Australian Practice in International Law

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Between 1970-1973, the period under review, Australia was involved in many significant matters relating to international law. In this context, it is impossible to catalogue or examine in detail all of those matters and some arbitrary choices of material for inclusion have thus been made.

(a) Human Rights

A most comprehensive statement on Australian practice in the human rights field was made by the Prime Minister to the House of Representatives on 24 May 1973. Mr Whitlam indicated that "we have an obligation to remove methodically from Australia's laws and practices all racially discriminatory provisions and from international activities any hint or suggestion that we favour policies, decrees or resolutions that seek to differentiate between peoples on the basis of the colour of their skin. As an island nation of predominantly European inhabitants situated on the edge of Asia, we cannot afford the stigma of racialism.

"Since taking office, the Government has set about systematically fulfilling this policy goal. On 20 March, on the occasion of the international day for the elimination of racial discrimination, I reaffirmed our intention to ratify the 1965 International Convention on the Elimination of All Forms of Racial Discrimination as soon as the necessary legislative and other measures could be completed. Our decision to deny racially selected sports teams the right to visit or transit Australia should also be seen in this light. We have demonstrated our active concern for the rights of peoples oppressed in Rhodesia and South Africa by voting in favour of the last two United Nations General Assembly resolutions on Rhodesia, which we had not previously supported, terminating all trade to and from Rhodesia, and by seeking the closure of the Rhodesia Information Centre in Sydney.

"Australia has also contributed for the first time to the United Nations funds established to assist the educational development and other aspirations of the people of southern Africa. We were represented at an international conference of experts for the support of victims of colonialism and apartheid in southern Africa held in Oslo last month. The purpose of this conference was to formulate a constructive programme of peaceful action to facilitate and hasten the process of decolonisation and the elimination of apartheid.

"Further, we have signed, as a first step towards ratification, the 1966 International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights. The Government has ratified two International Labour Organisation Conventions dealing with freedom of association—

drawn up in 1948—and protection of the right to organise and with the right to organise and bargain collectively—drawn up in 1949 . . .We are ratifying a number of other International Labour Organisation Conventions as soon as possible, in particular those dealing with equal remuneration—drawn up in 1951—and with discrimination in the fields of employment and occupation—drawn up in 1958. The Government has made financial contributions to the United Nations Fund for Population Activities and the International Planned Parenthood Federation."[1]

In 1973, the Labor Government also introduced a Human Rights Bill and a Racial Discrimination Bill which are the first of a number of measures designed to guarantee certain human rights in Australia.

(b) Migration

Amendments to s 64 of the Migration Act 1973 repealed certain sections which were discriminatory on racial grounds. The previous legislation required an Aboriginal who is subject to any control, disability or restriction under the laws of the State or Territory in which he resides to obtain a permit to leave Australia. The Minister for Immigration had power to make an order declaring that a particular Aboriginal does not require a permit to leave Australia even though he is subject to control. Those provisions and the provision which made it an offence to help an Aboriginal to whom the section applies to leave Australia without a permit were repealed by the 1973 Migration Act. In speaking to these amendments, the Minister for Immigration, Mr Grassby, said that "controls on Aborigines as such have now been lifted in all States and in the Australian Capital Territory and Northern Territory. With a view to ratification of the International Convention on the Elimination of all forms of Racial Discrimination it is necessary that this legislative provision, which is discriminatory on racial grounds, be removed."[2]

(c) Nationality and Citizenship

Prior to the passage of the 1973 Australian Citizenship Act applicants for Australian citizenship, depending, for instance, on their country of origin, had to be resident in this country for five years, or three years or only one year before becoming eligible for citizenship. The new Act ends those distinctions. In order to phase out the old provisions a transitional period is provided whereby citizens of the UK and Commonwealth countries, Ireland and citizens of Pakistan and South Africa, living in Australia at 30 November 1973, may until 31 May 1974 obtain Australian citizenship provided they have lived in Australia for the immediately preceding five years. In addition, until 30 November 1975, aliens who have lived in Australia for one year may have up to two years residence in a Commonwealth country counted as residence in Australia.

The amendments contained in the 1973 Citizenship Act, in essence, enable any settler who has lived in this country for two and a half years to apply for citizenship but he must have lived in Australia for three years before citizenship can be granted. There is no "qualifying period" on residence for certain persons. A husband, wife, widow or widower of an Australian citizen, provided they intend to settle here permanently, may apply for citizenship at any time after arrival in Australia. In the case of children, the Citizenship

Act requires those under 18 to obtain the consent of a responsible parent and those under 16 may become citizens at the same time as their parents.

On 31 January 1973, the Minister for Immigration, Mr Grassby, announced[3] that he had issued new instructions following a major review of the Australian migration programme. He said that the new system would be used in all countries where Australia is selecting migrants and it would give greater attention to the assessment of the personality of migrant applicants. Mr Grassby stated that the new procedure had taken the best from the points rating system such as that used by Canada and would ensure greater objectivity by selection officers and more comprehensive examination of prospective migrants. This new procedure had been subjected to field trials in Britain, France, Italy and the United States, and it was designed to provide sufficient detail to allow those cases where there may be strong humanitarian considerations to be properly assessed.

