Commonwealth Practice*

I. INTERNATIONAL LAW

A. Recognition

1. Of States and Governments

Recognition of a new Government in Greece: Comparison with the status of Communist China.—While a government reply to a question upon notice will often have importance as a considered pronouncement on some aspect of policy or as an explanation of the Government's view of a particular situation, answers to questions without notice must be treated with caution. For obvious reasons an unprepared reply may not be the most reliable guide to the Government's views and, for present purposes, the language used in the reply may not be precise enough to provide a satisfactory basis for analysis of Australian practice.

Even with this qualification in mind, it is nevertheless interesting to examine the reply given by the Minister of External Affairs to the following question without notice asked by Mr. Bryant, A.L.P., on 4 May 1967:—

> "We note the alacrity with which Australia recognized the new Fascist Government of Greece. Why does the Minister not apply the principles which he enunciated on Tuesday when he said: 'We do not pass a judgment on the political events in a country .... We continue to deal with the constitutional government of that country, whatever it might be.'
> Why does he not apply these principles, which seem reasonable enough, to Australia's relationship with China, especially in view of the importance of China's wheat purchases to Australian primary industry? Will he explain the seeming contradiction?"[1]

The tone of the question prompted what might be termed a series of "lively exchanges" between the Minister and the Member, but the substance of the reply did not provide any satisfactory distinction between the recognition of the new Greek régime and the continued non-recognition of the Government of the People's Republic of China.

To begin with, Mr. Hasluck stated that "the position in respect of Greece is that we are in full diplomatic relations with Greece. We have an Ambassador *en poste* in Athens. After a change of govern-

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* The section on International Law is contributed by D. W. Greig, and that on the United Nations by A. C. Castles. Both contributors wish to express their thanks for the references to material provided by Mr. P. Brazil who at the time was the Legal Adviser to the Department of External Affairs. It should be emphasized, however, that the views expressed are solely those of the individual contributor.

1 H. of R., vol. 55, p. 1725.

ment takes place, if it has been made quite clear that that government is in effective control of the country and is recognized as the constitutional government of that country, we authorize our Ambassador to enter into communication with it. In the case of China, we are not in diplomatic relations".[2] This pronouncement largely begs the question. It is certainly no more than stating the obvious that an Ambassador should not communicate with a new régime that has seized power unconstitutionally in the State to which he is accredited until his own State has recognized the régime.

However, it often happens that, in such a situation, the means of according recognition is for the Ambassador himself to do so by resuming normal intercourse with officials of the régime. It is possible that this procedure was in fact the one followed, because two days earlier the Minister had stated that the Australian Ambassador in Athens had "been given permission to recognize the new Government of Greece". But even in this earlier statement the reason for according recognition was obscured by the language used, because the Minister went on to explain: "No formal act is required on our part relating to recognition if a country changes its government and that government is constitutionally and practically recognized."

This pronouncement is similar to that already quoted which the Minister made two days later when he referred to a government "recognized as the constitutional government of that country". If the use of the term "recognized" is meant to denote recognition by the Australian Government, much of what he said is rendered meaningless. It can, therefore, only refer to "recognition" of the new régime by the Greek people. If that is the case, one must look elsewhere for the Australian Government's justification of its different attitude to the People's Republic of China which is in every respect as "practically recognized" by the people of mainland China.

The fact that the State which has to make a decision on recognition has an Ambassador *en poste* gives that State a convenient "procedural" advantage in according recognition, but it is hardly a substantive factor justifying such recognition. It is true that an Ambassador is less likely to remain in the foreign capital if the change of government is effected by violent revolution or civil war. But the reason for according recognition when a government comes to power unconstitutionally is not the presence or absence of an Ambassador at the seat of government. Recognition in such a situation will be accorded or withheld either because the recognizing State makes a practice of acting on the "effective control" test, or because it is more inclined to act on the basis of whether it approves or disapproves of the new régime. It would seem that on this occasion the Minister was anxious to avoid publicly acknowledging the Australian Government's predilection for the second alternative; hence the change of government in Greece was categorized as "constitutional". At least such a conclusion seems inescapable in the light of the references to the Government as "con-

2 Ibid., at p. 1580.

stitutionally recognized", and "recognized as the constitutional government of that country".

The reason for the Minister's reticence on this matter is understandable enough. He was obviously anxious not to give any political advantage to the Opposition in an unprepared answer. It is, therefore, more informative to look to an earlier explanation of the Australian Government's attitude to the People's Republic in a statement made by the then Minister of External Affairs, Mr. Casey, on 13 August 1959.[3] Mr. Casey admitted that there were

> "some people who argue, with obvious conviction, that Australia should take steps to recognize the Peking administration—which describes itself as the Chinese People's Government—as the Government of China, irrespective of what others may do. They believe it is the proper course for Australia to take, on formal legal grounds, notwithstanding what any one else may do. ... It is argued that all the normal rules for diplomatic recognition are satisfied—that is, that the government is established in Peking and that it is in a position to exercise sovereignty and to carry out its international obligations. That is, of course, broadly true. It is contended that, if the Australian Government accepts the fact of the existence of the Chinese Communist régime as, of course, we must do, then logically it should take steps towards diplomatic recognition."

Mr. Casey then put forward a number of reasons why recognition had not been accorded, and then stated, finally, that "a régime's capacity to govern is not the sole test for recognition by other governments. International practice certainly supports the view that whilst capacity to govern is a primary requirement, recognition remains, in fact, within the national discretion to be determined in the national interest". He then pointed out that more than 50 States other than Australia had not recognized the Chinese Communist régime.

> "For various reasons deriving from their national and international interests, these countries have not so far recognized Peking. Some Asian countries, having large Chinese minorities or insurgent Communist movements, do not want accredited Communist Chinese representatives and agencies on their territories. In another case—that of Japan—the Chinese Communist pressure for recognition is accompanied by a demand that Japan should abandon the present general aims and direction of that country's foreign policies. As Japan is unwilling to yield to these demands, Peking has cut off all trade with Japan. The separate problems and attitudes of non-recognizing countries reflect the complex political character of this question of recognition. It is not to be assumed that Australian policy on this matter can be treated as purely and solely a matter arising between Peking and Australia, and with no wider significance."

