International Organisations

International Court of Justice. Nomination of candidates for election. Australian national group

In the House of Representatives on 8 March 1978 the Minister for Foreign Affairs, Mr Peacock, was asked upon notice:

(1) Was an Australian national group established in 1960 for the purpose of nominating candidates for election by the General Assembly and by the Security Council of the United Nations to fill vacancies in the International Court of Justice.

(2) If so, who have been members of the group on each occasion that it has nominated a candidate or candidates.

(3) Whom did the group nominate as a candidate or candidates on each occasion.

(4) Has a nomination been put forward to the group on behalf of the Government on any of those occasions; if so, did the Chief Justice refrain from participating in the group's deliberations, as Chief Justice Dixon refrained from participating in the then national group's deliberations on nominations for the triennial elections in 1957 (Hansard, 19 March 1957, page 13 and 22 May 1957, page 1894).

On 2 May 1978 the Minister answered as follows (HR Deb 1978, Vol 109, 1666):

(1) Yes.

(2) and (3) The Australian National Group nominated candidates for the elections held in 1960, 1966, 1969 and 1975.

(a) In 1960, the Group nominated Philip G Jessup (USA), Helge Klaestad (Norway), Vladimir M Koretsky (USSR) and Sir Muhammad Zafrulla Khan (Pakistan). For the casual vacancy created by the death of Sir Hersch Lauterpacht the Group nominated Sir Gerald Fitzmaurice (UK). At the time of making its nominations, the Group comprised Chief Justice of the High Court Sir Owen Dixon, former Chief Justice Sir John Latham, Sir Kenneth Bailey, then Commonwealth Solicitor-General, and Professor KO Shatwell, then Dean of the Faculty of Law in the University of Sydney.

(b) In 1966 the Group nominated Sir Kenneth Bailey. At the time of making its nomination, the Group comprised Sir Owen Dixon, Chief Justice Sir Garfield Barwick, Sir Kenneth Bailey, then Australian High Commissioner in Ottawa, and Professor Shatwell.

(c) In 1969, the Group nominated Dr Thanat Khoman (Thailand), Mr Constantin Stavropoulos (Greece) and Dr Jiminez de Arechaga (Uruguay). The Group comprised Mr RJ Ellicott, then Commonwealth Solicitor-General, Sir Garfield Barwick, Sir Kenneth Bailey, then Special Consultant in International

Law to the Department of External Affairs, and Professor Shatwell.

(d) In 1975, the Group nominated Dr Edvard Hambro (Norway), President Manfred Lachs (Poland), Professor Shigeru Oda (Japan) and Judge CD Onyeama (Nigeria). The Group then comprised Sir Garfield Barwick, Mr MH Byers, QC, Commonwealth Solicitor-General, Mr CW Harders, Secretary of the Attorney-General's Department, and Professor Shatwell.

(4) I am advised that before each election the Government has consulted with the Group to ensure that the Group is aware of the foreign policy implications of any decision it may make in regard to the nomination of candidates. The Government has also at times suggested candidates which the Group might consider nominating, but always on the understanding that the Group is an independent body which makes its own decisions as to the weight which should be given to suggestions put to it.

(5) I am advised that since his appointment to the Australian National Group in 1964, the Chief Justice has participated fully in the Group's deliberations before each triennial election . . .

In the Senate on 13 September 1978 the Attorney-General, Senator Durack, was asked upon notice:

(1) Has the Australian National Group yet made its choice of candidates for election to the International Court of Justice; if so, who are the candidates, if not, when will the decision be made, and will the Attorney-General make the names public immediately.

(2) What advice did the Foreign Affairs Department give the Group concerning possible nominees.

(3) Did the Secretary of the Attorney-General's Department, who is a member of the Group, consult with him about the Group's nomination.

On 10 October 1978 the Attorney-General answered as follows (Sen Deb 1978, Vol 78, 1181):

(1) Yes. The Group nominated Professor Roberto Ago (Italy), Professor Richard Baxter (USA), Ambassador Sette Camara (Brazil) and Dr Abdullah El Erian (Egypt).

