Digest of Australian Practice in International Law, 1964-1965

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NOTE: The present Digest covers the period 1 July 1964 to 30 June 1965. However, it includes also a statement made on 28 May 1964, by the Australian delegate at the thirty-first session of the United Nations Trusteeship Council, with regard to the defence of the Trust Territory of New Guinea in relation to the ANZUS Treaty (see *post*).

States and non-state entities

a. Right to assist a legitimate government with that government's assent—distinction between internal strife and insurrection stimulated from outside.—For the purpose of deciding whether it was lawful for the United States Government to give military assistance to the Government of South Vietnam, with that Government's consent, the Australian Government has supported a distinction between internal strife *stricto sensu*,[1] and insurrection stimulated and assisted from outside. The following passage occurred in the Ministerial Statement of 23 March 1965 made to the House of Representatives by the Minister for External Affairs (Mr. Hasluck):—

> "We are told from time to time that, while external aid can help, it is for the people of South Vietnam themselves to establish a political regime which will withstand internal subversion. We must remember, however, that the South Vietnamese are not dealing simply with a situation of local unrest, but with a large-scale directed campaign of assassination and terrorism, and the direction comes from outside. It would be a dangerous thing to argue that, because subversive elements inspired instability within a country, these elements thereby earn the right to become the government of that country." (*Hansard*, 23 March 1965, pp. 232-3.)

b. Trust territory—attainment of independence.—It is the Australian Government's opinion that the progressive development of the inhabitants of a trust territory towards independence pursuant to article 76 paragraph b of the United Nations Charter is not conditioned upon the attainment of complete economic self-reliance. Thus in a ministerial statement to the House of Representatives concerning the report

1 *Semble*, the rule of international law in this connexion is that in the case of strife which is primarily internal, and particularly where the outcome is uncertain, the mere invitation by either faction to an outside State to intervene does not legalize an otherwise improper intervention.

on New Guinea of the mission of experts sent by the International Bank for Reconstruction and Development, the Australian Minister for Territories (Mr. Barnes) said: "It is not the Government's view that self-determination must wait until the Territory has a fully viable economy". He did point out however that the Territory's present degree of economic dependence was "extreme". (*Hansard*, 5 May 1965, p. 1144.)

c. Trust territory—no necessity for administering authority to obtain approval of United Nations for military installations required for defence of territory.—In answer to a question in the House of Representatives, the Australian Prime Minister Sir Robert Menzies) stated that it was not necessary for Australia, as administering authority of the Trust Territory of New Guinea, to obtain the approval of the United Nations before attending to the matter of military installations required for the defence of the Territory. He cited article 4[2] and article 7[3] of the Trusteeship Agreement relating to New Guinea. (*Hansard*, 12 November 1964, pp. 2867-8.)

d. Trust territory—defence pursuant to mutual defence treaty between administering authority and other States.—At the thirty-first session of the United Nations Trusteeship Council, in the course of the meeting on 28 May 1964, the Soviet delegate, Mr. P. F. Shakhov said with reference to the Trust Territory of New Guinea:—

> "The Soviet delegation continued to believe that Australia had no right to draw the Trust Territory into the network of the Security Treaty between Australia, New Zealand, and the United States of America (ANZUS). Although the indigenous population had absolutely no desire to participate in the military plans of ANZUS, the administering authority had embarked upon a vast program of military preparedness in the area."

The Australian delegate, Mr. D. McCarthy said in reply, *inter alia*:—

> "The ANZUS Pact, which applied to the Territory of New Guinea, was not an aggressive but a defensive pact. In 1962, the Australian Minister for External Affairs, then Minister for Territories, and the Australian Prime Minister had stressed that Australia's international obligations towards the peoples under its administration included the obligation to defend them." (*Official Records* of thirty-first session of the United Nations Trusteeship Council, T/SR.1230, p. 36, paragraph 34, and p. 39, paragraph 62.)[4]

e. Meaning of "self-determination".—With regard to the meaning of the expression "self-determination" used in articles XVII-XXI of the Indonesia-Netherlands Agreement of 15 August 1962, regarding West

2 Providing that the administering authority is to be responsible for the peace, order, good government and defence of the Territory.

3 Providing that the administering authority may take all measures in the Territory which it considers desirable to provide for the defence of the Territory and for the maintenance of international peace and security.

4 See also *Official Records* of thirtieth session of the Trusteeship Council, 1963, T/SR. 1203-1224, meeting of 13 June 1963, pp. 88-9, for earlier statements on the matter by the Soviet and Australian delegates.