There is a second point of interest raised by Mr. Hasluck's statement of 4 May 1967. During his discourse on the differences between the recognition of the new military Government of Greece and the situation in China he said:—

> "We are still in diplomatic relations with the Republic of China but not with the People's Republic of China centred on Peking. That is the country which I understand the honourable member ... wishes us to

3 Ibid., vol. 24, pp. 195, 196.

> recognize. ... If any change of government takes place there the action that would be required of us would not be simply to authorize our Ambassador, already *en poste*, to communicate with the new government; it would involve a change of policy to enter into relations with a government with which we were not previously in relations."

The Minister was apparently suggesting a broader distinction based upon the proposition that recognition of the People's Republic would be tantamount to recognition not of a government, but of a new *State* ("country", to use the Minister's term). It may be that his language was carelessly selected and this final part of his speech was no more than a confirmation of the smoke-screen designed to obscure as fas as possible the Government's true motives. But if the language was employed deliberately it raises the interesting consideration that the Australian Government might regard the "two Chinas" situation in a different light from that in which it was seen by the United Kingdom Government in 1950.

The United Kingdom Government recognized the Communist Government as the *de jure* Government of China from 6 January 1950. Recognition was, therefore, withdrawn from the Nationalist Government and both the status of that Government and of the island of Formosa are, in the view of the British Government, uncertain. To the British Government, recognition of the Communist régime was solely a question of recognition of a government. It is possible, however, to classify the situation as having more in common with questions of recognition of statehood; to treat the Nationalist Government as the government of the Republic of China and to regard the People's Republic as a new State. If the Minister's statement can be taken at face value, it certainly would seem that the Australian Government sees the People's Republic's claims to recognition, not as requiring them to be preferred in place of the Nationalists, but as a new State in addition to the existing Republic of China.

Should the Australian Government's view be that the present doubtful status of China and Formosa has more in common with issues of statehood than with a straightforward choice of which government to recognize, it would have every justification for withholding recognition from the People's Republic. It is generally accepted that recognition of a State, as opposed to recognition of a government, is such an important step that the purely factual test of the existence of the entity seeking recognition is inadequate. Even the United Kingdom, which has expressed the greatest support for the Lauterpacht view that recognition should be accorded once the factual characteristics of statehood or of governmental capacity exist, has, significantly, limited its public pronouncements to the duty to recognize *governments;*[4] and declined

4 See the Foreign Secretary's statement in the House of Commons in 1951: 485 H.C.D., Col. 2410; and the explanation given by Sir Roger Makins who at the time (1954) was British Ambassador in Washington, cited Whiteman, *Digest of International Law*, vol. 2, p. 111. It is worth noting that Lauterpacht's main emphasis was on the duty to recognize new *States* (see his *Recognition in International Law*, p. 6), a theory which not even the United Kingdom Government appears prepared to accept.

to recognize the international personality of a number of quasi-state entities like the German Democratic Republic, North Viet Nam and North Korea, and, of course, Rhodesia.

2. Of territorial changes

Mr. Whitlam, A.L.P., asked the Minister for External Affairs upon notice whether the Trade Agreement between the U.S.S.R. and Australia, signed in Moscow in October 1965, applied to trade between Australia and Estonia, Latvia and Lithuania.

In a guarded reply, Mr. Hasluck stated:—

> "Australia has never recognized, and does not now recognize, the juridical incorporation of Estonia, Latvia and Lithuania into the territory of the Soviet Union. The Agreement to which the Honourable Member refers provides for the exchange of most favoured nation treatment between Australia and the U.S.S.R. Most favoured nation treatment also applies to trade between Australia and Estonia, Latvia and Lithuania."[5]

B. Law of the Sea

1. International straits

In a statement made on 25 May 1967 the Minister for External Affairs (Mr. Paul Hasluck) referred to the Gulf of Aqaba as follows:—

> "So far as the present critical question of the blockade of Israel in the Gulf of Aqaba is concerned, the Australian Government believes that redress of grievances should be sought in the first instance by making full use of United Nations organs and machinery. On the substance of this question, Australia holds today, as it has always done and reaffirmed in 1957 and on other occasions, that the Straits of Tiran must be regarded as an international waterway through which the vessels of all nations have a right of passage."

C. Territorial Jurisdiction

1. Diplomatic immunities

It was not until 1967 that an Act was passed in Australia to give effect to the Vienna Convention on Diplomatic Relations of 1961 (Diplomatic Privileges and Immunities Act) which came into force for 22 other States in April 1964, and has since been ratified by many more.

On the second reading of the Diplomatic Privileges and Immunities Bill, the then Minister of External Affairs (Mr. Hasluck) claimed that it (together with certain ancillary legislation relating to customs duties) would "provide for the first time in Australia a comprehensive code of law on the subject".[6] The Minister explained that the present law was scattered over several statutes, while a substantial part—particularly the law relating to diplomatic immunity—rested on the com-

5 H. of R., vol. 53, p. 2434.

6 H. of R., vol. 54, p. 504. The other Bills (Customs Tariff Bill (No. 2); Excise Tariff Bill; Pay-Roll Tax Assessment Bill; Income Tax Assessment Bill; Sales Tax (Exemptions and Classifications) Bill covered a varitey of diplomatic privileges of a fiscal nature and will not be dealt with in this paper.

mon law. The aim of the Bill was to "embrace within its provisions the whole subject of diplomatic privileges and immunities".[7] Hence, s. 7 (1) of the Act provides that, subject to a number of slight modifications contained elsewhere in s. 7, "the provisions of Articles 1, 22 to 24 (inclusive) and 27 to 40 (inclusive) of the Convention shall have the force of law in Australia and in every Territory of the Commonwealth".

(a) **Classes of Diplomatic Agent.**—Under those provisions of the Convention enacted as part of Australian law by the Act, various categories of personnel were created.