(d) Deportations

During question time in the Senate on 3 April 1973, Senator Withers asked the Attorney-General if an assurance could be given to the Senate that in future no unnaturalised person would be deported from Australia "for alleged political activities without such deportation being referred to a judge of the Supreme Court who is appointed a commissioner under the Migration Act so that the facts surrounding the reason for the deportation may be properly evaluated".

In reply, Senator Murphy said[4] that "he hated to think that any person could be deported whether before or after an inquiry, for political activities. The provisions of the Migration Act give the Government the right to deport persons in certain circumstances such as, for instance, where within 5 years, they have been guilty of crimes of violence against the person or convicted of a crime for which they have been imprisoned for one year or longer. There is already provision for a commissioner to inquire into the matter. It is extremely important that those procedures be observed.

"My understanding is that such persons are given some right to show cause, even where they have been convicted of particular crimes, as to why they should not be deported. There is also the provision, which is often availed of, of lodging a habeas corpus application to ensure that the proper procedures have been carried out. For my part, I think the law ought to be extended, perhaps as far as it has been extended in the United States of America, where there is the clear and present danger theory.

"The other side of the coin is this: If persons are engaged in violence and terrorism, if they use bombs or guns—it is immaterial whether their conduct is associated with political activities—and if they are not naturalised they ought to be liable to be deported. This ought to be the law and it has been the law for some time. If they commit crimes which make them liable to deportation, if there is an apprehension of violence from such persons and they meet the requisites of deportation, I think we would all agree that they have no place in this country".[4]

(e) The International Nuclear Test Case

On 9 May 1973, Australia and New Zealand filed separate but similar Applications in the International Court of Justice against France to restrain

it from conducting atmospheric nuclear tests in the Pacific which would deposit radio-active fallout on those countries. The Applications were made pursuant to the terms of Article 40 (1) of the Statute of the Court. Only the Australian action is considered here. Australia sought to obtain:

(i) a declaration from the Court that if France continued to hold more atmospheric nuclear tests in the Pacific area then it would be acting in disregard of international law and would be infringing the rights of Australia; and
(ii) an Order that France cease to carry out these tests;
(iii) a Provisional Order that France refrain from further testing in the area pending the judgment of the Court.

In 1963 several of the nuclear powers, including the USA, the USSR and UK, signed the Partial Test Ban Treaty which prohibited atmospheric nuclear tests. France is not a signatory to that Treaty. The first French nuclear test took place in the Pacific in 1966 and since then, with the exception of 1969, France has conducted nuclear tests in the Pacific each year.[5] With the failure of diplomatic action to halt the tests, Australia commenced its action at the International Court of Justice.

The competence and jurisdiction of the Court to hear this case, which concerns a novel international dispute, was a matter of primary concern by the parties.

Both Australia and France have accepted the jurisdiction of the Court pursuant to Article 36 (2) of the Court's Statute,[6] the so called "Optional Clause". This Clause permits States to recognise the Court's jurisdiction over certain legal disputes they specify without any further special agreement with any other State accepting the same obligation.

In May 1966, France accepted the jurisdiction of the Court with the reservation that the Court did not have jurisdiction to hear disputes concerning national defence. However, in addition to the jurisdiction claimed under the "Optional Clause", Australia also sought to invoke the Court's jurisdiction under Article 17 of the General Act for the Pacific Settlement of Disputes 1928. That Article provides, "All disputes with regard to which the parties are in conflict to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted to the Permanent Court of International Justice, unless the parties agree . . . to have resort to an arbitral tribunal". Both France and Australia are parties to the General Act, and the "reservations" referred to in Article 33 are not germaine to this dispute. That Article also provides for the ordering of interim measures of protection.

As Higgins[7] indicates, the question of jurisdiction is not as easily disposed of as that—and the problems are vital, because the Court has stated in previous cases that it will not grant interim measures before it has even decided whether it has jurisdiction to proceed on the merits of the case, "if the absence of jurisdiction on the merits is manifest".

Where there is a dispute over the jurisdiction of the Court, it is normal for the State denying jurisdiction to attend and argue its case. France—following in this regard the unfortunate example of Iceland in her dispute with Britain over the fisheries limit—declined to do so.[8] The French Government, by a letter and annex of 16 May 1973, addressed to the Registrar of the Court, indicated that in its opinion the Court was not competent in

the case thereby preventing it from accepting the Court's jurisdiction and making it unnecessary to appoint an Agent. Central to the French argument were the views that the 1928 General Act was no longer effective and was obsolete and that France had accepted the jurisdiction of the Court under Article 36 (2) with the reservation of "disputes concerning activities connected with national defence". The Australian Attorney-General, Senator Murphy, pointed out in his address to the Court, that if the jurisdiction of the Court is in question, then under Article 36 (6) of the Court's Statute, the Court itself shall decide if it has jurisdiction.