New Guinea (West Irian), the Australian Minister for External Affairs (Mr. Hasluck) made the following observations in answer to a question put in the House of Representatives by Mr. E. G. Whitlam, Q.C., Deputy Leader of the Opposition:—

"The obligation for an act of self-determination in West Irian might perhaps be paraphrased as an obligation to carry out an act of ascertainment. I think 'self-determination' does not mean the holding of some sort of plebiscite or direct consultation with the people in that manner. I am doubtful whether the documents would justify that view. There certainly has to be an act of ascertainment—some sort of attempt to consult the people ...". (*Hansard,* 25 March 1965, p. 325.)

Recognition of States and Governments

Non-recognition of a country is not an obstacle to participation in discussions with it on matters of global significance.—In the course of a press conference at London on 27 June 1965, the following question to and answer by the Australian Prime Minister (Sir Robert Menzies) was directed to the position of Communist China, neither recognized by Australia nor accepted by her as entitled to United Nations credentials:—

"Q: Can you see an alternative way in which China could be brought into disarmament talks of some kinds outside the United Nations?

A: Well, after all, China has been involved in some discussions in relation to South-east Asia—I don't think it is at all impossible on an overwhelming matter of world significance like disarmament to have people coming to conference whether they are members of the United Nations or not, simply in their capacity as significant powers." (*Current Notes on International Affairs,* June 1965, p. 354.)

Territorial, personal, and external jurisdiction

a. Australian forces serving overseas—questions of status and jurisdiction in peace-time.—Because of Australia's commitments under the United Nations Charter of 1945, under the ANZUS Treaty of 1951, under the South-east Asia Collective Defence Treaty (SEATO) of 1954, and under the Government's pledge of September 1963 to defend Malaysia, Australian forces may be called upon in peace-time (i.e. in the absence of a status of war) to serve in the territory of other countries for a variety of reasons; e.g. SEATO joint military exercises, the precautionary stationing of troops to meet possible aggression, and the commissioning of American-built warships or aircraft requiring the training of crews in the United States, etc. That there is a lack of uniformity in the status of Australian forces serving overseas, the subject being regulated largely on an *ad hoc* basis by reciprocal legislation and arrangements governing questions of jurisdiction, subject to international law, is indicated by the answer furnished in the House of Representatives by the Australian Prime Minister (Sir Robert Menzies), on behalf of the Acting Minister for External Affairs, to a question by Mr. E. G. Whitlam, Q.C., Deputy-Leader of the Opposition.

After referring to the fact that Australia was a party to the Tokyo Agreement of 19 February 1954 concerning the status of United Nations forces in Japan (these forces included Australian units) and the United States-Australia Agreement of 9 May 1963 regarding the status of American forces in Australia, both of which Agreements were modelled upon the NATO Status of Forces Agreement of 19 February 1954, Sir Robert Menzies' statement continued as follows:—

> "Arrangements giving appropriate status to Australian servicemen abroad on short or long term missions are kept under close review, discussion and as necessary, negotiation. In the case of the United Kingdom, Canada, New Zealand and Malaysia, legislation in general similar to the Australian Defence (Visiting Forces) Act 1963 exists to govern the status of visiting servicemen in those countries. In Malaysia, our forces have the same status as other Commonwealth Forces in that country. ... In Vietnam, the Government has ensured by technical bilateral arrangements that Australian servicemen are accorded by the Vietnamese Government a status equivalent to that accorded to servicemen of other friendly countries who are likewise serving there.
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> In the case of Australian servicemen in the United States, the United States Government has been asked to extend to them the provision of its Friendly Foreign Forces Act 1944. A reciprocal status of forces agreement with the United States to be concluded at a future date is envisaged in the protocol to the Agreement of 9th May 1963, concerning the status of United States forces in Australia." (*Hansard,* 17 November 1964, p. 3058.)

b. National police or civilian unit serving as part of a United Nations peace-keeping force—duty of sending country to maintain criminal jurisdiction if force immune from the criminal jurisdiction of the country where the force is serving.—In his second reading speech in the House of Representatives on the Crimes (Overseas) Bill 1964,[5] the Australian Attorney-General (Mr. Snedden) made observations indicating that, in the Government's view where a national police or civilian unit is serving as part of a United Nations peace-keeping force in a country, which has conceded to that force immunity from its criminal jurisdiction, it is the duty of the sending country to ensure that the jurisdiction of its own courts extends in relation to any offences that may be committed in the territory of the receiving country by personnel sent or contributed by it to the peace-keeping force. The Bill itself reflected this view. The immediate situation to which the Bill was directed was the presence of an Australian police unit as part of the United Nations Force in Cyprus, taken in conjunction with the fact that Cyprus had virtually conceded immunity from local jurisdiction to the members of the force in respect of any offences committed in Cyprus territory. In the absence of such provisions as in the Bill, Australian courts would have had no jurisdiction over offences (if any) committed by members of the police unit in Cyprus. However, the Bill was in general terms, covering that and any like situations which may arise in the future.

