Digest of Australian Practice in International Law 1965-1966

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Note: The present Digest covers the period 1 July 1965 to 30 June 1966

States and non-State entities; Intervention

(a) Question of the attainment of independence by a dependent territory is primarily a matter concerning the dependent territory and the parent State.—In answer to a question in the House of Representatives on 16 September 1965, raising, *inter alia,* the point whether the Australian Government would consider arranging the visit to Rhodesia of a parliamentary delegation, the Minister for External Affairs (Mr. Hasluck) said:—

> "The view of the Australian Government is that matters relating to the independence of Rhodesia are primarily matters between the United Kingdom Government and the Rhodesian Government and that no good purpose would be served by other governments intervening in matters affecting those two Governments where the constitutional relationships and the political responsibilities are quite clear." (*Hansard,* 16 September 1965, p. 956.)

(b) Member States of Commonwealth—duty of each Member State not to concern itself with internal affairs of another Member State.—The Australian Government decided not to participate in the special Commonwealth Conference, held at Lagos, 11-12 January 1966, to consider the problem of the Rhodesian régime established following the unilateral declaration of independence on 11 November 1965.[1] In the course of a statement made on 6 January 1966, the Prime Minister, Sir Robert Menzies, said:—

> "If the modern Commonwealth, on the initiative of some or many of its members, begins to claim the right to intervene in and give orders in relation to matters which are the proper concern of some individual member of the Commonwealth, good relations cannot long continue, nor can the present Commonwealth structure long endure.
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> "As I have previously pointed out, the last Prime Ministers' Conference in 1965 unanimously declared (not for the first time) that 'the authority and responsibility for leading her remaining colonies, including Southern Rhodesia, to independence, must continue to rest with Britain'.

1 An Australian observer was present at the Lagos Conference, which purported to be a Commonwealth Prime Ministers' Meeting, although all heads of government of the Commonwealth were not present, and some countries were represented only by Ministers and High Commissioners. The attendance of the Australian observer was not however "representation" of Australia, and the final communiqué of the Meeting contained the following correct statement: "There was an Australian observer."

"Britain having the sole authority and responsibility, is it for the rest of us to give instructions to Britain as to how she is to use her authority and discharge her responsibility?

"My Government strongly believes that it is not. For if Britain can be instructed or coerced by the Commonwealth—or most of its members—in a matter which is, by concession hers and hers alone to deal with, then Australia can some day be instructed or coerced on some matter in which the sole jurisdiction resides with Australia." (*Current Notes on International Affairs,* January 1966, p. 37.)

(c) Intervention—right to do so upon request of the country concerned and/or pursuant to the obligations under a collective defence treaty.—The Australian Government has, among other grounds, given as legal justification for sending armed forces to South Vietnam, the fact that a request for assistance was made by the Government of the Republic of Vietnam, and that such action was pursuant to obligations under the South-east Asia Collective Defence Treaty (SEATO) of 8 September 1954. In the House of Representatives on 1 October 1965, in answer to a question by Dr. J. F. Cairns: "What is the legal basis for the use of force by the Australian armed services in Vietnam?", the Minister for External Affairs (Mr. Hasluck) said, *inter alia*:—

"The decision to despatch Australian forces to South Vietnam was made by the Executive Government after a request for assistance had been received from the Government of the Republic of Vietnam, a State designated in the protocol to the South-east Asia Collective Defence Treaty. The Australian Government's decision to commit forces in South Vietnam was taken in accordance with Australia's obligations under that Treaty". (*Hansard,* 1 October 1965, p. 1647.)

See also statements by the Prime Minister, Sir Robert Menzies, and Mr. Hasluck in, respectively, *Hansard*. 17 August 1965, p. 146, and 28 September 1965, p. 1366.

