

H. V. EVATT AT SAN FRANCISCO:

A LASTING CONTRIBUTION TO INTERNATIONAL LAW

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INTRODUCTION

As a "Middle" Power in international affairs¹ Australia does not often present politicians or diplomats who take a high international profile to play significant and lasting leadership roles in the multilateral fora of the international community. Occasionally, however, there are Australians who not only have the opportunity and the ability to make such a contribution but who also avail themselves of the opportunity to do so. Dr HV Evatt's participation, as joint leader of the Australian delegation, in the founding conference of the United Nations arguably amounted to such a contribution. Evatt's involvement both in drafting provisions and in arguing for positions on questions of principle and of substance resulted in a lasting contribution to that most important constitutive document – the Charter of the United Nations.

Evatt's best known involvement at San Francisco is probably his fight with the Great Powers on restricting the scope of the veto power for permanent members of the Security Council. It is perhaps ironic that Evatt is best known for a battle he ultimately lost. However, it is probably fair to say that because of both his prominence as a spokesman for many of the Smaller Powers and his persistence on the veto issue he was the person primarily responsible for extracting significant concessions from the Great Powers on the scope of General Assembly authority under the Charter.

There were several other issues on which Evatt campaigned and was rewarded. Most notable among them were the final compromise wording for Article 2(4) of the Charter; the provisions in Chapter XI of the Charter on the trusteeship system; the inclusion in the Charter of a pledge to pursue economic

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¹ The Australian Foreign Minister, Senator Gareth Evans, recently used this phrase to describe what he perceived Australia's status in international affairs to be. He stated that:

Australia is a middle Power. We are manifestly not a great Power or even a major Power; nor, however, are we small or insignificant.

Department of Foreign Affairs and Trade, "Australia's Role in Being an Effective Middle Power in World Affairs", *Peace and Disarmament News*, Feb 1992, p 9.

and social goals – particularly full employment – and the elevation of ECOSOC to principal organ status.

The San Francisco conference provided a unique opportunity for Evatt to shine on the multilateral stage. This paper will first consider the combination of circumstances which enabled Evatt to play a leading role. It will then attempt to evaluate the significance of his contribution particularly in relation to the issues referred to above.

THE OPPORTUNITY FOR INTERNATIONAL RECOGNITION

The San Francisco Conference provided a unique combination of circumstances which enabled Evatt to rise to international prominence and recognition. The primary purpose of the Conference was to draft a Charter for the new organisation. Although the Great Powers presented their Dumbarton Oaks Proposals² as the basis for discussion at San Francisco the Smaller Powers were given the opportunity to submit draft amendments to the Proposals and the final text of the Charter was open for negotiation. Any final drafting process, especially one that involves a constitutive instrument, is enhanced by the legal skills of precise language and terminology. As an accomplished constitutional lawyer, judge and politician Evatt had already demonstrated a keen interest and an exceptional ability in legal draftsmanship. Paul Hasluck worked for Evatt in the Department of External Affairs and was a member of the Australian delegation to San Francisco. He said of Evatt's drafting skills:³

... in the three or four hours we worked together, I conceived a very high respect for the skill and ingenuity of Dr. Evatt in this form of draftsmanship. As a person who had tried to write verse, I had often previously given a great deal of attention to the finer shades of meaning of English words when used in an evocative and literary way, but my eyes were now opened to the even finer gradations of meaning, from all to nothing, that can be given to English words when they are used carefully in a legal and political way.

By the time Evatt reached San Francisco he was familiar with the details of the Dumbarton Oaks Proposals. He had identified flaws and omissions and had prepared his own alternative wording for many articles of the Charter.⁴ The depth of his understanding of the Dumbarton Oaks Proposals and his ability to suggest precise wording acceptable to many delegations enabled him to make a

² The three Great Powers (US, USSR and UK) met at Dumbarton Oaks, a private estate near Washington DC, between August and October 1944 to draft a proposed Charter for the new international organisation. The text became known as the Dumbarton Oaks Proposals. The text is reprinted as Document 1, G/1 "The United Nations Dumbarton Oaks Proposals for a General International Organisation" in *Documents of the United Nations Conference on International Organisation* (hereinafter referred to as *UNCIO Documents*) Vol 3, p 1.

³ Hasluck, "Australia and the Formation of the United Nations", (1954) *XL Journal of the Royal Australian Historical Society* 133 at 152.

