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**International Court of Justice**

**THE HAGUE**

**Cour internationale de Justice**

**LA HAYE**

**YEAR 2014**

***Public sitting***

***held on Wednesday 22 January 2014, at 10 a.m., at the Peace Palace,***

***President Tomka presiding,***

***in the case concerning* Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste *v.* Australia)**

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**VERBATIM RECORD**

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**ANNÉE 2014**

***Audience publique***

***tenue le mercredi 22 janvier 2014, à 10 heures, au Palais de la Paix,***

***sous la présidence de M. Tomka, président,***

***en l'affaire relative à des* Questions concernant la saisie et la détention de certains documents et données (Timor-Leste c. Australie)**

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**COMPTE RENDU**

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|---|---|---|
| *Present:* | President | Tomka |
| | Vice-President | Sepúlveda-Amor |
| | Judges | Owada |
| | | Abraham |
| | | Keith |
| | | Bennouna |
| | | Skotnikov |
| | | Cançado Trindade |
| | | Yusuf |
| | | Greenwood |
| | | Xue |
| | | Donoghue |
| | | Gaja |
| | | Bhandari |
| | Judges *ad hoc* | Callinan |
| | | Cot |
| | Registrar | Couvreur |

*Présents :* M. Tomka, président
M. Sepúlveda-Amor, vice-président
MM. Owada
Abraham
Keith
Bennouna
Skotnikov
Cançado Trindade
Yusuf
Greenwood
Mmes Xue
Donoghue
M. Gaja
M. Bhandari, juges
MM. Callinan
Cot, juges *ad hoc*

M. Couvreur, greffier

***The Government of Timor-Leste is represented by:***

H.E. Mr. Joaquim A.M.L. da Fonseca, Ambassador of the Democratic Republic of Timor-Leste to the United Kingdom,

*as Agent;*

H.E. Mr. José Luís Gutteres, Minister for Foreign Affairs and Co-operation;

H.E. Mr. Nelson dos Santos, Ambassador of the Democratic Republic of Timor-Leste to the Kingdom of Belgium and the European Union;

*

Sir Elihu Lauterpacht, C.B.E., Q.C. Honorary Professor of International Law, University of Cambridge, member of the Institut de droit international, member of the English Bar,

Mr. Vaughan Lowe, Q.C., Emeritus Professor of International Law, University of Oxford, member of the English Bar,

Sir Michael Wood, K.C.M.G., Member of the International Law Commission, member of the English Bar,

*as Counsel and Advocates;*

Ms Janet Legrand, Partner, DLA Piper UK LLP,

Ms Emma Martin, Associate, DLA Piper UK LLP,

Ms Jolan Draaisma, Senior Associate, Collaery Lawyers,

Mr. Andrew Legg, Ph.D., member of the English Bar,

*as Counsel;*

Mr. Andrew Sanger, Lauterpacht Centre for International Law, University of Cambridge,

Mr. Eran Sthoeger, LL.M., New York University School of Law,

*as Junior Counsel;*

Mr. Bernard Collaery, Principal, Collaery Lawyers,

*as Advisor.*

***Le Gouvernement du Timor-Leste est représenté par :***

S. Exc. M. Joaquim A.M.L. da Fonseca, ambassadeur de la République démocratique du Timor-Leste auprès du Royaume-Uni,

*comme agent ;*

S. Exc. M. José Luís Guterres, ministre des affaires étrangères et de la coopération de la République démocratique du Timor-Leste ;

S. Exc. M. Nelson dos Santos, ambassadeur de la République démocratique du Timor-Leste auprès du Royaume de Belgique et de l'Union européenne ;

*

sir Elihu Lauterpacht, C.B.E., Q.C., professeur honoraire de droit international à l'Université de Cambridge, membre de l'Institut de droit international, membre du barreau d'Angleterre,

M. Vaughan Lowe, Q.C., professeur émérite de droit international à l'Université d'Oxford, membre du barreau d'Angleterre,

sir Michael Wood, K.C.M.G., membre de la Commission du droit international, membre du barreau d'Angleterre,

*comme conseils et avocats ;*

Mme Janet Legrand, associée au Cabinet DLA Piper UK LLP,

Mme Emma Martin, collaboratrice au Cabinet DLA Piper UK LLP,

Mme Jolan Draaisma, collaboratrice principale au Cabinet Collaery Lawyers,

M. Andrew Legg, Ph.D., membre du barreau d'Angleterre,

*comme conseils ;*

M. Andrew Sanger, Lauterpacht Centre for International Law de l'Université de Cambridge,

M. Eran Sthoeger, LL.M, Faculté de droit de l'Université de New York,

*comme conseils auxiliaires ;*

M. Bernard Collaery, associé principal, Cabinet Collaery Lawyers,

*comme conseiller.*

***The Government of Australia is represented by:***

Mr. John Reid, First Assistant Secretary, International Law and Human Rights Division, Attorney-General's Department,

*as Agent;*

H.E. Mr. Neil Mules, A.O., Ambassador of Australia to the Kingdom of the Netherlands,

*as Co-Agent;*

Mr. Justin Gleeson, S.C., Solicitor-General of Australia,

Mr. James Crawford, A.C., S.C., F.B.A, Whewell Professor of International Law, University of Cambridge, member of the Institut de droit international, Barrister, Matrix Chambers, London,

Mr. Bill Campbell, Q.C., General Counsel (International Law), Attorney-General's Department,

