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Sixty-ninth session

SUMMARY RECORD OF THE 1856th MEETING

Held at the Palais Wilson, Geneva,
on Thursday, 20 July 2000, at 3 p.m.

Chairperson: Ms. MEDINA QUIROGA

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GE.00-43447 (E)

The meeting was called to order at 3.05 p.m.

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT (agenda item 4) (continued)

Third and fourth periodic reports of Australia (CCPR/C/AUS/98/3 and 4; CCPR/C/69/L/AUS; HRI/CORE/1/Add.44)

1. At the invitation of the Chairperson, Mr. Luck, Mr. Campbell, Ms. Leon, Mr. van Beurden, Ms. Bicket, Mr. van der Wal and Ms. Meehan (Australia) took places at the Committee table.

2. The CHAIRPERSON welcomed the Australian delegation. She paid tribute to the contribution made by Ms. Evatt to the Committee's deliberations and the advancement of human rights.

3. Mr. LUCK (Australia) stated that Australia had a high level of acceptance, protection and observance of human rights. Its respect for human rights was founded on a liberal, democratic system. Australians were drawn from many cultures, and successive Governments had sought to build a social infrastructure reflecting the country's cultural diversity and optimizing the resultant benefits. The federal system of government, under which there was a division of political and legal responsibilities between the Federal Government and the governments of the states and territories, was fundamental to the implementation of the Covenant.

4. His Government recognized that European settlement had placed indigenous people at a disadvantage within the Australian community and it was strongly committed to effecting sustainable improvements in indigenous people's lives through a long-term strategy encompassing the fields of health, housing, education and employment. The adoption of measures in those spheres demonstrated the Government's earnest desire to fulfil its obligations under the Covenant.

5. His Government was in favour of providing opportunities for indigenous people to exercise more meaningful control over their affairs through participation in the political process. Indigenous people could vote, stand for election and contribute to the development and implementation of government policies affecting them through bodies such as the Aboriginal and Torres Strait Islander Commission (ATSIC). In addition, most discrete indigenous communities owned their own land and many managed local government functions with wide-ranging powers and responsibilities.

6. Nevertheless, indigenous Australians were over-represented in the criminal justice system. His Government was endeavouring to counter that problem by fostering more culturally-aware practices by police and courts and furthering community-based support programmes. Furthermore, it acknowledged that land was of enormous significance for indigenous Australians. They made up 2.1 per cent of the population, but owned or controlled some 15 per cent of the Australian continent as a result of long-standing legislation, which enabled them to make claims to Crown land, and the Government's programme of purchasing land for the benefit of indigenous communities. The 1992 Mabo decision by the High Court had

established the existence of a common-law property right of "native title" and in 1993 Parliament had enacted the Native Title Act to give legislative effect to the High Court's decision. In 1996, the Wik decision had extended the possible existence of native title to pastoral leases. In amending the Native Title Act to make it workable in the light of the Wik decision, the Government had sought to preserve the fundamental goals of the Act while providing a balance between the rights and interests of all Australians.

7. His Government was committed to the process of reconciliation between indigenous and non-indigenous Australians. In May 2000, the Council for Aboriginal Reconciliation, established by Parliament in 1991, had presented its final proposals for a "Document of Reconciliation", which represented tangible progress in that respect and would guide the formulation of further measures to improve the position of indigenous people.

8. Migrants had made a significant contribution to Australia and, per capita, the country maintained one of the largest refugee resettlement programmes in the world. Nevertheless, the treatment of asylum-seekers who entered unlawfully and were detained while their claims were investigated was a controversial issue. In that respect, however, Australia upheld its obligations under the Covenant and other human rights treaties. At the same time, his Government had a legitimate interest in maintaining the integrity of its migration programme as a proper exercise of its sovereign right to control who entered and remained in its territory.

9. Australia had an extensive array of laws, policies and programmes which gave effect to its obligations under the Covenant. Every legislative body in Australia had enacted comprehensive legislation making discrimination on grounds of sex, race and disability unlawful. Similarly, the privacy of personal information held by federal government agencies and private-sector credit-rating agencies was protected by law.

10. The Human Rights and Equal Opportunity Commission (HREOC) remained the centrepiece of the Federal Government's human rights machinery. Recent reforms had heightened the effectiveness and cost efficiency of the process for resolving complaints under federal anti-discrimination law. Further proposals would ensure that the Commission retained its statutory conciliation function and would give increased emphasis to its functions with regard to education, dissemination of information on human rights, and assistance to business and the community.

