INTERNATIONAL COURT OF JUSTICE

QUESTIONS RELATING TO THE SEIZURE AND DETENTION OF CERTAIN DOCUMENTS AND DATA

(*TIMOR-LESTE v. AUSTRALIA*)

COUNTER-MEMORIAL OF AUSTRALIA

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ANNEXES 1 - 28

28 JULY 2014

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28 JULY 2014

Office of International Law
Attorney-General's Department
Canberra

Volume I: Counter-Memorial and Annexes 1-28

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Chapter 1 – Introduction

Section I. The dispute

A. THE SUBJECT MATTER OF THE DISPUTE

1.1. The international law issue before the Court in these proceedings is, ultimately, a simple one: whether, in the specific circumstances of the dispute, the exercise of jurisdiction by Australia on its own territory and in relation to its own nationals, in order to protect Australia's national security, was consistent with international law.

1.2. On 3 December 2013, the Australian Security Intelligence Organisation ('ASIO') executed a warrant at the premises of an Australian lawyer, Mr Bernard Joseph Edward Collaery, at 5 Brockman Street, Narrabundah, in the Australian Capital Territory. ASIO searched the premises, and removed and retained certain documents and electronic devices ('the Materials'). These actions were an exercise of Australia's sovereign authority to take steps within its territory and in relation to its nationals for the purpose of protecting Australia's national security,[1] including the lives and safety of Australian citizens and possibly others.

1.3. In taking these actions, Australia put in place a comprehensive set of measures to protect any potential rights of Mr Collaery's clients, including Timor-Leste. The safeguards implemented by Australia, which were communicated to Timor-Leste through its legal representatives, ensured that any rights Timor-Leste may have in the Materials were protected. To further protect Timor-Leste's possible rights, the Australian Attorney-General, Senator the Hon. George Brandis QC, gave binding undertakings which ensured that the

[1] Senator the Hon. George Brandis QC, Attorney-General of Australia, 'Ministerial Statement: Execution of ASIO Search Warrants', 4 December 2013 [**Annex 52**].

Materials have not been, and will not be, made available to those conducting the Arbitration,[2] these proceedings[3] or any hypothetical future negotiations.[4] These undertakings have been confirmed and reinforced by the Court's Order of 3 March 2014, with which Australia has complied in full. It follows that Timor-Leste has not been disadvantaged (in the Arbitration or otherwise) in any way as a result of the execution of the warrant.

B. THE QUESTION BEFORE THE COURT

1.4. In its Order of 3 March 2014, the Court identified the 'principal claim' of Timor-Leste as 'a violation … of its right to communicate with its counsel and lawyers in a confidential manner with regard to issues forming the subject-matter of pending arbitral proceedings and future negotiations between the Parties'.[5] The Court specifically identified three categories of rights asserted by Timor-Leste, being:

(1) 'the rights to inviolability and immunity' of the Materials

(2) the 'right to the confidentiality of communications' between Timor-Leste and its legal advisers, and

(3) legal professional privilege.[6]

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[2] Senator the Hon. George Brandis QC, Attorney-General of Australia, 'Written Undertaking', *Arbitration under the Timor Sea Treaty*, 19 December 2013 [**Annex 74**].

[3] Letter from Senator the Hon. George Brandis QC, Attorney-General of Australia, to Mr David Irvine AO, Director-General of Security, 23 December 2013 [**Annex 53**].

[4] Senator the Hon. George Brandis QC, Attorney-General of Australia, 'Written Undertaking', *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, 21 January 2014 [**Annex 54**].

[5] Order on the Request for the Indication of Provisional Measures, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, 3 March 2014, [27].

[6] Order on the Request for the Indication of Provisional Measures, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, 3 March 2014, [24].

1.5. The Court concluded that:

> at least some of the rights for which Timor-Leste seeks protection – namely, the right to conduct arbitration proceedings or negotiations without interference by Australia, including the right of confidentiality of and non-interference in its communications with its legal advisers – are plausible.[7]

1.6. A key legal question before the Court concerns the existence, scope and application of the rights claimed by Timor-Leste as a matter of international law, and the extent to which those rights are consistent with the established rights of other States at international law.

1.7. As all of the relevant actions occurred in Australia's territory, the starting point for the Court's consideration should be Australia's right to exercise territorial sovereignty. Territorial sovereignty is at the heart of, and crucial to, the international legal order. As a fundamental concept of international law, the territorial sovereignty of a State can only be subject to appropriately qualified and limited exceptions.

1.8. Australia's Counter-Memorial places Timor-Leste's claimed rights within the proper context and demonstrates that:

(1) this exercise of Australia's sovereign rights within its territory and over its nationals for national security purposes was consistent with international law

(2) the rights claimed by Timor-Leste are an unfounded attempt to create novel principles of international law

(3) even if Timor-Leste's claimed rights could be proven at law, they do not have the broad and unqualified scope or application asserted by Timor-Leste, were not violated by the actions of 3 December 2013,

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[7] Order on the Request for the Indication of Provisional Measures, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, 3 March 2014, [28].

and could not override the sovereign rights of Australia referred to in sub-paragraph (1), and

(4) the Attorney-General's comprehensive package of undertakings to the Arbitral Tribunal and the Court removes any risk of damage to Timor-Leste's position in current or future legal proceedings, or in any future hypothetical negotiations which may take place between the Parties.

Section II. Australia and Timor-Leste enjoy a close and positive bilateral relationship

1.9. Australia and Timor-Leste enjoy a close and positive relationship, and Australia has a strong and continuing interest in the stability, security and prosperity of its neighbour. In light of this relationship, Australia regrets that Timor-Leste's Memorial creates the impression that Australia has acted to the detriment of Timor-Leste, particularly in relation to the resources of the seabed between the two States.[8] Timor-Leste's Memorial does not acknowledge the positive character of the bilateral relationship and paints a misleading picture of bilateral relations.

1.10. Australia has taken the leading role in peace-keeping and stabilisation efforts in Timor-Leste, including the International Force in East Timor, which deployed in September 1999 and was led by Australia in accordance with United Nations Security Council Resolution 1264,[9] and the International

[8] Timor-Leste, Memorial, [2.18]-[2.47].