(d) Nature of civil war—question whether the strife between the North Vietnamese and South Vietnamese forces is a case of civil war.—The Australian Government has adopted the view that the conflict between North Vietnamese and South Vietnamese forces is not of the nature of a civil war, upon the grounds that in its opinion the purpose of the North Vietnamese operations is to destroy the existence of South Vietnam as a separate entity, and that because of two separate administrations, the situation is not one of civil war inside a single State. In a booklet, *Vietnam, Questions & Answers,* issued under the authority of the Minister for External Affairs (Mr. Hasluck), the following is stated (at pp. 10-11) with reference to the question of the existence of a civil war:—

"The fact that there are Vietnamese fighting Vietnamese is not the only element in the situation. By an agreement accepted by an international conference, there are two separate zones and two separate administrations covering respectively the North and South of Vietnam. While the division of the country was not intended to be permanent, the present reality is that the country has not been re-unified; and until it is re-unified, the separate administrations will continue to exist. Internationally, the two zones are extensively recognized as separate States.

"The war, then, is not a civil war inside a single State but a war in which one State is trying to subdue another and take over the rule of it by force."

See also statements by Mr. Hasluck in *Hansard*, 18 August 1965, p. 189.

(e) Right of a State freely to choose and develop its political, social, economic, and cultural systems.—The United Nations Special Committee on the Principles of International Law concerning Friendly Relations and Co-operation among States has in its discussions 1964-1966 treated the right of a State freely to choose and develop its political, social, economic, and cultural systems as included in the principle of equality of States. In a statement in the House of Representatives on 2 September 1965, the Minister for External Affairs (Mr. Hasluck) apparently treated this right as related also to the principle of non-intervention in a country's domestic affairs. After pointing out, *inter alia*, that it would not be a good principle in international relations to interfere in the domestic affairs of any country, he added, with reference to the position in Thailand:—

> "Whether in any country there may be an ideal government or a government that is less than ideal is not an issue for the Australian people. We must respect the domestic jurisdiction and the internal affairs and responsibilities of other countries." (*Hansard*, 2 September 1965, p. 715.)

(f) Representation, by means of special advisers, of trust and non-self-governing territories at United Nations proceedings.—On 4 November 1965, the Minister for External Affairs (Mr. Hasluck) announced that two members of the Papua and New Guinea House of Assembly would join the Australian Delegation to the 20th Session of the United Nations General Assembly in the capacity of special advisers, and would advise the Delegation when the General Assembly's Fourth Committee (Trusteeship and Non-Self-Governing Territories) met to consider the Report of the Trusteeship Council. Mr. Hasluck said:—

> "The presence of indigenous advisers in the Delegation will assist the Australian Delegation when this item is being considered. It will also be of considerable benefit both to the special advisers themselves and to the House of Assembly, which will thus be able to receive a first-hand account of the United Nations proceedings." (*Current Notes on International Affairs*, November 1965, p. 762.)

(g) Emancipation of a trust territory or non-self-governing territory is primarily a matter for the people concerned.—In reply to a question asking whether any timetable had been prepared by the Australian Department of Territories for the granting of independence to Papua and New Guinea, the Minister for Territories (Mr. Barnes) said in the House of Representatives on 18 August 1965:—

> "At all times we have stated that it is not for Australia or this Government to say when these people (i.e. the people of Papua and New Guinea) should have either self-government or independence; it is a matter for the people themselves. I for one would never attempt to hurry this development." (*Hansard*, 18 August 1965, p. 151.)

Recognition of States, Governments, and other entities

(a) Recognition not to be granted to government of former colonial territory which has made illegal declaration of independence.—In the

course of a statement dealing with the position of the Rhodesian régime, following the unilateral declaration of independence of 11 November 1965, the Prime Minister, Sir Robert Menzies, made the following observations in the House of Representatives on 16 November 1965:—

> "First, I should point out that as Great Britain is for this purpose the colonial power, only the Parliament of Great Britain could grant independence to Rhodesia. The Unilateral Declaration of Independence by the Rhodesian Government was therefore illegal. The Declaration having been made, and the Governor having dismissed Mr. Smith and his government, a position arose in which the only lawful government in Rhodesia is now the Government of the United Kingdom . . . .
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> "We have . . . refused to recognize what is now an illegal amdinistration." (*Hansard,* 16 November 1965, pp. 2767, 2770.)

