."

Senator Tate said the combined effect of these measures was to ensure that international law enforcement efforts kept ahead of the international growth in criminal activity.

International crimes - Kymer Rouge leaders - Saddam Hussein - possibility of international trials

On 29 May 1991 the Minister for Foreign Affairs and Trade, Senator Gareth Evans, said in the course of an answer to a question without notice (Sen Deb 1991, pp 3804-5):

> The suggestion for an international tribunal to identify Khmer Rouge leaders who should be barred from holding political office has some attractions in the abstract, but all the available evidence is that it is not an approach which is especially likely to prove practicable. It would be difficult to obtain international agreement necessary to establish a tribunal and to have its findings accepted. It may be more practical to proceed by way of agreement, perhaps explicit in the text of the final settlement or by way of a less formal agreement on the basis that a more formal disqualification provision may not be achievable.

On 14 August 1991 the Minister for Foreign Affairs and Trade, Senator Gareth Evans, provided the following written answer, in part, in answer to a question on notice (Sen Deb 1991, p 371):

> The United Nations Secretary General has said that the possibility of charging Saddam Hussein with war crimes "deserves much study and attention", and there have been statements from a number of governments calling for his prosecution.
>
> In practice, however, there would be problems in bringing Saddam Hussein to trial. There is no existing international tribunal which could try him, and it is difficult to see how he could be brought before any tribunal that might be constituted for the purpose without substantial international intervention in Iraq to apprehend him. The US Government has said that it would not use force to arrest him. We understand that, in the circumstances, it is not the intention of the UN to initiate war crimes proceedings against him.

Refugees – determination of refugee status – changes to procedures

On 27 June 1990 the Minister for Immigration, Local Government and Ethnic Affairs, Mr Hand, issued the following news release:

> The Federal Government today announced a number of changes affecting Australia's refugee and humanitarian policies and processes.
>
> The Minister for Immigration, Local Government and Ethnic Affairs, Mr Gerry Hand, said the changes were necessary to cope with the increasing number of foreign visitors and students seeking to remain in Australia by citing political unrest in their homeland.
>
> In recent times Australia, like other western nations, has experienced unprecedented growth in applications to remain in this country on humanitarian and refugee grounds.
>
> Mr Hand said the changes will involve the introduction of new procedures in the assessment of refugee and humanitarian claims as well as new arrangements for residence once an individual has been granted refugee status or found to have a humanitarian claim.

"Australia has an exemplary record in dealing with people who have sought protection on refugee and humanitarian grounds and this Government has a deep felt commitment to maintaining that record", Mr Hand said.

"However there is a difference between providing protection as required under our international obligations and granting immediate permanent residence to those who gain protection.

"The Government intends, therefore, to make these two things quite separate", the Minister said.

"People assessed as being refugees, or as having strongly based claims on humanitarian grounds will initially be provided with temporary entry permits, and not grant of resident status as is now normally the case. The Regulations are being amended to give an immediate effect to this principle.

"People holding temporary entry permits with an ongoing need for protection will have the opportunity to seek permanent residence after four years subject to places being available under the Migration Program. If places are not available and there is a need to continue protection they will be able to seek a further temporary entry permit."

Mr Hand said the Government is proposing to amend the Migration Act to give refugee determination a sound base in domestic law, whereas it has previously been covered by international treaty alone.

"In doing so we are looking to ensure natural justice and guarantee fairness to all applicants."

The Minister added that the DORS processes would be reviewed so as to expand their capacity to handle a larger number of cases while also ensuring that refugee and humanitarian applications were assured a fair handling of their claims.

"The new mechanism will also be used to assess the claims of any individuals who apply for protection on strong humanitarian grounds in the future.

"In addition", Mr Hand said, "the Government will also provide temporary entry permits on a class basis to any groups it judges in need of humanitarian support by means of special regulations", the Minister said.

On 26 October 1990 Mr Hand issued the following further news release:

The Federal Government today announced the introduction of a new system for determining claims for refugee status and humanitarian stay in Australia.

The Government will also provide significantly larger resources to speed up decision-making on refugee applications.

The new system, which will come into effect on 10 December, was foreshadowed by the Government in June this year.

The Minister for Immigration, Local Government and Ethnic Affairs, Mr Gerry Hand, said the changes were necessary in order to deal with the

growing number of people applying to stay in Australia on refugee and humanitarian grounds.

Mr Hand said from December 10, 1990, the process for dealing with such claims will have three stages:

- a primary stage for applications to be assessed and decisions made quickly on refugee status;
- a review stage where there are negative assessments; and
- where there are clear grounds for humanitarian stay, but where refugee status is not recommended, Ministerial approval for temporary entry on humanitarian grounds.

The Minister said a Refugee Status Review Committee will be established at the review stage, replacing the existing Determination of Refugee Status (DORS) Committee.

For the first time, Mr Hand said, a non-government representative will be involved in the refugee decision-making process. A representative nominated by the Refugee Council of Australia will be a member of the Committee, together with representatives of the Department of Foreign Affairs and Trade, the Attorney-General's Department, and the Department of Immigration, Local Government and Ethnic Affairs (Chair).

A representative of the United Nations High Commissioner for Refugees (UNHCR) will continue to attend meetings in an advisory capacity.

Mr Hand said the Government was committed to a system which deals with asylum seekers in Australia in a compassionate and humane way.

"The refugee determination system which we have decided upon is built on fairness and openness and will provide applicants with every opportunity for a full and impartial examination of their claims."

Mr Hand noted that a particularly important element of the new system was the inclusion of a community representative on the Review committee. This would underline the independence and integrity of the refugee determination process.

The Minister said the Government had agreed to significantly increase the resources available to process applications for refugee status in order to speed up decision-making.

"It is essential that Australia be able to decide refugee applications quickly and fairly", Mr Hand said.

"Delays in resolving cases add to the insecurity and uncertainty of applicants and undermine the credibility of our procedures.

"These changes will also ensure that frivolous and unfounded claims are dealt with expeditiously", the Minister added. "This will maintain the integrity of the asylum system as an important protection for those in need.

The Government will not tolerate its cynical abuse by those simply seeking to delay their departure."

Mr Hand said that new arrangements for considering claims to remain in Australia on humanitarian grounds would come into effect on 10 December 1990. This would give effect to the commitment made by the Minister in June that individuals who sought to stay in Australia on strong humanitarian grounds would have an opportunity to have their claims considered as part of the refugee determination process.

Applicants who are granted permission to remain in Australia on humanitarian grounds by the Minister will receive a four-year temporary entry permit on the same conditions as a refugee.

On 22 March 1991 the following article appeared in *Backgrounder* (Vol 2, No. 3, pp 7–8), published by the Department of Foreign Affairs and Trade:

Changes to Refugee and Humanitarian Policies

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, is unable or, owing to such fear, is unwilling to return to it.

(Article 1A of the 1951 Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees.)

By late 1989 a greatly increased number of people were seeking to stay in Australia on humanitarian or refugee grounds. The 1990 figure was 11,500. The annual rate of refugee applications had previously averaged about 500 a year. By the end of 1990 there were 12,000 applications not yet processed. Of this caseload, about 7,000 were People's Republic of China nationals, of whom more than 1200 were in Australia before June 1989. The existing system of refugee determination was clearly inadequate to handle this situation, particularly in the light of heightened judicial scrutiny. Changes agreed to by Cabinet were described by the Minister for Immigration, Local Government and Ethnic Affairs, Gerry Hand, in Press Release MPS 43/90 of 27 June 1990. Mr Hand said then that Australia had an exemplary record in dealing with people seeking protection on refugee and humanitarian grounds and the government had a deep felt commitment to maintaining that record. However, there was a difference between providing protection as required under Australia's international obligations and granting immediate permanent residence to those who gained protection. "The Government intends, therefore", Mr Hand said, "to make these two things quite separate".

The reforms include revision of the 13–year–old DORS (Determination of Refugee Status) Committee procedures and a new discretionary provision to approve temporary entry on humanitarian grounds for some applicants in exceptional circumstances but found not to be refugees. Cabinet also agreed to additional staff, as necessary for implementation of the reforms. The new procedures, which will be reviewed after a period of operation, are designed to handle an anticipated peak of 14,500 cases a year.

Refugee Claims

In the new procedures, the Department of Immigration, Local Government and Ethnic Affairs (DILGEA) alone is responsible for the primary assessment of all applications for refugee status. The DORS Branch receives all applications and puts recommendations to the Minister for Immigration, Local Government and Ethnic Affairs or his Delegate for a primary decision. Claimants refused refugee status, whether on the initial papers as manifestly unfounded or after more detailed assessment, have a right of review by the Refugee Status Review Committee (RSRC), the recommending body which is central to the new procedures.