[9] United Nations Security Council, Security Council Resolution 1264 (1999), adopted unanimously, 15 September 1999, S/RES/1264 (1999).

Stabilisation Force, which deployed in May 2006 following a request from Timor-Leste.[10]

1.11. Australia's commitment to Timor-Leste's security and prosperity is demonstrated by Australia's support for its economic and development needs. Since 1999, Australia has been the largest donor of development and humanitarian aid to Timor-Leste, providing over AUD1 billion in development and humanitarian assistance.[11] Australia and Timor-Leste continue to have a strong development partnership that reflects the priorities of the Government of Timor-Leste.[12] In line with Timor-Leste's own Strategic Development Plan,[13] Australia invests in agriculture productivity, education, health services and community infrastructure to help increase economic growth and reduce poverty. Australia also provides education and training opportunities in Australia for Timor-Leste nationals,[14] and Timor-Leste is a participant in Australia's Seasonal

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[10] The Hon. Peter Costello, Acting Prime Minister, 'Press Conference: Parliament House, Canberra, 9:50pm', 24 May 2006 (accessed at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Source%3A%22PRIME%20MINISTER%22%20Author_Phrase%3A%22costello,%20peter%22;rec=7> on 20 July 2014).

[11] Australian Government, Australian Agency for International Development, 'Submission No 22, Inquiry into Australia's Relationship with Timor-Leste', *Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade* (2013), 8 (accessed at <http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jfadt/timor_leste_2013/subs/sub%20022.pdf > on 20 July 2014).

[12] Australian Government, Australian Agency for International Development, 'Submission No. 22, Inquiry into Australia's Relationship with Timor-Leste', *Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade* (2013), 8.

[13] Government of Timor-Leste, *Timor-Leste Strategic Development Plan 2011-2030* (accessed at <http://Timor-Leste.gov.tl/wp-content/uploads/2011/07/Timor-Leste-Strategic-Plan-2011-20301.pdf> on 20 July 2014).

[14] Australian Government, Australian Agency for International Development, *Annual Report 2012-13*, 30 October 2013, 86-89 (accessed at < http://aid.dfat.gov.au/AnnualReports/Documents/rep13/ausaid-annual-report-2012-13.pdf > on 20 July 2014).

Worker Program, which facilitates employment in Australia for individuals from Timor-Leste.[15]

1.12. The two States have long had different views with regard to maritime boundary delimitation in the Timor Sea. Such differences are common to States with overlapping maritime claims. Through a series of bilateral negotiations, Australia and Timor-Leste have reached a constructive compromise – embodied in the Timor Sea treaty regime – which provides for the deferral of permanent boundary delimitation in favour of the joint development of the petroleum resources of the Timor Sea, for the benefit of both States. As a result of joint cooperation under this arrangement and prudent decisions by the Government of Timor-Leste, Timor-Leste has a Petroleum Fund worth USD15.7 billion.[16] Australia remains committed to the Timor Sea treaty regime negotiated between the Parties, which enables the joint development of Timor Sea resources in the near term.

1.13. However, the Timor Sea treaty regime, and the current Arbitration arising under that regime, do not raise legal issues for determination by the Court. In this respect, the considerable attention which Timor-Leste devotes to discussion of this regime and the Arbitration in its Memorial is irrelevant. In any case, Timor-Leste's submissions regarding the Timor Sea treaty regime and the Arbitration are selective and incomplete, and repeat as fact allegations and assertions which have not been proved. To the extent that it is necessary to

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[15] Government of Timor-Leste, Secretariat of State for Vocational Training Policy and Employment, Seasonal Worker Program 2012-2014, 30 April 2014 (with English translation) [**Annex 58**]; Australian Government Press Release, Australian Embassy in Dili, '"Seasonal Workers" husi Timor-Leste ba Northern Territory' ('Timor-Leste "Seasonal Workers" depart for the Northern Territory'), 30 April 2014 (with English translation) [**Annex 59**].

[16] Government of Timor-Leste, Banco Central de Timor–Leste, *Petroleum Fund of Timor-Leste: Quarterly Report*, Vol. 10 Issue XXIV, 31 March 2014 (accessed at <http://www.banco central.tl/Download/Publications/Quarterly_Report35_en.pdf> on 20 July 2014).

correct the factual misrepresentations contained in the Memorial, a brief overview of the Timor Sea treaty regime and the Arbitration is included in the Appendix.

Section III. Structure of this Counter-Memorial

1.14. The structure of Australia's Counter-Memorial is set out below.

1.15. Chapter 2 sets out Australia's position on the key legal issues underlying this dispute: the primacy of territorial sovereignty and the widespread enactment and application of national security laws by States.

1.16. Chapter 3 sets out the facts relevant to the Court's consideration of the dispute – namely the unauthorised disclosure of confidential information by Australian nationals, which has put at risk the safety of Australian citizens and Australia's national security. This Chapter also highlights the inherent uncertainty concerning the nature and content of the Materials and why, as a result of this uncertainty, the Court must proceed cautiously and with due regard for the limited facts available.

1.17. Chapter 4 demonstrates that there is no unqualified right of confidentiality of, or non-interference in, communications between a State and its legal advisers, and no basis for asserting that legal professional privilege is a general principle of law. Even if such rights exist and apply to this dispute, their scope must necessarily be limited; they should not be so broad as to enable a foreign State (Timor-Leste) to prevent the proper exercise of territorial sovereignty by a forum State (Australia) in the forum State's territory and over its nationals to protect the safety of its citizens (and possibly others) and its national security.

1.18. Chapter 5 addresses Timor-Leste's claim that the Materials are inviolable and are protected by the doctrine of State immunity. Timor-Leste's ownership and characterisation of much of the Materials cannot be established on the limited facts available. But even if its ownership could be established, there is no general

principle of inviolability which would extend to the Materials in the manner asserted by Timor-Leste. Finally, in the absence of a relevant proceeding against Timor-Leste or an agent of Timor-Leste, or another form of relevant process where immunity can be pleaded as a procedural bar, the law of State immunity is not applicable.