⁴ *Ibid* at 164–170.

number of alterations and additions to the final text. After the conference Evatt himself claimed that of Australia's original thirty six proposed amendments to the draft Charter twenty six had either been adopted without material change, adopted in principle, or been made unnecessary by other alterations.⁵

In addition to his academic and professional background Evatt was prepared to work tirelessly and argue relentlessly to achieve the objectives he had helped determine for the Australian delegation. The work of the conference was split between numerous committees and sub-committees many of which met simultaneously. The only way Evatt could participate in several of them was by rushing from one meeting to another, often only staying long enough to make his submissions.⁶

On several occasions Evatt took the role of advocate to argue against a position preferred by the Great Powers. Already well accomplished in such a role, he seemed to relish it in San Francisco. Evatt had said of the Dumbarton Oaks Proposals that:

This draft drawn up by four Great Powers was essentially a "great power" production. It dealt primarily with the problem of security in the military sense ... Dumbarton Oaks was a draft by Powers accustomed to protect their vital interests through reliance on their own military strength.⁷

The San Francisco Conference offered an opportunity for the Smaller Powers to challenge some of the Great Power presuppositions for the new organisation. Hasluck's assessment in a reflective address to the Royal Australian Historical Society after San Francisco was that:⁸

During the conference there was, I think, a real need for someone to challenge the idea that the role of the Great Powers was to propose and of the rest of the world to accept the proposals; there was a need for someone to state the needs of security and the considerations affecting security more broadly than they would be stated by those whose power was to be the guarantee of security; there was a need to reassert respect for sovereignty and territorial integrity in terms which were applicable to all nations and not only a few; there was a need to

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- 5 "Effect of the Australian Proposals on the Dumbarton Oaks Text", Statement by the Right Honourable HV Evatt as Annex L to the "Report By The Australian Delegates To The United Nations Conference On International Organisation", presented to the Parliament of the Commonwealth of Australia, (1945-46) Vol III *Parliamentary Papers* p 701, (hereinafter referred to as "Report by the Australian Delegates") at p 784.
 - 6 Hudson, "Dr. H.V. Evatt at San Francisco", *Australia Foreign Affairs and Trade: The Monthly Record*, Apr 1991, 166. Hasluck, at 170, recounts the experience of sending messages to Evatt to leave the meeting he was in to attend an alternative one for discussion of another issue.
 - 7 Evatt HV, *The United Nations* (1948), p 6.
 - 8 Hasluck, note 3 above, at 174.

reassert the old ideas that the exercise of power should be limited by respect for these rights and for justice. Even if Australia had not been there, these matters would probably not have been overlooked, but, being there, Australia asserted them as forcefully and unremittingly as anyone.

Evatt seized that opportunity. He was the person who led the campaign and achieved the most for the Smaller Powers at the conference. An article in the *New York Times* is indicative of the extent of his involvement at San Francisco and of the respect he gained from all those involved with the conference:⁹

When Dr. Evatt came here he was a virtually unknown second-string delegate, with the background of a professor and Labour politician. He leaves, recognised as the most brilliant and effective voice of the Small Powers, a leading statesman for the world's conscience, the man who was not afraid to force liberalization of the League Charter, and who had sense enough not to press his threat so far as to break up the conference.

THE WORDING OF ARTICLE 2(4)

1. *Background to Articles 1 and 2*

Chapter I of the Dumbarton Oaks Proposals contained a list of the overall purposes of the organisation. Most of the Smaller Powers agreed with the proposed wording of these and only minor changes were made at San Francisco. Chapter II of the Dumbarton Oaks Proposals contained the principles of the organisation which were expressly intended to facilitate the achievement of the purposes in Chapter I. Chapter II, unlike Chapter I, was not well received by the Smaller Powers at San Francisco, a majority of whom were concerned that the statement of principles in Chapter II did not explicitly provide for the recognition of their rights of individual sovereignty.

2. *Criticism at San Francisco*

The first principle in Chapter II of the Proposals stated that "The Organisation is based on the principle of the sovereign equality of all peace-loving states". This wording was accepted at San Francisco on the basis of an agreed interpretation as to the meaning of "sovereign equality". The Rapporteur of the Subcommittee responsible for discussion of this provision reported to the Committee preparing the final draft that the term "sovereign equality" had been approved:¹⁰

⁹ *New York Times*, 27 June 1945, quoted in Tennant K, *Evatt: Politics and Justice* (1970), p 174.

¹⁰ Report of the Rapporteur of Subcommittee I/1/A, Doc 739; I/1/A/19(a), reprinted in *UNCIO Documents*, Vol 6, 717 at 718.

on the assumption and understanding that it conveys the following:

- (1) That states are juridically equal.
- (2) That they enjoy the rights inherent in their full sovereignty.
- (3) That the personality of the state is respected, as well as its territorial integrity and political independence.
- (4) That the state should, under the international order, comply faithfully with its international duties and obligations.