(1) *Diplomatic agents and their families.*—In the words of the Minister, "full immunity is conferred only on the diplomatic staff of a mission, that is to say, the Ambassador, High Commissioner and Chargé d'Affaires, and members of the diplomatic staff (Counsellors, First, Second and Third Secretaries and Attachés)".[8] However, what the Minister did not explain was that are. 31 (1) of the Convention as enacted by the new legislation almost certainly has effected a change in the law. Immunity is not available—

(i) where the action relates to private immoveable property situated in the territory of the receiving State, unless it is held on behalf of the sending State for purposes of the mission;

(ii) if the action relates to matters of succession and the agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(iii) where the action concerns any commercial venture undertaken by the agent outside his official functions.

This last provision reverses previous authorities. In *Magdalena S. N. Co. v. Martin*[9] it was held that the accredited public Minister of a foreign State could not be sued in the English courts even though the proceedings arose out of a commercial transaction. The position in the other two cases is less certain. It was obviously desirable that the Australian courts should have jurisdiction in such situations. A number of dicta exist suggesting that the English courts might assume jurisdiction over immoveable property situated in England on the ground that if they did not, the courts of the sending State might not be able to exercise jurisdiction because of their conflict-of-laws rules,[10] but it was patently more satisfactory that the law should be made clear in the way provided for in the Convention.

Under art. 37 (1) members of the family of a diplomatic agent shall, if they form part of his household and are not nationals of the receiv-

7 Ibid., at p. 505.

8 Ibid.

9 (1859), 2 E. & E. 94; *Taylor* v. *Best* (1854), 14 C.B. 487 (First Secretary); *Re Republic of Bolivia Exploration Syndicate Ltd.*, [1914] 1 Ch. 139 (Second Secretary).

10 Subject to certain exceptions an English, or an Australian, court has no jurisdiction to entertain an action for the determination of title to, or the right to the possession of, foreign land: see Dicey & Morris, *Conflict of Laws*, pp. 147 *et seq.*; Nygh, *Conflict of Laws in Australia*, pp. 151-61.

ing State, enjoy the same immunities from suit, and most of the same privileges.[11]

(2) *Administrative and technical staff and their families.*—The definition of this category of staff contained in art. 1 of the Convention is not particularly helpful as the relevant paragraph states that they are "members of the staff of the mission employed in the administrative and technical service of the mission". The question of what personnel are covered under this heading is more easily answered by excluding personnel covered by the other categories. Hence they are staff not having diplomatic rank and not in domestic service. Mr. Hasluck gave as examples of such personnel typists, clerks and archivists. These staff, the Minister explained,

> "are accorded full immunity in respect of their official acts but in relation to their non-official acts they have no immunity from the civil jurisdiction of the state in which they are serving. They are, however, given immunity from the criminal jurisdiction of the receiving state, this being regarded as essential to enable these members of the staff of a mission to carry out their duties without risk of interference on the part of the state in which they are serving."[12]

The Minister did not deal with members of the family of such personnel who are, if forming part of a member of staff's household, entitled to like immunities (art. 37 (2)).

(3) *Service staff.*—Service staff of the diplomatic mission, defined in the Convention as "members of the mission in the domestic staff of the mission" enjoy immunity only "in respect of acts performed in the course of their duties" (art. 37 (3)).

(4) *Private servants.*—Private servants of members of the mission enjoy privileges and immunities entirely at the discretion of the receiving State (art. 37 (4)). The Australian Government has chosen to accord a certain degree of immunity; the position of such staff is considered in detail below.

(b) **Certification of diplomatic status.**—Article 14 provides an interesting departure from the common law position as laid down by the House of Lords in *Engelke v. Musmann.*[13] In that case the Court of Appeal had been informed that the defendant had been "appointed as a member of the staff of the German Ambassador under the style of Consular Secretary and . . . received in that capacity by the British Government". The Court had nevertheless allowed the defendant to be cross-examined on his precise status. This procedure their Lordships held to be improper. A statement made to a court on behalf of the Crown as to the *status* of a person claiming diplomatic immunity was conclusive.[14]

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11 I.e., those specified in arts. 29 to 36 of the Convention.

12 H. of R., vol. 54, p. 505; art. 37 (2) of the Convention.

13 [1928] A.C. 433; [1928] All E.R. Rep. 18.

14 Applying the same rule as that established in relation to a claim of sovereign immunity in *Duff Development Co. Ltd. v. Kelantan Government,* [1924] A.C. 797; [1923] All E.R. Rep. 349.

However, while such a certificate was conclusive on the status of the diplomatic agent in question, the Court was nevertheless free to consider what conclusions of law it should deduce from that fact. As the Attorney-General admitted in his submissions in *Engelke v. Musmann,*

> "such a statement is conclusive upon the question of diplomatic status alone; and it is still for the Court to determine as a matter of law whether, the diplomatic status having been conclusively proved, immunity from process necessarily follows ... there may be cases in which, though the diplomatic status is conclusively proved in the manner indicated, yet immunity from process may still not exist ..." .[15]

This limitation on the ambit of the executive certificate seems to have been overlooked by the Minister at the committee stage of the Bill. Under the Act the Minister "may give a certificate in writing certifying any fact relevant to the question whether a person is or was entitled to any privileges or immunities", but such certificate is only "evidence of the facts certified". When asked[16] about the change envisaged in the proposed legislation compared with the law as laid down in *Engelke v. Musmann,* the Minister explained that the Government had no wish to make the certificate "conclusive evidence". He instanced a traffic case or a suit for a debt.

> "The sort of certificate that the Minister would give would be to the effect that the person named in the certificate is, say, a chauffeur employed by such and such a diplomatic mission and that his national status is so and so. Then it would be for the court to say, after examining the Convention and the legislation now before us—assuming that it becomes an Act—that a person so certified by the Minister is entitled to this or that degree of immunity."[17]

A similar but, it is suggested, preferable solution would have been to make the *Engelke* decision statutory and to allow the Minister's certificate to be conclusive on the employment and status of the individual concerned. In this way any potential conflicts of evidence and diplomatically embarrassing cross-examinations of those claiming immunity on their precise duties would be avoided. It would still be for the court to draw its conclusions as to the effects of the Act and of the Convention on the individual whose status is thus established.