1.19. Chapter 6 concludes this Counter-Memorial by dealing with the remedies sought and is followed by Australia's final Submissions.

1.20. The Appendix responds to the submissions in Timor-Leste's Memorial regarding the Timor Sea treaty regime and the Arbitration.

1.21. This Counter-Memorial is supported by a number of Annexes containing much of the evidence and other supporting material upon which Australia relies. Those Annexes include international instruments, books, journal and media articles, transcripts, legislation, international and domestic case law and documents from the Australian and Timorese Governments.

Chapter 2 – Preliminary issues

2.1. This is a case involving two sovereign States: a forum State (Australia) and a foreign State (Timor-Leste). In this case, a foreign State has chosen to enter the forum State and engage a lawyer, a national of the forum State, resident in and subject to the laws of the forum State. The foreign State has chosen to do so outside the recognised diplomatic framework. In this scenario, the foreign State now asserts a broad and apparently unqualified right of confidentiality of communications, and inviolability and immunity from the laws of the forum State, together with 'a right of legal professional privilege' in respect of documents held by its lawyer in that State. The foreign State puts so extreme a position as to claim this absolute protection irrespective of the purpose, quality or content of the communications; or the harm that may be done to the forum State; or the content and qualification of the domestic law of the forum State. In this Chapter, Australia will show that such a position is unsustainable and that, as with all forum States which exercise jurisdiction in their territory, primary consideration must be given to Australia's right to territorial sovereignty.

2.2. Section I demonstrates that, given all relevant actions were taken by Australian authorities in Australia's territory and with respect to Australian nationals, Australia's right to exercise territorial sovereignty must necessarily be the starting point in these proceedings.

2.3. Section II shows that laws protecting national security – and actions taken by forum States in accordance with those laws – are a necessary, reasonable and legitimate exercise of territorial sovereignty, as reflected in widespread and representative State practice.

Section I. Australia's right to territorial sovereignty is a primary consideration

A. AUSTRALIA ENJOYS SOVEREIGNTY OVER ITS TERRITORY AND THE FREEDOM TO EXERCISE JURISDICTION OVER ITS NATIONALS THEREIN

2.4. Australia, as a sovereign State, enjoys the rights inherent in full sovereignty, including sovereignty over its territory. Territorial sovereignty is the basis of States' jurisdiction and the source of their freedom to prescribe, adjudicate and enforce laws within their territory and with respect to persons therein (subject to specific and agreed exceptions). A key element of Australia's territorial sovereignty (as with all other States) is the right to exercise enforcement jurisdiction within its territory. More specifically, Australia has the right to exercise jurisdiction with respect to criminal or national security matters and at premises and with respect to persons located in Australian territory.

2.5. Australia's enjoyment of territorial sovereignty is consistent with, indeed integral to, the principle of sovereign equality. The principle is canonically stated in Article 2(1) of the *Charter of the United Nations*[17] and is a foundational principle of international law, vital in relationships between States.[18] A number of elements – in the words of the Court, 'corollar[ies] of sovereign equality'[19] – are elaborated in the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the*

[17] *Charter of the United Nations,* San Francisco, 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945), Article 2(1).

[18] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, *Judgment*, I.C.J. Reports 2012, 99 at [57].

[19] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment,* I.C.J. Reports 1986, 14 at [202].

Charter of the United Nations.[20] One such element is the enjoyment by States of the rights inherent in full sovereignty, including sovereignty over their territory.[21]

2.6. International law requires that the rights of States flowing from the principle of sovereign equality be respected and fulfilled to the greatest extent possible, and at all times.[22] In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the Court affirmed State sovereignty as a norm underpinning the international legal order and as 'the fundamental principle of State sovereignty, on which the whole of international law rests'.[23] Respect for Australia's sovereignty over its territory is fully consistent with respect for the principle of sovereign equality under international law.

B. AUSTRALIA'S TERRITORIAL SOVEREIGNTY IS A PRIMARY CONSIDERATION IN RESOLVING THE DISPUTE

2.7. In evaluating the actions taken by a forum State within its territory, the presumption is that those actions are a lawful exercise of its territorial sovereignty.

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[20] United Nations General Assembly, General Assembly Resolution 2625 (XXV), *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, A/RES/25/2625 (24 October 1970).

[21] United Nations General Assembly, General Assembly Resolution 2625 (XXV), *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, A/RES/25/2625 (24 October 1970). This is further confirmed by the drafting history of Article 2(1) of the Charter. See, for example: The United Nations Conference on International Organization, *Report of Rapporteur of Sub-committee I/1/A to Committee I/1: Chapter II*, Doc. 739 I/1/A/19(a), 1 June 1945, 1 [**Annex 1**]; The United Nations Conference on International Organization, *Verbatim minutes of Second Meeting of Commission I,* Doc. 1123 I/8, 20 June 1945, 5 (Rapporteur (Syria)) [**Annex 2**]; The United Nations Conference on International Organization, *Verbatim minutes of Second Meeting of Commission I,* Doc. 1123 I/8, 20 June 1945, 6-7 (President (Belgium)) [**Annex 2**]; and The United Nations Conference on International Organization, *Report of Rapporteur of Commission I to Plenary Session*, Doc. 1179, 24 June 1945, 593 [**Annex 3**].

[22] United Nations General Assembly, General Assembly Resolution 2625 (XXV), *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, A/RES/25/2625 (24 October 1970).

[23] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*, I.C.J. Reports 1986, 14 at [263].

Where a foreign State is conducting activities on a forum State's territory, the rights of the former do not prevail over the territorial sovereignty of the latter unless a specific and express limitation on that territorial sovereignty applies. Such a limitation operates as *lex specialis*, consistent with the maxim *lex specialis derogat legi generali* ('a specific law prevails over a general law'). In determining the scope and application of any such exceptions to territorial sovereignty, a cautious approach should be adopted.[24] This is necessary to ensure that a forum State's rights, including its right to territorial sovereignty, are adequately taken into account in resolving competing claims, and to avoid imposing limitations that would unduly restrict a forum State's capacity to address its legitimate security concerns within its territory and in relation to its nationals.