Whether the 1928 Act has lapsed is a moot point. In 1949, on the recommendation of the General Assembly of the United Nations, a revised General Act for the Pacific Settlement of Disputes had been opened for accessions. The intention was to permit those States which had not been eligible in 1928 to become party to the earlier Act to become party to a comparable Act, and also to make the new Act relate more to the UN system than to the defunct League's system. Of the twenty States party to the 1928 Act, only five opted to come under the Revised Act. Neither France nor New Zealand nor Australia did so. Is the old Act still alive as between these three—and as between other nations such as Britain, in a comparable position? While the 1928 Act has never been formally denounced (though it has provision for denunciation at intervals of time), it has never been used. Does either that fact, or the fact of a new Act covering the same subject matter and tied more specifically to the UN system, indicate that the 1928 Act has indeed lapsed? All one can note is that in 1957 France herself invoked the 1928 General Act in the *Norwegian Loans Case*.[9] Although in this case the French application against Norway was based exclusively upon Article 36 (2) of the Court's Statute, in the hearings on the jurisdiction the French Government made the point that the General Act of 1928 could also establish the jurisdiction of the Court. The Court held that it could not entertain this line of argument at this late stage, and would be prepared to look at only the basis set out to the French application—viz Article 36 (2). So, although the Court did not rule upon the issue, France was prepared in 1957 to rely upon the 1928 Act.[10]

The opening of the hearings of the case took place at The Hague, in public on 21, 22, 23 and 25 May 1973, and present in the court were the Agent, Co-Agent, Counsel and other advisers of the Government of Australia. The Australian Government, at the beginning of proceedings and pursuant to Article 31 (2) of the Court's Statute, notified the Court of its choice of Chief Justice Sir Garfield Barwick to sit as Judge ad hoc.

Pending its final decision, the Court gave an order for interim measures of protection in favour of Australia by 8 votes to 6.[11] This Order, which was handed down on 22 June 1973, provides (inter alia):

> "The Governments of Australia and France should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court or prejudice the rights of the other party in respect of the carrying out of whatever decision the Court may render in the case, and, in particular, the French Government should avoid nuclear tests causing the deposit of radio-active fallout on Australian territory; the Court further decided that written proceedings shall first be addressed to the questions of the jurisdiction of the Court to entertain the dispute, and of the admissibility of the application."

The majority of the Court, in making its Order for interim measures of

protection, appeared to accept the arguments made by Australia, and that, to do so, it was not necessary for the Court to satisfy itself that it had jurisdiction to hear the case, it being sufficient that the provisions invoked by Australia appear "prima facie, to afford a basis on which the jurisdiction of the Court might be founded." Indeed the majority appear to have accepted Australia's bases for the indication of provisional measures, namely Article 41 of the Statute of the Court and Article 33 of the General Act of 1928, and held that the arguments and material presented to it by Australia appeared on the face of it to provide a basis on which its jurisdiction might be based, which as mentioned above was sufficient to enable the Court to make the Order. The Court also took into account the allegations of Australia, that there was an immediate possibility of further testing by France, when deciding on whether or not to order interim measures of protection, but did make it clear that since the object of Article 41 of the Statute of the Court is to preserve the respective Rights of the parties pending the decision of the Court and presupposes that prejudice should not be caused to parties in the dispute, then these objects and presuppositions would have to be taken into account when making the Order. It showed in doing this that it was anxious that its final decision in the case, which is still to be heard at the time of writing, should not be capable of anticipation by reason of the passing of any interim measures.

It is interesting to note the views expressed by some of the Judges who dissented from the majority opinion. For instance, Judge Forster stated that before such an Order could be made under Article 41 (1) he would have to be completely satisfied that the Court had jurisdiction to hear the case before it. In his opinion the Court did not have two distinct jurisdictions namely: one to be exercised with respect to provisional measures of protection and another to deal with the merits of the case, and accordingly, the Court should have gone much further into the consideration of whether or not it had jurisdiction to hear the case, especially since there was disagreement between the two countries concerning such jurisdiction or lack of it as the case may be. He went on to conclude that in his view, France had made an exception to the jurisdiction of the Court, namely disputes concerning activities connected with national defence, and since here, the disputes concerned activity connected with the national defence of France, then the Court lacked jurisdiction to hear the matter and so could not pass an order for provisional measures. Judge Petron also dissented on the ground that the Court had not discussed fully enough whether or not it had jurisdiction to hear the case before making the order for provisional measures and added to his dissenting judgment the reason that the Application by Australia instituting proceedings may have been inadmissible since the control of nuclear weapons and tests, no matter how dreadful, is "primarily a matter for statesmen".

Judge Ignacio-Pinto dissented because he found the grant of interim measures legally unjust even though he did express the view that he was, as a person, against nuclear tests being carried out anywhere in the world. He said that this case was different from any other case ever brought before the Court and so could not be resolved along the lines of former reasons put forward by the Court and further that the validity of the General Act of 1928 on which Australia relied was still not proved. He referred to the

French exclusion from the Court's jurisdiction of all "disputes concerning activities connected with national defence" which had as its basis Article 2 (7) of the United Nations Charter, which prevents the UN from intervening in the domestic jurisdiction of any state.

In his opinion, the arguments advanced by Australia particularly with regard to the validity of the General Act were not relevant, since it is admitted in international law that a special rule overrides a general rule and it would be difficult not to accept that the reservation of the French Government overrides the General Act which dates from a period before the Second World War, an era in which nuclear weapons did not exist. This judge stressed the right of France to act as it thinks fit within the limits of its sovereignty and said that other places such as Australia could do nothing about this except gain reparation for any damage that might be done. Judge Ignacio-Pinto also held that the question of illegality exceeded the competence of the Court and became a political problem.

