II. UNITED NATIONS

A. Security Council

1. Uniting for peace resolutions

With the rapid increase in United Nations membership in the past two decades, and the consequential changes in voting patterns in the General Assembly, Australia has tended, in recent years, to rely increasingly, with other western powers, on the Security Council as the main source of United Nations peace-keeping efforts.[1] This position is in contrast to the situation in the early 1950's when the Uniting for Peace Resolutions (sometimes referred to as the "Acheson Plan") were supported by Australia, albeit after some early diffidence, as a means of giving more effective power to the General Assembly to deal with peace-keeping matters when a veto or other tactics in the Council seems likely to frustrate peace-keeping efforts within the world organization.[2] More than anything else perhaps, the *Suez Affair* of 1956 confirmed Australian reluctance to support any major growth in the peace-keeping powers of the Assembly.

In the light of what has seemed to be Australian disenchantment with the use of the General Assembly as a forum for U.N. peace-keeping activities, Australian official reaction in June 1967 to moves to convene a special emergency session of the Assembly to deal with the Middle-East crisis, after the "six-day war" is hardly surprising. On 13 June 1967 the Soviet Union called for an emergency session of the Assembly to consider "a decision designed to bring about the liquidation of the consequences of aggression and the immediate withdrawal of Israel Forces behind the armistice lines".[3] On 14 June the Secretary-General of the United Nations requested member States if they concurred in this request.[4] Australia did not reply. The official view taken by this country was that there had not in fact been a breakdown in the Security Council as no veto had been applied. To the Government it therefore seemed to be doubtful whether the Uniting for Peace procedure was properly applicable in the circumstances.

The basic principles for convening special sessions of the General Assembly are to be found in Resolution 377A (v) and rr. 8 (b) and 9 (b) of the Assembly's rules of procedure. Resolution 377A (v) provides, *inter alia,* that special sessions of the Assembly can be convened when the Security Council "fails to exercise its primary respon-

1 Department of External Affairs, Annual Report, 1 July 1966-30 June 1967 (Canberra, 1967), p. 28.

2 Harper and Sissons, *Australia and the United Nations* (1959), pp. 113-5.

3 Annual Report, op. cit., p. 29.

4 A majority of United Nations member States, however, agreed that the Special Session should be convened and it met for the first time on 17 June.

sibility for the maintenance of international peace and security". Rule 8 (b) requiries a special session of the Assembly to be convened within 24 hours of a request for such a session coming from a majority of members of the United Nations. Rule 9 (b) sets out the responsibilities vested in the Secretary-General after a request has been received from a member State for a special session, under the terms of the Uniting for Peace Resolutions.

In cases where a veto has been applied in the Security Council, as during the *Suez Affair* of 1956, there is of course immediate potential for the operation of the Uniting for Peace Resolutions. More difficult circumstances naturally arise, however, in situations like that in mid-1966 when the Security Council's deliberations on the Middle-East crisis had not been stalemated by a veto. In this type of situation it is basically a matter of political judgment whether circumstances have arisen which can bring the Uniting for Peace Resolutions into operation. Australia, in mid-1966, opted for the view that it was not expedient, and presumably not politically desirable in the existing circumstances, to support the move for the Assembly to be convened. When stripped to its essentials this would also seem to have been the basis of the objection, albeit unsuccessful, which the United States formally sent to the Secretary-General in not responding favourably to the suggestion that the Assembly be called together. In its reply to the Secretary-General[5] the United States affirmed:—

> "General Assembly Resolution 377A (V) provides that an emergency special session may be called 'if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression'.
>
> As you know, the Security Council is seized of the question of the Middle East situation. The Council has already adopted four resolutions calling for a cease-fire by the parties to the recent hostilities in the area, and a fifth resolution of a humanitarian character dealing with the aftermath of the hostilities. All five of these resolutions were adopted unanimously. A sixth resolution was voted on at the Council meeting on 14 June and failed of adoption because it did not receive sufficient votes. Several other resolutions are pending before the Council as well as other suggestions to deal with this complex problem.
>
> With respect to the draft resolution proposed by the United States in document S/7952/Rev. 3, I indicated on 14 June that the United States would be prepared to consider constructive suggestions and revisions. With respect to the draft resolution submitted by Canada, its distinguished representative indicated that revisions were being considered.
>
> The present situation is therefore that members of the Security Council are still engaged in consultation looking towards further action by the Council on this matter.
>
> The processes of consultation, negotiation and search for measures to harmonize the actions of nations enjoined by the Charter therefore have not been exhausted. For these reasons, the United States Government does not believe that a situation has arisen in which the Security Council, in the words of General Assembly Resolution 377A (V),