2.8. A key example is the international law which accords certain limited immunities to the activities of a foreign State acting within the borders of a forum State. By virtue of the law of State immunity (which itself derives from sovereignty and the principle of sovereign equality), certain actions of foreign States and their officials are excluded from the jurisdiction of the courts of the forum State, notwithstanding the principle of territorial jurisdiction. This approach is reflected in the Court's decision in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, in which the Court took into account the territorial sovereignty of the forum State (Italy) and then applied the specific limitations set out in the international law of State immunity by way of exception to that sovereignty. As the Court said:

> the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of 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. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that

[24] H Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' in E Lauterpacht (ed.), *International Law* (Cambridge University Press, 1977), 325-326.

> territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.[25]

2.9. In the *Asylum Case (Colombia v. Peru)*,[26] the Court held that the specific legal basis for any departure from a forum State's territorial sovereignty must be established in each particular case. As the Court observed:

> In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.[27]

2.10. Consistent with the principle set out in the *Asylum Case*, Australia will enjoy sovereignty within its territory unless there is an established international law exception to its sovereignty that applies in the specific circumstances. In this dispute, Timor-Leste has not identified any applicable limitation under international law or demonstrated that such a limitation applies. As Australia will establish in Chapters 4 and 5, there is no exception under international law to Australia's territorial sovereignty that would apply here. But even if the Court found that such an exception did exist, its scope must be appropriately delimited and defined, taking due account of the protection of national security as an accepted and legitimate exercise of State sovereignty as a matter of international law.

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[25] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, *Judgment*, I.C.J. Reports 2012, 99 at [57].

[26] *Asylum Case (Colombia v. Peru)*, *Judgment*, I.C.J. Reports 1950, 266 at 274-275.

[27] *Asylum Case (Colombia v. Peru)*, *Judgment*, I.C.J. Reports 1950, 266 at 274-275.

Section II. Laws protecting national security are a necessary and accepted exercise of territorial sovereignty

A. THE PROTECTION OF NATIONAL SECURITY IS A FUNDAMENTAL EXERCISE OF TERRITORIAL SOVEREIGNTY

2.11. The protection of national security is a fundamental element of territorial sovereignty, and measures taken by States in their territory to protect their national security are a recognised and legitimate exercise of that sovereignty. The importance that States place on preserving the right to take such measures is reflected in wide-ranging practice whereby treaty obligations under international law are framed with appropriate regard for States' legitimate national security rights and interests.

2.12. Such provisions are found in treaties addressing areas as diverse as trade, human rights, international security and crime co-operation. For example:

(1) the *General Agreement on Tariffs and Trade 1994* explicitly preserves the right of a State Party to take 'any action which it considers necessary for the protection of its essential security interests'[28]

(2) under the *United Nations Convention Against Corruption 2003*, mutual legal assistance can be refused by a State Party where it 'considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests'[29]

[28] *General Agreement on Tariffs and Trade*, Geneva, 15 April 1994, 1867 UNTS 187 (entered into force 1 January 1995), Article XXI.

[29] *United Nations Convention Against Corruption*, New York, 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005), Article 46(21)(b).

(3) under the *International Covenant on Civil and Political Rights 1966*, Articles 12, 13, 14, 19 and 22 permit States to limit the enjoyment of rights for reasons connected with national security,[30] and

(4) under the *Rome Statute of the International Criminal Court 1998*, a State Party may decline to disclose information or evidence which would prejudice its national security interests.[31]

2.13. Domestic legislation is the accepted primary means of implementing a State's sovereign right to protect its national security within its territory. Such legislation allows for 'national security' to be properly defined, and provides a basis for regulation and judicial oversight of any action taken in reliance on the right of national security. The objects and purposes of such legislation closely align with the core attributes of a State, and are fundamentally in the public interest of the State and its nationals. They concern the protection of the lives and safety of nationals and the protection of the community more broadly. In the case of Australia, these purposes are evident in the national security objectives adopted and publicly promulgated by the Australian Government: to ensure a safe and resilient population; to protect and strengthen Australia's sovereignty; to secure assets, infrastructure and institutions; and to promote a favourable international environment.[32] These objectives are used to anchor decision-making and planning on national security issues, and to ensure that action is only taken where necessary and appropriate.

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[30] *International Covenant on Civil and Political Rights*, New York, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Articles 12, 13, 14, 19 and 22.

[31] *Rome Statute of the International Criminal Court*, Rome, 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002), Article 72.

[32] Australian Security Intelligence Organisation, *Strategic Plan 2013-2016*, 2013, 4 (accessed at < http://www.asio.gov.au/img/files/ASIO-Strategic-Plan_2013-16_A4_web.pdf> on 20 July 2014). See also: Attorney-General's Department, 'Australian Security Intelligence Organisation', *Portfolio Budget Statements 2014-2015: Attorney-General's Portfolio*, 257-258 (accessed at <http://www.ag.gov.au/Publications/Budgets/Budget2014-15/Documents/15%20PBS%202014-15%20ASIO.PDF> on 20 July 2014).

2.14. Australia exercises this aspect of territorial sovereignty through democratically enacted national security laws, which have a legitimate and closely defined content that reflects Australia's national security objectives. The concept of 'security' is defined in section 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth) ('the ASIO Act'), which establishes the functions and powers of ASIO. In that Act, the term 'security' refers to the protections necessary for Australia and its people to remain safe from threats such as sabotage, politically-motivated violence, attacks on Australia's defence system, and acts of foreign interference.[33] The effect of this definition is to establish a tightly-defined term addressing a limited number of key risks, which both guide and limit the activities of Australia's domestic intelligence service. Together with the circumscribed powers provided under the ASIO Act, this helps to ensure that ASIO only takes actions (such as the execution of search warrants) where necessary and in furtherance of legitimate national security objectives, and that such actions are subject to appropriate oversight and accountability under the Constitution.