The longest dissenting opinion was delivered by Judge Gros of France.[12] His opinion dealt largely with Articles 53 and 41 of the Court's Statute which concern, respectively, the non-appearance of a party before the Court and the power of the Court to grant provisional measures of protection to a party. He did not advert to the substantive problems of jurisdiction and admissibility as those issues were deferred by the Court to the next phase of proceedings. The Court is scheduled to hear argument on these substantive issues in July, 1974.

Whatever the final result in this Case, Australia and New Zealand have given the Court an opportunity to articulate clear principles concerning the admissibility of claims before the Court, the jurisdiction of the Court itself and the status of the 1928 Act. By bringing this action those States have also given the Court a much needed fillip to restore its prestige in the world community.

(f) Hijacking of Aircraft

On 26 October 1972, the Australian Parliament passed the Crimes (Hijacking of Aircraft) Act which, as its title indicates, endeavours to combat air piracy and the acts of violence that accompany the commission of that offence. In introducing this legislation into Parliament Mr Bowen,[13] the Minister for Foreign Affairs, said that "this was the third significant step taken by the Commonwealth to combat the problems of aircraft hijacking". He indicated that the first step was taken in 1963 with the passage of the Crimes (Aircraft) Act.

That Act created the Commonwealth offences of hijacking in respect of aircraft engaged in interstate flights, aircraft, including defence aircraft owned by the Commonwealth, and foreign aircraft that were engaged in a flight ending in or commencing in Australia. The Act also dealt with crimes committed on board aircraft engaged in interstate flights; in flights to and from overseas and, in respect of Australian registered aircraft and Commonwealth owned aircraft, crimes committed on such aircraft even if they were engaged in flights outside Australia. The law to be applied in respect of such crimes was the criminal law of the Australian Capital Territory. In effect, the Act made aircraft to which it applied Australian territory for the purpose of the application of criminal law.

The second major step was taken in 1970 when Parliament enacted the Civil Aviation (Offenders on International Aircraft) Act. That Act gave effect to the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft. The Convention established that, as for ships, the law primarily applicable to aircraft was the law of the State in which the aircraft was registered—a flag law. The Convention conferred upon an aircraft commander power to impose restraint in cases where the action was necessary for the protection of the aircraft or persons or property on board. It provided for the delivery of the persons who had been restrained by the commander of the aircraft to the responsible authorities at the place where the aircraft landed. The Convention imposed upon its contracting parties obligations to exercise jurisdiction over offences committed on board aircraft, the primary responsibility being placed on the State of registration of the aircraft. Machinery was provided by the Act for the holding in custody and extradition of offenders. There was power also to return an offender to his home State or to the Territory in which he had begun his journey.

Neither the Convention nor the Act created any new offence. Rather the intention was to ensure the expeditious dealing with offenders under law. Like all conventions on this subject the Tokyo Convention applied only to international civil aviation. Military, customs or police aircraft were excluded from its operations. The third step was the acceptance of The Hague Convention. This Convention was made at The Hague in December 1970 and is entitled 'Convention for the Suppression of Unlawful Seizure of Aircraft'. The Convention takes the unusual course of creating in Article 1 by international legislation, so to speak, the offence of hijacking. The offence is committed when a person who, being on board an aircraft in flight, unlawfully by force, threat or any other form of intimidation, seizes or exercises control of the aircraft or attempts to perform any such act. An accomplice on board such aircraft also commits the offence. Hijacking is generally accepted as a word descriptive of the offence. By Article 2 each contracting State is obliged to make the offence punishable by severe penalties.

The Hague Convention was signed on behalf of Australia in June 1972. The Convention came into force on 14 October 1971 following ratification by the tenth signatory state, the United States of America. The main purposes of the 1972 Act are to approve accession by Australia to the Convention, to create the offence of hijacking in cases to which the Convention is applicable and to provide the necessary procedures with respect to the taking of offenders into custody and their detention in custody pending a decision whether to try them or extradite them. There is also provision for the holding of a preliminary inquiry into the facts of a hijacking, as provided for by the Convention, the findings of which are, under the Convention, to be reported to other interested countries.

The opportunity has also been taken, however, to extend the ambit of Commonwealth law in respect of aircraft crimes to some categories of offences with which the Convention does not deal. The offence of hijacking is committed in a number of circumstances which are set out in s 8 of the Bill. The first circumstance is the offence to which the Convention directly applies and which Australia, pursuant to the Convention, is required to make punishable. The remaining circumstances are not wholly covered by

the Convention but, in the view of the Government, are cases to which this legislation should apply. These other circumstances are: (a) the hijacking of an aircraft on a flight in the course of trade and commerce with other countries or among the States or on a flight within a territory, between two territories or between a State and a territory; (b) the hijacking of a Commonwealth aircraft, including a defence aircraft; (c) the hijacking of an aircraft of the government of a foreign country in Australia or on a flight commencing or ending in Australia; and (d) the hijacking of an aircraft outside Australia by an Australian citizen.

Cases falling within paragraph (a) above would mostly come within the Convention with the important exception of interstate flights within Australia. Cases falling within paragraph (d) would also be mostly covered by the Convention but the Convention would not cover the hijacking by an Australian citizen of a foreign aircraft in flight between two places both within the country of registration of the aircraft. The other provisions ensure that in conjunction with the Crimes (Aircraft) Act of 1963 the offence of hijacking is comprehensively covered. The Act provides that the maximum punishment for hijacking is imprisonment for life. The Convention also requires its contracting States to establish their jurisdiction over 'any other act of violence' against passengers or crew committed by the alleged hijacker in connection with hijacking.