11. The Commission had helped to devise an extensive range of public awareness and educational programmes to promote human rights, one of which, "Tracking Your Rights", was designed to encourage indigenous people to know their rights and to utilize effective problem-solving mechanisms in order to resolve conflicts. The Federal Magistrates Service, recently established by the Government, would have concurrent human rights jurisdiction with the Federal Court and provide cheaper and faster access to justice in less complex cases.

12. Mechanisms to seek the views of NGOs on human rights matters had been extended and improved through a forum of some 30 organizations, which enabled them to raise issues directly with the Attorney-General and to exchange information between themselves and with the federal bureaucracy. As part of the United Nations Decade for Human Rights Education, the Government had provided seed-funding to establish a National Committee on Human Rights

Education, which was a tripartite organization bringing together the expertise of business, the community and Government. One of the aims of the Committee was to ensure that all Australians had an opportunity to learn about core human rights and values.

13. Australia had long played an active role internationally in the promotion and protection of human rights. It had participated in the negotiation of the statute for the International Criminal Court and had supported the establishment of institutions to safeguard human rights in a number of Asian countries. The HREOC had provided several national human rights institutions with technical assistance, and it hosted the secretariat for the Asia-Pacific Forum of Human Rights Institutions. Bilaterally, his Government had also conducted human rights technical assistance programmes and had put up funds for organizations to run such programmes and for the establishment of an independent Centre for Democratic Institutions in Canberra. The setting-up of the Centre demonstrated the Government's recognition that effective, accountable, democratic institutions had a key role to play in supporting sustainable development and participation in democratic decision-making, which were fundamental to the enjoyment and protection of human rights. Indeed, the robust debate within the country about human rights concerns was an indication of the depth of the democratic system underpinning the protection of human rights, including those under the Covenant.

14. Mr. CAMPBELL (Australia) said, with reference to question 1 of the list of issues (CCPR/C/69/L/AUS), that the general legal framework protecting human rights was set out in the core document (HRI/CORE/1/Add.44) on pages 52 et seq. Although treaties in Australia were not self-executing, it was government policy not to enter into a treaty unless Australian law and practice could give effect to the terms of the treaty. The manner in which the rights of the Covenant were implemented was likewise described in the core document and in the third and fourth reports. Naturally, the fact that a country gave effect to the Covenant did not guarantee that no breaches occurred. There was no single Australian law which gave effect to the Covenant, since federal action alone would not be an efficient means of doing so. States and territories administered significant elements of the legal system and therefore exercised responsibility over many areas of relevance to the Covenant.

15. The Covenant was implemented through existing democratic institutional processes, including Parliament and an independent judiciary. Secondly, some constitutional guarantees were relevant to certain Covenant rights. The right to personal liberty and to natural justice was enshrined in common law. Furthermore, the High Court had held that international law, and particularly fundamental human rights, could be used as a source to develop common law. Some federal legislation was directly relevant to the Covenant, and each of the states and territories had wide-ranging anti-discrimination legislation.

16. The Government did not view remedies solely in terms of monetary compensation. Because treaties were not self-executing, a person could not sue directly in an Australian court for compensation for a breach of the Covenant, except where the relevant right had been encapsulated in an enactment. The HREOC examined complaints alleging that a central government decision was contrary to human rights instruments annexed to the HREOC Act and reported to the Attorney-General if matters could not be resolved by conciliation. The reports were tabled in Parliament. The three Acts on various forms of discrimination protected individual human rights. At the federal level, a person who believed that he had suffered

unlawful discrimination on grounds of sex, race or disability could lodge a complaint with the Commission, and if unlawful discrimination was proven, a number of civil remedies were available. Similarly, at state and territory level a wide range of remedies were available for discriminatory conduct. Since Australia had acceded to the Optional Protocol, its citizens could submit a communication to the Human Rights Committee if they felt their rights under the Covenant had been violated.

17. There was no general law in Australia which required administrative decisions to comply with Australia's international obligations. However, it was government policy that such decisions should be consistent with those obligations and some guidelines did require conformity with them in matters relating to particular pieces of legislation. Furthermore, by annexing the Covenant to the HREOC Act, Parliament had provided a statutory complaints mechanism to deal with any failure to give effect to human rights obligations under the Covenant in administrative decision-making.

18. Turning to question 3, he stressed that Australia fully accepted that the provisions of the Covenant extended to all of its constituent states and territories without exception, as had been confirmed by its declaration relating to the Covenant. The Federal Government bore international responsibility for compliance with Australia's obligations under the Covenant, but those obligations were implemented in a manner consonant with the Australian system of federalism. The measures taken to that end made up the substance of the third and fourth reports. An attempt to implement the Covenant only through federal law would be impracticable. Legally, the Federal Government did not have unlimited powers under the Constitution. Even the external affairs power, under which the Government had implemented a number of treaties, was restricted. The Covenant contained rights applying to every level of government in Australia, so they were best implemented at state and territorial level. Consequently, measures taken to ensure compliance with article 50 included actions by the Commonwealth, states and territories. The Federal Government did not consider that that article imposed an obligation on it to enact overriding legislation on all occasions where state and territory action was potentially in breach of the Covenant. In instances where state and territory laws might have conflicted with international law obligations, the Federal Government had preferred to take up the issue with the relevant authority and to seek an outcome which would avoid a breach.