(2) The Department of Foreign Affairs provided the group with factual material relating to the nomination of candidates by other National Groups and brought foreign policy considerations to the Group's attention.

(3) No.

On 26 October 1978 the Attorney-General, Senator Durack, was asked upon notice.

Did the Australian National Group consult any of the following groups before making its nominations of candidates for the International Court of Justice: (a) the High Court; (b) legal faculties and schools of law; and (c) national academies and national sections of international academies devoted to the study of law, in accordance with the recommendations of

Article 6 of the Statute of the International Court. If not, which, if any, individual judges, academics and lawyers from those groups were consulted.

On 15 November 1978 the Attorney-General answered as follows (Sen Deb 1978, Vol 79, 2086):

> I am advised that the Australian National Group did not have consultations of the kind referred to in the question. The Chief Justice of Australia, Sir Garfield Barwick, and Emeritus Professor KO Shatwell are members of the National Group. The Statute of the International Court of Justice enables a National Group to nominate up to four persons. As stated in my answer to Question 755[61] the Australian National Group nominated Ambassador J. Sette Camara (Brazil), Professor Roberto Ago (Italy), Dr Abdullah El Erian (Egypt) and Professor Richard Baxter (United States). On 31 October these four persons, together with Judge Morozov (USSR), were elected as Judges of the Court for five years from February next.

In the Senate on 26 October 1978, the Minister representing the Minister for Foreign Affairs was asked upon notice:

(1) What foreign policy considerations were brought to the attention of the Australian National Group which was responsible for nominating candidates to the International Court of Justice.

(2) Who were the candidates on which the Minister's Department reported to the Group, and from what countries did they come.

On 22 November 1978 the Minister for Foreign Affairs, Mr Peacock, provided the following answer (Sen Deb 1978, Vol 79, 2425):

(1) The foreign policy considerations which were brought to the attention of the Australian National Group were those normally arising from the nomination of candidates to the principal judicial organ of the United Nations. These considerations take into account Australia's interests in the composition of the Court and Australia's relationship with Member States of the United Nations.

(2) The Department of Foreign Affairs provided factual material to the National Group on those candidates known to the Department on 10 August, 1978, namely:
Dr A El Erian (Egypt); Judge E Razafindralambo (Madagascar); Ambassador J Sette Camara (Brazil); Dr A Gomez Robledo (Mexico); Professor R Ago (Italy); Judge E Manner (Finland); Mr H Jayewardene (Sri Lanka); Professor Richard Baxter (USA).

On 24 November 1978 the Minister elaborated upon his answer as follows (Sen Deb 1978, Vol 79, 2670):

> Australia is concerned to ensure that the Court is composed of persons possessing the qualifications set out in Article 2 of the Statute of this Court, and that in the Court as a whole, in accordance with Article 9, the representation of the main forms of civilisation and of the principal legal systems of the world should be assured.

For comments on these answers see (1978) 52 ALJ 396–397, and 711–712.

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61. See the answer given on 10 October 1978 above p 418.

International Court of Justice. Application by an individual. Appeal by Australian Aboriginal

On 9 May 1978 Mr Paul Coe of the Aboriginal Legal Service in New South Wales sent the following letter to the Registrar of the International Court of Justice:[62]

> The Registrar
> International Court of Justice
> The Hague
> THE NETHERLANDS
>
> Dear Sir
>
> Re:Paul Coe on behalf of the Aboriginal People and Nation v Commonwealth of Australia.
>
> I refer to my telegram of 31st March 1978. The Aboriginal People and Nation of Australia claim against the Commonwealth of Australia recognition of their traditional land rights as a matter of law in those places where they have not yet been deprived of them de facto and compensation from the Commonwealth of Australia for the loss of these rights where they have been deprived of them de facto.
> These rights have been claimed by an action in the High Court brought by Paul Coe on behalf of the Aboriginal People and Nation. In this action the attempt on the part of the plaintiff to put this claim clearly and unequivocally has been defeated in the High Court inter alia on the grounds that international law did not apply. We enclose a copy of our Amended Statement of Claim and a copy of the Judgment of Mr Justice Mason in the High Court. An appeal has been lodged against this decision. In the meantime the Commonwealth of Australia is continuing in its failure to protect Aboriginal people to the extent that they are deprived of their own means of subsistence (by hunting, fishing and foodgathering) and are driven to social service (dole) payments. Certain of their traditional lands are no longer reserved to them and are threatened by bauxite mining.
> This is the result of action by the State of Queensland, one of the Member states of the Commonwealth of Australia.
> International intervention is claimed as a matter of urgency as negotiations with the State of Queensland and the Commonwealth of Australia have broken down and a decision of the Privy Council has been given in favour of bauxite mining.