5 Subsequently duly passed and assented to on 23 November 1964.

Mr. Snedden's speech also recognizes the fact that if a receiving country agrees that a visiting force shall be exempt from local jurisdiction in criminal matters, the local courts are bound in international law by the exemption so conceded.[6] (*Hansard,* 29 October 1964, pp. 2478-9.)

Legal regime of the sea

a. Discharge of oil by foreign vessels in non-territorial waters—coastal State no control or jurisdiction over such discharge.—In his second reading speech in the House of Representatives on the Pollution of the Sea by Oil Bill 1965,[7] the Australian Minister for Shipping and Transport (Mr. Freeth) stated that while "each sovereign power can pass laws to prohibit or control the discharge of oil by ships in its own territorial waters", the position is that "no country has power to legislate in respect of the discharge of oil by foreign ships in non-territorial waters." Although the Minister did not state this, the expression "non-territorial waters" includes waters of the Continental Shelf beyond the limits of the territorial sea. The only method consistent with international law of regulating the pollution of non-territorial coastal waters was for States to agree "to prohibit the discharge of oil by ships flying their flags in specified zones adjacent to world coastlines", as was done by the International Convention of 1954 for the Prevention of Pollution of the Sea by Oil, as amended. (*Hansard,* 17 March 1965, pp. 82-3.)

b. Right of foreign vessel to conduct whaling operations in non-territorial waters, notwithstanding the existence of a shore-based whaling station.—In answer to a question in the House of Representatives, the Australian Minister for External Affairs (Mr. Hasluck) conceded that a Russian whaling vessel was entitled to operate in non-territorial Australian coastal waters, notwithstanding the existence of a shore-based whaling station. He recalled that at the International Whaling Commission in 1954, both Australia and New Zealand proposed that sea-going whaling ventures should not operate within a radius of 500 miles of shore-based sperm whaling stations, but the proposal was defeated in the Commission. (*Hansard,* 30 March 1965, p. 420.)

c. Geneva Convention of 1958 on the Continental Shelf—"largely declaratory" of international law.—The Australian Government signed the Geneva Convention of 29 April 1958 on 30 October 1958 and ratified it on 14 May 1963.

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6 Cf. *Chow Hung Ching v. R.* (1949), 77 C.L.R. 449.

7 This Bill was duly passed, and was assented to on 12 April 1965. It was designed to amend the Commonwealth Pollution of the Sea by Oil Act 1960, which gave effect to the provision of the International Convention of 1954 for the Prevention of the Pollution of the Sea by Oil.

In answer to a question in the House of Representatives, the Australian Minister for External Affairs (Mr. Hasluck) said:—

> "On the advice given to me by my Department, the Convention is largely declaratory of existing international law as it is generally understood by the Australian Government, and Australia has already adopted legislation in this field. I refer to the Pearl Fisheries Act 1952-3." (*Hansard,* 30 March 1965, p. 413.)

The State and economic interests—International economic law

a. Foreign investment in Australia—Australian practice not to refuse repatriation of capital or making of current payments.—In his letter to President Lyndon B. Johnson, dated 12 March 1965, regarding proposed United States restrictions on the out-flow of capital, the Australian Prime Minister (Sir Robert Menzies) said *inter alia*:—

> "Australia is a free enterprise economy that has welcomed private oversea investment and treated it with exactly the same consideration that it gives to private investment of Australian origin. Moreover, Australia has joined with other Free World countries in measures to promote freer international trade and payments and, to this end, maintains an 'open' economy with practically no quantitative restrictions on imports and no restrictions on current payments. Although subject to formal control, repatriation of capital invested in Australia is not, in practice, refused."

b. Foreign investment in Australia—the right of investors to repatriate capital is not absolute or unconditional under international law.— It is clear from a statement in the House of Representatives by the Australian Treasurer (Mr. Holt) that notwithstanding the general liberal policy of the Australian Government towards the repatriation of capital by foreign investors, the Government does not acknowledge that under international law foreign investors have an absolute or unconditional right to repatriate capital. The following is the material passage:—