Mr. Henry Burmester, A.O., Q.C., Special Counsel, Australian Government Solicitor,

*as Counsel and Advocates;*

Mr. Chester Brown, Professor of International Law and International Arbitration, University of Sydney, Barrister, 7 Selbourne Chambers, Sydney, and Essex Court Chambers, London,

Mr. Rowan Nicholson, Barrister and Solicitor, Supreme Court of South Australia, Research Associate, Lauterpacht Centre for International Law, University of Cambridge,

*as Counsel;*

Ms Camille Goodman, Principal Legal Officer, Attorney-General's Department,

Ms Stephanie Ierino, Senior Legal Officer, Attorney-General's Department,

Ms Amelia Telec, Senior Legal Officer, Attorney-General's Department,

Ms Esme Shirlow, Acting Senior Legal Officer, Attorney-General's Department,

Ms Vicki McConaghie, Legal Adviser, Attorney-General's Department,

Mr. Todd Quinn, First Secretary, Embassy of Australia in the Kingdom of the Netherlands,

Mr. William Underwood, Third Secretary, Embassy of Australia in the Kingdom of the Netherlands,

*as Advisers;*

Ms Natalie Mojsoska, Administration Officer, Attorney-General's Department,

*as Assistant.*

***Le Gouvernement de l'Australie est représenté par :***

M. John Reid, premier secrétaire adjoint, division du droit international et des droits de l'homme, services de l'*Attorney-General*,

*comme agent ;*

S. Exc. M. Neil Mules, A.O., ambassadeur d'Australie auprès du Royaume des Pays-Bas,

*comme coagent ;*

M. Justin Gleeson, S.C., *Solicitor-General* d'Australie,

M. James Crawford, A.C., S.C., F.B.A., professeur de droit international à l'Université de Cambridge, titulaire de la chaire Whewell, membre de l'Institut de droit international, *Barrister*, Matrix Chambers (Londres),

M. Bill Campbell, Q.C., *General Counsel* (droit international), services de l'*Attorney-General* d'Australie,

M. Henry Burmester, A.O., Q.C., *Special Counsel*, *Solicitor* du Gouvernement australien,

*comme conseils et avocats ;*

M. Chester Brown, professeur de droit international et d'arbitrage international à l'Université de Sydney, *Barrister*, 7 Selborne Chambers (Sydney) et Essex Court Chambers (Londres),

M. Rowan Nicholson, *Barrister* et *Solicitor* près la Cour suprême de l'Australie-Méridionale (Supreme Court of South Australia), attaché de recherche au Lauterpacht Centre for International Law de l'Université de Cambridge,

*comme conseils ;*

Mme Camille Goodman, juriste principal, services de l'*Attorney-General*,

Mme Stephanie Ierino, juriste hors classe, services de l'*Attorney-General*,

Mme Amelia Telec, juriste hors classe, services de l'*Attorney-General*,

Mme Esmee Shirlow, juriste hors classe par intérim, services de l'*Attorney-General*,

Mme Vicki McConaghie, conseiller juridique, services de l'*Attorney-General*,

M. Todd Quinn, premier secrétaire, ambassade d'Australie au Royaume des Pays-Bas,

M. William Underwood, troisième secrétaire, ambassade d'Australie au Royaume des Pays-Bas,

*comme conseillers ;*

Mme Nathalie Mojsoska, administrateur, services de l'*Attorney-General*,

*comme assistante.*

The PRESIDENT: Good morning. Please be seated. The sitting is now open. The Court meets this morning to hear the second round of oral observations of Timor-Leste on its Request for indication of provisional measures. Let me immediately call upon Sir Elihu Lauterpacht. You have the floor, Sir. Please.

Sir Elihu LAUTERPACHT: Thank you, Mr. President, Members of the Court. I am sorry not to be able to provide the Court with a written text of what I am about to say. However, I have no doubt that the Court's excellent interpreters, to whom we are much indebted for their admirable work, will be able to cope with it. They will have no problem in following me.

Mr. President, Members of the Court, it is obviously a cause of regret to me that I should have caused offence to the Government of Australia and to my former colleagues. If I may have sounded harsh, there was no intention to hurt; but the word "inexplicable" was the only word I could think of to describe the what and the why and the when of the seizure of the property in Canberra — property belonging to the Government of Timor-Leste. And it is only yesterday morning that there has been an attempt by Australia to justify it in a specific and a comprehensible manner. I just refer to a couple of passages in the speech of the learned Solicitor-General at paragraphs 38-40 (CR2014/2):

> "Australia is entitled", he said, "to have a legitimate concern that a former officer of one of its intelligence agencies may have disclosed and may threaten to further disclose national security information";

— conduct which is likely to constitute a serious criminal offence under the Australian legislation. Australia is further entitled to be concerned that "Timor-Leste [is] encouraging the commission of [such] crime[s]" under Australian law. And he then continued: "To place classified information in the hands of a foreign State is a serious wrong for Australia, as it would be for any nation." And lastly, he says:

> "The true object of [Timor-Leste's] Request for provisional measures [is] to prevent Australia from taking steps properly available under [its] domestic law to protect [itself] from a threat to security posed by a disaffected former officer."

Now Timor-Leste will be the first to acknowledge the right of a State to protect itself. But certain questions remain. From what? Protect itself from what? By what means? And when?