62. Text provided by the Aboriginal Legal Service of New South Wales.

This decision of the Privy Council exhausts all the legal remedies under national law.
Kindly let us know what is our next procedural step.

Yours faithfully,

PAUL COE
Aboriginal Legal Service Ltd
Sydney
Australia.

On 19 May 1978 the Registrar of the Court wrote to Mr Coe as follows:[63]

Dear Sir,
I acknowledge receipt of the letter of 9 May 1978.
In reply, I must draw your attention to the provisions affecting the Court's jurisdiction which were mentioned in our letter of 24 August 1977, i.e. Article 93 of the Charter of the United Nations, and Articles 34, paragraph 1, and 35 of the Statute of the Court.
I must further refer you to Article 65 of the Statute of the Court, paragraph 1 of which provides that:

> "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request."

The only bodies thus authorised are the United Nations General Assembly and Security Council (Charter, Art 96, para 1) and certain other organs of the United Nations and specialised agencies (ibid, para 2).
The Court's functions having thus been defined, I am sure you will understand that it would not be appropriate for me to provide you with further guidance.

Yours faithfully

S Aquarone
Registrar

Mr Paul Coe
Aboriginal Legal Service Ltd
Sydney
Australia.

Pacific community. Development of concept

On 14 November 1979 the Minister representing the Minister for Foreign Affairs, Mr Peacock, said in answer to a question concerning proposals for the establishment of a Pacific community (Sen Deb 1979, Vol 83, 2246):

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63. Text provided by the Aboriginal Legal Service of New South Wales.

> The Government . . . believes that the concept of a Pacific community warrants close consideration and requires that we contribute fully to any developments in this direction. The Government recognises, however, that the realisation of any such idea in practical terms will be contingent on its broad acceptance throughout the region, and it will continually have this aspect in mind in carrying out its own examination of the concept.

United Nations. Amendment of the Charter

On 19 October 1978 the Australian representative, Mr Gilchrist, spoke in a meeting of the Sixth Committee of the United Nations General Assembly, and is reported as having said (A/C.6/33/SR.24, 13–14):

> 48. His delegation did not take a doctrinaire position regarding the amendment of the Charter. The world had changed dramatically since 1945, and continued to change in many ways, and the Charter should reflect the temper of the times. However, his country's approach to Charter revision was tempered with a large measure of caution. When criticising aspects of the Charter, one should not overlook some fundamental realities. While it was important to keep the Charter under review and to consider measures to improve it, it was of much greater importance that all States should strictly observe its principles. The Charter was not a rigidly inflexible instrument. It had shown itself to be remarkably adaptable to a range of evolving situations. Like any other great constitutional instrument in a period of change, it had been subject to a continuous process of interpretation, and some of the more important interpretations of the Charter undoubtedly reflected the way in which the world had changed in the past one third of a century. That process of reinterpretation was certain to continue as the international community continued to evolve.