The RSRC consists of representatives of DILGEA (as Chair), the Department of Foreign Affairs and Trade (DFAT), the Attorney General's Department (AG's) and a community representative nominated by the Refugee Council of Australia (RCOA). A United Nations High Commissioner for Refugees (UNHCR) representative is present as an observer. The RSRC will operate according to guidelines issued by the Minister for Immigration, natural justice safeguards are included in the process.

Members of the RSRC receive cases referred to them by the DORS Branch. There is provision for priority consideration of certain categories of applicants, eg applicants in detention. Each member independently reassesses a claimant's case. When RSRC members are not unanimous, the Committee will meet and discuss the case before making a recommendation. This decision is referred to the Minister or his Delegate for a final decision. The Committee may recommend the granting or rejection of refugee status. If a final decision is rejection of refugee status, there is no provision for further review.

Humanitarian Grounds

There is a third category of recommendation the RSRC may consider. A person may be identified as facing grave and individualised threat to life, and yet does not meet the technical definition of refugee in the 1951 Convention. In this case, the Committee may recommend that the Minister grant a Domestic Protection Temporary Entry Permit (TEP) on humanitarian grounds. The Minister has discretionary power in this matter.

As a consequence of the changes in June 1990, the grant of protection through refugee status or on humanitarian grounds does not now lead to grant of resident status under the Migration Act, but to grant of a four-year TEP subject to review. People unable to obtain permanent residence, but with a continuing need for protection beyond four years will be able to apply for further TEPs.

Current Situation

The last meeting of the DORS Committee took place in December last year and the new system is expected to be fully operational by mid-1991. In the meantime, primary processing is being carried out, regulations are being amended and staff recruitment is underway, in particular at DILGEA, where DORS staff will be increased substantially to 200 permanent officers. There will also be 50 temporary staff on one-year assignments to handle the large accumulation of applications that built up prior to streamlining procedures and the increase in staff. Accommodation in a new building at the Lake View Centre at Belconnen is being planned for the DILGEA DORS Secretariat, with its large number of additional staff.

DILGEA has also introduced the new position of Refugee Documentation Coordinator to help with collation and organisation of information relevant to refugee claims. The coordinator has already started work.

The Refugee, Immigration and Asylum Section of the Department of Foreign Affairs and Trade has already increased its staff from five to eight and is expected to add further officers when the RSRC is in full operation.

On 13 August 1991 the Minister for Immigration, Local Government and Ethnic Affairs, Mr Hand, issued a news release which read in part:

Australia's new system of assessing on-shore refugee claims has been further enhanced with a decision by the Minister for Immigration, Local Government and Ethnic Affairs, Mr Gerry Hand, to limit the time in which people can lodge applications.

Mr Hand announced today that claimants would be required to lodge a completed application within 28 days of indicating their intention to apply.

In the case of "border claimants" - that is, those people who arrive without legal authority to enter the country and who claim refugee status on arrival - the time limit would be 28 days from the date of arrival.

...

"In introducing the new time limit, we are further refining a system which allows us to deal firmly and fairly with ill-founded applications, while ensuring that all claimants are given a proper hearing."

Mr Hand acknowledged that there might be situations where compelling circumstances justified an extension of the time limit, but he expected such

cases to be rare. Where an extension was granted he envisaged three months would be the absolute maximum time allowable.

He said he had further decided to place some limits on the extent to which applicants could use procedural fairness measures to delay decisions.

"Some applicants are only lodging full details of their claims at the point when an officer of my Department has reached the view that their application should be rejected and offers them an opportunity to comment on this finding", he said.

"Such people lodge what amounts to a new application at this point and expect that they will be given yet another opportunity to comment on the assessment of this information.

"The reality is that Australia's refugee determination procedures already provide abundant guarantees of procedural fairness. Applicants are given no less than three opportunities to respond to adverse conclusions reached on their applications. I see no need to provide yet another layer of reconsideration.

"In the final analysis, applicants must take upon themselves the responsibility of advancing their claims to protection. From now on this will be achieved by the 28-day application limit."

Mr Hand said the new decisions had been taken against the background of a dramatic rise in the numbers of asylum claimants.

"Throughout most of the 1980s, application numbers averaged about 500 a year", he said.

"But from 1989 there was a sudden upsurge. We now have about 17,000 applications on hand, and the number is growing at the rate of 1000 a month.

"We may well reach a point in the future where on-shore asylum numbers begin to encroach seriously on our overseas resettlement capacity.

"Hence the need to introduce streamlined processes which meet our obligations as a humanitarian nation but which are firm and fair to all concerned."

Refugees - refugees from particular countries - China, Cambodia, Burma (Myanmar)

On 19 December 1990 the Minister for Foreign Affairs and Trade, Senator Gareth Evans, provided the following written answer in part to a question on notice (Sen Deb 1990, Vol p 6091):

> The Australian Embassy in Bangkok has registered Australia's concerns to the Thai authorities over the treatment of Burmese refugees. It has expressed the hope that Burmese displaced persons in Thailand, including students, will continue to be treated in accordance with accepted standards applying to the treatment of asylum seekers and should not be subject to refoulement. The

Embassy has also emphasised Australia's expectation that Burmese asylum seekers should be given normal UNHCR protection and assistance and that relief agencies and international organisations should have access to the holding centres in order to provide humanitarian assistance and, where applicable, to fulfil their protection function.

On 29 May 1990 Senator Bolkus provided the following information on behalf of the Minister for Foreign Affairs and Trade, Senator Gareth Evans (Sen Deb 1990, Vol 139, p 1318):

Yesterday I undertook to get more specific information for Senator Tambling on direct boat arrivals from Cambodia. He asked for the Government's reaction to reports that the Indonesian authorities would assist boat people to continue their journey to Australia. The Government is naturally concerned at the implications of any such decision. There have been a number of senior level exchanges between the Indonesian and Australian governments over the last three weeks on the issue of Cambodian boats. Most recently the Minister for Foreign Affairs and Trade, Senator Evans, has been in contact with his counterpart, Minister Alatas, on this issue.

The Australian Government recognises Indonesia's excellent record in providing first asylum and the particular problems posed by the Cambodian boat arrivals. We believe it is in both Indonesia's and Australia's interests, and in the interests of the safety of the boat people themselves, to land boats from Cambodia which enter Indonesian waters. We also endorse accepted international practice for dealing with asylum claimants – namely, proper determination of their claims and return to the country of origin of those found not to be refugees.

On 27 June 1990 the Prime Minister, Mr Hawke, and the Minister for Immigration, Local Government and Ethnic Affairs, Mr Hand, issued a joint news release, part of which read as follows:

PRC nationals in Australia on 20 June 1989 will be able to stay in Australia for four years under a special category of temporary residence permit. No PRC national in Australia on 20 June 1989 will be required during the four years or subsequently to return to China against their will unless they have seriously breached Australian laws.

Whether PRC nationals in this special category who wish to stay beyond the four years gain an extension of their temporary residence will depend upon conditions then prevailing in China. Unless we were confident that the situation in the PRC was such that human rights were no longer generally at risk, permanent residence would be granted to those who apply, subject to normal health and character checks. The timing of such a grant of permanent residence, will depend on the rate at which places can be provided in the immigration program at that stage, and in the meantime their temporary residence permits would be extended.

> In reaching this position the Government has had regard to the inherent uncertainty of developments in China over the coming years. The Government does not believe that PRC nationals in this group should be compelled to make decisions in the near future about their longer term plans in conditions of such uncertainty and risk. This decision therefore combines the government's humanitarian obligations to this group of people, with its responsibility to maintain control over the size and structure of Australia's immigration program in the national interest. ...
>
> Chinese nationals in Australia on 20 June may apply for the special four-year permit from 1 August 1990, when the regulation creating the category will come into force.
>
> They will not need to seek refugee or humanitarian status to qualify for the special four-year permit, and those who have already sought such status should seriously consider withdrawing those applications and apply instead for the special permit. There are long processing queues for residence on refugee or humanitarian grounds, and while in the queue, applicants will not have the sponsorship rights of those in the special group.

On 11 March 1991 Senator Bolkus, the Minister representing the Minister for Immigration, Local Government and Ethnic Affairs, said in the course of an answer to a question without notice (Sen Deb 1991, p 1548):

> The Minister has informed me that it is of real concern to him that the people who undertake these hazardous sea voyages reach Australia. His concern is compounded in that people who are seeking asylum choose to pass through other countries on the way without claiming protection. This does cause another problem. People seeking asylum are searching for protection that they do not believe their own country affords them and are not setting out for a preferred destination in which to settle.
>
> About 224 direct boat arrivals from Cambodia are already in Australia.