Section 9 of the Act therefore provides for the creation of offences arising from acts of violence committed on board an aircraft against the passengers or crew. The circumstances in which those offences are punishable are substantially the same as those in which hijacking is made punishable by s 8. The section therefore is not confined only to those acts of violence occurring in connection with a hijacking. It covers all acts of violence committed on an aircraft for which there may be no Australian law currently applicable. As in the case of the Crimes (Aircraft) Act 1963 the law that is made applicable to such offences is that of the Australian Capital Territory.

Section 10 of the Act embodies the obligation imposed by the Convention upon Australia to take the proper measures to restore control to the commander of an aircraft on which a hijacking has been committed or attempted. The remaining sections of the Act provide appropriate machinery for dealing with occurrences of hijacking and persons who have committed offences against the Act. There is substantial similarity between those provisions and the corresponding provisions of the 1970 Act. Provision is made to ensure that any hijacked aircraft is restored to the control of its lawful commander and for the taking of alleged offenders into custody or for their arrest. Where it is necessary for the facts of an alleged offence to be inquired into, a magistrate is authorized to hold an inquiry and the Act details the requirements to be observed and procedures to be followed in the holding of an inquiry.

On 12 October 1972, Australia signed the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation which deals principally with acts of sabotage and armed attacks against international civil aviation and its facilities. To enable Australia to ratify the Montreal Convention and bring its domestic legislation into line with the provisions of the Convention, the Crimes (Protection of Aircraft) Act

received Royal Assent on 27 May 1973. Australia's instrument of ratification was deposited on 12 July 1973.[14]

(g) Extradition

Two Acts closely associated with the Hijacking of Aircraft Act were passed by the Federal Parliament in 1972. Those Acts, the Extradition (Foreign States) Act 1972 and the Extradition (Commonwealth Countries) Act 1972, made the offence of hijacking an extradition crime. In order to implement the Montreal Convention as a basis for extradition in appropriate cases, consequential amendments were made in 1973 to those Extradition Acts.

(h) The Movement towards Self-Government and Independence by New Guinea

The emergence of Papua New Guinea into the modern world and as an independent nation has been of especial importance for Australia.

On 1 December 1973, Papua New Guinea formally became self-governing and its independence is expected to come by 1975. A Constitution is presently being prepared by an all-party Constitutional Planning Committee of the members of the Papua New Guinea House of Assembly. That Constitution is planned to make provision for all major aspects of the system of government in Papua New Guinea and the Constitution's adoption will signify the assumption of full independence by Papua New Guinea. The only powers retained by Australia until independence are those of foreign relations and defence.

In a statement to the Parliament on 24 May 1973, the Prime Minister, Mr Whitlam, said:[15]

"In the period before independence the government will do everything possible to meet Australia's obligations under the Trusteeship Agreement and to ensure the smooth and amicable transfer of power to the government of a United Papua New Guinea. We very well know how important this period is for the foundation of Australia's future relationship with the independent nation of Papua New Guinea. I look forward to this relationship developing fraternally and on a broad front that goes well beyond normal diplomatic ties. Papua New Guinea will occupy a special position on Australia's network of relationships, but we do not seek an exclusive relationship with Papua New Guinea which will want to find her own place in the international community. As Papua New Guinea's foreign service develops and as her range of international interests grow, we shall be ready to help where we can and as we are asked."

(i) Law of the Sea

Continental Shelf

On 30 October 1970, the Minister for Foreign Affairs, the Rt Hon W McMahon, made the following statement in the House of Representatives on Australia's Continental Shelf:[16]

"An article in a financial newspaper recently criticized the principles on which Australia has acted in relation to granting petroleum exploration permits on the continental shelf between the northern coast of Australia and Indonesian Timor and questioned the international validity of Australia's actions. The subject is of national importance both to Australia and to its great neighbour, Indonesia. But the article itself is factually so inaccurate and doctrinally so confused as to be altogether most misleading. I take this opportunity of putting the position in proper perspective.

I make four points. First, Australia based its 1967 legislation for regulating the exploration and exploitation of the petroleum resources on the continental

shelf squarely on the International Geneva Convention of 1958, to which Australia is a party. So are 40-odd other states, including the United States, the Soviet Union, the United Kingdom, France, Canada, New Zealand, Malaysia and Thailand. To follow the convention was strictly in accordance with Australian constitutional law.

There are some distinctive features of detail in the Australian legislation, for instance the so-called picture-frame lines which delimit for domestic purposes the areas within which the respective states and territories should exercise agreed administrative functions. But the principles, based as they are on the Convention itself, are common to many other countries, and in accordance with international practice.

Second, the 1958 Convention embodies the two conceptions on which the law of the continental shelf is founded. It expressly states what has been called the expanding rim doctrine—that is, that the shelf extends to the 200-metres depth line, and beyond it to the limit of exploitability. From this it is crystal clear that there is nothing in the law as it stands to restrict exploration permits to the 200-metres depth line. Many other countries besides Australia—including the United States, Canada and New Zealand—have granted such permits.

