

# Australia has violated Timor-Leste's sovereignty, UN court told

In opening submissions at The Hague, lawyers say Canberra has fallen short of the high standards expected of it

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The International Court of Justice in The Hague hearing the case between Timor-Leste and Australia. Photograph: Bart Maat/EPA

Australia's "illegal" seizure of documents from a Canberra-based lawyer acting for Timor-Leste falls short of the high standards expected of a nation with considerable international standing, the International Court of Justice has been told.

Timor-Leste's representatives used their opening submissions to the court in The Hague to denounce the raid by Australian Security Intelligence Organisation (Asio), arguing national security interests were "not some magic wand" that allowed a country to wave away its obligations under international law.

The International Court of Justice has set aside three days to hear the dispute between Timor-Leste and Australia over the fate of documents seized by Asio on 3 December. Australia's attorney general, George Brandis, issued warrants to search addresses in Canberra "on the grounds that the documents contained intelligence related to security matters".

Timor-Leste contends that the documents and electronic data removed from the offices of its Canberra-based legal adviser, Bernard Collaery, feature highly confidential, legally privileged correspondence with the government of Timor-Leste, including information about its strategy in the pending arbitration under the Timor Sea Treaty with Australia. In that dispute, Timor-Leste argues a 2006 agreement to extend the crucial oil and gas treaty is void because Australia conducted the negotiations in bad faith by allegedly bugging the Timor-Leste cabinet room to gain an unfair advantage.

Timor-Leste is seeking an urgent ruling from the International Court of Justice ordering Australia to deliver to the court the documents and data seized from Collaery's premises and to destroy any copies. It also wants Australia to "give an assurance that it will not intercept or cause or request the interception of communications between Timor-Leste and its legal advisers".

One of the lawyers appearing at the court for Timor-Leste, Sir Elihu Lauterpacht, said Australia's unconscionable conduct "manifestly distorts the character of the future negotiations by placing Timor-Leste at a considerable negotiating and litigating disadvantage".

Lauterpacht said Timor-Leste aimed "to prevent with immediacy Australia from deriving any further benefit from the internationally illegal seizure" of the documents. He contrasted Australia's status as large, powerful and rich in natural resources with the weaker position of its "much smaller and much poorer" neighbour.

"This unprecedented and improper, indeed, inexplicable conduct, compounded at various times by self-contradictory statements, on behalf of Australia, is not the behaviour of some state that does not subscribe to normal standards of international legal behaviour. Rather, it is the behaviour of a state of considerable international standing," Lauterpacht told the court on Monday.

Lauterpacht said he regretted appearing in a case against Australia as he had served as the principal legal adviser of the Department of Foreign Affairs between 1975 and 1977.

"During that time I conceived a deep affection and a high regard for that country, so it is saddening for me that in this case I'm obliged to confront Australia in respect of conduct which inexplicably falls so far short of the high standards that prevailed in my time," he said.

Apart from Collaery's offices, the raids reportedly included the home of a senior retired Australian Secret Intelligence Service (Asis) agent who was a prime witness to Australia's alleged spying against Timor-Leste during treaty negotiations.

Brandis told the Senate last month he had issued search warrants at Asio's request after satisfying himself that the requests from the intelligence agency met the relevant statutory tests.

The attorney general said the Intelligence Services Act prohibited current and former officers of Asis from communicating any information connected with the agency.

Lauterpacht told the court on Monday: “Despite the circumstances surrounding the present case, this is not a case about spying and espionage. The court will not have to pronounce on such activities generally. Rather the case is a relatively simple one: one state has taken the property of another and should be required to give it back, untouched and without delay.”

Monday’s two-hour hearing was dedicated to Timor-Leste’s opening submissions, with Australia set to present its opening arguments on Tuesday. Timor-Leste’s lawyers attempted to neutralise some of Australia’s arguments, including suggestions that Timor-Leste could have taken action in Australian domestic courts.

Sir Michael Wood, for Timor-Leste, said: “The existence of remedies under Australian law, even if they could be shown to be effective, is not relevant in the present situation where a sovereign state complains about a direct interference with its rights under international law.”

Wood said it was also irrelevant that the seized documents were “brought within or created within Australia”.

“It does not amount to a waiver of the rights which Timor-Leste has under international law in respect to its property,” he said. “Were it otherwise it’s difficult to see any foreign state seeking advice of lawyers in Australia.”

Referring to Australia’s national security argument, Wood said: “The court should indeed be prudent but national security and the enforcement of criminal law are not some magic wand that makes the rights and obligations of states under international law vanish.”

On 3 December, after the raids were carried out, Brandis rejected allegations the warrants were “issued in order to affect or impede the current arbitration between Australia and Timor-Leste at The Hague”. The attorney general said: “I have instructed Asio that the material taken into possession is not under any circumstances to be communicated to those conducting those proceedings on behalf of Australia.”

But Lauterpacht said Brandis’s undertakings were “silent upon the availability of these very sensitive and confidential documents to those Australian officials involved in maritime delimitation matters”.

Lauterpacht said the seized iPhone, laptop, USB thumb drive and other documents may contain “a very wide and miscellaneous range of materials” that were legally sensitive including matters not directly related to the arbitration.

He said Collaery’s office had been working on many files on behalf of the Timor-Leste government and they were therefore the property of Timor-Leste. “This is fully in line with the generally accepted proposition that the client, in this case the government, has proprietary ownership of documents that had been brought into existence or received by a lawyer acting as agent on behalf of the client, or that had been prepared for the benefit of the client and at the client’s expense.”

Lauterpacht said Australia failed to recognise “that the seizure of another state’s property is as

much a violation of international law as would be the seizure of any part of another state's territory – it is a matter of scale, not of quality”.

A Timor-Leste ambassador appearing before the court, Joaquim Fonseca, said present-day relations between the two countries were “close and friendly”, but national resources of the sea remained a “serious bone of contention”.

“The government and people of Timor-Leste feel a real sense of grievance at the manner in which they have been treated by our last neighbour in this respect. To their credit, there are many in Australia who share our discontent,” Fonseca said.

“Timor-Leste has now initiated arbitration under article 23 of the Timor Sea treaty. Then, in complete disregard and disrespect of our sovereignty, Australian secret agents have seized papers relating to the arbitration proceedings as well as other important legal matters between Timor-Leste and Australia. That has caused deep offence and shock in my country.”

The hearing before the principal judicial body of the United Nations continues.

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