On 29 May 1991 the Minister for Immigration, Local Government and Ethnic Affairs, Mr Hand, said in the course of an answer to a question without notice (HR Deb 1991, p 4180):

> Dealing with the Cambodian boat people: since November 1989 five boats with a total of 320 people have arrived from Cambodia. It must be remembered that unauthorised boat arrivals have technically not entered Australia. Despite this, they can lodge claims for protection on refugee grounds. As prohibited immigrants, these people cannot under law simply move into the community. They can enter only when they have a legal basis to remain in Australia. For this reason they must be kept in custody.
>
> ...
>
> I remind the House of the process these people are involved in to establish their refugee status. All applicants for refugee status are assessed against the United Nations definition of a refugee. This definition has as its guiding principle the concept of well-founded fear of persecution. I cannot

emphasise strongly enough how fair and just this system is. I believe that nowhere else in the world do applicants have the opportunities they have in Australia to substantiate their claims. Nowhere else in the world are those claims so thoroughly assessed. The checks and balances that have been built into the system are second to none.

Refugees - refugees "*sur place*" - relevance of actions taken outside the country of a refugee applicant's nationality for the determination of refugee status

On 21 August 1991 the Federal Court of Australia handed down its judgment in *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 102 ALR 339, which concerned an application for judicial review of a refugee decision by the Minister. In the course of his reasons Gummow J (with whom Keely and Jenkinson JJ agreed on the relevant point) said (at 356-358):

Refugees "sur place"

> There was, however, another branch of the appeal concerning the determination as to lack of refugee status, upon which detailed submissions were made, and in response to those submissions the court should, in my view, express a conclusion which will be supplementary to that indicated above. It concerns an alleged error of law in construing s 6A(1)(c) of the Act as it picks up the terms of the Convention.
>
> Article 1A(2) of the Convention, as construed in *Chan*, requires the decision-maker, as regards an individual then outside the country of his nationality, to determine whether that person then is unwilling to avail himself or herself of the protection of the country of nationality owing to a well-founded fear of persecution which now exists for, inter alia, reasons of political opinion or membership of a particular social group. It follows that the well-founded fear of persecution which now exists may have arisen at a time when the person in question was already outside the country of nationality. As the decision in *Chan* indicates, the definition of "refugee" involves both objective and subjective elements.
>
> In deciding questions as to the meaning of provisions of treaties which arise in a matter before this court, it is permissible to have regard, inter alia, to the commentaries of learned authors and the decisions of foreign courts as aids to interpretation: *Fothergill v Monarch Airlines Ltd* [1989] AC 251 at 294-5. The High Court judgements in *Chan* illustrate this practice. In particular, in that case Dawson J (CLR at 396-7, 399-400), Gaudron J (CLR at 416), McHugh J (CLR at 430) and Toohey J (CLR at 405), in addition to considering the writings of various learned authors, also had regard to the handbook issued by the office of the United Nations High Commissioner for Refugees under the title *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979. (Mason CJ (CLR at 392) inclined to the view that the *Handbook* should not be treated as providing an interpretation of the meaning of relevant parts of the Convention.)

In the *Handbook*, under the heading "Is Outside the Country of his Nationality", taken from Art 1A(2), is the sub-heading "Refugees 'sur place'". There follow paras 94, 95 and 96 in these terms:

"94. The requirement that a person must be outside his country to be a refugee does not mean that he must necessarily have left that country illegally, or even that he must have left it on account of well-founded fear. He may have decided to ask for recognition of his refugee status after having already been abroad for some time. A person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee *'sur place'*.

"95. A person becomes a refugee *'sur place'* due to circumstances arising in his country of origin during his absence. Diplomats and other officials serving abroad, prisoners of war, students, migrant workers and other have applied for refugee status during their residence abroad and have been recognised as refugees.

"96. A person may become a refugee *'sur place'* as a result of his own actions, such as associating with refugees already recognised, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person's country of origin and how they are likely to be viewed by those authorities."

To the same effect is a passage in Goodwin-Gill's work *The Refugee in International Law*, p 25, and in Grahl-Madsen's *The Status of Refugees in International Law*, 1966, vol 1, para 95.

I have referred to the conclusion recorded in para 33 of the statement of reasons of 5 July 1990, that the despatch of the letter to the Iranian Embassy and to others was not a step taken in good faith, and was undertaken for the sole purpose of enhancing the appellant's claim for refugee status. In that regard, Lockhart J said:

"There is some conflict of opinions as to whether an applicant for refugee status who has deliberately created circumstances in the country of residence exclusively for the purpose of subsequently justifying a claim for refugee status is entitled to be treated as a refugee *sur place* and this division of opinion is referred to in some of the material before the decision-makers in this case. I cannot accept that a person who has deliberately created the circumstances to which I have just referred is entitled to recognition as a refugee *sur place*, for to accept it would be to place in the hands of the applicant for refugee status means of unilaterally determining in the country of residence his status as a refugee and deny to the sovereign State of his residence the right to determine his refugee status. The true position is in my view as stated in para 96 of the United Nations handbook. It is this position which was adopted by the decision-makers in this case. The view was taken

that, after examining the relevant circumstances surrounding the sending of the letter by the applicant to the Iranian Embassy in Canberra and the other persons and bodies previously mentioned on 6 December 1989, the applicant had done this for the purpose of creating the circumstances which might endanger him in Iran.

...

"That a person can acquire refugee status *sur place* is plain enough because if a person was not a refugee when he arrived in the country of residence, but events occurred there or in his place of origin which gave rise to a real or well-founded fear of persecution upon his returning to the country of origin, his status as a refugee may arise notwithstanding that the only relevant events that gave rise to it are those which occurred after he left his country of origin. Those events may result solely from his own actions such as expressing his political views in his country of residence. It is true that the expression of those views may in some cases justify a well-founded fear of persecution if he should return to his country of origin; but I am not persuaded as presently advised that a person whose sole ground for refugee status consists of his own actions in his country of residence designed solely to establish the circumstances that may give rise to his persecution if he should return to the country of origin is necessarily a refugee *sur place*."

Lockhart J said that it was unnecessary for him to decide the legal issue as to which there was a conflict of learned opinion. Nevertheless, for the reasons which on a provisional footing commended themselves to his Honour, it should be accepted that actions taken outside the country of nationality or, in the case of a person not having a nationality, outside the country of former habitual residence, which were undertaken for the sole purpose of creating a pretext of invoking a claim to well-founded fear of persecution, should not be considered as supporting an application for refugee status. The fear of persecution to which the Convention refers, in such cases will not be "well-founded". There was no error of law in the decision of 20 April 1990 in the treatment of the Convention.

Immigration - illegal immigrants - presence of illegal immigrants in Australia may be "non-entry into Australia" in certain circumstances

On 21 August 1991 the Federal Court of Australia handed down its judgment in *Heshmati v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 102 ALR 367, which concerned an application for judicial review of a refugee decision by the Minister. In the course of his reasons Gummow J (with whom Keely and Jenkinson JJ agreed) observed (at 369-371):

Non-entry into Australia

Section 5(1) of the Act provides that for the purposes of the Act a person who arrives in Australia by an aircraft and disembarks from the aircraft at a proclaimed airport within the meaning of s 5(1) shall be deemed to enter Australia when he leaves the airport. Tullamarine is a proclaimed airport.

However, s 36A(8) provides that a person shall not for the purposes of the Act be deemed to have entered Australia by reason only of his having been taken from a proclaimed airport for the purpose of being kept in custody at a place outside that airport, in pursuance of, inter alia, 36A(3). That provisions is in the following terms:

"36A(3) Where a person, not being a person exempted, by instrument under the hand of the Minister, from the requirements of Division 1A, who travels by aircraft from a place outside Australia to a proclaimed airport has sought and been refused an entry permit at that airport or at any other airport in Australia at which he has called in the course of that travel, he may, if an authorised officer so directs, be taken into custody at that first-mentioned airport by an officer and kept in such custody, either at that first-mentioned airport or elsewhere, as an authorised officer directs until such time as he is removed from Australia in accordance with sub-section (4) or until such earlier time as an authorised officer directs."

An entry permit may be granted to a non-citizen either upon arrival in Australia, or, subject to s 6A, after the non-citizen has entered Australia: s 6(5). Neither of those limbs of the sub-section applied to the appellant. No entry permit was granted upon his arrival and he was deemed not to have entered Australia.

...