5 United Nations Doct. A/6718.

'fails to exercise its primary responsibility for the maintenance of international peace and security'. Accordingly, the United States is not able to concur in the request for the holding of an emergency special session at this time."

2. The Rhodesian situation

It is not surprising, in view of the considerable interest shown in Australia with respect to Rhodesia's Unilateral Declaration of Independence, that questions were raised in the Commonwealth Parliament on official attitudes towards moves in the Security Council to deal with the situation. Even before the Security Council Resolutions of 16 December 1966, which called for mandatory sanctions against Rhodesia, Australia, for almost 12 months, had been applying sanctions with respect to Rhodesian trade.[6] These sanctions had been applied voluntarily at the request of the United Kingdom, which Australia continued to recognize, after U.D.I., as the "Sovereign" power in Rhodesia. After the imposition of mandatory sanctions by the Security Council a series of questions by Sir Wilfrid Kent Hughes in the House of Representatives directed attention to issues related to the practice of the Security Council in dealing with the Rhodesian situation. The replies by the then Minister for External Affairs, Mr. Paul Hasluck, indicated general acceptance by this country of well-accepted Security Council procedures relating to the Council's operations.

On 13 April 1967 Sir Wilfrid Kent Hughes inquired if the U.S.S.R. and France had abstained from voting on the resolution of 16 December 1966 imposing mandatory sanctions on Rhodesia. "If so", he suggested, "did not their action invalidate, under art. 27 of the United Nations Charter, this decision of the Security Council, despite the fact that this Article has not been enforced in the past." In reply, the Minister for External Affairs, in referring to the long-accepted practice of the Security Council, affirmed that the abstention of a "permanent member does not preclude fulfilment of art. 27 (3)" which lays it down, *inter alia*, that decisions on all matters, other than those which are procedural "shall be made by an affirmative vote of seven members, including the concurring votes of the permanent members".[7]

The reply of the Minister, and his implied recognition of this practice with respect to abstentions, could hardly have been otherwise. There are three basic situations where it is recognized that a permanent member may not participate in a vote, and such action will have no effect on the decision of the Council. First, under the so-called obligatory abstention, which is set out in a proviso to art. 27 (3), a party to certain disputes is required to refrain from voting. Secondly, a member, including a permanent member, may voluntarily refrain from voting and since the earliest days of the operation of the Security Council it has been recognized that such action does not invalidate a decision of the Council. Thirdly, absence of a permanent member, as most clearly evidenced by the Security Council resolutions of June-

6 Annual Report, op. cit., p. 27.

7 Parl. Deb. (Com.), H. of R., vol. 54, p. 1315.

July 1950, dealing with the Korean situation, also does not invalidate decision making in the Security Council on non-procedural questions.[8]

B. General Assembly

1. Powers over "international" territory

Of the resolutions of "legal interest", adopted by the United Nations General Assembly at its 21st regular session, the decision of 27 October 1966[9] to terminate South Africa's mandate over South West Africa was probably the most important as far as Australia was concerned. Australia joined with 113 other member States in the General Assembly in supporting this move which formally asserted that South West Africa was to come "under the direct responsibility of the United Nations", until such time as the people of the territory could exercise the right of self-determination and achieve independence. For this country, as the sole remaining administering authority of a non-strategic Trust Territory of the United Nations, the resolution of the General Assembly provided an expression of opinion, to be followed later with formal administrative steps related to implementation, which could provide new guidance on the juridical status of the Trust Territory of New Guinea under international law.