(b) **Effect of non-recognition of an illegal régime—the instrumentalities of the illegal régime are not to be recognized.**—In a statement on 18 December 1965 in the House of Representatives, the Prime Minister, Sir Robert Menzies, dealing with the position of the Rhodesian régime not recognized by Australia, said:—

> "In relation to financial measures, we will recognize the Board of the Reserve Bank of Rhodesia, which the British Government has appointed to replace the previous Board. We will recognize it as the only proper authority. Following from this decision, it may be necessary for us to consider introducing restrictions in respect of financial transactions between Australian and Rhodesian representatives comparable with the restrictions introduced by Britain. Also, we have decided to suspend the money order service between Australia and Rhodesia." (*Hansard,* 18 December 1965, p. 3743.)[2]

(c) **Representation in negotiations of unrecognized body, not treated otherwise as possessing international status.**—In a press conference at Saigon on 19 December 1965, the Minister for External Affairs (Mr. Hasluck) dealt with the question of the representation of the Viet Cong in possible future negotiations between governments over the Vietnam problem, as follows:—

> "If North Vietnam wants to include representatives of the Viet Cong in its delegation, well and good. That is its decision. But the Viet Cong has no international status—it is a rebellion, a subversive movement. The Viet Cong as such has no international status, so it could not accredit representatives, but there is no objection to North Vietnam, which has international status, including members of it in its delegation." (*Current Notes on International Affairs,* December 1965, p. 854.)

It may be noted that according to a statement by the Prime Minister, Sir Robert Menzies, in the House of Representatives on 17 August 1965, the Australian Government had "not entered into any

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2 Cf. in this connexion the proceedings taken in West German courts in December 1966 to prevent the export from West Germany to Rhodesia of new banknotes printed for the Rhodesian office of the Reserve Bank of Rhodesia. An injunction was first granted, but dissolved by a Frankfurt civil court in January 1967 on the ground that although the British-appointed Board of the Bank might be the legally constituted organ, it had not been given effective power to issue banknotes in Rhodesian territory.

form of official relationship with the authorities in North Vietnam" (*Hansard,* 17 August 1965, p. 146).

(d) Admission of visitors from territory under control of an unrecognized government—granting of visas—conditions of admission so as to exclude any implication of recognition.—In answer to a question in the House of Representatives on 28 October 1965 by Mr. Bryant, relating to the matter of the refusal of visas to athletes from East Germany desiring to attend pentathlon events to be held in Australia, the Minister for External Affairs (Mr. Hasluck) said:—

> "I would ask the honourable gentleman to realise that the granting of a *vias* requires the previous possession of a passport or some other travel document; the beginning of the matter is the original possession of the travel document. The Australian Government does not recognize the capacity of the Soviet controlled régime in East Germany to issue passports that we will accept. The only travel documents that Australia will accept in respect of residents of East Germany are the travel documents issued by the Allied Travel Board in Berlin. This policy is the same as that followed by most Western countries, including the United States of America, the United Kingdom and France. If the Board gives a travel document to an East German resident, the question then arises as to whether we will give a *visa.*
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> "The only objection to giving *visas* to athletes coming here for the pentathlon or any other athletic event is related to action they may take that would appear to give in Australia a national status to East Germany and a recognition of the East German Government that the Australian Government does not accord. The only conditions would be that they should not hoist the East German flag or carry badges that purport to show there are two Germanies where our official policy, and the policy of the Western powers is to recognize only one Germany. This is a question that basically relates not to any consideration of Communism or doctrine but solely to the question of the future of a divided Germany. If the Allied Travel Board gives the athletes acceptable travel documents, and if in the arrangements made for the holding of any athletic contest this question of giving a national status to East Germany is not at issue, there is no difficulty on the part of my Department or, I imagine, on the part of the Department of Immigration; but we do not wish to decide—and we think it would be wrong to decide—in the course of giving recognition to an athletic team, questions that fundamentally relate to the future of the divided Germany." (*Hansard,* 28 October 1965, pp. 2305-6.)