Although the agreed interpretation of Principle 1 made explicit reference to respect for the individual State's rights of "territorial integrity and political independence", these rights were not explicitly referred to in the wording of the principles themselves. Furthermore, the first principle was merely a statement of the individual State's standing in the Organisation and not a guarantee of its rights of sovereignty. Many of the Smaller Powers refused to accept the principles without an explicit reference guaranteeing recognition of the sovereign rights of individual States.

Several States submitted amendments or suggestions to include a general obligation on the part of member States to respect each others' territorial integrity and political independence among the principles of the Organisation.¹¹ Other States proposed a broader principle guaranteeing respect for individual States' rights of territorial integrity and political independence by the Organisation as a whole.¹² Some States argued that there should be a guarantee of a collective response by the Organisation and its members to an act of aggression against the territorial integrity or political independence of a member State.¹³ The Great Powers considered all of these suggestions unnecessary. The principles had been proposed as general guidelines to give effect to the purposes of the organisation. They were not a rigid set of rules that required an exhaustive list of all the particular rights to be recognised by the new organisation. The Great Powers were reluctant to increase the number of principles and so change the nature and appeal of Chapter II as a concise statement of guiding principles for the operation of the organisation. Evatt proposed an amendment that satisfied both the Smaller Powers' concern and the interests of the Great Powers.

3. Evatt's Proposal

The fourth principle of the Dumbarton Oaks Proposals was that "all members of the Organisation shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organisation."

11 UNICIO Documents, Vol 3, Egypt, 453 at 454; Ethiopia at 558; and Bolivia 577 at 578).

12 UNICIO Documents, Vol 3, Chile at 283; Czechoslovakia at 467; Honduras at 349; Mexico at 65; and Paraguay at 347.

13 UNICIO Documents, Vol 3, Ecuador at 399; New Zealand at 486; and Uruguay at 30.

This principle represented a new standard in the regulation of force used by individual States. Customary international law prior to the formation of the United Nations had never known such a broad proscription against unilateral force. The obligation on members to refrain from resort to force as an instrument of national policy was fundamental to the achievement of the purposes of the Organisation. Consequently, this principle was highly significant.

Evatt recognised that the greatest threat to the individual sovereignty of small States was the use of force by more powerful members of the international community. Therefore he proposed that the reference to the sovereign rights of individual States be incorporated in this principle. Members of the United Nations would be committing themselves to recognise the sovereign rights of other States by undertaking not to use force against those States.

Other delegates immediately recognised the value of Evatt's suggestion and his wording was accepted *verbatim* as the final version for Article 2(4). The Article now reads:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

4. The Importance of Article 2(4)

Forty five years after the establishment of the United Nations, Article 2(4) is now one of the most important provisions of the Charter. It is constantly cited, referred to and relied upon as the general proscription of the use of force and as the guarantee of individual sovereignty against aggression. Although the Article is not an absolute prohibition of forceful measures,¹⁴ its effect is to make any such measures against another State *prima facie* unlawful. The State resorting to force bears the onus of showing that it has acted consistently with an exception to Article 2(4).

It is not suggested that Evatt was responsible for the adoption of the new proscription against the use of force in Article 2(4). That new standard was incorporated in the Dumbarton Oaks Proposals and met with widespread approval from delegations at San Francisco. Evatt's involvement in the wording of Article 2(4) is cited as an example of his ability to find a compromise drafting formula to satisfy various delegations with different concerns and contrary positions.

The adoption of Evatt's suggestion to include the phrase "against the territorial integrity or political independence of any state" to satisfy the demands

¹⁴ The Charter contains a number of express exceptions to Article 2(4). These include the right of the Security Council to use collective force under Articles 41 and 42, the right of regional organisations to use forceful measures with the authorisation of the Security Council under Article 53 and the right of individual states under certain circumstances to use force in self-defence under Article 51.

of many Smaller Powers for an explicit reference to the protection of their independent sovereignty is important to the interpretation of Article 2(4) and the scope of the prohibition against the use of force. Some writers have interpreted the words "against the territorial integrity or political independence of any state" as a qualification on the extent of the general proscription¹⁵ whereas the intention of the drafters in including the phrase was clearly not to limit or qualify the scope of the prohibition.