The juridical status of mandated and Trust Territories has long been a source of contention. Various theories have been advanced from time to time to determine the nature of sovereignty in these territories. These, however, have served little useful purpose.[10] International Court of Justice decisions on South West Africa[11] have given some guidance on the position, but without any determinative result. It would seem, in the last analysis, however, that the weight of opinion has tended to the conclusion that the legal régime for mandated and Trust Territories rests basically on the "international agreements creating the system and rules of law which they attract".[12] In its resolution of 27 October 1966, acting under the Declaration on Colonialism and declaring that the mandate had been conducted by South Africa "in a manner contrary to the Mandate, the Charter of the United Nations and the Universal Declaration of Human Rights", the General Assembly unilaterally made itself responsible for determining that the "international agreements" relating to the Mandate and the "rules of law which they attract" had been violated with respect to South West Africa.

---

8 Repertoire of the Practice of the Security Council 1946-1951 (1954), pp. 165-77; ibid., 1952-1955, pp. 67-8; ibid., 1956-1958, p. 64; ibid., 1959-1963, pp. 94-6; ibid., 1964-1965, pp. 63-4.

9 Resolution 2145 (XXI).

10 Castles, "International Law and Australia's Overseas Territories, ch. 12, in *International Law in Australia* (ed. D. P. O'Connell) (1965), pp. 318, 319.

11 International Status of South West Africa, Advisory Opinion, I.C.J. Reports, 128; Admissibility of hearings of petitioners by the Committee on South West Africa, Advisory Opinion, I.C.J. Reports, 1955, p. 67.

12 Castles, op. cit., p. 319.

On its face, the decision of the General Assembly could perhaps be construed as being *sui generis* and, therefore, be regarded as having no direct relationship to the status of the Trust Territory of New Guinea. Under the trusteeship system no specific provision was made for the unilateral termination of a trust by the General Assembly.[13] The League of Nations, however, retained a right to renounce a mandate agreement.[14] As the successor of the League, the General Assembly, in its resolution of October 1966, could be regarded, therefore, as acting in accordance with the powers of the League, transferred to it with respect to the Mandate. The resolution itself, in the light of its terminology, gives some limited support for this contention. It does refer to the situation under which the United Nations, as the successor to the League, "has supervisory powers in respect of South West Africa". At the same time, reference to the special "international status" of South West Africa, combined with affirmed reliance on the United Nations Charter, the Universal Declaration of Human Rights and the Declaration on Colonialism[15] is suggestive, however, of a decision upholding the authority of the Assembly, to exercise residual power, virtually amounting to sovereign power, over territories which are subject to an international régime in which the United Nations has authority to exercise supervisory powers with respect to the territory.

Whatever technical agreements may be made concerning the applicability or otherwise of the South West Africa resolution to the régime of trusteeship, however, the decision of the Assembly, in line with the general trend of General Assembly decision-making on colonial issues, epitomizes a style of attitude which would almost certainly lead to the assertion of similar rights with respect to a Trust Territory, virtually amounting to sovereign rights, albeit, as a temporary measure before independence, if it was believed in the Assembly that the political circumstances warranted such a conclusion.

With such a result, as with the South West Africa resolution, however, in the final analysis, the legal standing to be accorded to such a resolution depends upon a more determinative consensus, than is presently possible, on the status to be accorded to such a resolution of the Assembly. In the light of the existing disagreements on the status to be given to Assembly resolutions,[16] U.N. member States, like South Africa, take comfort from the narrow, traditional view of such resolutions, regarding the power of the Assembly, under art. 10 of the United Nations Charter, as being to make recommendations only.

---

13 Toussaint, *The Trusteeship System of the United Nations* (1956), p. 134; International Status of South West Africa, Advisory Opinion, I.C.J. Reports 1950, p. 128, at 167.

14 Ibid.

15 Resolution 1514 (XV).

16 Higgins, *The Development of International Law through the United Nations* (1956), pp. 100-5; Castles, "Legal Status of U.N. Resolutions", 3 Adel. Law Review 68; Skubiszowski, "Enactment of Law by International Organisations" (1955-6), 32 B.Y.I.L. 198.