19. Mr. van BEURDEN (Australia), answering question 4, emphasized that Australia supported the principle of indigenous people exercising meaningful control over their affairs in consultation with the Government. Self-management and self-empowerment expressed that principle domestically. In discussions on the "Draft declaration on the rights of indigenous peoples", the Government had made it clear that it could not accept the inclusion of a specific right of indigenous self-determination, because that would have implications of separate nations and laws.

20. The ATSIC was equivalent to a government department. It was headed by a popularly elected indigenous board and controlled half of his Government's annual expenditure on indigenous programmes. Aboriginal people often had a vital say in decision-making in mainstream bodies. Indigenous local government also existed in many parts of Australia. Aboriginal courts could be set up within community government areas and were presided over

by Aboriginal residents of the area. Many indigenous control organizations were involved in the planning and delivery of government-funded services in the fields of health, legal services, employment and housing.

21. Turning to educational provision for Aboriginal persons (question 5), he said that the Government had introduced a national Aboriginal and Torres Strait Islander education policy to improve the low levels of literacy and numeracy among the Aboriginal population. It included a special admissions policy for higher education establishments and a grants scheme for assistance with income maintenance and travel costs. A national indigenous literacy and numeracy policy had been introduced in March 2000. The proportion of indigenous adults who had never attended school had fallen from 27 per cent in 1971 to 3 per cent in 1996. The proportion of indigenous children who completed their final year of schooling had increased from 1 in 11 in 1971 to 1 in 3 in 1998. The proportion of indigenous people with post-school qualifications had risen from 4 per cent in 1971 to 14 per cent in 1996.

22. On the subject of participation by the Aboriginal population in political life, he said that Aboriginal persons had the same opportunities for participation as all other Australians. Under the Constitution, deputies were elected to the Federal Parliament to represent a geographical area rather than a cultural or ethnic group. There was currently one Aboriginal deputy in the Senate, and there were a number of deputies at state and territory level, particularly in Northern Territory.

23. Turning to health, he said that Australia provided high-quality and affordable health care for all its citizens. However, in view of the poor overall health status of the indigenous population, the Government had, in collaboration with indigenous communities, introduced a long-term strategy intended to combat specific causes of mortality and morbidity and improve environmental factors such as housing, sewerage and water supply. Approximately 100 health centres, managed by the indigenous community itself, had been set up to provide culturally appropriate health care, in addition to the Aboriginal health centres at state and territory level.

24. Infant mortality among the Aboriginal population had been three times higher than that of the non-Aboriginal population in 1994-1996, although it had been 20 times higher in 1970. Mortality among indigenous adults was currently three times that among non-indigenous adults. Life expectancy in 1991-1996 had been 57 years for Aboriginal males and 61 for females: the corresponding figure for non-Aboriginals had been 75.2 years. The Government acknowledged that there was still much room for improvement, but there had recently been an encouraging decrease in deaths from male heart disease, lung cancer and trauma; immunization and antenatal care rates had also improved.

25. The Committee had asked for information about the removal of indigenous children from their families (question 6). He could give no precise figures for the number of children involved, since the practice had taken place all over Australia in widely differing circumstances until the 1960s. A survey by the Australian Bureau of Statistics in 1994 had concluded that approximately 1 in 10 indigenous children had been separated from their families, either voluntarily or involuntarily: however, another survey in 1995 had stated that the figure might be as high as 1 in 3.

26. Many families had suffered greatly, and were still suffering, from the forcible removal of their children. A report entitled "Bringing them home", issued by the HREOC in 1997, contained wide-ranging recommendations to the federal, state and territorial governments. Shortly thereafter, the Federal Government had announced a package of measures worth $A 63 million, including a national network of family link-up and counselling services, improved access to personal information records, and measures to maintain indigenous languages and cultures. The Government considered that financial compensation was not the best way to deal with the complex long-term cultural and social effects of the practice of separation, although individuals did claim financial compensation through the legal system.

27. Ms. LEON (Australia), speaking on indigenous land rights (question 7), said that the Native Title Act of 1993 had been passed in response to the historic Mabo decision by the High Court of Australia in 1992. Its aims were to recognize and protect native title, determine the Government's actions relating to it, and balance the rights and interests of all Australians. It had proved necessary to amend the Native Title Act in the light of subsequent developments.