THE VETO POWER

Evatt's proposal for the wording of Article 2(4) was never a controversial issue because he suggested a formula which satisfied all parties. However, most of Evatt's participation at the conference was not as conciliatory. His most dramatic involvement was in the controversial battle over the extent of the Great Powers' right of veto in the Security Council. Evatt himself claimed that the issue "came close to wrecking the Conference"¹⁶ and others have described the issue as "the most serious controversy at San Francisco".¹⁷

1. The Yalta Voting Formula

The Great Powers at Dumbarton Oaks were unable to agree on voting rights in the Security Council – not until the later Yalta conference¹⁸ was consensus achieved. The decision at Yalta was formulated as follows: (1) each member of the Council to have one vote; (2) decisions of the Council on procedural matters to be made by a majority vote of seven members; and (3) decisions of the Council on all other matters to be made by a majority vote of seven members including the concurring vote of each of the permanent members of the Council.¹⁹ It had been agreed at Dumbarton Oaks that the Great Powers would be the only permanent members of the Security Council. The effect of the Yalta voting formula was to give each of the permanent members the ability to vote against a non-procedural decision of the Security Council and veto that decision regardless of the number of members voting for it. This proposal caused a furore among the Smaller Powers at San Francisco.

15 See for example Stone J, *Aggression and World Order* (1958), p 95. Other writers have used the argument in relation to specific uses of force. Eg concerning the US action in the Cuban Missile Crisis, Chayes A, *The Cuban Missile Crisis* (1974), pp 152–153; on Israeli action in the Entebbe Rescue in Henkin L, *How Nations Behave* (1979), p 145; and D'Amato on the Israeli bombing of the Iraqi Nuclear Reactor in "Israel's Air Strike Upon the Iraqi Nuclear Reactor", (1983) 77 AJIL 585.

16 Evatt, note 7 above, p 22.

17 Russell RB, *A History of The United Nations Charter* (1958), p 713.

18 The UK, US and USSR met at Yalta on the Black Sea in February 1945 to resolve some disagreements about the war effort in Europe and to finalise proposals for the San Francisco Conference. See Russell, *ibid*, pp 515–548.

19 *Ibid*, p 713.

2. *Evatt's Opposition to the Veto*

It was Evatt's conviction that none of the Smaller Powers at San Francisco "really believed in the justice of the Great Power veto".²⁰ The United Nations was to be a truly global organisation based on democratic principles. The Security Council was to be the primary decision-making body invested with the power to actively maintain international peace and security. The Smaller Powers did not object to the Great Powers occupying permanent seats in the Security Council. Great Power willingness to co-operate in the maintenance of international peace and security was the main reason for optimism for the success of the new organisation. The Smaller Powers did object, however, to the possibility of a Great Power exercising the veto and obstructing the work of the Security Council, for whatever reason, without being accountable to the international community. It was Evatt's view that some of the Smaller Powers were prepared to vote for the veto power for reasons of political expediency. On the other hand, many of those Powers were totally opposed to the veto and refused to vote in favour of it. Evatt's own response "lay midway between the two extremes".²¹

Although the Yalta formula distinguished "procedural matters", and "other matters" the Great Powers refused to explain the precise scope of the formula. They did make it clear at San Francisco, though, that they intended the veto to extend to decisions under both Chapter VI and Chapter VII of the Charter.

The Australian delegation was prepared to accept the veto in matters relating to enforcement measures under Chapter VII of the Charter. That Chapter empowers the Security Council to take action to maintain international peace and security and to call up troops and supplies of weapons from among the members if necessary. These provisions should only be relied upon in extreme circumstances and so Evatt argued that the permanent members of the Security Council could possibly justify retention of a right of veto in such matters.²²

The Australian delegation, however, was not prepared to accept the veto in the peaceful settlement of disputes under the provisions of Chapter VI of the Charter. Evatt was convinced that the process of conciliation and mediation could never be regarded as a *power* of the Security Council. Instead, he believed that the Council's involvement in the peaceful resolution of disputes was "its imperative and continuing *duty*" because the Charter gave the Council the primary responsibility for the maintenance of international peace and security.²³ Consequently, a permanent member of the Security Council should never be able to veto a decision to facilitate a peaceful settlement. The exercise of the duty and the existence of the veto were incompatible in Evatt's mind.

²⁰ Evatt, note 7 above, p 23.

²¹ Ibid.

²² Hudson, note 6 above, at 167.

²³ Evatt, note 7 above, p 23 (emphasis added).

One further issue of concern to Evatt was the provision in Chapter VIII of the Dumbarton Oaks Proposals allowing the Security Council to utilise regional arrangements for the maintenance of international peace and security. Evatt supported this notion in principle but objected to the restriction that such regional arrangements could only undertake enforcement action with the prior authorisation of the Council. The effect of such a restriction could be to prevent a State calling for regional assistance to defend itself against aggression because Security Council authorisation had been blocked by a veto.