B. LAWS PROTECTING NATIONAL SECURITY ARE STANDARD PRACTICE AMONG STATES

2.15. The legal framework underpinning Australia's national security includes both the legislated establishment of intelligence agencies (including ASIO and the Australian Secret Intelligence Service ('ASIS')), and laws which prohibit the unauthorised disclosure of State secrets. Timor-Leste, likewise, has an established national intelligence service and has enacted laws prohibiting the disclosure of national security information.[34] The methods of protecting national security

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[33] *Australian Security Intelligence Organisation Act 1979* (Cth), s 4 [**Annex 37**].

[34] *Decree Law No. 3/2009 (National Intelligence Service)* (Timor-Leste), Articles 1 and 13 [**Annex 47**]; *Decree Law No. 19/2009 (Penal Code of the Democratic Republic of Timor-Leste)* (Timor-Leste), Article 200 [**Annex 48**].

adopted by Australia and Timor-Leste are in fact widespread if not universal among States, throughout civil and common law jurisdictions and across the different regions of the world.

Australia's national security laws

2.16. Like most States, Australia has established a legal framework to address the key risks arising from the disclosure of national security information. This includes both criminal laws intended to prevent the disclosure of national security information and a legislated basis for the investigation and enforcement of such laws.

2.17. The functions of ASIO include collecting and evaluating intelligence relevant to security, and advising Ministers and Commonwealth authorities about security matters.[35] ASIS is responsible for obtaining and distributing secret intelligence about the capabilities, intentions and activities of individuals or organisations outside Australia in the interests of Australia's national security, Australia's foreign policy or Australia's national economic well-being.[36]

2.18. To ensure the effective protection of national security, it is essential that certain information remains confidential. Accordingly, Australian criminal law prohibits the disclosure of information which could create a threat to national security, including the publication of identifying information of intelligence officers which could lead to grave threats to the lives and safety of Australian nationals and others.

2.19. The *Intelligence Services Act 2001* (Cth) establishes two relevant offences which protect information about ASIS and the identity of its staff. Section 39 of the Act criminalises the communication of certain information relating to ASIS,

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[35] *Australian Security Intelligence Organisation Act 1979* (Cth), s 17 [**Annex 37**].

[36] *Intelligence Services Act 2001* (Cth), ss 6 and 11 [**Annex 38**].

subject to limited exceptions. Section 39 applies where: a person communicates information that has been prepared by or on behalf of ASIS; that information is connected with either the functions of ASIS or the performance of its functions; and that person has obtained that information through working for ASIS or by entering into a contract, agreement or arrangement with ASIS.[37] Section 41 of the Act criminalises the publication of the identity of ASIS staff. First, it prohibits a person from identifying him/herself or another person as being or having been an ASIS officer, subject to limited exceptions (for example, the Director-General of ASIS is a public office holder). Second, section 41 prohibits a person from making public any information from which the identity of an ASIS officer could reasonably be inferred, subject to limited exceptions (such as consent by the Director-General).[38]

2.20. Section 91.1 of the *Criminal Code Act 1995* (Cth) establishes additional offences in relation to the communication of information or records to another State about the 'operations, capabilities and technologies of, and methods and sources used by, the country's intelligence or security agencies'.[39] Finally, section 70 of the *Crimes Act 1914* (Cth) makes the unauthorised disclosure of official information by a current or former Australia Government official a criminal offence.[40]

2.21. Like other States, Australia investigates suspected breaches of its criminal laws and takes steps to prevent further breaches from occurring. Any decision to

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[37] *Intelligence Services Act 2001* (Cth), s 39 [**Annex 38**].

[38] *Intelligence Services Act 2001* (Cth), s 41 [**Annex 38**].

[39] *Criminal Code Act 1995* (Cth), Schedule, s 91.1 [**Annex 39**].

[40] *Crimes Act 1914* (Cth), s 70 [**Annex 40**].

prosecute is made by the Commonwealth Director of Public Prosecutions, who is an independent officer.[41]

National security laws in Timor-Leste

2.22. Timor-Leste has a single intelligence service covering both domestic security and foreign intelligence, the National Intelligence Service.[42] In its security work, the National Intelligence Service has roles and responsibilities similar to those of ASIO. The Service has a 'Department of Internal Intelligence' and its functions include informing 'the competent authorities … of news and intelligence that come to its knowledge relating to internal security and to crime prevention and repression'.[43]

2.23. The Prime Minister of Timor-Leste, Xanana Gusmão, has himself acknowledged the necessary and legitimate role of security agencies in protecting States and their nationals. Prime Minister Gusmão stated that:

> Intelligence services in a democratic State have absolutely nothing in common with the ones existing in totalitarian States. In modern societies [intelligence services] pursue their activities in order to protect national interests and to help the State to achieve its goals, being the first line of defence and security of those countries.[44]

2.24. Prime Minister Gusmão specifically recognised the role of the Timorese National Intelligence Service in pursuing these aims. He affirmed that the Service

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[41] Commonwealth Director of Public Prosecutions, *Annual Report 2012/13*, 16-17 (accessed at <http://www.cdpp.gov.au/wp-content/uploads/CDPP-Annual-Report-2012-2013.pdf> on 20 July 2014).

[42] *Decree Law No. 3/2009 (National Intelligence Service)* (Timor-Leste), Articles 1 and 13 [**Annex 47**].

[43] *Decree Law No. 3/2009 (National Intelligence Service)* (Timor-Leste), Article 5 [**Annex 47**].

[44] His Excellency the Prime Minister Kay Rala Xanana Gusmão, 'Address on the Occasion of the Seminar on Intelligence', Dili, 2 July 2009, 2 (accessed at < http://Timor-Leste.gov.tl/wp-content/uploads/2010/03/20090702_pm_SNI_Workshop_eng.pdf > on 20 July 2014).