As to "from what?": is it protecting itself from the likely revelation that Australia's security seriously and illegally entered Timor-Leste under false pretences? Then surreptitiously placed devices in the government offices of Timor-Leste, eavesdropped, and extracted information to which they were not entitled? And which we are bound to presume facilitated their own thinking. So, Australia does not want the details of this publicly revealed and threatens action against the ex-officer who is blamed for the revelation of this perfidy.

"By what means?": to seize possibly incriminating materials from the premises of a lawyer in Australia, materials belonging to Timor-Leste and held on its behalf by the lawyer.

"And when?": when the lawyer was out of his office, out of the country.

So "why now?": only because Australia has become aware of the prospect that the material involved might somehow be used against it in the arbitration proceedings. Or because it wished to cause apprehension in those who might give evidence against it in the arbitration proceedings.

And did Australia even consider that the documents might belong to its neighbour, Timor-Leste? The Court has not heard a word denying Timor-Leste's ownership of the material. Australia has chosen to treat the material as if it were ordinary — and I use an adjective they employed — *commercial* material, beneficially owned by the lawyer concerned. It has not said anything to deny Timor-Leste's ownership. Australia denies Timor-Leste's entitlement to the protection of its property. It argues that for Timor-Leste to claim title to material in Australia is a new form of claim to extra-territorial jurisdiction. Nothing of the kind. Property ownership is property ownership. Not to be confused with any recognized form of extra-territorial jurisdiction.

State property cannot be seized or interfered with. It is the immunity attaching to such property in the hands of an agent that we are concerned about. No loss of title, but it is simply in the custody of a person acting on their behalf.

No word was said in reply to the authorities cited by Timor-Leste like the *Rahimtoola* case, the *Cristina* and *Ysmael* cases— all decisions of either the House of Lords, or the Privy Council or the Court of Appeal in which recognition was given to the title of the State in the property held by the agent. No word was said about, for example, the precedent of the United Kingdom recently in protesting against the Spanish seizure of papers in Spain. I likened the seizure to taking by a State of part of its neighbour's territory, and I wish to emphasize that there is no difference between the

taking of territory and the taking of property — that is only a matter of size, not of quality. A taking is a taking. Now all of Australia's position appears to rest on the invocation by Australia of the possibility of recourse to Australian domestic legal procedures. No answer is made to Timor-Leste's submission that the exhaustion of local remedies is not relevant to this matter. We have given the Court authorities like *Avena*, the *Corfu Channel*, and so on. But no answer is given to their invocation.

Now, Australia complains in passing of the failure or lack by Timor-Leste to file written observations prior to this hearing, as Australia did. There must be some misunderstanding. Australia put the failure in terms of a failure to respond to an invitation by the Court. There was no such invitation. I cannot find any reference to such a possibility in the Court's Statute or Rules, nor amongst our papers is there a copy of any invitation. Timor-Leste is certainly grateful to Australia for its own Written Observations, but they fail to deny Timor-Leste's ownership and they repeat the constant reference to local remedies available in Australia.

But there is no way in which Timor-Leste can be criticized for not having put into writing our own written observations. One needs only to recall the fact that the Application instituting proceedings in the case was made on 17 December and that it was followed on the same day by the Application for provisional measures. No invitation came from the Court to supplement that request.

Nor is it necessary for Timor-Leste to anticipate this week's proceedings. It is sufficient that Timor-Leste's case is stated in front of you, Mr. President and Members of the Court, yesterday and today.

There was a certain reference in the Australian contribution to balancing of interests. Now, in advancing balancing of interests, Australia place all the emphasis on its interests. It seems to disregard Timor-Leste's interests, but they cannot be disregarded. Timor-Leste has a security interest of a very specific kind, namely, the protection of the privacy of its internal government discussions.

Australia makes indirect threats aimed at witness K, and even at Mr. Collaery. In so doing it fails to take into consideration two items of prospective prosecution. First, if the criminal law enforcement authorities in Australia adopt what I might call an even-handed approach, the

possibility of prosecution in Australia of persons concerned with ordering or administering the activities which are themselves a violation of Australian law, that needs to be taken into account. And against this there is a possibility that the prosecution can be started in Timor-Leste against those responsible for the initiation of the interceptions in the Government's offices. Such proceedings, under Timor-Leste's criminal law, obviously would take place in the Timorese courts, but they would be entitled to seek the assistance of the Australian authorities in presenting the accused for trial.

The significance of the latest undertaking by the Attorney-General needs to be mentioned. Only now does it extend to maritime delimitation matters. I mean no disrespect to the Australian Attorney-General when I say that his undertaking should be backed up by an order of the Court that deals with the treatment of the materials.

I come now, Mr. President, to my concluding point. I am fortunate in having the benefit of knowledge of what Sir Michael Wood will say, and he will cover quite a number of other points. I know that Latin is not the favoured language of Australia. Even so it would be better if Australia were to say *culpa mea maxima culpa* and thus admit its blameworthiness now. By so doing, it could put this whole sorry affair behind us. Let Australia restore the materials forthwith and, in the Arbitration, incidentally, accept that the CMATS Treaty never properly came into existence. Australia has it in its power to restore a proper basis for the maintenance and improvement of friendly relations between the Parties.

Mr. President, that is all that I wish to offer the Court. I respectfully ask you to call on Sir Michael Wood. I thank you very much for allowing me to speak and I need hardly say that it is with the greatest displeasure that I leave you now. Thank you, Mr. President.

The PRESIDENT: Thank you very much, Sir Elihu. Now I call upon Sir Michael Wood to continue in presenting observations of Timor-Leste.