It must be said, however, that the attitude of the Australian Government in allowing to the courts such scope is refreshingly different from that of the United Kingdom Government. In the British Diplomatic Privileges Act of 1964, s. 4 goes far beyond the position laid down in *Engelke v. Musmann* and provides that if in any proceedings any question arises whether or not any person is entitled to any privilege or immunity under the Act, a certificate issued by or under the authority of the Secretary of State stating any fact relating to that question "shall be conclusive evidence of that fact". It would

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15 [1928] A.C., at pp. 436-7.

16 By Mr. Killen, H. of R., vol. 54, p. 778.

17 Ibid., at pp. 778-9.

thus be possible for a British Foreign Secretary to issue a certificate withdrawing virtually any matter from determination by the courts.

(c) **The Relevance of Nationality.**—Article 8 of the Convention laid down what was already established in diplomatic practice. Members of the diplomatic staff of the mission should in principle be of the nationality of the sending State, and cannot be appointed from among persons having the nationality of the receiving State without the consent of that State. There is no restriction upon the employment of nationals of the receiving State on the technical or service staff of a mission.

In all cases the Convention curtails the immunities of a diplomatic agent or other member of the staff of the mission if the individual concerned is a national of, or permanently resident in, the receiving State. Under art. 38 a diplomatic agent, who is a national of, or permanently resident in, the receiving State, shall enjoy only immunity from jurisdiction and inviolability in respect of official acts performed in the exercise of his functions. Other members of the staff of the mission and private servants who are nationals of, or permanently resident in, the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere with the performance of the functions of the mission. The course proposed by the Australian Government was expressed by the Minister as follows: the Government "considers that private servants and non-diplomatic staff who are Australian citizens or who are permanently resident in Australia should not be accorded privileges, but that it is reasonable to accord them immunity in respect of acts performed in the course of their duty. The same immunity is proposed for private servants who are not Australian citizens or permanently resident in Australia".[18]

While this was the proposal, s. 11 of the Act extended immunities from jurisdiction and inviolability in respect of "acts performed in the course of their duties" to

> "(*b*) private servants of members of such a mission, being servants who are Australian citizens or ordinarily resident in Australia or in a Territory of the Commonwealth; and
> (*c*) private servants of the head of such a mission who are not Australian citizens and are not ordinarily resident in Australia or in a Territory of the Commonwealth."

The consequence of this curious provision is that unless they are servants of the head of the mission, private servants who are non-nationals and non-residents have their position regulated by the Convention: they are, therefore, exempt from income tax, but jurisdiction may be exercised over them providing it is done "in such a manner as not to interfere unduly with the performance of the functions of the mission" (art. 37 (4)). If, on the other hand, the private servants are servants of the head of the mission, or if they are Australian citizens or Australian residents, they have complete immunity in respect of their

18 Ibid., at p. 506.

official acts. In other words, private servants in general (i.e. those not serving the head of the mission himself) may be subject to the jurisdiction in respect of their official acts if they are foreign nationals and foreign residents, but are exempt if they are Australian citizens and residents. This bizarre consequence arose, it appears, through an oversight during the passage of the Bill through Parliament.[19]

(d) **Waiver of immunity.**—Abuse of diplomatic immunity has always been a contentious issue, particularly in countries like Australia where diplomatic personnel and other staff form such a relatively large percentage of the population of the federal capital. The Minister dwelt on this issue at some length in his speech.

> "I pass now to consider another aspect of diplomatic immunity. It is argued that diplomatic immunity often involves hardship for an individual who has a right of action against a member of a diplomatic mission which would otherwise be adjudicated in court. It cannot be denied that such a consequence may, and sometimes does, arise but there are other considerations to be borne in mind.
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> Article 32 provides that diplomatic immunity may be waived by the country which the diplomat involved represents; and in practice, waiver often occurs. Moreover, the Vienna Conference passed an important resolution which recommends that governments waive the immunity of members of diplomatic missions in respect of civil claims when this can be done without impeding the performance of the functions of the mission. The resolution also recommends that, should a mission not waive immunity, the sending state should use its best endeavours to bring about a just settlement of the claim.
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> It could well be the case that this resolution will result in changes in the attitudes of governments as regards claims of diplomatic immunity in respect of actions involving their staff. So far as Australia is concerned the Australian Government has drawn the attention of missions in Canberra to this resolution in several cases over recent years with the result that claims of immunity have been withdrawn. Furthermore, if cases of hardship resulting from the application of the rules relating to diplomatic immunity arise, the Department of External Affairs is prepared to assist whenever it can bring about a solution acceptable to both sides—perhaps by bringing the parties together in some way or by seeking agreement that a dispute be referred to arbitration.
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> I do not want to leave the impression that I am of the opinion that claims to diplomatic immunity may never cause inconvenience or hardship, but I have sought to show that the Government will do all it can to overcome any problems which individuals might face in this regard. It is the Government's view that a fair balance is struck in the Convention between the needs of individuals and the needs of Governments. We should remember too, that an effect of any further reduction of diplomatic immunities could well be to place in jeopardy the security of Australian missions overseas and of Australian personnel serving in those missions."[20]

The Government's optimism was not altogether shared by certain

19 It may be permissible to argue that the act of any "employee" of a foreign State in the course of official functions should be protected from the jurisdiction of the local courts by a plea of *sovereign immunity* although this principle would presumably not apply to purely domestic chores within a servant's employment. It is a pity that the Act did not lay down a general rule of immunity in respect of acts in the course of a servant's employment irrespective of his nationality.