'strives to safeguard national independence, national interests, external security and internal security'.[45]

2.25. Moreover, Timor-Leste has enacted criminal laws prohibiting the disclosure of State secrets. These include criminal laws of general application that prohibit the unauthorised disclosure of national security information, similar to those adopted by Australia.[46]

International practice with respect to national security

2.26. The maintenance of intelligence services and the criminalisation of the disclosure of State secrets is widespread practice among States.

2.27. First, many other States have security intelligence services with similar functions to ASIO, ASIS and the National Intelligence Service:

(1) Many States have an intelligence agency that is specifically responsible for security intelligence, such as ASIO. A review of legislation in other States demonstrates that ASIO operates consistently with widespread State practice, and under tight legal control.[47]

(2) Many States also have an agency that is specifically responsible for intelligence overseas, such as ASIS.[48]

(3) Finally, some States have a single intelligence service covering both domestic security and foreign intelligence, like the National Intelligence Service.[49]

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[45] His Excellency the Prime Minister Kay Rala Xanana Gusmão, 'Address on the Occasion of the Seminar on Intelligence', Dili, 2 July 2009, 3.

[46] *Decree Law No. 19/2009 (Penal Code of the Democratic Republic of Timor-Leste)* (Timor-Leste), Article 200 [**Annex 48**].

[47] Table: Extracts from National Legislation Establishing Intelligence Organisations [**Annex 49**].

[48] Table: Extracts from National Legislation Establishing Intelligence Organisations [**Annex 49**].

2.28. Clearly, it is common practice for States to have a security intelligence agency such as ASIO, and it is normal for those agencies to have the power to collect intelligence (including through the execution of search warrants), in order to address serious national security concerns.

2.29. Similarly, most if not all States have established a legal framework to address the key risks arising from the disclosure of national security information.[50] More specifically, conduct of this kind on the part of their intelligence agents is unlawful under the laws of most if not all States.[51] There does not seem to be any State with a foreign or security intelligence service in which the disclosure of national security information by officers of that service is not illegal and attended by serious penalties.

Conclusion

2.30. In Australia's submission, the starting point for the Court's consideration of this case must be the primacy of territorial sovereignty. The right of States to take action to protect their national security is an inherent element of territorial sovereignty, reflected in international law and standard as a matter of domestic practice. In this regard, Australia's national security law and practice is underpinned by a well-established legislative framework, falling well within the spectrum of international and national practices. The actions which are the

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[49] Table: Extracts from National Legislation Establishing Intelligence Organisations [**Annex 49**].

[50] For example: Albania, Armenia, Australia, Bangladesh, Belgium, Brazil, Bulgaria, China, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, India, Ireland, Italy, Japan, Latvia, Lithuania, Malaysia, Mexico, Morocco, New Zealand, the Philippines, Poland, Russia, Singapore, Slovakia, Slovenia, Switzerland, Timor-Leste, Uganda, the United Kingdom, the United States of America and Zimbabwe. See further: Table: National Offences for the Unauthorised Disclosure of Classified Information [**Annex 50**].

[51] For example: Australia, Belgium, Brazil, Bulgaria, Croatia, Czech Republic, Finland, Georgia, Germany, Ireland, Italy, Latvia, Malaysia, Mexico, Morocco, New Zealand, the Philippines, Russia, Singapore, Slovenia, Switzerland, Timor-Leste, Uganda, the United Kingdom, the United States of America and Zimbabwe. See further: Table: National Offences for the Unauthorised Disclosure of Classified Information [**Annex 50**].

subject of this dispute were taken consistent with Australia's legitimate right to exercise territorial sovereignty, and pursuant to this established domestic legal framework.

2.31. Against this background, Australia respectfully submits that the Court should take a very cautious approach in recognising any new limitations on a forum State's right to exercise territorial sovereignty, particularly with respect to the protection of its national security interests. Recognising a limitation on such exercise of territorial sovereignty where none currently exists (by increasing the generic rights assigned to foreign States in the territory of forum States) could have serious ramifications for the certainty and stability of international law, and create uncertainty about the extent to which forum States may lawfully take action in the public interest to protect national security and human lives.

Chapter 3 – The relevant facts

3.1. At the heart of this dispute is the execution of a warrant on 3 December 2013 by ASIO at premises belonging to Mr Collaery, an Australian national, located at 5 Brockman Street, Narrabundah, in the Australian Capital Territory. Pursuant to the warrant, ASIO entered and searched the premises, performed a brief inspection of the items located there for the purposes of identification only, and removed and retained some of those items. In this Chapter, Australia will explain the factual and legal basis which necessitated, underpinned and safeguarded the exercise of these powers.

3.2. In Section I, Australia demonstrates that the execution of warrants by ASIO was a reasonable and necessary step by Australia in response to legitimate national security concerns. In Section II, Australia outlines the safeguards put in place to mitigate any risk of harm that might otherwise have been caused by the execution of the warrants to any rights which Timor-Leste may plausibly enjoy. In Section III, Australia explains the limited facts available to the Court on which to establish the true character of the Materials, and the significant difficulties that are thus encountered in determining whether Timor-Leste has any rights in relation to them.

Section I. Australia's actions involved an exercise of territorial sovereignty, over an Australian national, to protect Australia's national security

3.3. The facts on which the current dispute turns clearly show that the acts of Mr Collaery and one of his clients, known as 'K', constituted an unauthorised disclosure of Australian national security information, which posed serious threats to Australian lives and national security. In these circumstances, the execution of the warrant by ASIO was a reasonable and necessary response.

A. 'K' AND MR COLLAERY DIVULGED, WITHOUT AUTHORISATION, AUSTRALIAN NATIONAL SECURITY INFORMATION

3.4. By Timor-Leste's own statements, the circumstances ultimately leading to these proceedings began in 2008 when 'K', a former employee of ASIS, contacted the Inspector-General of Intelligence and Security about an employment dispute with ASIS.[52] 'K' was dissatisfied with the outcome of a promotion selection process. The Inspector-General advised 'K' of several options by which he could seek to have his grievance resolved,[53] and 'K' asked the Inspector-General to organise for his solicitor, Mr Collaery, to be briefed in order to assist with formulating his complaint.[54]

3.5. In 1987 'K', as an Australian Government official requiring access to information held by ASIS, undertook to keep such information confidential as a condition of that access.[55] Later, on becoming an officer of ASIS, 'K' had of course undertaken to keep certain information confidential, both during his employment with ASIS and subsequent to that employment. He gave this undertaking in writing and on multiple occasions: in 1999, upon commencement of his employment with ASIS;[56] in 2002, following the enactment of additional disclosure offences in sections 39 and 41 of the *Intelligence Services Act 2001*;[57]

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[52] Timor-Leste, Memorial, footnote 58.