28. The term "native title" referred to the rights and interests of Aboriginal and Torres Strait Islander people in respect of their ancestral lands and waters. Since native title predated the European settlement of Australia, it was recognized, rather than legally granted, by the courts. Native title varied greatly throughout Australia: it might cover the right to occupy or use land or water, the right of access, or the right to have a say in the way others used the land. The term "coexistence" was applied to a situation where other rights, such as a lease or the right of access, existed alongside native title.

29. The 1992 Mabo decision stated that native title was vulnerable to extinction, i.e. that native title would no longer exist if the Government had granted other types of title to the land, such as a freehold lease. Native title was thus intended to apply mainly to vacant Crown land, national parks, public reserves and similar areas, rather than to land which had been assigned to housing, farming, roads or commercial uses by an act of government.

30. The Native Title Act had been drafted on the assumption that native title could not exist in respect of land subject to leasehold, including pastoral leases. However, the Wik decision, issued by the High Court in 1996, stated that the grant of a pastoral lease did not necessarily extinguish native title, i.e. that the two might coexist. There was thus great uncertainty among both indigenous and non-indigenous parties to land disputes, and the prospect of every land claim having to be contested in court.

31. Amendments to the Native Title Act had been adopted in 1998, after 18 months of public scrutiny and three parliamentary inquiries. The amendments confirmed the pastoral leaseholds granted between the adoption of the Native Title Act in 1993 and the Wik decision in 1996. A very limited number of leaseholds was involved, and any native title holders whose rights were affected were entitled to compensation. The amendments also specified that native title was suspended, rather than extinguished altogether, by non-exclusive grants, such as the granting of mining rights. Indigenous groups had been given details of all such mining rights granted in the period 1993-1996 and were free to seek compensation, although none of them had yet done so.

32. The amendments had further confirmed the implications for native title of certain federal acts. It was now stated unequivocally that native title had been extinguished by all freehold grants, commercial, residential and community-purpose leases and leases for the exclusive possession of pastoral land which had been adopted prior to the Wik decision. None of those decisions was new: the amendments merely confirmed the decisions which had been taken over the previous 200 years in respect of approximately 20 per cent of the territory of Australia.

33. Following the Wik decision, native title now coexisted with pastoral leasehold in some cases. The amendments regulated the practical aspects of that coexistence, stating that the pastoralists' right to carry on primary production activities would prevail over native title, but only in those areas where the two were incompatible.

34. Under the Native Title Act, registered native title holders and claimants were entitled to object to applications for mining or prospecting licences, in which case an independent arbitration body would rule on the application. The Government considered that that right was not appropriate in cases of coexistence of native title with pastoral rights or where the application would have only a slight effect on native title rights, since it impeded commercial and resource development without bringing commensurate benefits for native title holders. In many cases, the right to negotiate had been replaced by the right to be consulted on developments affecting native title or the right to have objections heard by an independent authority.

35. The amendments to the Native Title Act had been subjected to international scrutiny, by the Committee on the Elimination of Racial Discrimination, among others. The international bodies had unfortunately failed to take note of the benefits accruing from the amendments. For example, if applicants sought to establish native title on vacant Crown land, any earlier extinguishing acts by the Crown would be disregarded; native title holders had a statutory right of access to pastoral leasehold land.

36. Mr. van BEURDEN (Australia), speaking on measures to protect the indigenous cultural heritage of Australia (question 8), said that areas and objects of particular significance to indigenous people were protected by state and territory legislation and by federal legislation, principally the Aboriginal and Torres Strait Islander Heritage Protection Act, 1984. A new bill designed to replace that Act was currently before Parliament. It stated that the significance of an object or area would be primarily determined by the views of the indigenous people concerned, and that any culturally sensitive information disclosed during the administration of the legislation would be protected.

37. Turning to the issue of deaths of Aboriginal people in custody (question 13), he said the royal commission appointed in 1987 to investigate the high level of such deaths had concluded that indigenous people were no more likely to die in custody than non-indigenous people, but that the former made up a far larger proportion of the prison population than their numbers in the general population warranted. The commission had made 339 recommendations designed to increase safety in custody, keep people out of the criminal justice system, improve their experiences of the criminal justice system and reduce the socio-economic disadvantage which was often a factor in their imprisonment. The commission's findings had contributed to

Australia's decision to accede to the Optional Protocol to the Covenant and to the Convention against Torture. The Federal Government had committed the sum of $A 400 million to the implementation of the recommendations in the period 1992-1997.