Children - United Nations Convention on the Rights of the Child, 1989 - parental rights and responsibilities - signature and ratification by Australia - reservation

On 23 August 1990 the Attorney-General, Mr Duffy, in the course of announcing Australia's signature of the Convention on the Rights of the Child, said (HR Deb 1990, Vol 172, p 1454):

I take the opportunity on this occasion to reject the claim of some critics that the convention, among other things, enables children to view pornographic movies or associate with anyone contrary to the wishes of their parents. In fact, the convention says that children need their families to develop into mature adults. Many of the convention's articles are intended to firmly guarantee family support and guidance to children. This decision by Australia to sign the convention was taken after appropriate consultation with State and Territory governments, and I am pleased to be able to advise the House that the convention enjoys widespread support within Australia, including the support of church and community groups.

On 24 August 1990 the Minister for Justice, Senator Tate, said in part in answer to a question without notice (Sen Deb 1990, pp 2180-1):

It is a fact that Australia signed the Convention on the Rights of the Child a couple of nights ago in New York. I believe it is a very significant affirmation by Australia of its willingness to adhere to the principles enshrined in that Convention. Honourable senators will know that the

Convention is aimed at a worldwide expression of solidarity with infants, children and teenagers in their securing of those minimum rights which are essential to their very physical well-being and then their maturing and growing within a sociable community, but, of course with the pre-eminent role being accorded to a family if it is a well functioning unit. ...

Somebody just interjected about the rights of the parents. The Australian delegation to the various United Nations forums which drew up this particular convention took a leading role and had inserted certain articles and provisions to ensure that the parents, or legal guardians if parents were not available, should take that prior and pre-eminent role and that governments should support parents in that role. For example, the Australian delegation had Article 5 inserted, which says:

> States Parties shall respect the responsibilities, rights and duties of parents ... to provide, in a manner consistent with the evolving capacities of the child appropriate direction and guidance in the exercise by the child of the rights (recognised in the Convention).

Further, Article 19 provides that States which are parties to this particular convention:

> Shall take all appropriate legislative, administrative and educational measures to protect the child, from all forms of physical or mental violence, injury or abuse...

and make sure that where that occurs in the context of a family that is not functioning well, then certain action can be taken.

Whilst recognising that certain households can break down in their relationships to protecting children, the pre-eminent role of the family is recognised.

On 7 November 1990 the Minister for Justice, Senator Tate, said further in part answer to a question without notice (Sen Deb 1990, pp 3606-7):

Article 14 in respect of the right of the child to freedom of thought, conscience and religion quite clearly states:

> States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right-

that is, in relation to freedom of thought, conscience and religion-

> in a manner consistent with the evolving capacities of the child.

Nothing could be clearer. ...

When one looks at the totality of the Convention one certainly sees that we have an international benchmark against which nations that sign and then ratify the Convention can be judged in the international community. By itself, even ratification - and Australia has not yet ratified the Convention but has signed it - does not make the Convention part of the law of Australia; action is still required by the elected parliaments of this nation responsible to

> the electorate before the Convention can become part of the laws of Australia to any of the States.

On 18 December 1990 the Minister for Foreign Affairs and Trade, Senator Gareth Evans, and the Attorney-General, Mr Duffy, announced that Australia had ratified the Convention. Their news release said in part:

> The Ministers said the step represented an "important new development in the protection of the rights of children and indicates the concern of the Australian Government to assist to the greatest extent possible in the improvement of human rights throughout the world".
>
> The Ministers welcomed the widespread support of the Australian community for ratification.
>
> They said they regretted the dishonest campaign against the Convention that had been mounted by a small but vocal section of the community and the way this group had played unscrupulously upon the false assertion that the Convention would undermine the family and parental responsibilities for their children.
>
> "Article 5 of the Convention requires countries to ensure that parents are able to discharge their responsibilities, rights and duties to direct and guide their children in the exercise of the child's rights. Under the rules of treaty interpretation all other articles must be interpreted so as to remain consistent with this Article", the Ministers said.
>
> The Ministers noted the opposing views in some parts of the Australian community about whether the Convention had the effect of prohibiting terminations of pregnancy in all circumstances. They said there could be no doubt that the Convention did not affect any country's ability to make its own laws relating to the termination of pregnancy.
>
> State and Territory laws already enable Australia to meet all the obligations the Convention will impose except one that requires child and adult criminal offenders to be imprisoned separately. It is not always possible for Australia to meet that obligation in remote areas. Therefore, Australia has made a reservation which means that the obligation will not apply to it.

Also on 18 December 1990 the Minister for Justice, Senator Tate, said in the course of a question without notice (Sen Deb 1990, p 5864):

> It now provides Australia with a benchmark for the solidarity which we must show worldwide as far as the provision of a certain minimum recognition of the rights and responsibilities towards children is concerned.
>
> As a result of the review of State and Territory laws which was required to be undertaken before ratification could take place, Australia has lodged one reservation in regard to the convention; that is, that we accept all the obligations of the convention except one that requires child and adult criminal offenders to be imprisoned separately. It is not always possible for Australia to meet this obligation in remote areas. Australia has, therefore,

> made a reservation which means that this obligation will not apply to it. But, of course, in regard to the normal situation within Australian jurisdictions, one would hope that juvenile offenders are not either on remand or kept in prison with adult prisoners after being sentenced to a gaol term. ...
>
> Rather than family and parental responsibilities being undermined because of Australian work in the formulation of the convention under Article 5, countries are required to ensure that parents are able to discharge their responsibilities, rights and duties to direct and guide their children in the exercise of the various rights formulated in the convention. ...
>
> Ratification simply means that Australia is now a state party to the convention. It does not change the law in Australia one jot or tittle. If the law in Australia is to be changed, that must be by way of an action in the parliaments of Australia by the elected representatives of the Australian people. That is also a most important matter to emphasise in relation to this Convention on the Rights of the Child.

On 11 March 1991 the Minister for Foreign Affairs and Trade provided the following written answer, in part, to a question on notice (HR Deb 1991, p 1739):

> The Australian Ambassador to the United Nations in New York deposited Australia's instrument of ratification for the Convention on 17 December 1990. Australian ratification of the Convention followed extensive consultations involving State and Federal authorities. The purpose of these consultations was to ensure that Australia's laws and practices, at Commonwealth, State and Territory level, were consistent with the terms and obligations embodied in the Convention.

Human rights – incorporation of international human rights instruments into Australian law – the absence of legislation

On 22 December 1988 the Family Court of Australia handed down its decision in *Re Jane* 85 ALR 409. The case concerned an application to have a mentally-retarded child sterilised without her consent. The Human Rights and Equal Opportunity Commission, in the exercise of its statutory power in legal proceedings involving human rights issues, intervened and submitted to the Court that the child had rights under certain international human rights instruments and that those rights would be infringed if the operation went ahead. The Court did not accept that the relevant instruments were part of Australian law. Following is an extract from the judgement of Nicholson CJ, who comprised the Court (from 420 and 423–6):

> I turn now to consider whether, as contended by the Human Rights Commission, the girl has additional rights under international humanitarian law if and in so far as the same forms part of the domestic law of Australia. The Human Rights and Equal Opportunity Commission contends that she has those rights and that they will be infringed if the operation proceeds.

> The Commission is established pursuant to the Human Rights and Equal Opportunity Commission Act 1986 (Cth). Its functions are set out in s 11 of that Act and include inquiry into any act or practice which may be inconsistent with or contrary to any human right. Section 11(1)(o) provides: "Where the Commission considers it appropriate to do so, with the leave of the Court hearing the proceedings and subject to any conditions imposed by the Court, to intervene in proceedings that involve human rights issues ..."
>
> The Schedules to the Act set out, inter alia, the International Covenant on Civil and Political Rights and certain declarations of the General Assembly of the United Nations, including the Declaration on the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons.

His Honour set out several relevant provisions of these instruments and continued:

> The Commission concedes that the Act itself does not give any of the instruments set out in the Schedule the force of law.
>
> However, it submits that Australian courts will treat customary international law as incorporated into the domestic law of Australia so far as it is not inconsistent with any applicable statute law or with any binding precedent. In support of this proposition, it cites *Buvot v Barbut* (1736) as approved by Lord Mansfield CJ in *Triquet v Bath* (1764) 3 Burr 1478 at 1481; 97 ER 936 at 938; *Trendtex Trading Corp v Central Bank of Nigeria* [1977] 1 QB 529 per Lord Denning MR at 553–4; *Chung Chi Cheung v R* [1939] AC 160 at 167–8; *Chow Hung Ching v R* (1949) 77 CLR 449 at 477–9 per Latham CJ, 462–5 per Starke J and 470–1 per Dixon J; *Polites v Commonwealth* (1945) 70 CLR 60 per Williams J at 80–1.
>
> The Commission further submits that in order to ascertain the nature of customary international law, the courts will have regard to international treaties and conventions, authoritative texts, the Charter of the United Nations, Declarations of the General Assembly and other international developments which show that a particular subject has become a legal subject of international concern. In support of this proposition, it cites *Polites v Commonwealth, supra* and *Koowarta v Bjelke Petersen* (1982) 39 ALR 417; 153 CLR 168 at 218–21 per Stephen J and 234–5 per Mason J. In further support of this submission, it relies upon s 11(1)(o) of the Act to which I have already referred and says that this involves an implied recognition of the rights conferred by the instruments set out in the Schedules to the Act on the basis, so the Commission says, that it is unlikely that the Parliament would have given the Commission an intervener function unless the rights referred to in the Schedules of the Act were capable of being applied by a court on existing legal principles.
>
> I am extremely doubtful as to whether these propositions represent the law in Australia.