Evatt believed that Australia was entitled to ask for help and use force against aggression without prior authorisation from the Security Council and he wanted the Charter to reflect that entitlement. The Latin American States were also firmly of this view and would not have accepted a Charter which made their collective right to respond to regional aggression dependent on Security Council approval, given that such approval would be subject to a negative vote by any one of the permanent members. Ultimately the United States developed a formula similar to the final version of Article 51 which resolved the issue not only for Evatt and the Latin American States but for any State needing to use force in self-defence.²⁴

Evatt had substantial support for his position on the veto power. An overwhelming number of Smaller Powers rallied behind him in the battle to restrict the application of the veto and he became their spokesman. Because of personal conviction, dogged determination and skilful elocution, Evatt repeatedly challenged the position of the Great Powers on the issue. The Smaller Powers were finally presented with an ultimatum: either accept the Yalta voting formula unaltered or the conference will fail and there will be no United Nations Organisation. Of course there was no real choice and for the sake of the conference the Smaller Powers accepted the Yalta voting formula. As it happened Evatt's personal efforts were not altogether in vain.

As a result of Evatt's persistent commitment the Great Powers gave some undertakings in relation to restrictions on the use of the veto. Evatt had made it quite clear to them that the Smaller Powers were not prepared to accept the Charter "unless certain minimum demands for restriction of the veto were accepted, viz., that there should be no veto upon the placing of items on the Council Agenda, and no veto on discussion".²⁵

The Great Powers eventually delivered a joint statement on their attitudes to the voting procedure in the Security Council. *Inter alia* it said that:²⁶

24 For a detailed description of the negotiating history of Article 51 see McCormack, "Anticipatory Self-Defence in the Legislative History of the United Nations Charter", (1991) 25 *IsLR* 24-40.

25 *Ibid*, at 24.

26 'Statement by The Delegations of the Four Sponsoring Governments on Voting Procedure in the Security Council', included as Annex N to the "Report By The Australian Delegates", p 787.

It is not to be assumed, however, that the permanent members, any more than the non-permanent members, would use their "veto" power wilfully to obstruct the operation of the Council.

Evatt was not entirely satisfied with the joint statement on the Council voting procedure.²⁷ However, he accepted that the Organisation would not be created without the voting formula and resigned himself to the hope that:²⁸

... during the next few years the Great Powers will demonstrate to the world by their actions in the Council that they will not in practice exercise to the full the veto rights which they possess under the Charter. Certain public indications along these lines have already been made, and we all accept these indications thankfully and in good faith. If it can be agreed that all peaceful means of settling disputes must be adopted and exhausted and that in practice the veto will not be used to block such procedures, I am convinced that we will make a great step forward. This would remove many of the doubts which middle and smaller countries have felt regarding acceptance of the present text. ... The Great Powers can perform a great service to the world if they demonstrate in practice that the powers given to them under the Charter will be used with restraint and in the interests of the United Nations as a whole. "Oh it is excellent to have a giant's strength – but it is tyrannous to use it as a giant".

When Evatt was invited to deliver the Oliver Wendell Holmes lectures at Harvard University in 1947, only two years after the San Francisco conference, he was already disappointed that the permanent members of the Security Council had abused their right of veto and frustrated the work of the Council in matters related to the peaceful settlement of disputes.²⁹

3. Security Council Practice Since 1945

Evatt's concern over possible abuse of the veto and his personal efforts to argue against its unbridled scope have been vindicated throughout the years of Security Council practice. The body with the primary responsibility for the maintenance of international peace and security and with the constitutional power to send troops to restore peace has not fulfilled the role intended for it and failed to perform the function each of the permanent members committed themselves to. Prior to 1991 and the Gulf War the only occasion on which the Security Council ordered troops to use force to restore peace was in Korea in 1950. The Soviet Union had boycotted the United Nations over protests about

27 "Voting Procedure in the Security Council: Analysis of the Joint Statement Issued by the Four Sponsoring Governments", included as Annex O to the "Report By The Australian Delegates", p 789.

28 Extract from a speech given before Commission III, "Report By The Australian Delegates", p 718.

29 Evatt, note 7 above, pp 56–71.

the failure to take China's permanent seat in the Security Council from the Nationalist Government of Taiwan and give it to the Communist Government of Peking. While the Soviet representative was absent from the Council the US rushed through several resolutions authorising United Nations troops to fight in Korea. It is obvious that under normal circumstances the Soviet Union would have vetoed any such resolutions.

Throughout the Cold War years Security Council efforts were consistently frustrated by superpower use of the veto in any situation threatening international peace and security. Only recently, with the thawing of East-West relations and the dramatic termination of the Cold War, has there been growing evidence among the permanent members of the Security Council of a willingness to co-operate with each other. Evatt would probably be encouraged to witness the new era of East-West relations and the removal of some political obstacles to genuine cooperation among the permanent members of the Security Council to pursue the goals of the United Nations Organisation.