38. Following a summit of indigenous people's representatives and a ministerial summit, the States of Western Australia and Victoria had launched new Aboriginal justice strategies. All jurisdictions throughout Australia had introduced programmes designed to reduce crime among young people and the high levels of violence in indigenous communities, and to improve the treatment of people in custody by improving safety, identifying at-risk prisoners and providing better training for custodial officers. Culturally appropriate alternatives to custodial sentences were being sought, including chastisement by community elders; other measures such as community-run night patrols and safe places for inebriated persons were being introduced. Federal funding for indigenous legal aid services had more than doubled in the previous decade.

39. The Government's measures had had a positive impact. Although the absolute number of indigenous people in prison had risen in the 1990s, because the overall indigenous population had increased they were no longer so over-represented in the prison population. Indigenous prisoners were no more likely to die in custody than non-indigenous prisoners. A study by the Australian Institute of Criminology showed that indigenous people received shorter sentences than non-indigenous people for almost all categories of offence. The Federal Government was addressing the socio-economic causes of crime with a $A 2.3 billion programme for housing, health services, education and employment.

40. Ms. LEON (Australia), speaking on gender equality (question 9), said that discrimination on the grounds of gender was illegal in all States and territories. Civil remedies, including damages, an order not to repeat the discrimination and an order for the performance of acts of redress were available. The Law Reform Commission had published a report entitled "Equality before the law" in 1994: the Government had implemented many of its recommendations, including a network of women's legal services, which provided legal advice and representation in court and referral to other services where necessary. The Government funded special legal services for Aboriginal and Torres Strait Islander women and women in remote rural areas. The Commission's recommendations about violence against women had been incorporated into the Family Law (Amendment) Act of 1995.

41. Measures had been taken to strengthen the Sex Discrimination Act, including the provisions on indirect discrimination and pregnancy discrimination. The new Federal Magistrates Service would provide a cheaper and more accessible mechanism for dealing with civil and family law cases, including discrimination.

42. The Committee had asked for statistics about the position of women in Australian society (question 10). She would provide the secretariat with written statistics compiled by the Australian Office on the Status of Women, covering the employment of women in the labour force as a whole, management, public service, politics and higher education. The statistics also gave details for Aboriginal and rural women.

43. Women's participation in the labour force had reached a record 54.9 per cent. The number of women on the boards of private companies had doubled since 1996. Women

constituted almost 50 per cent of public service employees (including one third of entrants to training for management posts in the previous 12 months), one quarter of representatives in the Federal Parliament and over one half of the university student population.

44. Mr. van BEURDEN (Australia), replying to question 11, said his Government was not aware of any official reports referring to race as a determining factor in the imprisonment and sentencing of juveniles: Australian laws applied to everyone regardless of race. However, his Government acknowledged that the over representation of indigenous juveniles in detention centres was due in large part to factors such as poverty, lack of education, poor health and inadequate housing. A range of measures had been introduced to address those needs, including crime prevention programmes, pre- and post-detention support services, and counselling and mediation to help reduce levels of violence in indigenous communities.

45. Ms. LEON (Australia), in response to question 12, said that the mandatory sentencing laws stipulated minimum custodial sentences for certain offences. In certain circumstances, juveniles who committed a second or third property offence in Northern Territory could receive a minimum sentence of 28 days, and those who committed a second or third domestic burglary in Western Australia were liable to a minimum sentence of one year's imprisonment. In Australia's federal system, the States and territories were primarily responsible for implementing criminal law, and the Government recognized those two States' competence to introduce mandatory sentencing as a means of addressing recidivism. Nevertheless, the Government was concerned to ensure that the impact of such laws on juvenile offenders was mitigated by federal programmes offering them support, education and rehabilitation. In April, the Prime Minister and the Chief Minister of Northern Territory had released a joint statement outlining a number of wide-ranging initiatives designed to prevent young people entering the criminal justice system. Subsequently, Northern Territory had enacted legislation raising the minimum age for adult offenders from 17 to 18, and jointly-funded indigenous interpreting services had been introduced. The Federal and Northern Territory Governments were currently applying the finishing touches to an agreement under which the former would commit $A 5 million per annum to a series of diversionary programmes for juveniles in Northern Territory.

46. She emphasized that the mandatory sentencing laws in Northern Territory and Western Australia were intended for general application; it was likely that any disproportionate impact on indigenous juveniles reflected the over-representation of indigenous people in the criminal justice system as a whole. The funding which the federal Government had committed to the programmes she had mentioned was additional to that which had been allocated for other indigenous-specific programmes intended to address the various socio-economic disadvantages suffered by the indigenous community.