20 Ibid., at pp. 506-7.

members, most notably Mr. Fraser, A.L.P., the representative for the A.C.T. He commented that "over the years" he had brought to the House's attention "many cases in which real harm and real hardship" had been suffered by members of the community because of the "operation of diplomatic immunity".[21] He cited the example of a dispute which arose in 1962, between a representative of the U.A.R. and the owners of a house in Canberra. After various attempts had been made to settle the matter amicably, a writ was issued by the owners claiming $530 arrears of rent. The defendant subsequently claimed diplomatic immunity so that no further action could be taken in the courts. At a later date the parties agreed that their dispute should be submitted to arbitration and that the Dean of the Law Faculty of the Australian National University should act as arbitrator. An award was made in the owners' favour in December 1964, but the diplomatic agent left Australia in January 1965, without paying the amount awarded as the costs. The matter was taken up through the Australian Embassy in Cairo, but at the time of the present debate no settlement had apparently been reached.[22]

(e) **Traffic offences.**—Particular anxiety was voiced over the effect of immunity upon the observance of traffic regulations and upon any claim that an Australian citizen might have as a result of negligent driving by a diplomatic agent. In his second reading speech the Minister suggested that "it should be borne in mind that the immunity of diplomatic personnel is not an immunity from the provisions of the local law. It is an immunity from the jurisdiction of the courts of the receiving State. The Convention, in art. 41, makes it clear that it is the duty of diplomatic personnel to respect the laws and regulations of the receiving State. In the case of a serious breach of the law by a member of a diplomatic mission, or in the event that frequent offences are committed by any such person, earnest consideration will be given by the Government to declaring the person *non grata*". Furthermore, the Minister pointed out, the Convention certainly restricted the class of persons entitled to immunity in respect of non-official activities:—

> "administrative and technical staff will be subject . . . to civil proceedings in relation to any off-duty accidents and members of service staff will be liable to both civil and criminal proceedings in relation to off-duty accidents or offences."[23]

It was of course realized on both sides of the House that the relations between the authorities of the receiving State and individual representatives of the sending State was largely a matter of "moral obligation", to use Mr. Fraser's expression. There were bound to be cases in which the conduct of the diplomatic agent did not live up to this obligation. Mr. Fraser instanced a number of "flagrant breaches of the traffic laws, particularly in relation to parking. In any of the shopping centres in Canberra you will see cars bearing DC plates which are illegally parked at bus stops, by red painted kerbs at

21 Ibid., at p. 770.
22 Ibid., at p. 774.
23 Ibid., at p. 507.

corners and in the centre of streets in which centre parking is not permitted. You will find DC cars double-parked or left for hours in places in which the ordinary citizen, if he left his car there for only a short while, . . . would be fined . . . . Diplomats, of course, cannot be touched for such breaches of the law".[24]

Among the more striking illustrations of diplomatic peccadillos given by Mr. Fraser was "the celebrated case of the French diplomat who had a passion for low-slung sports cars". Apparently he used to boast that he could drive the 193 miles from the centre of Sydney to the centre of Canberra in two and a quarter hours. On a subsequent occasion he drove round one of the main ring roads in Canberra at 70 miles an hour. When attention was drawn to this behaviour the offending diplomat was "back in France within 48 hours".[25] Another example quoted by the Member concerned the wife of an Asian diplomat who went through all the necessary preliminaries to securing a driving licence, but was found to have defective eyesight. She was informed that she could not be issued with a licence, but that she was nevertheless entitled to drive as persons entitled to diplomatic privileges did not require a licence.[26]

This last example serves as a convenient introduction to the vexed question of traffic accidents in which a diplomat is alleged to be responsible for injuries suffered by a private claimant. Basically, of course, there is no difference between a claim of this type and any other action against a person entitled to diplomatic immunity. However, whereas there is no obligation upon a mission to take out industrial injury[26a] or other type of insurance to satisfy any possible liability to employees or other persons, there is a requirement that a third-party insurance policy issued by an authorized insurer be lodged before a vehicle is registered and DC plates issued. Does the existence of an insurance policy covering any liability that the diplomat might incur affect the position of the would-be claimant?

In a subsequent statement issued by the Minister of External Affairs on 16 March 1967 it was explained that the existence of a policy of insurance did not place the claimant in a more satisfactory position. After pointing out that diplomatic immunity was an immunty only from the jurisdiction of the courts of the receiving State and did not confer an immunity from legal liability, and that immunity could be and, in civil cases, frequently was waved by the sending State, the Minister went on to consider the "practical issues" confronting the victim of a traffic accident who wished to obtain redress from a diplomatic agent.

> "If an action is brought in respect of the accident, two possibilities exist: either the immunity is waived or it is not. In the event of waiver, the matter would proceed to judgment in the ordinary way. As the third party policy provides insurance against the legal liability of the insured, it follows that an insurance company that has issued a third-party policy

24 Ibid., at p. 772.
25 Ibid., at p. 771.
26 Ibid., at p. 772.
26a Subject to the provisions of art. 33 of the Convention.

to a person entitled to diplomatic immunity cannot take advantage of that immunity to avoid responsibility under the policy, where the liability of the insured for the death of or bodily injury to a member of the public is established. I note in this connection that the law of each State and Territory provides that, if the judgment is not satisfied, judgment may be entered against the insurer. If the immunity is not waived, the Department of External Affairs would, on being approached on behalf of the injured person, be prepared to raise the matter with the diplomatic mission concerned and seek to have the other Government comply with the recommendation adopted at the Vienna Conference. It is the Government's hope—and, as I have mentioned, there are grounds in Australia's experience for thinking that this may not be an idle hope—that, in cases of traffic accidents giving rise to questions of diplomatic immunity, the immunity would be waived."

2. Application to aliens of legislation enforcing military service

Proceedings in federal Parliament.—It was during the period under review that the Commonwealth Government announced its decision to extend liability to military service to aliens. In a statement of 10 August 1966 the Minister of Labour and National Service, Mr. Bury, declared that those who were not British subjects, who had chosen Australia as their home or who would come in future to make their home in Australia, would be liable for national service. Mr. Bury pointed out that the effect of this decision would be to put such persons on the same footing as British subjects who had similarly made Australia their home. "The Government's decision", Mr. Bury continued, "will apply to all who have come or who will come to Australia with the intention of making their home here. It will not apply to those who are here only for a limited period, for example, tourists, students and those on business. Nor will it apply to those here as employees of other Governments or as officials of the United Nations, its specialized agencies and other prescribed international organizations". No migrant, whether British subjects or not, would be called up until they had been in Australia for at least two years; and those who wished to leave rather than be called up would be permitted to do so. In the case of migrants who were not British subjects, call-up would be deferred for a year until the age of 21 to enable them to make as adults the decision whether or not they wished to remain in Australia. Finally, Mr. Bury explained that, in coming to its decision, the Government had given careful consideration to the international aspects of the matter. It had reached the conclusion that the new arrangements he had outlined, applying as they did only to those choosing to make Australia their home, were entirely reasonable from the international standpoint, and did not conflict with any established principles of international law.