Nuclear Weapons and Nuclear Non-Proliferation

(a) Concession of rights of passage and landing to the military aircraft of a country preparing to conduct nuclear weapon tests—Nuclear Weapon Tests Ban Treaty of 5 August 1963.—In reply to certain questions in the House of Representatives on 10 May 1966 by Mr. E. G. Whitlam, Q.C. (now Leader of the Opposition), relating to a landing of a French military aircraft at Port Moresby *en route* to and in preparation for French nuclear tests in the region of Tahiti and its dependencies, the Minister for External Affairs (Mr. Hasluck) said:—

> "The policy which has been laid down by the Cabinet, and which I assume would apply in all cases, is that before any flight by French aircraft which may in any way be connected with French operations in the Pacific and which involves passage over Australian territory or

the use of Australian airfields is approved, we obtain from the French Government an explicit assurance that the aircraft will not carry any implements, devices, or materials connected with the proposed nuclear tests." (*Hansard*, 10 May 1966, p. 1604.)

Australia is a party to the Nuclear Weapon Tests Ban Treaty of 5 August 1963.

(b) Nuclear-free regional zones—whether admissible as a general principle.—The Australian Government does not favour the establishment of nuclear-free regional zones as a general principle, applicable in an absolute manner; the question of the institution of such a zone is one relative to the circumstances of the region. Sir James Plimsoll, Leader of the Australian Delegation, said on 25 October 1965 in the First Committee of the United Nations General Assembly:—

"Different regions of the world . . . are in different situations and have different opportunities open to them for achieving or having to reject the institution of a nuclear-free zone in their particular regions. Countries which are huddled together alongside a great power which they regard, rightly or wrongly, as a potential aggressor, are in a different position from that of countries that are more remote or that have less cause to fear their neighbours. Nuclear-free zones may be possible in the latter circumstances; they are not possible in the former." (*Current Notes on International Affairs*, October 1965, p. 636.)

Aliens

Establishment—in the absence of treaty, a foreign bank has no right to set up a banking business in Australia.—In answer to a question by Mr. Devine, in the House of Representatives on 2 September 1965, the Prime Minister (Mr. Holt) said:—

"Over the years requests have been received from various countries asking for the opportunity to establish banks in Australia. These requests have come from the U.S.A., Japan and from some European countries. The policy of the Government has been quite firm and consistent on this matter. It is one of opposition to the establishment of such banks in Australia. This policy has been confirmed in quite recent times by Cabinet consideration of specific requests. There have been instances recently of some overseas banks establishing representative offices in Australia, but this does not represent an extension of their actual banking business in this country." (*Hansard*, 2 September 1965, p. 713.)

Diplomatic envoys

Nature of position of the head of an Australian diplomatic mission—not merely an agent.—In the House of Representatives on 28 October 1965, the Minister for External Affairs (Mr. Hasluck) said:—

"An Australian Ambassador is essentially part of the whole structure of Australian Government. One should not think of an ambassador as some person who is merely an agent and who is unfairly asked to perform functions that the Government itself is unwilling to perform." (*Hansard*, 28 October 1965, p. 2306.)

Compare article 3 of the Vienna Convention on Diplomatic Relations of 18 April 1961, to which Australia is a party, providing

that the functions of a diplomatic mission include representation of the sending State in the receiving State, protection in the receiving State of the interests of the sending State and of its nationals within the limits permitted by international law, and negotiation with the Government of the receiving State.

The Law and Practice of Treaties

Effect of fundamental change of surrounding conditions on the rights and obligations under treaties.—The Australian Government has adopted the view that paragraph 7 of the Final Declaration, dated 21 July 1954, of the Geneva Conference of 1954 on Indo-China, providing that general elections throughout Vietnam were to be held in July 1956 under the supervision of an international commission composed of representatives of Canada, India and Poland, and that consultations regarding the elections were to be held between competent representative authorities of the two zones of Vietnam, as from 20 July 1955, ceased to be operative because, as South Vietnam maintained, the conditions for free elections did not exist throughout the whole of Vietnam. The booklet, *Vietnam, Questions & Answers*, issued under the authority of the Minister for External Affairs, in May 1966, contains the following, at p. 8:—

> "The Final Declaration of the Geneva Conference envisaged that free elections would be held throughout the whole of Vietnam in 1956 to unify the country. Although these elections did not take place, responsibility cannot be put exclusively on one side—the South. The South argued quite rightly that the conditions did not exist for free elections throughout North and South Viet Nam. Free elections could not possibly be held in the North because that part of the country was under- the control of a communist, totalitarian régime where dissenting non-communist parties had no genuine opportunity to organize or to present their policies to electors. The South took the position that, until the people in the North were able to have genuine elections, it would be impossible to hold 'free elections' over the whole of the country for the purposes of unification. For the South to have taken any other position would have been unrealistic and wrong."