In *Jago v District Court of New South Wales* (Supreme Court of New South Wales (Kirby P, Samuels and McHugh JJA), No 259 of 1987, 10 May 1988, unreported), Samuels JA discussed the status of international covenants and declarations including the International Covenant on Civil and Political Rights to which Australia, with certain reservations and declarations, is a party. His Honour pointed out that accession to a treaty or international covenant or declaration does not incorporate the instrument into domestic law in the absence of express stipulation and cited *R v Secretary of States for Home Department; Ex parte Bhajan Singh* [1976] 1 QB 198 at 207; *R v Chief Immigration Officer Heathrow Airport; Ex parte Salamat Bibi* [1976] 1 WLR 979; *Sezdirmezoglu v Acting Minister for Immigration and Ethnic Affairs (No 2)* (1983) 51 ALR 575 at 577. His Honour discussed the statement of Scarman LJ in *R v Secretary of State for Home Department; Ex parte Phansopkar* [1976] 1 QB 606 at 626 to the effect that it was the duty of, inter alia, the courts in interpreting and applying the law to have regard to the European Convention on Human Rights and referred to subsequent criticisms of that statement contained in the judgements of Roskill LJ and Lord Denning in *R v Chief Immigration Officer Heathrow Airport; Ex parte Salamat Bibi* at 985–6 and 984–5 respectively. His Honour concluded:

"Certainly, if the problem offers a solution of choice, there being no clear rule of common law, or a statutory ambiguity, I appreciate that consideration of an international convention may be of assistance. It would be more apt in the case of ambiguity, although in either case it would be necessary to bear in mind not only the difficulties mentioned by Lord Denning, but the effect of discrepancies in legal culture. In most cases I would regard the normative traditions of the common law as a surer foundation for development."

Kirby P adopted a somewhat broader view. After citing English authority including *R v Secretary of State for Home Department; Ex parte Phansopkar, supra,* he said:

"The position in Australia is complicated by reason of the Federal Constitution. The precise relationship of Australian domestic law to international law remains to be settled in the future, cf *Chow Hung Ching* (1949) 77 CLR 449 at 462, 471 and 477: see also *Polites v Commonwealth* (1945) 70 CLR 60 at 81 and *Kioa v Minister for Immigration and Ethnic Affairs* (1984) 55 ALR 669 at 680. Note see Anderson and Rowe "Human Rights in Australia: National and International Perspectives" (1986) 24 *Archiv Des Volkerrechts* 56 at 83. None the less, I regard it to be at least as relevant to search for the common law of Australia applicable in this State with the guidance of a relevant instrument of international law to which this country has recently subscribed as by reference to disputable antiquarian research concerning the procedures which may or may not have been adopted by the itinerant justices in eyre in parts of England in the reign of King Henry II.

"Our laws and our liberties have been inherited in large part from England. If an English or imperial statute still operates in this State, we must give effect to it to the extent provided by the Imperial Acts Application Act 1969, especially s 6, Sch 2 Pt I. But where the inherited common law is uncertain, Australian judges, after the Australia Act 1986 at least, do well to look for more reliable and modern sources for the statement and development of the common law. One such reference point may be an international treaty which Australia has ratified and which now states international law."

In this context, it is of interest to note the comments of the learned authors of the article referred to by Kirby P at 80 in relation to the question of the incorporation of rules of public international law into the municipal law, so far as it is not inconsistent with rules enacted by statutes or finally declared by the courts. The learned authors say:

"Application of this doctrine immediately raises problems. First, what are the principles sought to be thus incorporated? Most international human rights law is treaty based, and therefore referable to specific words. But they are not usually precise, or necessarily tailored to local conditions: precision and adaptation may need to be effected locally by the appropriate organ. To the extent that human rights derive from customary law, or from treaties which become to some extent customary, there is an even greater lack of authoritative definition. There is no international court with hierarchical authority to pronounce human rights law for the use of Australian courts. The International Court of Justice can decide according to international conventions, international custom, general principles for law recognised by civilised nations and judicial decisions and teachings of publicists, yet also (with the agreement of the parties) simply *ex aequo et bono*. Although comparisons might be drawn between these terms and the method of common law, the ambit of these terms indicates a lesser degree of definition, and a lesser observance of a hierarchical curial authority than exist in and appear necessary to the working of the common law."

The learned authors go on to point out that other difficulties are that international law is primarily framed in terms of state conduct and that the status of an international principle once municipally incorporated, is not easy to determine. They comment:

"As an international principle, it is not subject to the doctrine of *stare decisis*. If at the municipal level, it is subject to the normal common law principles, including those of *stare decisis* (and the consequently limited and awkward processes of amendment) it presumably cannot continue directly to receive modifications from the international sphere."

The learned authors point out that the Australian position is that one is left with a number of judicial statements which taken together are inconclusive.

I do not think that the annexure of the relevant covenants as Schedules to the Human Rights and Equal Opportunities Commission Act takes the

matter any further. The Commission seeks to draw some comfort from this fact, together with the intervener role which the Act gives to the Commission. However, as Samuels JA pointed out in *Jago's* case, *supra*, such instruments are not to be regarded as incorporated into domestic law in the absence of express stipulation. If there ever was an opportunity to expressly incorporate these instruments into domestic law, it was presented by the Human Rights and Equal Opportunity Commission Act and the Parliament chose not to do so. Accordingly, I can see no basis for drawing the inference relied upon by the Commission: see also *Kioa v West* (1985) 62 ALR 321; 159 CLR 550 per Gibbs CJ at 570, Wilson J at 604 and Brennan J at 630.

I think that the better view of the law is that whilst it may be open to have regard to such instruments as an aid to determining what the common law is in the event of doubt about, for example, the existence of a particular right, they are not by their terms incorporated into Australian domestic law. It is, nevertheless, permissible and, I believe, useful to have regard to them in considering the exercise of discretion.

I am, accordingly, quite unable to agree with the Commission's proposition that in applying s 60D of the Family Law Act, a court is bound to apply the various provisions of these instruments in so far as they are not inconsistent with it. In fact, there are inconsistencies as is apparent on examination of the relevant provisions. For example, Principle 6 of the Declaration of the Rights of the Child states that: "Except in exceptional circumstances, a child of tender years should not be separated from his mother."

Note: the New South Wales case referred to by Nicholson CJ was subsequently reported in (1988) 12 NWSLR 558: per Kirby P at 569–70, and Samuels JA at 580–1. The views of Nicholson CJ in *Re Jane* were followed by two other judges of the Family Court of Australia in *Re Marion* (1990) 14 Fam LR 427, decided on 6 December 1990. In this latter case Strauss J said, at 461:

I would refer shortly to Mr Basten's careful argument on behalf of the Human Rights and Equal Opportunity Commission. I share the views expressed by McCall J in this case and by the Chief Justice in *Re Jane* at Fam LR 672–7; FLC 77, 245–50. I note, that Australia has recently become a signatory to the Convention on the Rights of the Child, as adopted by the General Assembly of the United Nations. Australia has not yet ratified this convention, although it is expected to do so in the near future. I have compared the convention with the Declaration of the Rights of the Child, which is contained in the Third Schedule to the Human Rights and Equal Opportunity Commission Act 1986. The differences between the convention and the declaration seem to me to underline the difficulties implicit in the view that the Declaration of the Rights of the Child and for that matter, the Declaration of the Rights of Mentally Retarded Persons, should be treated as part of Australian domestic law. In any event, however, I believe that the existing laws in Australia

> regarding children, including mentally retarded children, are altogether consistent with the broad principles enunciated in these declarations.

McCall J said at 473:

> In view of the approach that I have taken in the determination of whether parents can consent to the carrying out of the sterilisation operation, it does not appear to me to be necessary to consider the effect of the international conventions and the Declarations Relating to the Rights of Mentally Retarded Persons and the Rights of Disabled Persons annexed to the Human Rights and Equal Opportunities Commission Act 1986 to which we were referred by counsel for the intervener. I have read, and with respect, agree with what was said on this issue by Nicholson CJ in *Re Jane*. Again with respect, I would adopt his conclusion where he said at Fam LR 677; FLC 77, 249:
>
> "I think that the better view of the law is that while it may be open to have regard to such instruments as an aid to determining what the common law is in the event of doubt about, for example, the existence of a particular right, they are not by their terms incorporated into Australian domestic law."
>
> But, in this particular case, it appears to me quite settled that where the statute is in my view clear as to the rights and authorities of parents, then unless provisions of an international convention are specifically adopted by legislation the statute being part of the domestic law must prevail over any conflicting rules that may be contained in an international convention or declarations to which Australia is a party.