Sir Michael WOOD:

**APPLICATION OF THE LAW AND PRACTICE ON PROVISIONAL MEASURES**

1. Mr. President, Members of the Court, I shall respond to what the Australian side said yesterday concerning the conditions for the indication of provisional measures. But I should like to begin by quoting as Sir Eli has just done, the Solicitor-General, Mr. Gleeson. At paragraph 39 of his speech he said this:

> "these disclosures threaten our security interests. The security interests are broader than the fate of the Arbitration. To place classified information in the hands of a foreign State is a serious wrong to Australia, as it would be to any nation."

Quite. And to seize classified information from Timor-Leste is a serious wrong, as it would be to any nation.

2. Mr. President, I would like to turn first to Judge Cançado Trindade's question, which was put to both Parties. The question read:

> "What is the impact of a State's measures of alleged national security upon the conduction of arbitral proceedings between the Parties? In particular, what is the effect or impact of seizure of documents or data, in the circumstances of the present case, upon the settlement of an international dispute by negotiation and arbitration?"

3. I shall try to answer that question, both as a matter of principle, and as it applies to this case, but the short answer is that the seizure of documents makes the settlement of international disputes much more difficult. Trust is lost, relations are poisoned. States should refrain from allowing national interests, including national security interests — important though they may be — adversely to affect international proceedings between sovereign States, and the ability of sovereign States to obtain legal advice. Nothing should be done which would infringe the principles of the sovereign equality of States, non-intervention, and the peaceful settlement of disputes, provided for in Article 2.3 of the United Nations Charter. These are at the core of the international legal order as reflected in the Charter and other key documents, such as the Friendly Relations Declaration[1].

[1] A/RES/25/2625, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 24 October 1970.

4. Applying this to the case in hand, we look to the Court to ensure that Australia does not secure unfair advantage, either in the context of litigation or, more broadly, in the context of the Timor Sea.

5. Both Parties seem to agree that legal privilege is a general principle of law, and is not without limitations, but the Parties seem to disagree on the scope of these limitations. In response to Judge Cançado Trindade's question, I would point to the difference between such limitations under domestic law, as argued for by Australia, and limitations under international law. The domestic limitations argued for by Australia should not apply when a sovereign State seeks legal advice. Australia is not entitled to restrict Timor-Leste's ability freely to communicate with its lawyers. There is no limit on immunity in respect of diplomatic documents on Australian soil; there is no reason of principle why the same should not apply to a State's claim to privilege in respect of legal advice.

6. In any case, any assertion of a limitation on privilege should not hinder Timor-Leste's preparations for international proceedings or negotiations. This principle was expressly recognized in the *Libananco* case[2]. Contrary to what Mr. Burmester said yesterday[3], recognition of this principle should not preclude Australia from continuing any criminal investigation; it would just ensure that Timor-Leste's documents remain inviolable notwithstanding that process.

7. Mr. Campbell began by asking you to keep in mind the alleged general principles applying to provisional measures set out in Australia's Written Observations[4]. As we made clear yesterday, we do not regard as convincing what they had to say on these matters. The Written Observations take a very restrictive view of provisional measures. Yet the institution of provisional measures is essential to the judicial process. Its importance is increasingly recognized by international courts and tribunals. Of course, like any judicial process, it can be abused, but courts know how to deal with that. Mr. President, we reject any insinuation by Australia that Timor-Leste is acting abusively in seeking provisional measures. In particular, we reject the unworthy suggestion by Professor Crawford that Timor-Leste is using these proceedings "to skirt around the confidentiality

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[2] *Libananco Holdings Co. Limited* v. *Republic of Turkey, ICSID Case no. ARB/06/8, Decision on Preliminary Issues*, 23 June 2008, p. 42, para. 1.2

[3] CR 2014/2, p. 32, para. 17 (Burmester).

[4] CR 2014/2, p. 21, para, 3 (Campbell).

provisions of the Arbitral Tribunal and maximize the opportunity for publicity and comment prejudicial to Australia"[5]. We are not. You only have to look at the terms of our letter of 16 January, in response to Australia's requests concerning confidentiality, to see that that is not the case.

**(a) Prima facie *jurisdiction***

8. Mr. President, the Court has been placed in a rather awkward position by Australia's attitude to prima facie jurisdiction. Yesterday, Mr. Campbell said:

> "while Australia may well contest the jurisdiction and admissibility of Timor-Leste's Application commencing . . . proceedings at the merits phase, or earlier, [we hope not] it will not be raising those matters in relation to Timor-Leste's Request for provisional measures"[6].

Yet, Mr. President, the Court needs to satisfy itself that it has prima facie jurisdiction. So Australia's attitude is quite unhelpful, if not disrespectful.

9. Professor Crawford, at paragraph 22 of his speech, hinted that the present proceedings might — I say "might" because he did not develop the point — be caught by exception *(a)* in Australia's Optional Clause declaration: "any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement". That is far-fetched; the two cases, before the Arbitral Tribunal and before this Court, are entirely distinct. We do not believe that there is any reason for the Court not to conclude that it has at least prima facie jurisdiction.

10. Before leaving Professor Crawford's statement, let me say that I found his attempt to show that our concerns about the documents did not go beyond the Arbitration wholly unconvincing. He none too subtly emphasized some words in certain documents and tried to "skirt around", to use his expression, others which made clear the scope of our concerns. His assertion that it is difficult to be precise about the documents seized covering wider matters than the negotiations, because they are currently under embargo[7], is also pretty unconvincing. In many

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[5]CR 2014/2, p. 39, para. 8 (Crawford).