The International Court of Justice has emphasised in a recent North Sea case that what is known as the morphological concept is also inherent in the Convention. Indeed it is the foundation of the doctrine which the lawyers later took over and developed. The morphological concept is that the continental shelf is the natural prolongation under the sea of the land mass of the coastal state, out to the lower edge of the margin, where it slopes down to and merges in, the deep ocean-floor or abyssal plain. These two concepts are in no way inconsistent. They both point to the outer edge of the margin as the limit of the coastal state's rights.

Third, the rights claimed by Australia in the Timor Sea are based unmistakably on the morphological structure of the sea bed. The essential feature of the sea bed beneath the Timor Sea is a huge steep cleft or declivity called the Timor Trough, extending in an east-west direction, considerably nearer to the coast of Timor than to the northern coast of Australia. It is more than 550 nautical miles long and on the average 40 miles wide, and the sea bed slopes down on opposite sides sides to a depth of over 10,000 feet. The Timor Trough thus breaks the continental shelf between Australia and Timor, so that there are two distinct shelves, and not one and the same shelf, separating the two opposite coasts. The fall-back median line between the two coasts, provided for in the Convention in the absence of agreement, would not apply for there is no common area to delimit. This Australian view is of course well known to Indonesia. There has in fact been a recent exchange of views, still incomplete, between Indonesian and Australian officials.

Fourth, the sea bed proposals made last May by the President of the United States are based on the two concepts of the continental shelf that I have mentioned. Many developing states in the sea bed discussions in the United Nations, have expressed the desire to secure a revision of the 1958 convention, so as to restrict to the 200-metres depth line the area of national jurisdiction on the continental shelf. President Nixon, however, has put forward the compromise proposal that from the 200-metres depth line out to the continental margin the coastal state would continue to control sea bed operations, through administering an international mining code and holding as trustee for the international community a substantial proportion of the revenues derived.

Whatever eventual legal arrangements will emerge for the sea bed, the present law will not be changed except by agreement, and without adequate safeguards for existing investment there is little or no likelihood of agreement. I therefore do not accept the view that titles which Australia has granted in the Timor Sea are open to question."

(j) United Nations Conference on the Law of the Sea

On 19 December 1970, the United Nations General Assembly decided[17] to convene in 1973, a comprehensive international conference on the Law of the Sea which would deal with:

(a) the establishment of an equitable international regime for the area of

sea-bed beyond national jurisdiction, which Resolution 2749 had declared to be "the common heritage of mankind."

(b) a precise definition of the area; and

(c) the broad range of related issues, including those concerning the regime of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits) and contiguous zone, fishing and conservation of the living resources of the high seas (including the question of preferential rights of coastal states) the preservation of the marine environment (including inter alia the prevention of pollution) and scientific research.

The preparatory work for the 1973 Conference (now adjourned until 1974 in Caracas, Venezuela) has been entrusted to a Preparatory Committee of 86 States, which is an enlargement, with a widened mandate, of the General Assembly's Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor beyond the Limits of National Jurisdiction.

At its organizational session in March 1971, the Preparatory Committee decided to establish three sub-committees of the whole. The first will deal with the sea-bed regime and the international machinery to give effect to it. The second will prepare for the Conference a comprehensive list of subjects and issues of the related law of the sea matters that the Conference should consider, and prepare draft treaty articles on them. The third will deal with the preservation of the marine environment including control of pollution.

Between 1971 and 1973 numerous sessions of each of the three sub-committees were held in which a great deal of substantive work was carried out. Reports from the sub-Committees were given to the main Committee. From 2 July to 24 August 1973, the Committee on the Peaceful Uses of the Sea-bed held its Sixth Session in Geneva.

Ambassador R L Harry, the Leader of the Australian Delegation to Sub-Committee 11 outlined[18] the Australian position on the question of archipelagos as follows:

"My delegation bases its support for the archipelagic concept on a clear principle —a principle that guides our approach relating to several issues before this Committee. That principle is that the oceans of the world are the heritage and concern of all mankind, but that coastal states—in which 95% of mankind lives—by virtue of their position bordering on or located in these oceans, have special interests in certain oceanic areas. Those special interests derive from the potential which the oceans have for contributing to or detracting from the security of the coastal state, the potential of the oceans for affecting the environment of a coastal state and the importance to the coastal state of the management—both for the well-being of its own people and on behalf of the rest of mankind—of the resources of the sea in an area adjacent to its coast. We believe that this philosophy is recognized by all delegations. The only problem is to identify and agree upon the extent of control or jurisdiction which is required by a coastal state to safeguard its special interests . . .

. . . The co-sponsors of the archipelagic concept have eloquently expounded the particular reasons why they believe that they should be accorded a special place in the new emerging law of the sea. We agree that a state spread over a large area of ocean with its population scattered throughout a large number of islands—over 13,000 in the case of Indonesia—cannot be expected to exercise political control effectively over its component islands if those islands are separated by areas of water accorded the status of high seas. We agree that in such an environment, the potential for external interference from seaward in the political affairs of a state is manifestly greater than in a continental coastal state. The consequences of marine pollution on the marine environment of an archipelagic

state are also significantly more serious than for a continental coastal state. Again, the reliance of an archipelagic state on marine resources is normally greater than for a continental state. Thus we accept—based on the principle outlined earlier—that an archipelagic state has special concerns related to:
—the preservation of its security and political unity;
—the preservation of its marine environment; and
—the exploitation of its marine resources.