Nicholson CJ, however, cast doubt on his earlier view, and said in part, at 449–452:

> Although, as I have said, I do not think it necessary to rely upon it, I think that, in Australia at least, the existence of the Human Rights and Equal Opportunity Commission Act 1986 and the International Instruments appearing as schedules to it, which have been ratified by Australia, lend support to my conclusion.
>
> I think that the case for the incorporation of the principles contained in those conventions and declarations into Australian domestic law is stronger than would be the case if Australia had merely ratified them without anything more. I am conscious that in *Re Jane* I expressed the view that, while it was open to have regard to such instruments as an aid to determining what the common law is in the event of doubt about the existence of a particular right, they were not incorporated into Australian domestic law. However in that case I did not have the benefit of oral argument from the commission which we did on this occasion.
>
> I there expressed the opinion that parliament had a clear opportunity to incorporate those instruments into domestic law and did not do so. I am now, however, far from sure that this is the case. It seems to me that the Act and its Schedules constitute a specific recognition by the parliament of the existence of the human rights conferred by the various instruments within

Australia and, that it is strongly arguable that they imply an application of the relevant instruments in Australia.

It now seems to me to be inconsistent with the whole purpose of the Act to assert that the human rights which the Act requires the commission to protect are not rights which are recognised by Australian domestic law.

The classic view as to the incorporation of international law into domestic law is that expressed by Dixon J (as he then was) in *Chow Hung Ching v R* (1949) 77 CLR 449 at 477, where his Honour said:

"... the theory of *Blackstone (Commentaries*, 1809, vol 4, p 67) that 'the law of nations is ... adopted to its full extent by the common law, and is held to be part of the law of the land' is now regarded as without foundation. The true view ... is that 'international law is not a part, but is one of the sources of English law ... In each case in which the question arises, the court must consider whether the particular rule of international law has been received into, and so become a source of, English law.'"

It is to be noted that, in the same case, Latham CJ said, at 462 that "a universally recognised principle of international law would be applied by our courts".

In *Jago v District Court Judges of New South Wales* (1988) 12 NSWLR 558, Kirby P sought to develop the doctrine of incorporation further, but his views did not find favour with the other members of the bench and the issue was not dealt with in the subsequent appeal to the High Court ((1989) 63 ALJR 640). However, Samuels JA said at 582, after discussing the relevant English authorities:

"Certainly, if the problem offers a solution of choice, there being no clear rule of common law, or a statutory ambiguity, I appreciate that consideration of an international convention may be of assistance. It would be necessary to bear in mind not only the difficulties mentioned by Lord Denning, but the effect of discrepancies in legal culture. In most cases I would regard the normative traditions of the common law as a surer foundation for development."

The Human Rights and Equal Opportunity Act defines "human rights" in s 3, as meaning: " ... the rights and freedoms recognised in the Covenant, declared by the Declarations or recognised or declared by any relevant international instrument".

An international instrument is defined as including "a declaration made by an international organisation".

Subsection 4 provides:

"In the definition of human rights in subsection 1 –

(a) the reference to the rights and freedoms recognised in the Covenant shall be read as a reference to the rights and freedoms recognised in the Covenant as it applies in Australia (my emphasis) and;

(b) the reference to the rights and freedoms recognised or declared by any relevant international instrument shall –

  (i) in the case of an instrument (not being a declaration referred to in sub-paragraph (2)) that applies to Australia be read as a reference to the rights and freedoms recognised or declared by the instrument as it applies to Australia; or

  (ii) in the case of an instrument being a declaration made by an international organisation that was adopted by Australia – be read as a reference to the rights and freedoms recognised or declared by the Declaration as it was adopted by Australia."

Covenant is defined in s 3(1) as meaning:"... the International Covenant on Civil and Political Rights, a copy of the English text of which is set out in Schedule 2, as that International Covenant applies in relation to Australia".

"Declarations" means:

(a) the Declaration of the Rights of the Child proclaimed by the General Assembly of the United Nations on 20 November 1959, a copy of the English text of which is set out in Schedule 3;

(b) the Declaration on the Rights of Mentally Retarded Persons proclaimed by the General Assembly of the United Nations on 20 December 1971, a copy of the English text of which is set out in Schedule 4; and

(c) the Declaration on the Rights of Disabled Persons proclaimed by the General Assembly of the United Nations on 9 December 1975, a copy of the English text of which is set out in Schedule 5.

The functions of the commission are set out in s 11 and, for present purposes, relevant ones include the following:

(e) to examine enactments, and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments, or proposed enactments as the case may be, are inconsistent with or contrary to any human right, and to report to the Minister the results of any such examination;

(f) to inquire into any act or practice that may be inconsistent with, or contrary to, any human right, and –

  (i) where the Commission considers it appropriate to do so – to endeavour, by conciliation to effect a settlement of the matters that gave rise to the inquiry; and

  (ii) where the Commission is of the opinion that the act or practice is inconsistent with, or contrary to, any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that give rise to the inquiry, or has endeavoured without success to effect such a settlement – to report to the Minister in relation to the inquiry;

(g) to promote an understanding and acceptance, and the public discussion, of human rights in Australia;

(h) to undertake research and educational programs and other programs, on behalf of the Commonwealth, for the purpose of promoting human rights, and to co-ordinate any such programs undertaken by any other persons or authorities on behalf of the Commonwealth;

...

(n) to prepare and to publish in such manner as the Commission considers appropriate, guidelines for the avoidance of acts or practices of a kind in respect of which the Commission has a function under paragraph (f);

(o) where the Commission considers it appropriate to do so, with the leave of the court hearing the proceedings, and subject to any conditions imposed by the court, to intervene in proceedings that involve human rights issues ....

It was pursuant to the latter provision that the commission appeared before this court in the present case.

Other relevant provisions of the Act are s 20, which regulates the process of inquiry by the commission, s 21 which enables the commission to require persons to give information or supply documents to it, and ss 22 and 23 which enable it to examine witnesses on oath and provides a penalty for failure by witnesses to comply with such requirements. Section 28 requires the commission, in endeavouring to effect a settlement of a matter that gives rise to an inquiry, to have regard to the need to ensure that any settlement of the matter reflects a *recognition of human rights and the need to protect such rights* (my emphasis).

Mr Basten did not argue that any of the provisions of covenant and declarations which were inconsistent with domestic statutes or common law had any effect, although it may be a nice question, if it be correct that they are incorporated into Commonwealth domestic law, as to whether they may not prevail over inconsistent state law or the common law in general. It is not, however, necessary to decide this issue in this case.

Contrary to what I said in *Re Jane*, however, I now think it strongly arguable that the existence of the human rights set out in the relevant instrument, defined as they are by reference to them, have been recognised by the parliament as a source of Australian domestic law by reason of this legislation.

...

It should be appreciated that this is a difficult and complex area of the law in respect of which opinions of judges may differ, as is apparent from this and the earlier decisions of this court to which I have referred. The issue has been considered by the highest courts of the United Kingdom and Canada, which have arrived at different conclusions. In such circumstances, I

think it desirable that the issue be considered and determined by the High Court of Australia. ...

Note: *Re Marion* was appealed to the High Court of Australia, and judgement was still reserved on 31 December 1991.

Human rights - Australia's international approach - universal rights

On 26 August 1991 the Minister for Foreign Affairs and Trade, Senator Gareth Evans, said in the course of an address to Amnesty International in Australia in Sydney on the occasion of its 30th anniversary:

something of a rear-guard action is being fought against the notion that the familiar civil and political rights are really *universal* rights at all.

The argument is made that the International Covenant on Economic, Social and Cultural Rights is the only real touchstone for developing countries. At its strongest, the argument is that political and civil rights have no real application at all in non-Western societies, being based on values developed in very different religious, cultural and social environments. More often the argument is that these are subordinate, later in the queue: economic development must have priority, since it enables the conditions to be addressed which give rise to human rights abuses.

These are not arguments that these days have much persuasive force. Neither Australia, nor the international community as a whole (as evident from the terms of the Universal Declaration of 1948 and the two International Covenants of 1966), accepts that economic rights must take precedence over political rights, or that the two are mutually exclusive. A society which respects and promotes individual freedoms - with the mobility, expressiveness and inventiveness that go with them - is more likely to enjoy economic growth than one in which collective or state rights suppress civil or political freedom.