Mr. Bury's statement was the subject of close questioning in the House of Representatives. Referring to the statement made by Latham, C.J., in the well-known case of *Polites v. Commonwealth* that the wartime regulations conscripting aliens were "contrary to an established rule of international law",[27] Dr. J. F. Cairns, A.L.P., asked[28]

27 (1945), 70 C.L.R. 60, at p. 70.
28 H. of R., vol. 52, p. 102.

whether the Government's view did not still concide with that expressed by the Chief Justice.

The question was answered by Mr. Snedden, the Attorney-General. He explained that, even in 1945 when the case was heard, the judges of the High Court had held differing views, and since then there had been a great deal of writing on the subject and a change of emphasis in the views expressed in such writings. The matter had been closely examined by the Government and, as it applied only to people who elected to make their home in Australia and offered an accelerated naturalization to those concerned, the proposal did not conflict with any principle of international law.[29]

Dr. Cairns directed a further question to the Government spokesman a fortnight later.[30] He had obviously had his attention directed to a statement made by the former Minister of Labour, but present treasurer, Mr. McMahon, to the effect that under the rules of international law aliens were not and should not be liable to service in the armed forces of a country other than their own without the acquiescence of their own Government.[31] Dr. Cairns, however, omitted the reference to the acquiescence of the alien's own Government and represented the Minister's pronouncement as meaning that aliens should not be called up whatever the circumstances. Despite this misstatement of what the Minister had said, it is apparent that the Government were embarrassed by the fact that their attitude had demonstrably undergone a change within a comparatively short period of time.[32]

There were obvious factors involved in this change of policy. While the original reason for the exemption—the fact that would-be migrants might be deterred from coming to Australia if they foresaw the likelihood of being conscripted themselves, or of their sons being conscripted—still held good, two other considerations were now regarded as of greater significance. First, there was the adverse public reaction to the fact that Australian 20-year-olds could be conscripted while migrant youths were exempt from national service as long as they remained aliens. And, secondly, although of less importance, this exemption operated as a deterrent in some cases to naturalization, thus, to an extent, adversely affecting the Government's avowed object of obtaining rapid migrant assimilation.

Despite ministerial references to the shift in emphasis that rules of international law had undergone since 1945, it is obvous enough that it was a change of policy rather than a change in the law which resulted in the gazetting of a notice extending liability to national service to aliens.[33] Nevertheless, it is clearly important that Australian legislation should, as far as possible, comply with the Commonwealth's obligations under international law. The question, therefore, arises

29 Ibid., at pp. 102-3.

30 Ibid., at pp. 507-8.

31 H. of R., vol. 44, p. 2785.

32 Hence Mr. Bury's evasive reply: H. of R., vol. 52, p. 508.

33 This power was granted to the Minister by s. 10 of the original National Service Act 1951.

whether the amendments did have the effect, as was implied by Dr. Cairns' questions, of bringing the Act into conflict with existing principles of international law.

The *Polites Case*.—A convenient starting point to the discussion is the opinions expressed by the members of the High Court in the *Polites Case*. The majority of judges were prepared to accept that international law imposed restrictions upon the right of the territorial sovereign to conscript aliens. As Latham, C.J., himself stated: there was

> "a rule which prevented the imposition upon resident aliens of an obligation to serve in the armed forces of the country in which they resided unless the State to which they belonged consented to waive this ordinarily recognized exemption . . . . This rule, however, does not prevent compulsory service in a local police force, or, apparently, compulsory service for the purpose of maintaining public order or repelling a sudden invasion."[34]

A variety of texts were then referred to[35] as establishing "the distinction . . . between the use of military forces for ordinary national or political objects and police action to preserve social order or to protect the population against an invasion". Similar views were expressed by Dixon, C.J., who stated that, generally speaking, one nation at war with another was not allowed "to compel the nationals of a third country, without its consent, to fight in that war";[36] by McTiernan, J.;[37] and by Williams, J., who adopted the principle, put forward by the International Commission of Jurists, that foreigners could not be "obliged to perform military service, but those foreigners who were domiciled, unless they prefer to leave the country, may be compelled, under the same conditions as nationals, to perform police, fire-protection, or militia duty for the protection of the place of their domicile against national catastrophes or dangers not resulting from war".[38] Of the other judges, Rich, J., assumed that some such principle existed for the purposes of deciding the case, but expressed doubts whether States were likely to agree on "questions of international law";[39] and Starke, J., referred to "the practice or rule" as "rather vague and undefined".[40]

Nineteenth-century practice.—The various texts to which the Court was referred drew their conclusions on the then existing principles of international law from a very limited range of opinions and of practice. Heavily relied upon by the writers cited to the Court were a number of statements made by the British Government at the time of the American Civil War. In its instructions to Lord Lyons, H.M. Govern-

34 70 C.L.R., at p. 70.

35 *Inter alia*, Oppenheim, *International Law*, 5th ed. (1937), vol. 1, pp. 541-2; Pitt Cobbett, *Cases on International Law*, 5th ed. (1937), vol. 1, p. 203; Hall, *International Law*, 8th ed. (1924), pp. 259-60.

36 70 C.L.R., at p. 77.

37 70 C.L.R., at p. 79.

38 This Project appears in the (1929) 23 A.J.I.L. (Supp.), p. 234; quoted in 70 C.L.R., at p. 80.

39 70 C.L.R., at p. 74.