These concerns, in our view, justify inclusion of the whole water area inside an archipelago under the sovereignty of the archipelagic state. I shall return in a moment to the characteristics of archipelagic waters.

In advocating that special consideration should be accorded to archipelagic states, my delegation, of course, has in mind also its special responsibility to the people of Papua New Guinea, represented at this session by two members of my delegation.

Papua New Guinea is now entering the stage of formal self-government with the assurance of attaining independence before the Convention towards which we are working is concluded, or in any event before its entry into force. Papua New Guinea shares a land border with its archipelagic neighbour the Republic of Indonesia on the island of New Guinea. The remainder of the total land area of 183,540 square miles comprises 600 islands, including an arc of major islands formed by Bougainville, New Ireland, New Britain, New Hanover and Manus Island. By reason of geography alone, therefore, Papua New Guinea has a vital interest in the ultimate outcome of the conference on the Law of the Sea. With a population of 2.5 million and a high rate of population growth, the new sovereign state will face those problems shared by other developing countries: the need to maintain national unity in the face of difficult problems of communication and potentially divisive geographical factors and the need to make the most advantageous use of the natural resources available to it.

The decision as to the legal status which should be claimed for the waters between its islands is a matter which my Government considers should be made by the government of an independent Papua New Guinea. The Chief Minister of Papua New Guinea recently signed the agreement with Indonesia, negotiated in concert by my Government and the Government of Papua New Guinea, delimiting the adjacent seabed boundary. We do not envisage, however, unless this should be specifically requested by the Government of Papua New Guinea, that it will be necessary to determine, in advance of independence, other aspects of the maritime boundary of the future state. We shall seek, as the Government of Papua New Guinea desires, to keep the options of the emerging state open. An important option for Papua New Guinea is the possibility of seeking recognition as an archipelagic state. My Government is confident that members of this Committee will pay sympathetic attention to its needs in connection with the definition of archipelagic states.

Mr Chairman, while supporting the archipelagic concept as important to our friends and developing neighbours, my delegation assumes that responsible criteria can be formulated to confine recognition of archipelagic status to those States which are genuinely archipelagic in character, and to which the special concerns, referred to earlier, are applicable. The extent of particular archipelagic claims must, of course, be limited to an area consistent with those special concerns. We do not, for example, envisage that every single island over which a state exercises sovereignty must necessarily be included within the archipelagic perimeter any more than islands included in the territory of a continental state, but situated outside its territorial sea, need be included within the area of sea over which that continental state exercises sovereignty. Secondly, the Australian Government believes that there must be an assured and unimpeded right of passage—which we believe need not be inconsistent with the special concerns of the coastal state—at least along adequate traffic lanes—through the waters enclosed within an archipelagic state."

(k) Immunities

(*a*) *Traffic Offences*

In the House of Representatives on 11 September 1973, the Deputy

Leader of the Liberal Party, Mr Lynch, asked the Minister for Foreign Affairs, Mr Whitlam, on notice:

(1) On how many occasions did diplomats in Australia claim diplomatic privilege in respect of parking and traffic offences during (a) 1971-72 and (b) 1972-73?
(2) What sum in fines was not collected as a result of the exercise of diplomatic privilege during each of those years?

The reply by the Minister was:

(1) Accurate statistics are not kept, as in all but the worst cases the offenders are not charged but are given at most an oral warning. Diplomatic privilege is not claimed, rather it exists as a right at all times and is respected as such. Where a serious traffic offence is involved the facts are reported to the Department of Foreign Affairs which then takes the matter up with the Embassy or High Commission concerned.
(2) As no accurate statistics of offences are available, the value of fines not collected cannot be supplied.[19]

(*b*) *Rates*

Senator Gietzelt asked upon notice:

(1) Has the Australian Government decided to require all embassies to pay rates on properties in Canberra in an endeavour to bolster the City's municipal budget?
(2) Will the Government give consideration to extending the important principle, viz, that rates should be paid on all properties, by agreeing that rates be paid on all Australian Government properties to local authorities thus rectifying a serious grievance now existing between them?

On 13 November 1973, Senator Murphy said that the Minister for Services and Property had provided the following answer to the question:

(1) Before 1 July 1973 embassies in Canberra were required to pay water charges but were exempt from the payment of general and sewerage rates.
Following negotiations with the Treasury and the Department of Foreign Affairs it has been agreed that in future all diplomatic properties will be charged for specific services beneficial to the property, such as water, sewerage, engineering services and parks etc.
Diplomatic properties will continue to be exempt from payment of other elements of the general rate (eg public libraries, vacation play centres) under the terms of the Vienna Convention. The Australian Government will pay the amount for which diplomatic properties are exempt . . .[20]

(*c*) *Bombing of Embassies*

Senator Mulvihill asked upon notice:

Will any of the perpetrators of bomb attacks on Yugoslav consulates who are apprehended and found guilty be returned to Yugoslavia as is the practice followed by the West German Government in such cases . . .