[53] Letter from Mr Ian Carnell, Inspector-General of Intelligence and Security of Australia, to 'K', 6 March 2008 [**Annex 75**].

[54] Letter from 'K' to Mr Ian Carnell, Inspector-General of Intelligence and Security of Australia, 12 May 2008 [**Annex 76**].

[55] Armed Services and Government Employees Secrecy Declaration signed by 'K', 27 May 1987 [redacted] [**Annex 77**].

[56] Secrecy Agreement between Director-General of ASIS and 'K', made on 29 November 1999 and signed by 'K' on 1 December 1999 [redacted] [**Annex 78**].

[57] Secrecy Agreement between Director-General of ASIS and 'K', made on 7 January 2002 and signed by 'K' on 4 January 2002 [redacted] [**Annex 79**].

in 2006, at the time of ceasing his employment with ASIS;[58] and in 2008, during his correspondence with the Inspector-General.[59]

3.6. As part of a briefing to enable Mr Collaery to assist 'K' with his submission to the Inspector-General, Mr Collaery likewise undertook to keep certain 'protected' information, including the identities of ASIS employees such as 'K', confidential. He signed a written undertaking to this effect on 29 May 2008, confirming that he would not disclose or communicate any protected information in circumstances that would constitute an offence against any law.[60]

3.7. Notwithstanding these written undertakings, it is clear (and is not disputed by Timor-Leste) that:

(1) in circumstances unexplained, 'K' disclosed to Mr Collaery confidential information which he was not entitled to disclose, in apparent contravention of Australian law

(2) in circumstances further unexplained, that confidential information was communicated to the Government of Timor-Leste, in apparent breach of 'K's obligations under Australian law and also apparently in breach of Mr Collaery's written undertaking and his professional obligations as an Australian legal practitioner, and

(3) in circumstances further unexplained, Mr Collaery disclosed that information publicly through the media.[61]

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[58] Separation Interview Writeup of 'K', 30 October 2006 (Extract) [redacted] [**Annex 80**].

[59] Letter from 'K' to Mr Ian Carnell, Inspector-General of Intelligence and Security of Australia, 12 May 2008 [**Annex 76**].

[60] Secrecy Undertaking, signed by Mr Bernard Collaery, 29 May 2008 [redacted] [**Annex 81**].

[61] E Alberici, 'Bernard Collaery, Lawyer for East Timor', *Lateline*, Australian Broadcasting Corporation (3 December 2013) (accessed at <http://www.abc.net.au/lateline/content/2013/s3904428.htm> on 20 July 2014); C Duffy, 'New details emerge in claims of spying on East

3.8. It has not been made clear by Timor-Leste or Mr Collaery why or how this information was disclosed by 'K', or came to be shared with Timor-Leste. Whether Timor-Leste held out inducements to 'K' or Mr Collaery, or both, is unknown. What is known is that 'K' has been a client of Mr Collaery since at least 2008,[62] and Timor-Leste has been a client of Mr Collaery since at least 2010.[63] Timor-Leste has not disputed that such unauthorised and apparently unlawful disclosures were made by 'K' and Mr Collaery and subsequently received by Timor-Leste.

3.9. Timor-Leste's Memorial indicates that Mr Collaery has acted for Timor-Leste for a number of years, including with respect to the Arbitration, where Mr Collaery was engaged as counsel and Collaery Lawyers as Timor-Leste's solicitors.[64] For the sake of completeness, it is relevant to note that on 7 July 2014, Timor-Leste advised of changes to the composition of its representation in the Arbitration. That notified representation no longer includes Mr Collaery, nor any member of Collaery Lawyers.[65]

Timor', *7.30*, Australian Broadcasting Corporation (4 December 2013) (accessed at <http://www.abc.net.au/news/2013-12-04/new-details-emerge-in-claims-of-spying-on-east/5135404> on 20 July 2014); T Allard, 'East Timor claims it knows which Australian spies bugged its offices', *Sydney Morning Herald* (10 December 2013) (accessed at <http://www.smh.com.au/federal-politics/political-news/east-timor-claims-it-knows-which-australian-spies-bugged-its-offices-20131209-2z1tk.html> on 20 July 2014); 'Raided East Timor Lawyer calls for Inquiry', *Australian Associated Press* (4 December 2013) (accessed at <http://www.news.com.au/national/breaking-news/raided-east-timor-lawyer-calls-for-inquiry/story-e6frfku9-1226774620861> on 20 July 2014); P Lloyd, 'ASIO raided office of lawyer representing East Timor in spying case', *ABC News*, Australian Broadcasting Corporation (3 December 2013) (accessed at <http://www.abc.net.au/news/2013-12-03/asio-raided-lawyer-representing-east-timor-in-spying-case/5132486> on 20 July 2014).

[62] Letter from 'K' to Mr Ian Carnell, Inspector-General of Intelligence and Security of Australia, 12 May 2008 [**Annex 76**].

[63] Extract from Timor-Leste E-Procurement Portal showing list of contracts awarded to Bernard Collaery for 'Consultancy Services' since 2010 [**Annex 72**].

[64] Timor-Leste, Memorial, [4.4].

[65] Letter from Ambassador for Timor-Leste to the United Kingdom, Joaquim da Fonseca, to Legal Counsel to the Permanent Court of Arbitration Garth Schofield, 7 July 2014 [**Annex 82**].