47. With respect to the compatibility of juvenile mandatory sentencing with article 14 of the Covenant she said that that article mainly concerned the trial process prior to conviction or acquittal, rather than sentencing. Nevertheless, strenuous efforts were made at all levels of government to ensure the fairness of trial systems and the appropriateness of court proceedings. Juvenile mandatory sentencing had no effect on a person's right to have his conviction and sentence reviewed by higher tribunal in accordance with article 14 (5). Furthermore, mandatory detention laws did not discriminate against any group of people in ways that related to articles 24 and 26 of the Covenant. In keeping with the approach to discrimination adopted by the

Committee, juvenile mandatory sentencing was applied, and had been formulated, without regard to race. Accordingly, the legislation in force in Northern Territory and Western Australia could not be considered discriminatory. Moreover, a recent Senate inquiry into the Human Rights Mandatory Sentencing of Offenders Bill had found that the statistics did not support claims that the laws on juvenile mandatory sentencing constituted a prime cause of the high incarceration rate of indigenous people.

48. The CHAIRPERSON thanked the Australian delegation and invited members of the Committee to put further questions.

49. Mr. KRETZMER said that his questions concerned matters relating to the status of Covenant rights in Australia. In that regard, he was sure the delegation would agree that the Australian declaration on implementation of the Covenant in a federal State could in no way affect the full discharge of Australia's obligations under the Covenant.

50. Although Australia remained one of the few countries not to have incorporated a formal and comprehensive bill of rights into its Constitution, he recognized that it was not obliged to do so by the Covenant. However, having listened to the delegation and read the relevant reports, he was still not entirely convinced that Australia was fulfilling its obligations under article 2 (1), (2) and (3) (a) and article 3.

51. The argument had been made that, in a common-law system, fundamental rights were residual, in that they existed only to the extent that they were limited by legislation, and therefore, in the absence of legislation restricting those rights, their protection was assured. In his view, that definition could refer only to freedoms, which a State party clearly could not violate unless it was empowered by its legislation to do so. A large number of cases in Australia had demonstrated that the law did not provide for the protection of positive rights, as opposed to the protection of freedoms. Even the answers just provided by the delegation showed that an individual subjected to mandatory sentencing had no recourse to a domestic remedy if he considered that his rights under the Covenant had been violated. Only intervention and mediation at the state or governmental level were possible.

52. With regard to the delegation's opinion that mandatory sentencing did not violate Covenant articles, he recalled that a recent Senate committee had expressed a different view. Moreover, a recent communication submitted to the Human Rights Committee concerned an individual who had argued that his rights under article 10 had not been respected by the State party. Having found in the complainant's favour, the judge had been unable to apply a remedy because Australian law made no provision for that right.

53. In keeping with decisions made in other common-law countries, the Australian High Court, in a case recently brought to the Committee's attention, had ruled that in making administrative decisions, officials must take into account Australia's obligations under the international human rights treaties it had signed and ratified. That was consistent with Australia's constitutional structure, under which the executive branch ratified treaties on behalf of the State party; however, since officials belonged to the executive, there seemed to be no reason why they should not be bound by the executive's decision. Unfortunately, it had also

come to the Committee's attention that the Federal Government intended to draft a bill designed to override the precedent set by that decision. He would like the delegation to clarify the situation.

54. Lastly, he expressed disappointment that, having incorporated the Covenant as the basis for the jurisdiction of the HREOC, the Australian Government had not taken the further steps required to enable that Commission to enforce legal remedies on behalf of individual complainants.

55. Mr. LALLAH said he entirely endorsed the previous speaker's comments concerning Australia's obligations under articles 2 (1) and 15 of the Covenant. He saw no reason why the Government should not persist in its efforts to overcome the difficulties that a federal State encountered in seeking to enact legislation that gave effect to the provisions of the Covenant. Since the Government had accepted responsibility for implementing universal human rights standards, there could be no justification for leaving individual States to administer them as they saw fit.

56. It was unfortunate that judges had no say in formulating the kind of legislation required, Australia having accepted the Committee's competence under the Optional Protocol. The Committee would have greatly appreciated the opportunity to learn more about Australian judicial thinking concerning the application of the Covenant's universal norms to reality. In turn, Australian judges had been denied the opportunity to apply the principles of the Covenant to the cases that came before them. In effect, Australia had been left to the jurisdiction of the Committee.

57. While he welcomed the anti-discrimination legislation that had been enacted since the submission of Australia's first report, the Committee's jurisprudence under article 26 showed clearly that non-discrimination was not the same as positive equality of treatment when it came to implementing legislation and executive acts and applying judicial determinations. Those were central concerns of the Covenant, and could only be addressed effectively by a body of guiding legislation that applied to judicial organs at every level in all States.