BROADENING GENERAL ASSEMBLY POWERS

Although Evatt lost the battle to restrict the scope of the veto power he refused to accept any restriction on the scope of proposed General Assembly powers. Given that it was possible for a permanent member to abuse the veto and obstruct the decision making processes of the Security Council, Evatt was determined to ensure that the General Assembly had "the widest possible powers of discussion and recommendation".³⁰ If the Security Council could be rendered inoperative it was essential that the General Assembly could become involved in the dispute. Again it was Evatt who relentlessly demanded an increased role in the maintenance of international peace and security for the General Assembly.

1. The Dumbarton Oaks Proposals

At Dumbarton Oaks the Great Powers had proposed a role for the General Assembly which would limit it to considering "the general principles of co-operation in the maintenance of international peace and security" and to discussing any questions "relating to the maintenance of international peace and security" which members of the organisation brought before it. The Assembly was never meant to have as much power as the Security Council. The effect of the Dumbarton Oaks Proposals was to limit the General Assembly's powers both in nature (only able to "discuss", "consider" and to "recommend") and scope (only matters related to the maintenance of international peace and security). Evatt was prepared to accept the limits as to the nature of the Assembly's power. At no stage did he object to the concept of the Security Council being the primary organ in the new organisation. He did, however, resent the limits on the *scope* of the Assembly's power.

³⁰ Ibid, p 19.

2. *Evatt's Commitment to the Scope of the Assembly's Power*

Evatt was convinced that the General Assembly, "as the most democratic Organ of the United Nations",³¹ should be entitled to discuss any matters within the scope of the United Nations Charter and to make recommendations where necessary. The Great Powers disagreed with this position but after the veto issue, Evatt, with the support of the Smaller Powers, would not compromise on the Assembly's role.

To avoid a frustrating stalemate, a special subcommittee was established to draft a text agreeable to all parties. The subcommittee had only three members: Mr Stettinius of the United States, Mr Gromyko of the Soviet Union and Dr Evatt of Australia. Evatt's inclusion in the subcommittee as the representative of the Smaller Powers was evidence of his influential position in the dispute. He was the obvious choice for involvement in the subcommittee having both the support and trust of the Smaller Powers and the respect of the Great Power representatives.³²

At first the subcommittee could not agree on a draft provision for the role of the General Assembly. Finally a draft proposed by Evatt was accepted by the subcommittee and ultimately adopted unanimously by the Conference. Another example of precise draftsmanship, Evatt's proposal could not be improved by any other party. It was included in the Charter as Article 10 which now reads:

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

Evatt was justifiably satisfied with the inclusion of this provision in the Charter. Article 10, he said:³³

removed any shadow of doubt as to the general jurisdiction of the Assembly to discuss any matter of international concern, whether relating to security or welfare and whether particular or general in character.

It is no exaggeration to say that the credit for both the wording and inclusion of Article 10 was largely due to the efforts of HV Evatt. Without his persistence the Great Powers may never have made the concessions they did. Evatt himself said that:³⁴

For the effective participation of all members in the work of the Organization and hence for the efficiency of its operation, this

31 Ibid.

32 Hudson, note 6 above, at 168.

33 Evatt, note 7 above, p 20.

34 See "Report By The Australian Delegates", p 720, para 88.

broadening of the General Assembly's powers is one of the most important achievements of the San Francisco Conference. It means that many matters which may not be investigated by the Security Council because of the application of the veto can be discussed and examined in the General Assembly.

3. General Assembly Practice Since 1945

In the first two years of Security Council practice Evatt organised a public censure in the General Assembly for the abuse of the veto in the Security Council.³⁵ In 1946 the Assembly adopted a resolution, drafted and proposed by Evatt, in which, *inter alia*, it urged the permanent members of the Security Council to ensure that the veto was not abused and asked that the views expressed by the members of the Assembly on the use of the veto be noted by the Council.³⁶ In 1947 Evatt was reiterating his earlier predictions that the Assembly's role would only increase if the permanent member exercise of the veto continued to frustrate the work of the Council.³⁷

In 1950 (only the fifth year of UN practice) Assembly members became exasperated with the USSR's use of the veto in the Security Council in regard to Korea. The General Assembly adopted Resolution 377,³⁸ more commonly referred to as the "Uniting For Peace" Resolution, which interprets the powers of the General Assembly under the Charter and states that the Assembly may make recommendations on matters threatening international peace and security in situations where the Council has been prevented from taking action by an exercise of the veto.³⁹

The "Uniting For Peace" Resolution did not add to the existing constitutional power of the Assembly under Article 10 of the Charter. However, it did clarify the powers of the Assembly and, forty years after its passage, the constitutional validity of the resolution is never questioned. It has been suggested that in the absence of the resolution the constitutional power of the Assembly could have

35 Evatt, note 7 above, p 74.

36 *Ibid*, p 75.