This view cannot preclude the General Assembly from taking administrative steps to implement its resolutions, at least as far as the operation of the United Nations is concerned.[17] But it can, as South Africa has already demonstrated, lead to a nation virtually ignoring such a resolution if it believes it has the political strength to do so. The moral to be gathered from this situation, as with a number of General Assembly resolutions in recent years, is that until more emphasis is placed upon realistic enforcement measures in the General Assembly, reflecting a willingness by sufficiently powerful States to act together to implement these measures, purported "law-making" decisions in the United Nations need be regarded as having only a limited effect. In the United Nations itself[18] and in countries willing to abide by such decisions such resolutions may provide a legal basis for political action. A State, for example, in the same fashion as the United Nations, may, with justification, regard South West Africa as being no longer under the *de jure* authority of South Africa. Such consequences, however, fall far short of the purported general law-making effect which resolutions, such as the Resolution on South West Africa, are ostensibly intended to achieve.

2. Human Rights Covenants

On 16 December 1966 the General Assembly unanimously adopted two Covenants on Human Rights, the International Covenant on Economic, Social and Cultural Rights[19] and the International Covenant on Civil and Political Rights.[20] At the same time, an Optional Protocol[21] to the International Covenant on Civil and Political Rights was also approved by the Assembly. These decisions of the Assembly ended almost 20 years of deliberations to translate into treaty form the "aspirations" of the Universal Declaration of Human Rights, promulgated by the General Assembly in 1948.

Both before and since the promulgation of the Universal Declaration, Australia has taken a close and active interest in United Nations efforts to produce workable international standards for the better preservation and protection of human rights.[22] It was, for example, during the late Dr. H. V. Evatt's presidency of the General Assembly that the Universal Declaration was approved and Dr. Evatt himself was prominent in the movement which stimulated early United Nations interest in this field. After the promulgation of the Declaration, Australia participated in the long, drawn-out drafting process which followed, leading up to the presentation of the International

17 Skubiszowski, op. cit., p. 202.

18 For an example of the effect of the new status of South West Africa in the working of the United Nations, see G.A.O.R., Fourth Committee 1680th Mtg., 2nd May 1967, paras. 1-2. As a result of the changed status of South West Africa in the United Nations, delegates from the territory were seated with the Committee.

19 Resolution 2200 (XXI).

20 Ibid.

21 Ibid.

22 Harper and Sissons, op. cit., ch. 9.

Covenants to the Assembly. Like most countries, Australia had both procedural and substantive doubts about clauses in both Covenants. In the consideration of the 53 articles in the International Covenant on Civil and Political Rights, for example, Australia opposed finally two of the articles and abstained from voting on six others.[23] Of the 31 articles in the Covenant on Economic, Social and Cultural Rights Australia voted against two of these and abstained from voting on a total of eight.[24]

Despite Australia's support of many of the provisions in the Covenants, however, even at the drafting stage, and its final acceptance of the Covenants in the Assembly, there are key provisions in both Covenants and the Optional Protocol which seemingly provide major barriers to any early action by this country to sign or ratify any of these agreements. Each provides, quite categorically, in the same form, that their provisions "shall extend to all parts of federal States without any limitations or exceptions".[25]

The inclusion of these clauses raises in an acute form problems associated with Australian practice related to the ratification of international agreements. Although it might well be argued that under the Commonwealth external affairs power the Commonwealth may sign, ratify and then legislate internally to implement international agreements, despite other strictures on Commonwealth power in the Constitution,[26] existing practice does not normally accept this position.[27] Australian practice starts from the premiss that Australian ratification of international agreements should not take place unless Australian municipal laws are in accord with the terms of an international agreement. Added to this, where the subject-matter of an international agreement touches or concerns matters over which the Commonwealth does not normally have constitutional authority, then only agreement by all States, and changes in State laws where required, to bring them into accord with international standards can lead to Australian ratifica-

23 Reports of Proceedings of Working Conference on Ratification of International Covenants on Human Rights (Australian Committee for Human Rights Year) (1969), Appendix E, p. 25.

24 Ibid.

25 Covenant on Economic, Social and Cultural Rights, Art. 28, Covenant on Civil and Political Rights, art. 50; Optional Protocol on Civil and Political Rights, art. 10.