Law of war and non-war armed conflicts

(a) Armed operations in Vietnam not technically of the nature of war.—In answer to a question in the House of Representatives on 15 March 1966 by Mr. Calwell, Leader of the Opposition, the Prime Minister (Mr. Holt) stated that Australia was engaged in Vietnam "in a number of limited operations with military forces", and was "not technically in a state of war". (*Hansard,* 15 March 1966, p. 207.) As to whether any of the bodies or entities against which such operations were being conducted were "enemies" in the technical or legal sense, see statement by Sir Robert Menzies, predecessor to Mr. Holt, *Hansard,* 17 August 1965, p. 146.

(b) Cold war relations—country concerned is not an enemy in the technical or legal sense.—In reply to a question in the House of Representatives on 13 May 1966 by Mr. Cope, asking the Minister for External Affairs (Mr. Hasluck) whether he considered the People's

Republic of China to be "an enemy of Australia's", Mr. Hasluck said:—

> "Australia is not in a state of hostilities with mainland China and we do not regard that country as being an enemy in that technical and legal sense. Imports and exports of strategic materials, however, are subject to control. There is no reason in our legal and technical relationship with China to apply any other control to trade." (*Hansard,* 13 May 1966, p. 1862.)

(c) Nature of aggression—constituted by armed infiltration of men and equipment across military demarcation line.—The armed infiltration of men and equipment from North to South Vietnam across the military demarcation line fixed under Chapter 1 of the Geneva Agreement on the Cessation of Hostilities in Vietnam, of 20 July 1954, would amount to aggression, in violation of that Agreement (see *Studies on Vietnam,* Information Handbook, No. 1 of 1965, prepared by the Department of External Affairs at the direction of the Minister and issued under his authority, p. 3).

(d) South-east Asia Collective Defence Treaty (SEATO) of 8 September 1954 not regional agreement under articles 52-54 of United Nations Charter.—A statement made in the House of Representatives on 4 May 1966 by the Minister for External Affairs (Mr. Hasluck), in answer to questions by Mr. Hughes regarding the effect of the South-east Asia Collective Defence Treaty (SEATO) of 8 September 1954, indicated that the Minister regarded that Treaty as a collective self-defence arrangement within the framework of article 51 of the United Nations Charter, and not as a regional arrangement within the meaning of articles 52-54. (*Hansard,* 4 May 1966, pp. 1429-1430.)

(e) Prisoners of war—application to Vietnam conflict of Geneva Convention of 12 August 1949.—So far as the actions of Australian units in Vietnam are concerned, the Australian Government has regarded itself as bound by the terms of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949; see statement by the Prime Minister, Sir Robert Menzies, *Hansard,* 3 December 1965, p. 3638. Article 12 of that Convention has also been applied by Australian forces to the extent that prisoners taken by Australian units have been handed over to the Government of the Republic of Vietnam (South Vietnam), which confirmed its willingness to observe the provisions of that Convention (see answers given by the Minister for the Army to questions by Mr. L. R. Johnson, *Hansard,* 28 October 1965, pp. 2403-4).

International economic law

Emerging principle of international law that under-developed are entitled to receive special economic and technical assistance.—On 15 February 1966, the Council of the Organization for Economic Co-operation and Development (OECD) in Paris decided to invite Australia to become a member of that Organization's Development Assistance Committee. The latter Committee was created in January 1960 for the specific purpose of providing a forum where suppliers of assistance to under-developed countries might consider together

common problems relating to their assistance efforts, and frame new policies and practices. In regard to this decision of the Council of OECD, welcomed by the Minister for External Affairs (Mr. Hasluck), the following was stated in the Department of External Affairs press release of 16 February 1966:—

> "In joining the Development Assistant Committee, Australia would aim at increasing the effectiveness of its own aid effort through co-ordination with the assistance programmes of the other members, who include all the major aid-donors of the free world. Australia hoped also, by contributing the fruits of its own experience and its own thinking, to help strengthen the overall aid effort being made by DAC members."