37 *Ibid*, pp 113-121.

38 5 UN GAOR, Supp (No 20) 10, UN Doc A/1775 (1950).

39 In Part A of the resolution the General Assembly, *inter alia*:

Resolves that 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, the General assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures...

been questioned on every occasion that the Assembly made recommendations after the Council had failed to act.⁴⁰

Resolution 377 has effectively prevented the contemporaneous frustration of the work of both the Council and the Assembly and enabled the United Nations to salvage some organisational legitimacy amidst growing international cynicism – particularly throughout the years of the Cold War.

The General Assembly has relied upon the "Uniting For Peace" Resolution on several occasions since its adoption in 1950.⁴¹ Most recently, in December 1989 the Assembly adopted Resolution 240 of 1989 condemning the US invasion of Panama.⁴² Although Resolution 44/240 did not refer expressly to Resolution 377 the General Assembly clearly relied on the constitutional powers referred to in that resolution. The US had frustrated the work of the Security Council and the Assembly stepped in to ensure that the action was formally denounced by an organ of the United Nations as a violation of Article 2(4).

Resolution 377 and the power of the General Assembly to step in after abuse of the veto in the Security Council would not have been possible without the inclusion of Article 10 in the Charter. Evatt made an enduring contribution to the efficacy of the United Nations organisation as a result of his participation in the struggle to broaden General Assembly powers at San Francisco.

EVATT'S OTHER ACHIEVEMENTS

It has been noted that Evatt contributed more at San Francisco than has been highlighted here.⁴³ While all his other achievements cannot be considered here, two areas should be mentioned.

1. Trusteeship Provisions

Prior to San Francisco Evatt was concerned that the Dumbarton Oaks Proposals made no mention of arrangements for non-self-governing territories. The relevant territories included those held in trust under the old mandate system of the League of Nations and those to be "detached" from the Axis Powers after

⁴⁰ See Reicher, "The Uniting For Peace Resolution on the Thirtieth Anniversary of its Passage", (1981) 20 *Columb J Tr L* 1.

⁴¹ Resolution 377 was relied on in: Korea (1950); Suez (1956); Hungary (1956); Lebanon (1958); Congo (1960); Bangladesh (1971); Afghanistan (1980); and the Middle East (1980).

⁴² GA Res 44/240, 44 UN GAOR, UN Doc A/44/L63 (1989). In Res 44/240 the Assembly *inter alia*:

Strongly deplores the intervention in Panama by the armed forces of the United States of America, which constitutes a flagrant violation of international law and of the independence, sovereignty and territorial integrity of States.

⁴³ See note 5 above.

World War II.⁴⁴ Several Governments made proposals on this subject and at San Francisco a working paper was prepared and presented as a basis for discussion of the issue.⁴⁵ The international trusteeship system of the United Nations was discussed in Committee IV of Commission II. In a speech to that Committee Evatt outlined the basic objectives behind the Australian recommendations. He said, *inter alia*, that:⁴⁶

We seek two main things: (i) a general pledge, covering all non-self governing territories, that responsible Powers will honour the principle of trusteeship, and (ii) at the same time, specific arrangements for implementation of this pledge in certain territories to be determined according to plan.

Evatt worked with Mr Fraser of New Zealand, who chaired the committee on trusteeship, and with British delegates to draft the provisions of Chapters XI–XIII of the Charter.⁴⁷ In particular he was instrumental in arranging a declaration regarding non-self-governing territories which now forms Chapter XI of the United Nations Charter. Under the terms of Article 73 governments with trusteeship responsibilities must recognise the interests of the inhabitants as "paramount" and must "promote to the utmost" the well-being of the inhabitants of these territories.

In addition to Chapter XI the Charter contains Chapters XII and XIII which provide for a system to supervise the administration of "trusteeship territories". Although it was not obligatory to bring non-self-governing territories under the trusteeship system, many States did so.⁴⁸ Since many of the trusteeship territories have now been granted independence, the system has lost much of its former importance.

Evatt's co-operation with delegates from New Zealand and the United Kingdom at San Francisco made some contribution to the work of the Trusteeship Council in the years following the establishment of the United Nations. However, his personal role in this issue was not as significant as in other areas to which reference has already been made.

2. ECOSOC

The Dumbarton Oaks Proposals suggested the creation of the Economic and Social Council but not as a principal organ of the United Nations. Evatt described the proposed Council as "anaemic"⁴⁹ and went to San Francisco

44 Evatt, note 7 above, pp 32–33.

45 *Ibid*, p 31.