We certainly accept that International covenants impose obligations on Australia just as much as on other countries. In this respect, for example, we were happy to present, earlier this month, reports on race relations in Australia to the Committee of the Convention on the Elimination of all Forms of Racial Discrimination. And I am pleased to say that we have recently taken a major step forward in more fully embracing our international human rights obligations by announcing our intention to sign the first Optional Protocol to the International Covenant on Civil and Political Rights. We had for too long been dragging our feet on this, which involves recognising the competence of the international Human Rights Committee to accept complaints from individuals alleging violations of their civil and political rights after they have exhausted domestic remedies.

A sensitive question that arises for Australian policy is how to deal with human rights issues in our own region, given the inclination I have already mentioned - which is certainly evident there - to de-emphasise civil and

political rights in favour of less immediately constraining economic, social and cultural rights.

The basic approach we have adopted is not to compromise in any way in our own policy principles, but to engage in constructive dialogue rather than counter-productive declamations. The best hope of achieving an improvement in the observance of human rights lies in a non-confrontational approach based on mutual understanding. We are trying to understand regional perspectives on human rights, not necessarily with a view to accepting them, but in the hope that we can reach a common agreement on how better to observe human rights. Our emphasis all the time is on there being certain universal values which apply to people irrespective of their cultural, social or religious background. And our method is to try through rational and open discussion to establish common ground out of different perceptions.

As a Western country living squarely within the developing world, and one which has worked consistently in international forums to develop understanding between western and developing countries, we have reasonably good credentials for this task. Regional countries might not welcome our bilateral and multilateral approaches on human rights matters, but they do take them seriously. The level of our activity, its non-discriminatory and universal approach, and our willingness to accept international scrutiny of our own behaviour have all given us real credibility as a country with genuine, nonpolitical objectives in the human rights field.

In considering how to move these dialogue processes forward, there are a number of specific strategies which suggest themselves - at the fully international level, the regional level and bilaterally. Let me spell out some of them.

In making international mechanisms, particularly the Commission on Human Rights, work more effectively, it is helpful to appreciate that most countries are more willing to cooperate with scrutiny of their human rights records by thematic rapporteurs rather than specific country rapporteurs. The Sri Lankan Government, for instance, resisted the appointment of a rapporteur to investigate allegations of human rights violations in Sri Lanka itself, but has cooperated with a working group charged with the investigation of disappearances on a world-wide basis.

Again, more countries might be amenable to concerns about human rights if less use were made in the Commission of confrontational and commendatory language. These ringing resolutions can sound fine but achieve little. In cases such as these, it is not essential that the process be up to the perfectionist canons of developed countries, as long as there is enough agreement to get a process going which could lead to better observance of human rights. That agreement is far more likely to arise from an approach based, where possible, on consensus and cooperation.

Again, I would like also to see the United Nations and countries interested in human rights pay more attention to preventative measures that could be of real, practical benefit. Training and education could be provided to the judiciary, the police and other relevant bodies to help them meet their obligations under international covenants on human rights. Non-government organisations could play a role in this. Of course this won't bring about a sea-change overnight. But with something as serious as human rights, we have no right to ignore the possibility of incremental but real advances.

On the regional level, Australia has long supported the formation of a regional body for the protection of human rights, of the sort that exists in other parts of the world. Other countries, particularly the Philippines and Indonesia, have begun to promote this idea. We believe that the United Nations should increase its activities in the region, perhaps by holding a session of the Commission on Human Rights in it. This would underline to our neighbours that human rights issues are on the international agenda and require the same sort of responsible handling that they are accustomed to give to other items of international cooperation.

Bilaterally, we shall continue to raise human rights cases, relying largely upon Amnesty and other organisations for information on which our approaches are often based. But we can also extend the dialogues on human rights issues that we have already begun with some countries. We shall also strongly encourage the formation of national human rights bodies of the sort that has been established in the Philippines and is being considered by Indonesia – not in the unrealistic hope that these bodies will be a panacea for human rights ills, but because they provide a channel that can lead to a wider awareness of human rights responsibilities.

Human Rights – International Covenant on Civil and Political Rights – Australia's reservations – Optional Protocols – Article 41 Declaration

On 11 October 1990 the Attorney-General, Mr Duffy, provided the following written answer in part to a question on notice (HR Deb 1990, Vol 173, p 2796):

> Australia withdrew most of the reservations and declarations on 6 November 1984. Consideration will be given to the question of the remaining reservations and declaration in the context of Australia's third report to the United Nations, as required under Article 40 of the Covenant, on the measures adopted by Australia to give effect to the rights recognised in the Covenant. The Report is to be submitted to the United Nations in 1992.
>
> The question of making a Declaration under Article 41 of the Covenant has been raised with the States and Territories in the past. This matter will be further considered after a decision has been made on accession to the First Optional Protocol. ...
>
> Outstanding matters in relation to accession to the First Optional Protocol remain under consideration in the forum of the Standing Committee

> of Attorneys-General. A decision on signature or ratification will be made in the light of that process of consultation. ...
>
> The Executive Council, on 13 September 1990, approved Australia's accession to the Second Optional Protocol.

On 25 September 1991 the Minister for Foreign Affairs and Trade, Senator Gareth Evans, and the Attorney-General, Mr Duffy, issued the following news release:

> The Minister for Foreign Affairs and Trade, Senator Gareth Evans, and the Attorney-General, Mr Michael Duffy, announced today that Australia had acceded to the First Optional Protocol to the International Covenant on Civil and Political Rights.
>
> The Ministers said that Australia's accession to the First Optional Protocol would make it possible for individuals within Australia who considered that any of their human rights, as set out in the Covenant on Civil and Political Rights, had been violated or infringed, to take their case to the United Nations Human Rights Committee.
>
> In loading Australia's documents of accession at the United Nations Secretariat in New York, Senator Evans said the move was fully consistent with Australia's policy of promoting universal accountability in the field of human rights.
>
> "Australia's accession to the First Optional Protocol underlines the importance accorded by the Government to the protection of human rights and our conviction that the human rights performance of Australian governments at all levels should be fully open to international scrutiny", Senator Evans said.
>
> The Ministers said that the rules of the Human Rights Committee required that individuals seeking to have their complaints considered under the Protocol would need to establish to the satisfaction of the Committee that all available domestic legal remedies were exhausted, or that the relevant legal processes had been unreasonably prolonged.
>
> Mr Duffy said that the Government was committed to fully observing its international human rights obligations.
>
> He said that although significant procedural safeguards for human rights existed in Australia, there may be cases where legitimate concerns remained after the individual had exhausted his or her domestic remedies. The mechanism provided by the Protocol would be applicable in such cases.

Human rights - International Covenant on Civil and Political Rights - equality before the law - participation of individuals in industrial relations proceedings

On 14 September 1990 the Minister for Foreign Affairs and Trade, Senator Gareth Evans, said in part in answer to the respective question without notice (Sen Deb 1990, pp 2370-1):

Is the Minister aware that some basic human rights which are explicitly listed in the International Covenant on Civil and Political Rights (ICCPR), and to which Australia claims to be committed, are denied to some residents in New South Wales? Is he aware that in New South Wales employees are not recognised as persons in their own right before the industrial jurisdiction and that if they gain access to the court by specific ministerial writ they are then excluded from legal aid in that jurisdiction, even if they may meet all other requirements – for instance, being on the dole?

... the procedural matters to which Senator McLean refers provided for in the New South Wales Industrial Arbitration Act do not, in our judgement, contravene a requirement in the International Covenant on Civil and Political Rights that all persons are to be equal before the courts and tribunals.

As to the legal aid aspects of his question, I am informed that as individuals are not parties to industrial proceedings, legal aid is not normally made available to them.

... the nature of the proceedings in question in the New South Wales Industrial Commission relate to the fixing hours, rates of pay and so on and proceedings in those matters, and appropriately one would think they would be commenced not by individuals but by parties to industrial matters – namely, employers and representatives of employees, the trade unions.

The procedure of the Act requires such a proceeding to be commenced by an application and a prescribed form to be signed by an employer or a union. There is also provision for reference of such matters by the relevant Minister or by the Commission itself. I think it is really stretching a long bow to argue that these relatively familiar industrial proceedings in specialist tribunals somehow call into question the applicability of fundamental human rights standards. I am not saying human rights standards have no application in industrial matters, although that is an argument that I suppose could be run – that the area of litigation is sui juris and not related to individual rights and issues of that kind.

Human rights – capital punishment – Australian opposition – denial of right to life – Grenada death sentences

On 17 December 1990 the Minister for Foreign Affairs and Trade, Senator Gareth Evans, provided the following written answer in part to a question on notice (Sen Deb 1990, p 5824).