[6]CR 2014/2, p. 21, para. 3 (Campbell).

[7]CR 2014/2, p. 41, para. 16 (Crawford).

cases it is perfectly clear, as we showed on Monday. LPP005, for example, is entitled "Correspondence to Lowe Q.C. re: Timor Sea maritime boundary issues".

**(b)** ***The rights whose protection is sought and the measures requested***

11. We dealt at some length on Monday with the rights under international law that are at issue in this case. Australia has skirted around most of the points we made.

12. Mr. President, Australia likes to exaggerate! As Sir Elihu has just pointed out, Australia accused Timor-Leste — yesterday — of creating a "new form of extra-territoriality", which amounts, as they said, to a "quantum leap in the expansion of public international law"[8]. They have said that we claim an "absolute" right[9]. Mr. Gleeson added that our argument renders superfluous other accepted immunities under international law[10].

13. Yet Timor-Leste's position does no such thing. It relies on the principles reflected in all immunities: that substantive law, which normally applies, cannot be enforced against a State, be it in relation to its diplomats, its special missions or its property. As the Court stated in *Germany* v. *Italy*, "[i]mmunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it"[11].

14. The relationship between immunity and substantive law was further addressed in that case, where you said:

> "Moreover, as the Court has stated (in the context of the personal immunities accorded by international law to foreign ministers), the law of immunity is essentially procedural in nature (*Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 25, para. 60). It regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful."[12]

And later you said:

> "The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another . . . They do not bear upon

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[8]CR 2014/2, p. 12, para. 6 (Gleeson).

[9]CR 2014/2, p. 11, para. 6 (Gleeson).

[10]CR 2014/2, p. 23, para. 6 (Gleeson).

[11]*Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 124, para. 57.

[12]*Ibid*., p. 124, para. 58.

> the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful."[13]

15. So the fact that Australia claims that its seizure of property in the possession of Timor-Leste's attorney has been carried out by a warrant issued by the Attorney-General, as provided for under domestic law, is of no relevance. As noted by the International Law Commission in its Commentary on the Draft Articles that became the 2004 Convention, "there is a clear and unmistakable presupposition of the existence of 'jurisdiction' of that other State over the matter under consideration; it would be totally unnecessary to invoke the rule of State immunity in the absence of jurisdiction".

16. Timor-Leste's argument is based on this very principle. Be it within the framework of the United Nations Convention, or as a matter of customary law, the immunity of a State's property is relevant precisely because it would otherwise be subject to the territorial jurisdiction.

17. Mr. President, Members of the Court, by issuing a warrant for the seizure of documents belonging to Timor-Leste, and by seizing and retaining such documents, the Australian authorities breached the inviolability of Timor-Leste's State papers and violated the immunity to which Timor-Leste is entitled under international law. As the Court said also in *Germany* v. *Italy*:

> "the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of the sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order."[14]

18. Mr. Campbell questioned the current status of the United Nations Convention[15]. But, unsurprisingly, this Court, like a number of regional and domestic courts, has found customary law to be reflected in the Convention, for example when determining the customary exceptions to the general rule of immunity.

19. Mr. Campbell challenged the view that in issuing the warrant the Attorney-General was acting as a "court" within the meaning of the Convention and customary law[16]. He said that the Attorney-General cannot fall under this description since he is from the executive branch, not the

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[13] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 140, para. 93.

[14] *Ibid.*, p. 123, para. 57.

[15] CR 2014/2, p. 25, para. 19 (Campbell).

[16] CR 2014/2, pp. 23, 26, paras. 9, 22 (Campbell).

judiciary, and since there are no judicial proceedings when the Attorney-General issues a warrant under the ASIO Act[17].

20. Mr. Campbell simply did not address the points we made on Monday. He did not refer to the definition of a "court" in Article 2.1 (*a*). He did not mention the International Law Commission's Commentary on that definition and its interpretation[18]. He did not address the term "judicial proceedings" or, in particular, the "quasi-judicial" nature of the Attorney-General's role when issuing the warrant in this case. He did not address the term "jurisdictional immunities".

21. This is a judge that normally issues a search warrant, but here it has been issued by the Attorney-General. This fact is of no relevance for the purposes of the Convention, which is to be interpreted autonomously and not by reference to domestic characterizations. Its object and purpose are served when immunities are granted from seizure of State property, regardless of the formal position of the issuing authority under domestic law.

22. Mr. Campbell appears to suggest that the Attorney-General's actions were outside the scope of the law on State immunity[19]. But they are precisely the kind of actions that the law on State immunity aims to prevent. That is why the Commentary states that the Convention applies to the exercise of judicial powers by whatever authority[20].

23. Mr. Campbell's assertion that there are no judicial proceedings involved is also hard to accept. We have heard Mr. Gleeson list a whole series of criminal legislation concerning offences that may have been breached[21]. We know that the ASIO Act stipulates that its violation amounts to criminal offence[22]. We heard that Australian law does not grant legal professional privilege to documents seized because they came into existence in pursuance of a crime or fraud[23].

24. In any event, given all of these references to criminality and criminal procedures, it is hard to accept that the seizure of the documents and their retention by ASIO is completely

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[17]CR 2014/2, p. 26, para. 23 (Campbell).