58. In his view, none of the indigenous-specific measures mentioned by the delegation approximated to implementation of the rights provided for in article 27 of the Covenant read in conjunction with its other articles. Article 27 guaranteed indigenous peoples additional rights in respect of their culture, religion and language. It was high time that the Federal Government enacted legislation to assure those rights and provide effective domestic remedies.

59. Australia's method of implementing the rights of the Covenant constituted a highly unsatisfactory patchwork of legislation, with the Constitution protecting only certain rights. He reiterated the Committee's view that constitutional amendment represented the most effective way to clarify human rights and the limitations that could be placed upon them.

60. He asked the delegation to confirm whether it was true that certain provisions of the Convention on the Elimination of All Forms of Discrimination against Women had been given legislative effect in Australia. If so, what was the situation regarding other human rights instruments, and why was there such resistance in respect of the Covenant?

61. Mr. SCHEININ said that the lateness and sheer volume of the material supplied by Australia made it impossible for the Committee to address matters other than those of urgent concern. Accordingly, he would confine his comments and questions to the situation of Australia's indigenous people. In that regard, he would take the under-representation of Aboriginal persons in civil society, the subject of question 5 of the list of issues, as the background for his comments. It was tragic that, in a country of such great human and natural resources, the indigenous population should have suffered such levels of dispossession, exclusion and marginalization. As a State party to the Covenant, Australia was obliged to make every effort to overcome the huge differences in status between its indigenous and other citizens.

62. Given that situation, the removal of indigenous children from their families (question 6) represented a redoubling of the tragedy. According to information received by the Committee, such children were more likely to experience arrest and imprisonment, mental breakdown and poor physical health, and less likely to be employed and to form stable relationships. Moreover, they were also more likely to have their own children removed in turn. If those allegations were correct, the past assimilation policies under which indigenous children had been removed from their families had failed abjectly.

63. A related concern was that, in the domestic context, genocide had been mentioned in relation to the removal of indigenous children. While it was not the Committee's concern to administer the Convention on the Prevention and Punishment of the Crime of Genocide, article 15 (2) of the Covenant made indirect provision for criminal laws to be applied with retroactive effect in the case of genocide. He did not mean to imply that the removal of indigenous children amounted to genocide; as others had also said, the policies in question had been of an assimilationist and paternalist nature. Rather, his intention was to emphasize that the wounds were still deep, and that the State party needed to do a great deal more to compensate the individuals and communities who had suffered from the policies in question. He would like more information from the delegation about such measures.

64. Turning to questions 11-13 of the list of issues, he said that in his view the delegation had passed over question 11 somewhat lightly. There was a certain discrimination not only in the fact that indigenous persons were more likely to face detention, but also in that they were more likely to be suspected or accused of crimes which had been made subject to mandatory sentencing regimes. The question therefore called for a more detailed reply. The Royal Commission on Aboriginal Deaths in Custody had recommended that detention of Aboriginal persons should be minimized, but the introduction of mandatory detention for precisely those crimes for which they were more likely to be convicted seemed directly to contradict that recommendation. He would like to know whether the State party intended to introduce alternative forms of punishment.

65. Concerning questions 7 and 8, while the information given in the report was valuable, he believed that to approach the issue of rights under article 27 solely in terms of native title legislation was somewhat misleading, since native title problems might take decades to resolve. He would like more information about the actual situation, and about what steps were being taken to secure the sustainability of the culture and way of life of Aboriginal communities. The delegation had stated that Australia could not turn back the clock. While that was true in one sense, it was not true in the sense that it implied that indigenous cultures would inevitably be

assimilated into a pattern of life which was fundamentally European. Indeed, it could be argued that there was need to turn the clock back, in order to see what could be done to secure the sustainability of traditional forms of Aboriginal economic and cultural life.

66. With reference to question 8, he had been concerned at reports that two sites of special significance to Aboriginal people were to be removed from protection. It was often difficult to distinguish between sites of religious and historical significance and sites crucial for the indigenous economy, since often the two were combined. He recalled that in 1996 Ms. Evatt had prepared a report recommending extensive reforms to improve the protection of such sites, and her recommendations had been widely supported. However, legislation subsequently introduced by the Government had not been based on those recommendations, and to some extent ran counter to them. The delegation had stated that a new law on the subject was to be introduced, and he would appreciate more information in that regard.

67. Lastly, concerning question 4, he noted that the delegation had not given much support to the idea that the situation of indigenous peoples should be seen as an issue under article 1 of the Covenant. The Committee had on many occasions dealt with article 1 issues together with article 27 issues where indigenous peoples were concerned. Its case law repeatedly emphasized that for States parties to comply with article 27, it was essential that they should ensure the sustainability of the way of life of indigenous peoples and also secure their effective participation. He would suggest that strengthening the protection of indigenous peoples under article 1 would give depth and substance to Australia's implementation of other provisions of the Covenant.