United Nations. Legal status of General Assembly resolutions

On 10 October 1979 the Minister for Foreign Affairs, Mr Peacock, said in answer to a question (HR Deb 1979, Vol 116, 1824–5):

> In accordance with the Charter of the United Nations, all member states have the right to pass a vote when draft resolutions or decisions are put to the vote in the General Assembly. Such resolutions are defined in the Charter as having the force of recommendations. They do not bind member states, but are recommendatory only. Australia decides upon its reactions to specific resolutions against the background to their adoption and taking account of their consistency with Australia's policies. We do not, therefore, see ourselves as being either legally or morally obliged to implement all General Assembly resolutions, but we take them into account as recommendations. The Security Council is different. With its complement of permanent and non-permanent members, it has the power to pass mandatory resolutions. But, of course, any of the five permanent members — the United States of America, Britain, France, the People's Republic of China and the Soviet Union — has the right of veto.

On 19 February 1980 the Report of the Senate Standing Committee on Foreign Affairs and Defence on *The New International Economic Order: Implications for Australia*[64] was presented to Parliament. The Committee considered the legal force of the New International Economic Order as follows:[65]

> UN resolutions are not legally binding on member countries of the United Nations whether they supported them or not. The United Nations is a political forum and the resolutions emanating from it normally have a political rather than legal force.
>
> Nevertheless, while it is important to consider the detailed wording of any specific resolution, the reservations and observations made at the time by country representatives, and the precise voting pattern, such resolutions do have a force greater than merely 'recommendations'. According to one witness, moreover, an expression of opinion in the form of a resolution by a body of this kind is bound to have a great deal of political impact, particularly if a series of resolutions is passed year after year by substantial majorities; it may ultimately be possible to ascribe to them a 'quasi-legislative' character.

United Nations. General Assembly. Principle of universality of membership. South Africa

At the 103rd meeting of the 35th Session of the United Nations General Assembly held at New York on 3 March 1981, Australia's Permanent Representative, Mr Anderson, explained Australia's vote on the third report of the Credentials Committee[66] as follows (A/35/PV.103, 18):

> The Australian delegation voted against the proposition that South Africa should not be heard in this Assembly today and against approval of the report of the Credentials Committee which we have just heard. We did so on legal grounds and particularly because we support the fundamental principle of universality of membership in the United Nations. This vote by Australia in no way detracts from my Government's categorical rejection of the policy of *apartheid* and its no less categorical rejection of the illegal occupation of Namibia by the Government of South Africa.

United Nations. General Assembly. Credentials Committee. Kampuchea

On 16 October 1979 the Minister for Foreign Affairs, Mr Peacock, wrote in answer to a question (Sen Deb 1979, Vol 82, 1382–3):

> On 21 September 1979 the United Nations General Assembly voted 71 countries in favour, including Australia, 35 against, and 34 abstentions, to adopt the report of the credentials committee recommending acceptance of the credentials of Democratic Kampuchea's representatives.

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64. PP No 1/1980.
65. At 20.
66. A/35/484. Add 2. The report was adopted by 112 votes to 22, with 6 abstentions (resolution 35/4C).

> As the Australian representative to the United Nations said in plenary debate on the credentials committee report, it has been the long standing attitude of the Australian delegation that the task of the committee is strictly legal and technical to determine whether a member has submitted its credentials in the proper form. There was no evidence to suggest that the credentials by Democratic Kampuchea were other than in their due and proper form. Therefore, in accordance with United Nations procedures, the Australian delegation voted in favour of the committee's report.
>
> The Australian Government continues to recognise the Pol Pot regime of Democratic Kampuchea. It does so because the Pol Pot administration at the time of Australia's recognition satisfied the generally accepted criteria of recognition. The Heng Samrin regime of the People's Republic of Kampuchea, which was installed as a result of Vietnam's armed intervention in Kampuchea, does not have superior claims to recognition. Only 23 countries recognise the Heng Samrin regime. They are mostly pro-Soviet countries.
>
> Australia and other like-minded countries in the region cannot condone Vietnam's use of force to overthrow the government of Kampuchea. To transfer recognition from the Pol Pot to the Heng Samrin administration would be tantamount to endorsing the right of Vietnam to intervene militarily in the affairs of other states in the region with impunity. This implication would be unacceptable to the Australian Government and to other like-minded countries in the region.
>
> Recognition of the Pol Pot regime does not carry with it approval of the policies of Democratic Kampuchea. Australia has joined other nations in condemning the excesses of the Pol Pot administration and will continue to make its position clear on the question of the massive violation of human rights which this regime perpetrated.