[18]CR 2014/1, pp. 37-38, paras. 20-22 (Wood).

[19]CR 2014/2, p. 26, paras. 23-34 (Campbell).

[20]Draft Article 1, Commentary (2), *Yearbook of the International Law Commission (YILC)*, 1991, Vol. II, Part II, p. 13.

[21]CR 2014/2, p. 17, para. 32 (Gleeson).

[22]Australian Security Intelligence Organisation Act 1979, Section 4A.

[23]CR 2014/2, p. 15-18, paras. 27-33 (Gleeson).

unrelated to any future judicial proceeding. And I would recall that State immunity is to apply from the very outset of an investigation by another State's authorities.

25. Mr. Campbell argued that Timor-Leste does not accept any exceptions to the rule of immunity of State property, and that therefore the immunity it argues for is implausible[24]. Mr. President, it is not for Australia or Timor-Leste to accept or make up exceptions. That is a matter of law. The exceptions reflect the fact that State immunity is a customary rule, as recognized by this Court, and under customary law there are certain exceptions. For example, commercial transactions[25] and in relation to immovable property[26]. But in so far as documents and data in the hands of legal counsel are concerned, there is no such exception.

26. This is the approach taken by States in their own domestic legislation. The basic rule is immunity, unless otherwise stipulated. One need look no further than the Australian Foreign States Immunities Act of 1985. Article 9 of that Act is entitled "General immunity from jurisdiction" and makes clear that a State and its property are immune from jurisdiction "[e]xcept as provided by or under this Act". Nowhere in the Australian Act does it say that State property in the hands of legal counsel is an exception to the rule on immunity.

27. Mr. Campbell asserts that Timor-Leste claims without basis that State property and papers enjoy "absolute inviolability"[27]. Counsel for Australia seem to like the word "absolute" to refer to what we said. I do not in fact recall using that word once on Monday. Australia is once again engaging in the well-known tactic of overstating a proposition in order to knock it down.

28. Australia was highly selective in the points it chose to address in response to what we said about inviolability and immunity. It ignored the network of treaties and customary law that has developed in respect of those matters, which create a web of interrelated and closely linked rights and obligations, all stemming from the principle of equality of States, sovereignty and non-intervention. The similarities, both in content and rationale, between the different types of immunity have helped develop and form broader principles of general customary international law.

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[24]CR 2014/2, p. 24, para. 17 (Campbell).

[25]The United Nations Convention on Jurisdictional Immunities of States and Their Property, Article 10.

[26]The United Nations Convention on Jurisdictional Immunities of States and Their Property, Article 13 (*a*).

[27]CR 2014/2, p. 24, para. 17 (Campbell).

29. As Sir Elihu has pointed out, Mr. Campbell said nothing about the recent United Kingdom practice[28]. He also said nothing about Professor Denza's references to the inviolability of archives of a foreign State government[29].

30. He questioned the significance of Mr. Taft's statement[30]. While Mr. Taft accepted that the issues that he was there addressing were "novel and complex", one cannot read that as a suggestion that the rights to which he referred were not plausible.

31. That the learned editors of *Oppenheim* regard official papers in the hands of non-diplomatic agents as "presumably entitled to immunity" was said to be equivocal. The reverse is the case: "presumably" is defined in the Shorter Oxford English Dictionary as "so as to take things for granted" or "(qualifying a statement) as may reasonably be assumed"[31].

32. As I said on Monday, we read this practice, and these authoritative writings, as recognizing a general customary rule of inviolability and immunity of State property. They certainly go to show, I would submit, that the rights we assert are plausible.

33. Mr. President, this is a convenient point to address the question posed by Judge Yusuf. He asked: "In the view of the Parties, to whom did the individual items listed in the ASIO Property Seizure Record of 3 December 2013 and their contents belong . . .?" As we explained on Monday, documents in the hands of lawyers on behalf of their clients belong to the clients, in this case, Timor-Leste. That applies to most of the items seized. Of course there were one or two other items, like the mobile phone, which presumably belonged to Ms Preston and which was eventually returned to her.

**(c)** ***The rights whose protection is sought and the measures requested***

34. Mr. Burmester tried to show yesterday that we had failed to demonstrate the necessary link between the rights that form the subject of the proceedings and the provisional measures sought[32]. He said that the relief sought "is all about ownership of certain documents and their

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[28]*Hansard*, 27 November 2013, Cols. 17-18WS.

[29]E. Denza, *Diplomatic Law*, 3rd ed. 2008, p. 226.

[30]CR 2014/2, p. 27, para. 26 (Campbell).

[31]Shorter Oxford English Dictionary, Sixth Edition.

[32]CR 2014/2, p. 29, para. 1 (Burmester).

return. In contrast, the emphasis in the provisional measures (*a*) to (*d*) is on the use of contents of certain documents and data . . .”[33]

35. That is to misread and misunderstand the Application and Request. The Application asks the Court to adjudge and declare that the seizure and continuing detention violate the sovereignty of Timor-Leste and its property and other rights under international law; that Australia must immediately return all the documents and data, and destroy and ensure the destruction of every copy that has been made; and afford satisfaction and an apology. The main purpose of seeking the return of the documents and in particular seeking the destruction of copies is to ensure that the content of the documents does not come into the hands of those who could use it to the disadvantage of Timor-Leste in its relations with Australia over the Timor Sea. Given that the property in question comprises highly sensitive documents, it is as plain as plain can be that the provisional measures sought are related to the rights that form the subject of the proceedings.