26 The weight of academic opinion suggests that the Commonwealth may well have wide authority to use s. 51 (XXIX) of the Commonwealth Constitution to use the external affairs power to implement treaties, with a concomitant right to trench upon powers otherwise reserved to the States. See, for example, Bailey, "Australia and International Labour Conventions", 54 Int. Lab. Rev. 290; Sawer, "Australian Constitutional Law in Relation to International Relations and International Law, in *International Law in Australia* (ed. D. P. O'Connell) (1965), ch. 2. See also *R. v. Burgess; Ex parte Henry* (1936), 55 C.L.R. 608; *R. v. Poole; Ex parte Henry (No. 2)* (1939), 61 C.L.R. 634; *R. v. Sharkey* (1949), 79 C.L.R. 121; *Airlines of New South Wales v. New South Wales,* [1965] A.L.R. 984.

27 Castles, *The Ratification of International Conventions and Covenants, Justice,* No. 2 (June 1969), pp. 1–8.

tion.[28] In the case of the Covenants on Human Rights each deals with a variety of matters which do not come normally within the ambit of Commonwealth authority, and State laws, in a number of instances, do not seem to be in accord with the international standards laid down in these agreements.[29] In these circumstances, and more particularly in the case of the Covenant on Civil and Political Rights, the prospects for early signature and ratification seem unlikely whilst the Commonwealth adheres to its present procedures with respect to ratification of international agreements in circumstances like this.[30]

In the case of each of the Covenants Australia argued strongly, in the early 1950's, for clauses to be included in each draft agreement to accommodate the special constitutional problems facing federal States in attempting to ratify international agreements.[31] If the Australian viewpoint had been accepted, then the Commonwealth, in so far as matters dealt with in the agreements came within Commonwealth authority, would have been able to sign and ratify these agreements without the need for State action to do this. For a time it seemed highly likely that a clause along these lines might have been acceptable. Australia, with Canada and the United States, argued that the absence of such a clause could make ratification for these countries virtually an impossibility, or, at the very least, a long-term aim only. These arguments were rejected finally, however, with the majority of United Nations member States holding that external constitutional limitations on the legislative power of the Governments representing internationally a federal State should not be permitted to limit the extension of the international legal order.[32]

The refusal to accept a special federal clause in the Covenants, along the lines supported by Australia, is one of a growing number of examples where the international community has refused to take into account special problems, like those encountered in Australia, in dealing with the ratification of agreements like these. Amongst the reasons given for the rejection of such clauses is that they open up the possibility that the standards laid down in international agreements may be violated with impunity in a federal State, where the central Government does not have constitutional authority to deal with a subject-matter. It has been suggested, too, that a federal clause may lead to greater burdens being placed upon unitary States, in contrast to federal States.[33]

---

28 Ibid., pp. 7, 8.

29 Proceedings of Working Conference on Ratification of International Covenants on Human Rights, op. cit., Appendix H.

30 The provisions in the Covenant on Civil and Political Rights are mandatory in form. In the case of the Covenant on Economic, Social and Cultural Rights, however, the provisions are generally more directory in form.

31 United Nations General Assembly, Resolution 421 (U). A draft of such a clause was included in a Note Verbale dated 20 July 1955 from the Government of Australia to the Secretary-General of the United Nations, G.A.O.R. (10th Session), Annexes, Agenda Item 28-I, 11 (1955).

32 Castles, *Ratification of International Conventions and Covenants,* op. cit. p. 9.

33 Ibid.

Another problem raised for Australia by these Covenants, which it shares in common with all other countries considering ratification, is the extent to which reservations may be made to them in any instrument of ratification. Both Covenants are silent on this point. In view of the controversial nature of some of the clauses in the Covenants, however, it seems likely that a number of governments may well attempt to ratify the Covenants with reservations and a consensus may well emerge supporting this development in dealing with these agreements.