40 70 C.L.R., at p. 76.

ment conceded that there was "no rule or principle of international law which prohibits the government of any country from requiring aliens, resident within its territories, to serve in the Militia or Police of the country, or to contribute to the support of such establishments". This pronouncement was seized upon as establishing the proposition that there *was* such a rule prohibiting the conscription of aliens into the regular forces of a State. Hence one finds Hall propounding (in a passage which found favour with members of the High Court) that it was reasonable, and in accordance with general principle,

> "to say, as is in effect said by Bluntschli, that—
> 1. It is not permissible to enrol aliens, except with their own consent, in a force intended to be used for ordinary national or political objects.
> 2. Aliens may be compelled to help to maintain social order, provided that the action required of them does not overstep the limits of police, as distinguished from political action.
> 3. They may be compelled to defend the country against an external enemy when the existence of social order or of the population itself is threatened, when, in other words, a State or part of it is threatened by an invasion . . ." .[41]

In a number of respects the nineteenth century precedents upon which Hall and Pitt Cobbett largely relied were unsatisfactory because mass conscription has been primarily a twentieth-century phenomenon. The impressments of the early part of the last century constituted harsh and brutal treatment which, if meted out to an alien, clearly gave the alien's own State a right to demand his release apart from the military service issue.[42] And the practice occasioned by the American Civil War concerned a situation that has no exact parallel with the normal circumstances in which an alien might be conscripted. This difference is well brought out by a passage in a report of the Law Officers of 30 September 1861, in which it was said that

> "While H.M. Government might well be content to have British subjects, voluntarily domiciled in a foreign country, liable to all the obligations ordinarily incident to such foreign domicile (including, where imposed by the municipal law of such country, service in the Militia, or National Guard, or local Police, for the maintenance of internal peace and order, or even, to a limited extent, for the defence of the territory from foreign invasion), it is not reasonable to expect that H.M. Government should remain entirely passive under the treatment to which we understand British subjects are actually exposed in various States of the former Union; such, for instance, as being embodied and compelled to serve in regiments, perhaps nominally of 'Militia', but really exposed not only to the ordinary accidents and chances of war, but to be treated as rebels or traitors in a civil war. . . . No State can justly frame laws to compel aliens, resident within its territories, to serve, against their will, in armies ranged against each other in a civil war."[43]

Despite the limited scope of these early pronouncements, it is un-

41 *International Law*, 8th ed. (1924), pp. 259-60, repeating the statement made in earlier editions; see, e.g., 4th ed. (1895), p. 217.

42 Though in his letter of 5 January 1804, to the American Minister in Britain, Secretary of State Madison was emphatic that "subjects of one country residing in another, though bound by their temporary allegiance to many common duties, can never be rightfully forced into military service, particularly external service . . .": Moore, *Digest of International Law*, vol. 4, p. 52.

43 *British Digest of International Law*, vol. 6, pp. 377-8.

doubtedly true that they had great influence on subsequent attitudes. As far as British practice was concerned, it was clearly accepted by the end of the century that service in a civil guard or militia could be imposed upon British subjects in the country in which they were resident unless an exemption was provided for by treaty (either directly or as a result of a most favoured nation clause giving an exemption accorded to aliens of other nationalities). It was also the policy to make representations on behalf of British subjects becoming liable to militia duty by new legislation of the State of residence on the ground that such an enactment would "operate harshly" upon them. Such representations could of course be formulated on the basis of comity rather than on any legal foundation. And, in the context of the attempt by the South African Republic to oblige non-national (not being coloured) residents to co-operate in the maintenance of the independence of the Republic, the Foreign Office expressly relied upon the whole of the Hall/Bluntschli quotation given above in advising the Colonial Office. It was stated more specifically that H.M. Government could "object to the enrolment of British subjects for the maintenance of the independence of the Republic as coming within the category of a national or political object defined by Bluntschli".[44]

Although American practice was not altogether uniform during the rest of the nineteenth century, there was a sufficient degree of continuity in the view that aliens should not be conscripted into a regular military unit. Hence, in 1880, the State Department strongly protested at the impressment of a group of Americans, who were visiting Mexico, into the Mexican army. It was clearly wrongful for visitors to be thus treated, but the American complaint was made, *inter alia*, on the wider ground that it was "in contravention of public law and international comity" for one State to conscript the citizens of another into its military service.[45] And in a later communication arising out of the forcible drilling of an American resident of Batavia in the local Dutch militia, the State Department advised the American Minister at The Hague that it was "well settled by international law that foreigners temporarily resident in a country cannot be compelled to enter into its permanent military service" although it was also true that "in times of social disturbance or of invasion their services in police or home guards may be exacted".[46]

Both the United Kingdom and the United States, throughout the nineteenth century, insisted upon the inclusion of provisions in their commercial treaties exempting their nationals from various forms of military service or contributions in the territory of the other party (on a reciprocal basis, of course). The suggestion is sometimes made[47]

44 These general principles governing Foreign Office attitudes at the tern of the century may be deduced from the materials reproduced in the *British Digest*, vol. 6, pp. 391-3.

45 Moore, op. cit., at p. 59.

46 Ibid., at p. 62.

47 E.g. in relation to British practice by Parry in (1954), 31 B.Y.I.L. 437; and *British Digest*, vol. 6, pp. 394-5: see also the same author's comments in *The Sources and Evidences of International Law*, p. 41.

that the existence of these treaties is evidence that the two States did not regard such an exemption as existing under customary international law. However, the need for these treaty provisions may be more readily explained on the ground that there were areas of uncertainty under the customary rule which could be avoided by an express and clearly worded undertaking. In addition, later treaties avoided the possible ambiguity in the use of the provision "shall be exempted from all compulsory military service whatsoever . . . and from all forced loans, or military exactions and/or requisitions", by exempting nationals resident in the territory of the other party from "all compulsory military service whatever, whether in the army, navy or national guard or militia" and from "all contributions . . . imposed as a compensation for personal service".[48] Hence the treaty exemptions were extended beyond those available under customary international law so that they cannot be put forward as evidence that the United Kingdom did not believe that customary law exempted aliens from permanent military service.