> "We would not . . . wish to see money borrowed in Australia by overseas interests for the purpose of facilitating the remittance of funds abroad. That would amount to an export of capital and, in the main, we are not in a position to become exporters of capital except perhaps for limited and specific purposes which are of clear advantage to Australia. Nor would we, as a general rule, be keen to see overseas interests borrowing money here where it is evidently in substitution for funds which normally they would have obtained from overseas sources.
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> It can be a different matter, on the other hand, where overseas businesses have been well established here over a long period. Often enough such businesses will have brought in substantial capital and have reinvested to a considerable extent from the profits they have earned in Australia. In all probability, they will have made and will still be making a real contribution to the progress of our economy and are doing so on terms which we can only regard as being fair to ourselves, even though they are also profitable to the overseas interests concerned. In such cases, we have long regarded it as quite the normal and proper thing for such enterprises to borrow to some extent from Australian banks or other institutions or on the market. They are, in other words, using and paying for the ordinary financial facilities of the country just as locally owned firms do and we can see no reason why they should not be able to use such facilities.

Again, there can be the case of new ventures starting up here which are bringing in capital of their own but which are also providing for substantial Australian participation in the shareholding of the enterprises. They may also contemplate borrowing in Australia a certain amount of the money they require for the development of their undertakings as well as borrowing from sources abroad. Within the limits of our capital maket to accommodate such borrowings, and keeping in view the needs of our own enterprises, we are inclined to regard this as also being a fair and reasonable arrangement." (*Hansard,* 13 May 1965, pp. 1525-6.)

c. Trade with less developed countries—Australian attitude towards emerging rules of international law governing such trade.—The Ministerial Statement in the House of Representatives by the Australian Minister for Trade and Industry (Mr. McEwan), dealing with the new Part IV added by Protocol of 8 February 1965, to the General Agreement on Tariffs and Trade of 30 October 1947, GATT, and Australia's acceptance of the Protocol, subject to certain reservations as to the commitments under the new article XXXVII,[8] reflected two points in Australia's attitude towards any emerging rules of international law governing trade with less-developed countries:—

(1) Unconditional obligations should not be imposed upon a State, such as Australia, which although not a less-developed country is nevertheless not a major industrial power, compelling it to remove or reduce duties on imports, for the purpose of encouraging trade from less-developed countries, where it would automatically be bound at the same time, with detriment to itself, to extend the like concessions to the major industrialised countries.

(2) The extension of new preferences (subject to consultation with countries significantly affected) as an expedient for encouraging exports of selected products from less-developed countries should not be absolutely excluded by any general rules of international law, otherwise designed to promote the development of free and open trading relationships. (*Hansard*, 19 Mary 1965, pp. 1631-6.)

Aliens

Call-up of aliens for military service—no compulsory obligation to serve.—The Australian Government regards aliens as exempt from any ***compulsory*** obligation to serve in the armed forces of the country in which they reside, unless the State to which they belong consents to waive this exemption. This proposition was explained in some detail by the Australian Minister for Labour and National Service (Mr. McMahon) in answer to a question in the House of Representatives with regard to the application of the National Service Bill 1964:—[9]

"A distinction must be drawn between migrants and aliens. If migrants are British subjects or are naturalised the law applies to them in the

8 These commitments, related to the encouragement of the export of products of special interest to less-developed countries, were accepted by Australia, subject to the reservations that it could not bind itself to fulfil such obligations to the same extent or in the same manner as other developed countries, and that it would discharge these consistently with Australia's own development needs, policies, and responsibilities.

9 Subsequently duly passed and assented to on 24 November 1964.

> same way as it does to a native born Australian. *Under the rules of international law aliens are not and should not be liable to service in the armed forces of a country other than their own without the acquiesence of their own government.* That applies in other countries, just as much as it does here. In other words, in what is called the comity of nations we accept that we should not call up aliens, and similarly other nations accept that they should not call up aliens for their fighting services. This is particularly important to Australia because if we called up aliens and other countries objected there might be reprisals. Those countries could call up Australian citizens who were temporarily visiting or resident there. Equally, we have the responsibility to ensure that nothing is done to interfere with our immigration programme. We want migrants and we are not prepared to offend the governments of the countries from which they come.
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> The principle of international law to which I have referred is accepted in the United Kingdom and also in the United States. It is true that in the United States aliens can be called up for service, but they have the right to opt out. However, having done so, if they subsequently leave the United States they cannot return. If they stay they will not be granted United States citizenship if they refuse to serve. None the less, the principles of international law are accepted there." (*Hansard*, 17 November 1964, p. 3074.)

See also the same effect, Mr. McMahon's statement regarding the United States practice, *Hansard*, 5 May 1965, p. 1137.