36. Indeed, Mr. Burmester seemed to recognize that when he referred to “the right to prevent any potential advantage Australia may gain from access to the documents in relation to the arbitration and in relation to Timor Sea resources”[34]. It is no answer to say, as he does, that “such a link cannot be shown in light of the explicit undertaking that the material removed will not be made accessible to those connected with the arbitration or to anyone other than intelligence and criminal law enforcement personnel”[35]. We did indeed receive a new undertaking yesterday, following what we said on Monday. The undertaking does not, however, go to the link between the rights at issue in the case and the preliminary measures sought. Its relevance, if any, would be to the requirement of irreparable harm and urgency.

37. Mr. Burmester laid great emphasis on measure *(e)*, perhaps recognizing that his arguments on *(a)-(d)* were very weak, but we think that the link there is equally clear. Australia clearly considers that it is at liberty to disregard our rights and we request the protection of the Court in relation to ongoing communications with its lawyers. Sir Elihu has said all that needs to

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[33]CR 2014/2, p. 30, para. 5 (Burmester).

[34]CR 2014/2, p. 30, para. 6 (Burmester).

[35]*Ibid.*

be said about Australia's one-sided view of the balance of interests. I think I shall move to my conclusion.

The PRESIDENT: I think that Timor-Leste could continue until 5 or 7 minutes past 11, as we started a bit late.

Sir Michael WOOD: I am very grateful, Mr. President. I shall go back a bit in that case.

38. Mr. Burmester argued that there was no risk of irreparable prejudice because the circumstances of concern will simply not occur[36]. And why is this? Apparently because of the undertakings. We have received a new undertaking and we will look at it with interest in the light of the responses given to the questions, but we were told yesterday that unilateral undertakings by States "can give rise to legal consequences" and that "the most recent undertaking given by Australia to this Court . . . [is] of that nature" [37]. It would, however, be good to hear the Agent for Australia say unambiguously that Australia accepts that the undertaking given on 21 January is binding on Australia, vis-à-vis Timor-Leste, under international law.

39. Mr. Burmester suggest that our concerns about wider matters, other than the Arbitration are "mere speculation"[38], since there are currently no boundary negotiations. Alas, that is true. That regrettable fact, however, does not mean that documents relating to our broader legal strategy are not highly sensitive and should not get into the hands of anyone on the Australian side concerned with such matters. I trust that Australia's statement does not mean that it intends to disregard its obligation to negotiate a maritime boundary agreement in good faith under Articles 74 and 83 of UNCLOS.

40. We are accused of demonstrating a lack of urgency by failing to bring a claim under Australian law. If this were right it would simply be a backdoor way of forcing foreign States to submit to domestic courts. Anyway, we do not accept that any of the remedies would be effective. We note, for example, that Australia's Administrative Decisions (Judicial Review) Act expressly excludes decisions under the ASIO Act. We also, despite Professor Crawford's eloquence

[36]CR 2014/2, p. 34, para. 21 (Burmester).

[37]CR 2014/2, pp. 33-34, para. 23 (Burmester).

[38]CR 2014/2, p. 35, para. 27 (Burmester).

yesterday, cannot see that the remedy, any remedy from the Arbitral Tribunal, would be able to cover our wider concerns.

**Concluding remarks**

41. Mr. President, in conclusion, let me recall the *Diplomatic and Consular Staff in Tehran* case. The Court there referred to the extreme importance of the principles of law, which it was called upon to apply. And it referred to

> "the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected"[39].

42. The inviolability of State property, in this case confidential and legally privileged papers, which we seek to uphold with the Application and this Request for provisional measures, is an essential part of this vital "edifice of law".

43. Mr. President, Members of the Court, that concludes my statement and I would request that you invite the Agent of Timor-Leste to the podium.

The PRESIDENT: Thank you very much, Sir Michael. I give the floor to the Agent, His Excellency Ambassador Joaquim da Fonseca. You have the floor, Sir.

Mr. DA FONSECA:

**Concluding statement by the Agent of Timor-Leste**

1. Thank you, Mr. President, Members of the Court. I shall now conclude Timor-Leste's oral arguments on its Request for provisional measures, by thanking the Court and reading out our final submissions.

2. But before doing that, allow me now to address some remaining points made by Australia in the course of the oral observations yesterday. In his remarks Mr. Gleeson criticized Timor-Leste for omitting to mention the profitable revenue-sharing arrangement for the Greater Sunrise fields under the CMATS Treaty[40]. This is not the place to debate CMATS, but we cannot let that remark

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[39] *United States Diplomatic and Consular Staff in Tehran, Judgment, 1.C J. Reports 1980,* pp. 43-44, para. 92.

[40] CR 2014/2, p. 12, para. 9 (Gleeson).

pass without pointing out the following. Both the Timor Sea Treaty and CMATS Treaty are meant as temporary arrangements for the exploration and exploitation of maritime resources in the Timor Sea. But under no conceivable maritime delimitation would the Greater Sunrise fields lie within Australia's territory. They are located within 200 nautical miles from the coastlines of Timor-Leste, far closer to Timor-Leste than they are to Australia. So, in the absence of a permanent maritime boundary, the question remains. To whom actually the resources currently shared at 50:50 per cent between Timor-Leste and Australia really belong? And who is being generous to whom?