The period from 1900 to 1945.—There is nothing in the practice of the United Kingdom and the United States during the first half of the present century to suggest that their views had altered. During the First World War, the American Selective Service Act made liable to military service, in addition to all male citizens in the specified age group, all other male persons of such ages, not being alien enemies, "who had declared their intention to become citizens". These "declarant aliens", as they were called, were still regarded as their nationals by the States from which they came, but they had a sort of "intermediate status" under American law. Numerous complaints were received from the States concerned at the induction into the American army of such persons, and, once the complaint had been verified, the individual concerned was discharged. The number of complaints were so many that the U.S. Government found it more convenient to amend the Act to allow such persons to withdraw their declaration of intent and thus avoid liability for call-up. Similarly, in the Second World War, the Selective Training and Service Act allowed declarant aliens to claim exemption as aliens at the penalty of being debarred from ever becoming a U.S. citizen.

No real problems raised themselves in the United Kingdom. Conscription was only extended to a limited number of foreign nationals. Agreements were entered into with various governments-in-exile allowing the United Kingdom to call up those of their nationals who had not entered the service of their own units.[49] Such agreements were probably necessary in any case because of the existence of earlier treaties providing for the mutual exemption of nationals, but they also demonstrate the reluctance with which the British Government would force military service upon aliens.

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48 The forms and the various treaties are listed in the *British Digest,* vol. 6, pp. 394-6.

49 See Whiteman, *Digest of International Law,* vol. 8, pp. 547-8.

Post-1945.—The position in the United Kingdom has remained unchanged. The National Service Act of 1948, which continued compulsory conscription in Britain for more than a decade, applied only to British subjects. In the United States, the Selective Service Act of 1948, and the Universal Military Training and Service Act into which it was converted in 1951, both continued the practice of conscripting aliens (in the later Act male aliens within the specified ages who had been "admitted for permanent residence"), unless they wished to claim exemption on that ground. If an individual did claim exemption upon the basis that he was an alien he became "permanently ineligible" to citizenship.[50]

Australian legislation and international law.—There is sufficient evidence to suggest that the "exemption of aliens from military service . . . is part of general international law"[51] in the sense that their presence within the territory of a State alone is not a sufficient basis for conscription. However, international law is based upon a compromise between the conflicting interests of States. It is not possible to say that the conscription of an alien is automatically a breach of a State's obligations towards the national State.

Both the United States and the Commonwealth of Australia have welcomed and encouraged immigration as a means of increasing their population or of obtaining desired technical skills or other abilities. As a consequence both countries have had a large percentage of aliens wishing to obtain citizenship amongst their population. Once an alien is firmly established in a new country and has the intention of remaining there, it is not unreasonable to regard his links with his State of residence as carrying with it the obligations of permanent membership of that community. Certainly the *Nottebohm Case* was prepared to recognize the rights of the State of residence as against a connexion with a State of nominal nationality.[52] And there would seem to be some grounds for suggesting that the State of residence of an immigrant should have certain rights as against the other State and its national. The conscripting State is not claiming *priority* but only the power to consider the individual as its national unless the person concerned makes a clear stand in favour of his former nationality.

In the United States this stand takes the form of claiming exemption on the ground of nationality and thus of forfeiting any opportunity of being admitted subsequently to U.S. citizenship. The alternative to call-up in Australia, however, is more serious—the migrant is allowed to leave the country. Although this choice may appear harsh in humanitarian terms, it would not seem in itself to involve a breach of international law. A State has in any case a right to exclude or deport aliens so that it could hardly be wrongful to *allow* any alien to leave rather than face military service. It is only automatic conscription of

50 Immigration and Nationality Act 1952, s. 315; 8 U.S.C. Sect. 1426.

51 French Senate report reproduced in Kiss, *Répertoire Français de Droit International Public*, vol. 4, para. 555.

52 I.C.J. Reports, 1955, p. 4.

aliens to which exception might be taken. However, the weakness of the Australian Government's stand lies not in its claim to be able to treat permanently resident aliens as "quasi-citizens", but in the fact that it has imposed national service as a burden upon such persons without allowing them many of the benefits of citizenship (the right to vote, to be employed in the public service, etc.).

Despite Opposition allegations to the contrary, it cannot be said that the National Service Act itself constitutes a breach of the Commonwealth's obligations under international law. On the other hand, the Government suggestion about a change in emphasis in the law on the subject is not altogether accurate. It is not an absolute rule that aliens cannot be conscripted, even for full-time military service. During the American Civil War the advice of H.M. Government remained throughout that "British subjects . . . were entitled . . . to leave the country (if they should elect to do so) rather than submit to compulsory military service". But it was never supposed that the British Government "could claim as a right that British subjects should be permitted to continue permanent inhabitants of the territory of either belligerent upon terms of exemption from the local laws as to military service".[53]

Where it might be argued that Australian law does fall short of the international standard as in its imposition of the burdens of citizenship upon many aliens without allowing them the benefits. The attempt has been made to meet this criticism by the 1967 amendment to the Nationality and Citizenship Act 1948-1966. All residential qualifications prerequisite to naturalization are waived in the case of an alien who has served for not less than three months in the permanent forces of the Commonwealth. It should be realized, of course, that such service in no sense entitles the alien to naturalization the grant of which remains at the discretion of the Minister of Immigraton. Furthermore, the possibility of accelerated naturalization is only available to the conscript: it is small consolation to the parents that they must continue to be regarded as aliens while their son serves in the Australian army. It is hardly surprising that the Australian Government hastened to regularize its relations with Italy, from which a majority of its non-British migrants come, by obtaining the "without prejudice" acceptance by the Italian Government of the alternative of conscription or repatriation for Italian migrants in Australia contained in the Australian-Italian Migration Agreement of September 1967. Article 33 of the Agreement stated that the "attitudes of the two Governments on the principle of the liability for military service of persons who are not citizens of but have chosen to make their home in the other country have been made clear one to the other in diplomatic exchanges in Canberra and in Rome during the year 1966. Without prejudice to the substance of these exchanges, it is reaffirmed that . . . an Italian citizen in Australia who wished to leave Australia rather than be called up for national service will, on application to the Australian Department of Labour and National Service, be free to do so".

53 Report of the Law Officers of 6 December 1864: *British Digest*, vol. 6, p. 390.