On 4 May 1971, Senator Wright said that the Minister for Foreign Affairs had furnished the following reply:

The purpose of an extradition agreement between two countries is to provide for the return to one country for trial of a person who has committed or is alleged to have committed an extraditable offence in that country and has fled to the other country. If a person were apprehended and charged with a bomb attack upon a Yugoslav consulate in Australia he would be prosecuted under Australian law.[21]

(l) Recognition

Diplomatic Relations with China

A joint communique establishing diplomatic relations between Australia and the Peoples' Republic of China was signed in Paris on 22 December 1972. The text of that communique reads as follows:

"The Australian Government recognizes the Government of the People's Republic of China as the sole legal Government of China, acknowledges the position

of the Chinese Government that Taiwan is a province of the People's Republic of China and has decided to remove its official representation from Taiwan before 25 January 1973."

In the Senate on 13 March 1973, Senator Little asked the Minister representing the Minister for Foreign Affairs, upon notice: 'Will the Government oppose or support any claims by Communist China for the former Embassy of Taiwan's property in Australia?....'

In reply, Senator Willessee said—"the Government has taken no position on the question of ownership of property in the name of the former "Republic of China" Embassy or Consulates at the time Australia recognized the People's Republic of China. In the Government's view that question is strictly a legal matter which it is for the Australian Courts to decide, should the matter be brought before them."[22]

Diplomatic Relations with East Germany

A Joint Communique was issued on 22 December 1972, which gave effect to the decision to establish diplomatic relations by Australia with the German Democratic Republic. That Joint Communique was agreed to but not actually signed by the States Parties.

(m) Ratification of International Agreements, Conventions and Treaties

On 27 March 1973, Mr N H Bowen asked the Minister for Foreign Affairs upon notice what international conventions, treaties and agreements had been signed, ratified or acceded to by Australia since 2 December 1972, and upon what dates.

Mr Whitlam's reply[23] is recorded in the following tabular form:

Treaty	Date and place of signature	Entry into force	Action taken by Australia
1 International Covenant on Economic, Social and Cultural Rights	19 December 1966, New York	Not yet in force	Signed 18 December 1972 (Subject to ratification)
2 International Covenant on Civil and Political Rights	19 December 1966, New York	Not yet in force	Signed 18 December 1972 (Subject to ratification)
3 International Cocoa Agreement	15 November 1972, New York	Not yet in force	Signed 12 January 1973 (Subject to ratification)
4 Treaty on the Non-Proliferation of Nuclear Weapons	1 July 1968, London, Washington, New York	5 March 1970	Ratified 23 January 1973 (Signed 27 February 1970)
5 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof	11 February 1972, London, Washington, Moscow	18 May 1972	Ratified 23 January 1973 (Signed 11 February 1972)
6 (a) Vienna Convention on Consular Relations..	24 April 1963, Vienna	19 March 1967	Ratified 12 February 1973 (Signed 31 March 1964)
(b) Optional Protocol to the Consular Relations Convention on the Compulsory Settlement of Disputes	24 April 1963, Vienna	8 June 1967 ..	Acceded to 12 February 1973
7 Agreement with Indonesia concerning certain Boundaries between Papua New Guinea and Indonesia	12 February 1973, Jakarta ..	Not yet in force	Signed 12 February 1973 for Australia by Michael Somare, Chief Minister Papua New Guinea (Subject to ratification)
8 ILO Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948	9 July 1948, Geneva	4 July 1950 ..	Ratified 28 February 1973
9 ILO Convention No. 98, Right to Organise and Collective Bargaining Convention, 1949	1 July 1949, Geneva	18 July 1951 ..	Ratified 28 February 1973

* Editor

1 *Hansard*, 28th Parliament, House of Representatives p 2649
2 *Hansard*, 28th Parliament, House of Representatives p 54 28 February 1973
3 *Australian Foreign Affairs Record*, February, 1973, pp 133, 134
4 *Hansard*, Senate, 28th Parliament, p 751
5 See p 2 of the Australian Application Instituting Proceedings against the French Republic for a table of France's atmospheric nuclear tests
6 Article 36 (2) of the Statute of the Court provides:
"The States parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
a the interpretation of a treaty;
b any question of international law;
c the existence of any fact which, if established, would constitute a breach of an international obligation;
d the nature or extent of the reparation to be made for the breach of an international obligation."
7 Rosalyn Higgins: "French Tests and The International Court", *The World Today*, July, 1973, Vol 29, No 7, pp 277, 278.
8 Ibid
9 *ICJ Reports* 1957
10 Higgins, op cit pp 278-279
11 Two Judges, the President Judge Lachs and Judge Dillard were prevented by illness from voting.
12 It is interesting to note that this Judge appeared as Agent for France in the Norwegian Loans Case.
13 *Hansard*, 27th Parliament, p 3315-3317
14 *Civil Aviation* 1972-73, p 10
15 *Hansard*, 28th Parliament, House of Representatives, p 2647
16 *Hansard*, 26th Parliament, House of Representatives, p 31074
17 In Resolution 2750 (c)
18 Report of the Australian Delegation to the Sixth Session of the United Nations Committee on the Peaceful Uses of the Sea-bed at the United Nations European Headquarters Geneva, Annex 17, p 2 ff
19 *Hansard*, 28th Parliament, House of Representatives, p 828
20 *Hansard*, 28th Parliament, Senate, p 1750
21 *Hansard*, 26th Parliament, Senate, p 1271
22 *Hansard*, 28th Parliament, Senate, p 391
23 *Hansard*, 28th Parliament, House of Representatives, pp 764-765