3. Mr. Gleeson further suggests that Timor-Leste may be encouraging the commission of crime that threatens Australia's national security[41]. Mr. President, my government is committed to pursue justice in this Court. It is equally committed to pursue mutual interests between Timor-Leste and Australia through broader bilateral co-operation. Such expression of distrust falls short of a recognition and appreciation of our broader relationship. I must firmly reject this careless and outrageous suggestion. Our counsel have responded to what Australia had to say yesterday morning. I only wish to emphasize again the great importance that my country attaches to these proceedings. Our concern is primarily practical, but also one of principle. Untold harm could be done to Timor-Leste's vital interest in the resources of the Timor Sea without provisional measures to ensure that illegal seized materials are not made available to any person having any role in connection with Australia's diplomatic or commercial relations with Timor-Leste over the Timor Sea and its resources. In addition, we ask the Court to uphold the principle that one State may not seize and retain the documents of another State and to recognize the principle of legal and professional privileges in international law, as both counsels of Timor-Leste have alluded to.

4. Mr. President, we have of course taken careful note of the new undertakings dated 21 January 2014. But in addition to the remarks that have already been made by the counsel, I must say that we await with interest Australia's answer to the questions put by Members of the Court yesterday.

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[41]CR 2014/2, p. 20, para. 38 (Gleeson).

5. It remains only for me now to thank you, Mr. President, and all Members of the Court for your courtesy and attention, and to thank the Registrar and his staff, and the interpreters, for all their assistance. I also wish to thank our colleagues in the Australian legal team, especially my friend Mr. John Reid, for the spirit in which they have approached these proceedings.

6. I shall now read out the submissions on behalf of the Democratic Republic of Timor-Leste. They remain unchanged from those in the Request:

> "Timor-Leste respectfully requests that the Court indicate the following provisional measures:
>
> *(a)* That all of the documents and data seized by Australia from 5 Brockman Street, Narrabundah, in the Australian Capital Territory on 3 December 2013 be immediately sealed and delivered into the custody of the International Court of Justice.
>
> *(b)* That Australia immediately deliver to Timor-Leste and to the International Court of Justice (i) a list of any and all documents and data that it has disclosed or transmitted, or the information contained in which it has disclosed or transmitted to any person, whether or not such person is employed by or holds office in any organ of the Australian State or of any third State, and (ii) a list of the identities or descriptions of and current positions held by such persons.
>
> *(c)* That Australia deliver within five days to Timor-Leste and to the International Court of Justice a list of any and all copies that it has made of any of the seized documents and data.
>
> *(d)* That Australia (i) destroy beyond recovery any and all copies of the documents and data seized by Australia on 3 December 2013, and use every effort to secure the destruction beyond recovery of all copies that it has transmitted to any third party, and (ii) inform Timor-Leste and the International Court of Justice of all steps taken in pursuance of that order for destruction, whether or not successful.
>
> *(e)* That Australia give an assurance that it will not intercept or cause or request the interception of communications between Timor-Leste and its legal advisers, whether within or outside Australia or Timor-Leste."

7. In accordance with Article 60, paragraph 2, of the Rules of Court, a signed copy of the text which I have just read out will be communicated to the Court and transmitted to the other Party.

8. Mr. President, Members of the Court, that concludes the oral pleadings of the Democratic Republic of Timor-Leste. Thank you.

The PRESIDENT: Thank you very much, Excellency. The Court takes note of the submissions you have just read on behalf of the Government of Timor-Leste. I now give the floor to Vice-President Sepúlveda-Amor, who has several questions. Mr. Vice-President, you have the floor.

The VICE-PRESIDENT: Thank you very much, Mr. President. I have three questions to be submitted to Australia. The first one is the following:

> "1. Does Australia have evidence supporting the proposition that Timor-Leste is encouraging the commission of crimes under Australian law or otherwise jeopardizing Australia's national security, as suggested by Mr. Gleeson in his intervention of 21 January 2014 before the Court? If so, could Australia be more specific on this particular matter?"

My second question is the following:

> "2. In accordance with the *Australian Security Intelligence Organisation Act 1979*, Section 25 (4C), a text which is included in Annex 13 of Australia's judges' folder, provided to us at yesterday's hearing,
>
> > 'A record or other thing retained as mentioned in paragraph (4) *(d)* of (4A) *(c)* may be retained:
> >
> > *(a)* if returning the record or thing would be prejudicial to security — only until returning the record or thing would no longer be prejudicial to security; and
> >
> > *(b)* otherwise — for only such time as is reasonable.'
>
> Should the documents, data and other property seized by the Australian authorities at the premises of Mr. Bernard Collaery be still retained by the Australian authorities on grounds that returning them is currently prejudicial to Australia's national security?"

And my third question is the following:

> "3. Does Australia consider that, under customary international law, State documents are entitled to international protection in the form of immunity and inviolability outside the framework of diplomatic and consular relations? If so, what is the extent of international protection that Australia claims for its own State documents in foreign territory?"

Those are my three questions, Mr. President. I thank you very much indeed.

The PRESIDENT: Thank you very much, Mr. Vice-President. Australia is invited to reply, in the course of the second round of oral argument. The text of the questions will be transmitted to

both Parties as soon as possible. If Timor-Leste wishes to comment on replies provided by Australia it can do that, in writing, at the latest by Friday, 24 January, 6.00 p.m.

The Court will meet again this afternoon at 5.00 p.m. to hear the second round oral argument of Australia. Thank you. The Court is adjourned.

*The Court rose at 11.05 a.m.*

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