46 "Territorial Trusteeship: Statement at the San Francisco Conference 10 May 1945", in Evatt HV, *Australia in World Affairs* (1946), p 29.

47 Harper N and Sissons D, *Australia and the United Nations* (1959), p 77.

48 See Evatt, note 7 above, pp 91–92.

49 *Ibid*, p 9.

determined to raise the profile of the Council amongst the organs of the United Nations. He was convinced that international economic and social co-operation were essential for the advancement of peace and particularly believed in the need for full employment for all peoples. He argued strenuously for the inclusion of a pledge by members of the new organisation to pursue this goal.

The Great Powers were not interested in discussing full employment and economic and social interests at San Francisco. Evatt had a different agenda and his efforts helped elevate ECOSOC to principal organ status. Chapters IX and X of the Charter contain the provisions dealing with the Council. Under Article 56 all members of the organisation "pledge themselves" to take action in co-operation with the organisation to achieve the purposes in Article 55. These include "human rights, higher standards of living, full employment, and conditions of economic and social progress and development".

At the time Evatt was satisfied that the members of the new organisation had made such a firm commitment to social and economic goals. Subsequent to the "victory" on full employment, however, others have argued that the inclusion of the pledge has achieved little of substance.⁵⁰ Under the terms of Article 56 members have only committed themselves to co-operate with the Organisation on general goals with no specific binding obligations. In any case the objectives of Article 55 arguably fall within matters of domestic jurisdiction by virtue of Article 2(7) and are beyond the intervention of the United Nations.

An alternative view is that the mere fact of the inclusion of the pledge was a significant development because human rights and economic and social standards had never been acknowledged as worthwhile pursuits in international instruments prior to 1945. The international law of human rights has developed substantially since that first reference in Articles 55 and 56.

CONCLUSIONS

Evatt's involvement at San Francisco resulted in an extensive contribution to the drafting of the United Nations Charter. Throughout the Conference he earned the respect and admiration of representatives from all the participating delegations. One American observer described Evatt as:⁵¹

... the generally acknowledged leader of the whole strength of the Smaller Powers. A stocky man, powerful in frame, rosy-hued, with a bush of gray hair, he was as observed a figure among the delegates as Molotov had once been before his return to Moscow ... He had come armed and girded with relentless determination to see that the rights of the lesser nations did not disappear under the shadow of the greater ones. And he had won the respect of all – great countries as well as small. Stettinius consulted him; Vandenberg worked with him.

⁵⁰ Harper and Sissons, note 47 above, p 69.

⁵¹ Meigs C, *The Great Design: Men and Events in the United Nations from 1945 to 1963* (1964), pp 49, 50.

Everyone listened to him and took note of the telling amendments which he brought forth on behalf of his government. His was real and brilliant statesmanship, resourceful, constructive. Yet he was no demagogue. He had the full weight of the smaller nations behind him, but he refrained from using their strength to block the proceedings of the Conference.

Evatt's influence on the Conference was so far reaching that, at the final meeting of the Steering Committee, the delegate of Peru moved a special resolution of thanks to him and all the delegates, including those of the Great Powers, rose to acclaim him.⁵² It is disappointing that while Evatt was lauded by the delegates at the conference and admired by journalists from all over the world, his political opponents in Australia criticised his efforts at San Francisco as "showmanship" and he failed to receive the recognition he deserved in his own country.⁵³

After San Francisco, Australia was elected to non-permanent membership of the first Security Council. Evatt himself was appointed the first President of the Atomic Energy Commission and elected to the Presidency of the General Assembly for a two year term in 1948-49. All of these appointments reflected the widespread respect for Evatt's involvement at San Francisco.

In retrospect it is evident that Evatt's contributions have had a lasting effect on international law and the maintenance of international peace and security. At the close of one of the Oliver Wendell Holmes memorial lectures at Harvard in 1947, Evatt expressed the following sentiments:⁵⁴

It is useless for us to deplore the basic weakness of San Francisco. Rather it is our task to try and recapture, and to maintain, the crusading spirit of that Conference – to march forward together, with clear heads, determined to find means, in spite of all obstacles, of resolving difficulties which stand in the way of international co-operation, so that "men in all lands" may yet "live out their lives in freedom from fear and want".

Evatt displayed that "crusading spirit" which he challenged others to develop. Although international legal obligations are often violated and States sometimes escape international criticism the United Nations Charter remains the single most significant multilateral treaty in international law. Credit is due to HV Evatt for his part in substantially improving that important instrument.

52 Hasluck, note 3 above, at 174.

53 Tennant, note 9 above, p 176.

54 Evatt, note 7 above, p 44.