The law of treaties

a. Treaty practice—Use of exchange of notes to constitute an agreement.—It is significant that of 11 bilateral agreements and treaties concluded by Australia between 1 April 1965 and 30 June 1965 four were effected by Exchanges of Notes. These were:—

(1) Australia-United States Agreement regarding a Joint Research Programme for the Purpose of Measuring the Physical Effects of Disturbances in the Atmosphere or in Space, Canberra, 12 April 1965.

(2) Australia-Laos Agreement constituting an Amendment to the Agreement of 24 December 1963, concerning the Foreign Exchange Operations Fund for Laos, Vientiane, 7 April 1965.

(3) Australia-Malaysia Agreement relating to the Assumption by Malaysia of the Responsibilities of the Singapore Government under the Agreement of 6 June 1963, concerning the Provision of Treatment in Singapore Hospitals for Asian residents of Christmas Island, etc., Kuala Lumpur, 16 and 21 June 1965.

(4) Australia-United States Agreement regarding the Reciprocal Granting of Authorisations to permit Licensed Amateur Radio Operators of either country to operate their Stations in the other country, Canberra, 25 June 1965. (*Current Notes on International Affairs*, June 1965, pp. 361-3.)

b. Obligations under multipartite treaty of alliance—whether several as well as joint.—The Australian Government takes the view that under the South-east Asia Collective Defence Treaty (SEATO), in

the absence of express terms to the contrary, the obligations of the parties are several as well as joint, and that one party can respond to obligations of military assistance, even if all jointly do not so act. In answer to a question in the House of Representatives regarding the despatch of Australian troops to South Vietnam, the Prime Minister (Sir Robert Menzies) said:—

> "We regard ourselves as honouring a SEATO obligation. There has been some discussion about whether decisions ought to be unanimous . . . . But we have taken the view, and have stated it in this place more than once, that the obligations under SEATO are several as well as joint." (*Hansard,* 5 May 1965, p. 1137.)

The same view was expressed in 1962 by Sir Garfield Barwick when Minister for External Affairs, when supporting in connexion with the question of assistance to Thailand, the American opinion that the obligations under SEATO were individual as well as collective. (*Hansard,* 14 March 1962, pp. 837-8; and 17 May 1962, p. 2452.)

Law of war and non-war armed conflicts

a. Australian military assistance to South Vietnam—whether contrary to international law.—In a reply to the Soviet Government's Note to the Australian Government, dated 15 May 1965, supporting the North Vietnamese protest against Australia's decision to send an infantry battalion to South Vietnam, the Australian Government maintained that such military assistance was in no way contrary to international law. The reply pointed out that the situation involved aggression by North Vietnam in breach of the Geneva Agreements of 1954 regarding the Indo-China settlement, and "the right of individual or collective self-defence is an acknowledged right in international law and is recognised in the Charter of the United Nations" (i.e. in article 51). It follows also that the Australian Government regards article 51 as declaratory only, and not as constitutive in respect to the right of individual or collective self-defence. (*Current Notes on International Affairs,* June 1965, pp. 336-7.)

b. "Confrontation" of Malaysia contrary to international law.—In the course of his defence review on 10 November 1964 in the House of Representatives, the Australian Prime Minister (Sir Robert Menzies) made the following observations indicating that in the Government's view Indonesia's "confrontation" of Malaysia was contrary to international law:—

> "True, in international opinion Malaysia has been strengthened by the vote in the Security Council, the meeting of the Commonwealth Prime Ministers in London, and the relative failure of President Sukarno to gather support at the Cairo conference of unaligned nations. But, though it is now clear that, for all practical purposes, no impartial person doubts that Indonesia is carrying on active and entirely unjustified armed aggression against her neighbour, the fact is that Indonesia still goes on her unlawful way, seeking to undermine Malaysian morale, to cause the disintegration of Malaysia, and no doubt to dominate the Borneo territories if and when they can be detached from Malaysia." (*Hansard,* 10 November 1964, p. 2716.)

c. Use of non-lethal tear gases, and of napalm and incendiary bombs—not contrary to international law.—In answer to a question in the House of Representatives, the Australian Minister for External Affairs (Mr. Hasluck) stated that the use of the non-lethal tear gases, C.N., C.S., and C.N.D.M., as used in South Vietnam "would not be contrary to any international conventions; nor would it contravene the 1925 Protocol for the Prohibition of the Use in War of Asphixiating, Poisonous or other Gases and of Bacteriological Methods of Warfare". The remainder of his statement, impliedly if not in terms, indicated that in the opinion of the Government the use of napalm bombs as conventional weapons, and of phosphorus bombs as incendiaries, for target marking and to produce smoke for concealment, was not in breach of international law. (*Hansard,* 30 March 1965, pp. 416-7.)