C. Economic and Social Matters

1. Convention on Racial Discrimination

On 13 October 1966 the Australian Minister for External Affairs signed the International Convention on the Elimination of all Forms of Racial Discrimination.[34] This Convention, which was adopted by the General Assembly in March 1966, was supported by Australia. This country, however, in appending its signature to this agreement, could not, because of Australian practice with respect to treaty ratification, move immediately to do this. Again, as in the case of the problems faced by Australia with respect to ratifying the International Covenants on Human Rights, the matter of ratification had to be delayed, pending Commonwealth-State negotiations, to ensure that both Commonwealth and State laws were in accord with the provisions of the Convention.[35] This Convention was, therefore, added to a growing list of international agreements where the accepted relevance of Commonwealth-State agreement, by the Commonwealth, proved to be a crucial factor in limiting or delaying this country's final acceptance of new legal standards being increasingly accepted formally by member States of the international community.[36]

2. Commission on the status of women

Australia's record with respect to the ratification of international agreements prepared under the aegis of the Status of Women Commission, has been impeded, as in other fields, by the constitutional division of powers between the Commonwealth and the States on many of the matters raised and dealt with through this United Nations body.[37] A relatively minor matter, like the eligibility of women to serve on juries in some States, was put forward in 1967, for example, as one reason why Australia was not in a position to ratify the Convention on the Political Rights of Women, which was promulgated in 1952 and came into force in 1954.[38]

---

34 Department of External Affairs Annual Report, 1 July 1966-30 June 1967 (1967), p. 35.

35 Ibid.

36 Castles, *Ratification of International Conventions and Covenants*, op. cit., Appendix, "Status of a Select List of Multilateral Treaties in Australia", pp. 13-9.

37 Ibid.

38 Ibid., p. 13.

In early 1967 at a meeting of the Status of Women Commission this body considered a draft Declaration on the Elimination of All Forms of Discrimination against Women. Even in these circumstances the influence of the federal-State division of powers seemingly proved to be of considerable importance to the Australian representative in determining this country's voting attitude in dealing with this particular matter. While voting for the Declaration was unanimous the Australian delegate, in an explanatory statement, indicated that whilst this country supported the spirit and objectives of the Draft, the fact that certain provisions fell within the province of State Governments, meant that further consultation with State Governments would be necessary before this country could indicate full support for the move.[39]

D. Colonial and Trusteeship Matters

Formally the establishment of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (known popularly as the Committee of Twenty-Four) made no change in the operation of the United Nations Trusteeship Council. In practice, however, in the light of the political realities of voting patterns in the Fourth Committee of the Assembly, and in the Assembly itself, the Committee of Twenty-Four has, to a considerable extent, pre-empted the role of the Trusteeship Council in forming United Nations attitudes on the remaining Trust Territories as well as other colonial territories which do not come within the purview of Trusteeship Council deliberations.[40]

In 1966 a Report of the Committee[41] gave clear indications of the way in which United Nations machinery, set up under Resolutions of the General Assembly, was forging new methods for dealing with colonial questions. These have raised, *inter alia,* issues of importance for Australia, particularly in terms of the extent to which this country should regard itself as being obliged to co-operate with evolving United Nations techniques for dealing with matters of direct concern to this country.

Four Australian territories were considered in the Report, covering the work of the Special Committee in 1966. These were the Trust Territories of New Guinea and Nauru and the Territories of Papua and the Cocos (Keeling) Islands. In each case the Committee (on which Australia was then represented) undertook reasonably detailed investigations with respect to each territory, with special reference to the steps being taken towards the achievement of independence in these territories under the terms of the Declaration on Colonialism.

---

39 Department of External Affairs Annual Report, op. cit., p. 35.

40 Castles, "The United Nations and Australia's Overseas Territories", ch. 14, in *International Law in Australia* (ed. D. P. O'Connell), pp. 386-7.

41 G.A.O.R., Draft Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, United Nations Decl. A/AC.109/L.339 (6 October 1966).

The record of the Committee's deliberations in 1966 indicates that despite Australia's initial opposition to the Declaration on Colonialism, this country has adopted a general practice of co-operation with the Committee and this is confirmed by the Council Report for the Department of External Affairs for 1966-7. In this Report it is stated that the "Australian delegation has co-operated with the Committee by giving full reports on developments" in the Australian territories dealt with by the Committee.[42]

42 Department of External Affairs Annual Report, op. cit., p. 32.