68. Mr. HENKIN, referring to questions 1-3, said he too found it difficult to see why Australia could not incorporate the Covenant into its domestic law. The delegation had admitted that the Government was responsible for compliance with the Covenant, including compliance in matters which, in the absence of a treaty, might be the responsibility of federal States. It would seem to him that a federal statute should be able to require compliance by all federal States with all the provisions of the Covenant, and, in the absence of such compliance, to provide for federal enforcement. The United States, which also had a federal system, had managed to find ways of persuading states to carry out national policies. He would like to know what steps were being taken in Australia to remedy the situation.

69. On the issue of genocide, he noted that an Australian court had ruled that no crime of genocide existed under Australian law. Did that imply that a crime that fell within the definition of genocide under the Genocide Convention, which Australia had ratified, was not regarded as a violation of Australian law?

70. It had been reported that the Government of Australia had reservations about the value of the work of United Nations human rights treaty bodies. He would suggest that Australia should regard the Committee's work as a way of helping it to comply with the obligations it had itself voluntarily assumed. That work, of course, required Australia's collaboration with the Committee, in regard to its reports and in regard to its response to the Committee's Views.

71. Ms. GAITAN DE POMBO said the oral introduction had been most useful as a supplement to the wealth of information provided in the report. Firm foundations had now been

laid for a constructive dialogue with Australia, both at the current session and on the occasion of the presentation of future reports. She too was greatly concerned that no measures had been taken to incorporate the Covenant into national law applicable throughout the territory, as provided for under article 50. She would like to know whether any steps had been taken to establish a process of consultation with the states concerned, in order to facilitate enactment of the necessary legislation.

72. She was pleased to hear that indigenous peoples now enjoyed greater access to public services, and in particular that infant mortality rates had fallen. However, it was difficult to accept that at the beginning of the new millennium, in a country as wealthy as Australia, indigenous peoples were still suffering from discrimination. Were any programmes in place for Aboriginals in the rural areas, particularly women, and how were they being implemented? With regard to question 8, were any specific measures taken to ensure that children were taught their native language, since language was the key to cultural identity? Lastly, concerning question 3, it had been stated that Aboriginal prisoners were classified as "high risk". Who was responsible for making that assessment? What were the criteria used? And did the Red Cross have any role to play in the matter?

73. Mr. ANDO, while welcoming the delegation, expressed regret at the long delay in the submission of Australia's third and fourth periodic reports. Regarding Australia's past policy vis-à-vis Aboriginals, he endorsed Mr. Scheinin's concern as to the long-term effects of removing children from their parents. Those effects amounted to violations of article 6 (right to life), article 9 (right to security of person), article 17 (right to privacy) and article 24 (right of the child to protection), to say nothing of article 27. He would be grateful if the delegation could shed light on that issue.

74. On the question of the incorporation of the Covenant into Australia's domestic law, he recalled that on the occasion of the submission of Australia's second periodic report 12 years earlier, the delegation had stated that the High Court had recently held that external affairs powers of the Federal Government could be involved in the implementation of obligations under international treaties. Thus, the Federal Government could exercise powers that had been traditionally reserved for federal States. However, the delegation had gone on to say that there was opposition to incorporation of a bill of rights into national domestic law, because universal and equal suffrage "would threaten the very survival of the Governments of those States". Since that time, had any further efforts been made to overcome that seemingly insurmountable obstacle?

75. Mr. AMOR thanked the delegation for a remarkable report. The delegation had referred to the Aboriginals as underprivileged, but in his view they could better be described as misunderstood, or not sufficiently understood. While, on the one hand, the authorities tried to take account of the special characteristics of the Aboriginals, on the other they tried to force them into an alien mould which was based on an individual ethos rather than on a community ethos. The perception of land in Australian law was based on the notion of individual ownership, whereas for Aboriginals land was perceived as having more than merely economic significance. For instance, guardianship of the secrets of sacred sites was entrusted only to women: the fact that the Australian authorities had given responsibility for management of those sites to a man was proof of a profound misunderstanding.

76. Regarding the heritage of the Aboriginals, there were many items of religious significance currently held in museums in London. Had discussions with the United Kingdom authorities been successful in securing the return of some of those items? Lastly, was any kind of affirmative action policy applied with regard to the employment of Aboriginals?

77. Mr. KRETZMER, Mr. LALLAH, Mr. SCHEININ, Mr. HENKIN, Ms. GAITAN DE POMBO and Mr. AMOR associated themselves with the Chairperson's tribute to Ms. Evatt for her contribution to the work of the Committee.

The meeting rose at 6.05 p.m.