On 13 October 1980 Australia's Permanent Representative to the United Nations, Mr Anderson, explained Australia's vote in favour of accepting the credentials of Democratic Kampuchea in the course of debate in the General Assembly on the Report of the Credentials Committee (A/35/484) (A/35/PV.35, 98):

> The principal function of the Credentials Committee is to consider whether the credentials of representatives have been submitted in proper form and signed appropriately in accordance with the provisions of rule 27 of the rules of procedure of the General Assembly.
>
> The task of the Credentials Committee is, therefore, a strictly procedural one. In these circumstances, it would have been neither proper nor appropriate for the Committee to have taken account of political considerations in preparing its report. No evidence — I repeat, no evidence — has been brought forward to suggest that the credentials submitted by Democratic Kampuchea are other than in due and proper form. My delegation therefore considers that, consistently with established United Nations procedures, the credentials of Democratic Kampuchea must be accepted in accordance with the report of the Credentials Committee.

United Nations. Joint Staff Pension Fund

On 21 November 1980 the No 1 Taxation Board of Review held that a taxpayer was liable to pay income tax in respect of payments received by him from the United Nations Joint Staff Pension Fund: *Decision on Case M90,* [1980] Aust Tax Cas 648. After reviewing the facts of the case and the nature of the Fund and relevant legislation, the Board concluded that a pension was not part of the "official salary and emoluments of an official of a prescribed organisation" so as to be "exempt income" within the meaning of section 23 (y) of the Income Tax Assessment Act 1936. The Board's concluded reasons were as follows (at 652):

> 15. As would be expected participation in the Fund does not follow as a matter of course without a medical examination, except in nominated circumstances which, presumably, did not exempt the taxpayer from such examination. Forfeiture of benefits may arise.
>
> 16. Because participation in the Fund is not conferred automatically it is a misnomer to speak of a person such as the taxpayer getting as a "package" an emolument which includes a salary and pension benefits (at the conclusion of employment or on the happening of nominated events).
>
> 17. Although the word "emolument" in some contexts may comprehend a pension payable after employment has ceased, the Convention aforesaid and the legislation and subordinate legislation, so also the regulations and rules of the United Nations Joint Staff Pension Fund all tend to the construction that an emolument relates to a monetary benefit payable to one who is presently serving the United Nations (or a member organization of the said Fund) and conversely that a pension relates to a monetary payment to that person (or his widow or dependant) after his contributory service has been brought to an end by death, disability or other qualifying retirement. Furthermore as the Fund is held by the United Nations on behalf of the participants and of the beneficiaries of the Fund the Fund is not the property of the United Nations, but rather it holds as trustee. Accordingly, payments from the Fund to a pensioner are not payments from the assets of the United Nations even though such payments come from a fund which is held by the United Nations.
>
> 18. Thus it follows that the taxpayer as a former official of the United Nations cannot bring the subject pension within the opening words of sec. 23(y) of the *Income Tax Assessment Act* viz. "the official salary and emoluments of an official" even though the former employer was comprehended by the words next ensuing in sec. 23(y) viz., "of a prescribed organization of which Australia", etc.

World Health Organisation. Membership. Moves to expel Israel

On 14 May 1979 the Minister for Foreign Affairs, Mr Peacock, issued a statement (Comm Rec 1979, 616) in which he

> strongly criticised reported moves at the current session of the World Health Assembly to suspend Israel from the World Health Organisation. Mr Peacock said that any attempt to invoke Article 7 of

the WHO Constitution (which provides for the suspension of voting rights and of WHO services) against Israel would be resolutely opposed by Australia and, he hoped, the majority of WHO members. Mr Peacock said:

Australia has always opposed the introduction of political questions into specialised agencies such as the WHO. The UN General Assembly and Security Council are the appropriate forums for such discussions. Furthermore, it is important that the principle of universality of membership of such organisations be maintained.