The Australian Government is firmly opposed to capital punishment in all circumstances. The Government's concern over the excessive use of the death penalty in Iran has been firmly and frequently conveyed to the Iranian authorities, both in the multilateral and bilateral context. The Government will continue to press the Government of Iran to adhere to international human rights standards, and to cease this cruel and inhumane form of punishment.

On 29 July 1991 the Acting Minister for Foreign Affairs and Trade, Dr Blewett, issued the following news release:

> The Acting Minister for Foreign Affairs and Trade, Neal Blewett, today expressed concern about the reportedly imminent execution of 14 people convicted of the murder of Prime Minister Maurice Bishop in the 1983 coup in Grenada.
>
> Dr Blewett said that the Australian Government was unconditionally opposed to the imposition of the death penalty in any circumstances and considered capital punishment to be a violation of the most fundamental of human rights – the right to life.
>
> "The Australian Government urges the Grenadian Governor-General, Sir Paul Scoon, to exercise his perogative of clemency and commute the death sentences", he said.
>
> Dr Blewett said the 14 individuals involved were sentenced to death in 1986 after being convicted on charges relating to the murder of Prime Minister Bishop. Their appeals had been rejected on 12 July 1991 by the Grenadian Court of Appeal.
>
> He said that the Australian Government had previously made known to the Government of Grenada its concerns about the death sentences, and had noted that no executions had taken place in Grenada since 1978.

Human rights – prisoners – prisoner transfer arrangements – Australian citizen in a United States prison

On 9 October 1991 the Minister for Justice and Consumer Affairs, Senator Tate, said in the course of an answer to a question without notice (Sen Deb 1991, p 1665):

> One has to recall that this man was found guilty by a jury in Florida of murder in the first degree, robbery with a deadly weapon and sexual battery with great force, with a deadly weapon, against a 57–year–old woman. I think that we can all take some heart in the fact that the Florida Supreme Court has commuted the death sentence. It is certainly in accord with Australia's humanitarian policy that the death penalty ought not to be inflicted, even for such crimes as those.
>
> The question of whether a transfer ought to take place is quite another matter. Indeed, under Australian law at the moment there is no provision whatsoever by way of treaty with the United States, or indeed any other country for that matter, to permit the transfer of prisoners from a jurisdiction in which they have been convicted back to Australia. Even if Australia did have such a treaty on international models, it would require the consent of the sentencing country to allow that transfer to take place. It is by no means clear that the State of Florida, for example, would consent to the transfer of a prisoner who has been properly convicted of the crimes that I have mentioned.

Before Australia would even consider entering into such a treaty relationship, Victoria would be required to make it possible to hold such a person in custody in an Australian prison. Otherwise, if Mr Savage, for example, was simply returned to Australia and taken from the airport to a place of custody in Victoria, he could immediately apply for habeas corpus and be released. There is no law enabling him to be held in Australia for an offence for which he has been convicted and sentenced to a term of imprisonment abroad. There would also need to be laws relating to remissions and so on.

The bottom line in all of this is, as far as I am aware, that there has been no request made by Mr Savage; there have been various people purporting to speak on his behalf. As I understand it, there has been no formal request made by Mr Savage. Of course, if such a request were to be made, the Government would take it into account in formulating its policy. The policy of the Australian Government at the moment is that there are no such treaties. I believe that I have indicated a very considerable number of legal hurdles which would stand in the way of their being negotiated successfully.

Human rights - torture - Convention against Torture, 1985 - possible declarations under Articles 21 and 22

On 7 November 1990 the Minister for Foreign Affairs and Trade, Senator Gareth Evans, provided the following written answer in part to a question on notice (HR Deb 1990, Vol 173, pp 3509-10):

I confirm that Australia signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 10 December 1985.

I confirm that Australia ratified the Convention on 8 August 1989.

The Australian Government has not previously considered making declarations under Articles 21 and 22 of the Convention against Torture and Other Cruel, Inhuman, and Degrading Treatment. The question of whether these declarations, along with declarations under Article 14 of the Convention on the Elimination of all Forms of Racial Discrimination, and Article 41 of the International Covenant on Civil and Political Rights will be made will be actively considered in the near future.

Human rights - hostage-taking - Iraq - Australian condemnation

On 12 September 1990 the Prime Minister, Mr Hawke, said in part in answer to a question without notice (HR Deb 1990, Vol 172, p 1672):

... the actions of Iraq in not allowing all foreign nationals to leave freely are contrary to international law and they are repugnant according to all accepted rules of international behaviour. The threat to use hostages as human shields is horrific and has been properly condemned around the world.

Against that background, the Government is relieved at the release of women and children. My Government deeply believes that all Australians

> must be released and they must be allowed to leave without delay. The safety and the welfare of Australians is a matter of the gravest concern to the Government, as I know it is to all members of the House. I have registered that fact strongly and personally with the Iraqi Ambassador.
>
> Again I am sure I speak for both sides of the House when I say that Australia does not and will not accept any linkage between the deployment of our Royal Australian Navy ships to the Gulf and the safety of Australians in Iraq and Kuwait.

On 16 October 1990 the Minister for Foreign Affairs and Trade, Senator Gareth Evans, said in part in answer to a question without notice (Sen Deb 1990, p 3099):

> Iraq's invasion of Kuwait was itself, as we all know, a grave and flagrant breach of international law. Similarly, Iraq's actions in holding foreign nationals, including Australians, as hostages continues to be a grave violation of the international law of both peace and war. ...
>
> Australia, in common with the rest of the civilised world, has made very clear through repeated public statements and bilateral demarches to the Iraqi authorities how much we deplore and condemn Iraq's behaviour. We have called repeatedly on Iraq to halt its present policies and practices, to withdraw from Kuwait, and to free all foreign nationals. We have strongly supported throughout the actions of the United Nations Security Council in condemning the invasion and the treatment of foreign nationals, and in putting in place an effective sanctions regime to secure these objectives.

On 20 December 1990 the Prime Minister, Mr Hawke said in part in answer to a question without notice (HR Deb 1990, Vol 174, p 4774):

> I, as with every member of this House, I am sure, am delighted that the hostages have been released from Iraq. I think everyone in this House recognises that the Government has been unceasing in its efforts to have the hostages released and in providing for the welfare of Australians in Kuwait and Iraq. As with the hostages from all other countries, the Australians should never have been held hostage and they should not have been denied their basic freedoms in the first place.
>
> The Government's position that all hostages should be released unconditionally and that the international community maintain absolute solidarity has been shown to be correct.

Human rights - China - East Timor - Australian position

On 5 November 1991 the Minister for Foreign Affairs and Trade, Senator Gareth Evans, said in the course of an answer to a question without notice (Sen Deb 1991, p 2368):

> As to the Government's position on these matters, I have made perfectly clear, as has the Prime Minister and other Ministers, our position on the events of 4 June in unmistakable terms. Our view remains that the actions

> taken by the Chinese Government in suppressing the pro-democracy movement constituted a grossly excessive use of force and a gross violation of basic human rights. Those abuses were also condemned by the governments of like-minded countries.
>
> The lifting of restrictions, I should also say, on our relations with China doe not imply in any way that the Government's position in regard to the events of June 1989 has changed. We continue to regard the violence that occurred at that time as totally indefensible.

On 5 September 1991 the Minister for Foreign Affairs and Trade, Senator Gareth Evans, said in the course of an answer to a question without notice (Sen Deb 1991, p 1200):

> The Australian Government has attempted to improve the human rights situation of the East Timorese by, first of all, making it clear on many occasions to the Indonesian Government that we support the universal observance of fundamental human rights in all countries. We have done that very clearly and very consistently, both at the bilateral level and in multilateral forums, such as the UN Commission on Human Rights. Secondly, by making representations to the Indonesian authorities whenever we have received credible, specific reports of human rights abuse, I and my ambassador in Jakarta have regularly registered concerns at those reports with Indonesian Ministers.

On 13 November 1991 the Prime Minister, Mr Hawke, said in the course of an answer to a question without notice (HR Deb 1991, p 2952):

> the Australian and Indonesian governments have both worked hard - as I think all honourable members acknowledge - on the basis of goodwill on both sides to build a responsible and beneficial relationship between our two countries. That relationship is one to which not only my Government attaches great importance; I think that is an importance also shared in the minds of all honourable members. East Timor, we must say, has always been an area of concern in that relationship. We have recognised Indonesia's sovereignty over East Timor, but we have constantly expressed our concern about human rights abuses there. We have consistently done that. We encourage the Indonesian Government to deal with this tragedy openly and in accordance with the international standards of respect for human rights to which both countries subscribe.