B. THE UNAUTHORISED DISCLOSURES WERE PREJUDICIAL TO AUSTRALIA'S NATIONAL SECURITY AND PUT AT RISK THE SAFETY AND LIVES OF INDIVIDUALS

3.10. The unauthorised disclosures by 'K' and Mr Collaery appear to be serious criminal offences in Australia, which could result in imprisonment for up to 25 years.[66] However, the impact is much broader – the disclosure of this information jeopardises Australia's national security, and puts the safety and lives of Australians at risk. This is confirmed by the public statements of Minister Alfredo Pires, Timor-Leste's Minister for Petroleum and Mineral Resources, which acknowledge the risks posed to Australia's national security and, in particular, the safety of Australian intelligence officers. For example, on 9 December 2013, Minister Pires stated:

> We've got names that we have been able to deduce. Those names are inside some of our computers and in today's age, no-one with a computer is safe … If those names wind up in the wrong hands, if those people may be still active in other parts of the world … they have to take extra precaution not to be identified, there are dangers involved. We don't want anyone else to get hurt in this thing.[67]

3.11. Similarly, on 17 March 2014, the Australian Broadcasting Corporation's *Four Corners* program featured video footage of Minister Pires saying:

> We heard that people are here back in those days, and it doesn't take a genius to work it out that they, they did not swim over. Those names are there. We don't want to put them at risk.[68]

<u>The unauthorised disclosures posed a serious threat to Australian lives</u>

3.12. Once revealed, personal and confidential information purporting to concern Australian intelligence personnel cannot be 'unrevealed'. Such unauthorised disclosures have the real potential to result in irreparable and

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[66] *Intelligence Services Act 2001* (Cth), ss 39 and 41 [**Annex 38**]; *Criminal Code Act 1995* (Cth), Schedule, s 91.1 [**Annex 39**]; *Crimes Act 1914* (Cth), s 70 [**Annex 40**].

[67] R Le May, 'More whistleblowers in Timor spy scandal', *Sydney Morning Herald*, 9 December 2013 (accessed at <http://news.smh.com.au/breaking-news-national/more-whistleblowers-in-timor-spy-scandal-20131209-2z1nu.html> on 20 July 2014).

[68] M Wilkinson and P Cronau, 'Drawing the Line', *Four Corners*, Australian Broadcasting Corporation, 17 March 2014 [**Annex 60**].

ongoing risk to those individuals, and to prejudice their ability to be engaged as Australian government officials in any capacity. Equally, it is very difficult to correct the publication of erroneous information which incorrectly asserts that certain operations were undertaken or that certain persons are associated with intelligence work.

3.13. The threat of serious harm to individuals is not remote. If a person working overseas in an official capacity for Australia is incorrectly identified (or identifiable) as an intelligence officer, that person will be at risk. There are many examples of intelligence officers or those with links to them having been killed following the disclosure of their identity, including CIA officials Richard Welch[69] and William Buckley,[70] and individuals killed after their intelligence activities in the former USSR were disclosed.[71] There are also instances of individuals being arrested or executed on the accusation that they were conducting intelligence activities in a foreign State.[72] The risks are both specific to individuals who are identified or made identifiable, and general to the categories of people identified. At a minimum, disclosure of the confidential information puts at risk 'K' and any other individuals identified as Australian intelligence officers (whether or not the identification is correct).

3.14. Moreover, disclosure of even small amounts of classified information can have serious consequences for individuals. The Australian Law Reform

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[69] Central Intelligence Agency, 'Remembering CIA's Heroes: Richard S. Welch', 29 June 2011 (accessed at <https://www.cia.gov/news-information/featured-story-archive/2011-featured-story-archive/heroes-richard-s-welch.html> on 20 July 2014).

[70] Central Intelligence Agency, 'CIA Remembers Agency Hero William Buckley', 14 March 2014 (accessed at <https://www.cia.gov/news-information/press-releases-statements/2014-press-releases-statements/cia-remembers-agency-hero-william-buckley.html> on 20 July 2014).

[71] Federal Bureau of Investigation, 'Famous Cases & Criminals – Aldrich Hazen Ames' (accessed at <http://www.fbi.gov/about-us/history/famous-cases/aldrich-hazen-ames> on 20 July 2014).

[72] For example, the execution of two individuals in Iran: Y Katz, 'Iran hangs two spies for spying for Israel, US', *The Jerusalem Post*, 19 May 2013 [**Annex 61**].

Commission[73] recognised this in its report entitled *Secrecy Laws and Open Government in Australia*, in which it said:

> [E]ven small amounts of information could, when taken together with other information, compromise national security regardless of its initial security classification. For example, great care is required to ensure that intelligence officers are not publicly identified[.][74]

3.15. The same report quoted the following from a submission submitted by the Australian Intelligence Community:[75]

> Even seemingly innocuous pieces of information, such as the amount of leave available to ASIS or ASIO staff or their salary, can yield significant counterintelligence dividends to a foreign intelligence service because such information may help to identify ASIS or ASIO officers. Protection of the identity of ASIS and ASIO officers is critical to human intelligence collection as those officers are either working in foreign countries beyond the protection of the Australian Government or their identification can lessen the ability of ASIO and ASIS to perform their national security functions.[76]

<u>The unauthorised disclosures were prejudicial to Australian national security</u>

3.16. Unauthorised disclosure also poses broader national security threats. For example, such disclosure could harm Australia's ability to protect its national security by allowing State and non-State actors to put in place counter-intelligence measures. Furthermore, unauthorised disclosures jeopardise cooperation and intelligence sharing between the intelligence services of Australia and other countries. The exchange of intelligence with other States contributes significantly

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[73] A federal agency that reviews Australia's laws to ensure they provide improved access to justice for all Australians by making laws and related processes more equitable, modern, fair and efficient.

[74] Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, ALRC Report 112, [8.53] (accessed at <http://www.alrc.gov.au/publications/report-112> on 20 July 2014).

[75] The Australian Intelligence Community is made up of the Office of National Assessments, Australian Security Intelligence Organisation, Australian Secret Intelligence Service, Defence Signals Directorate, Defence Intelligence Organisation and Defence Imagery and Geospatial Organisation.

[76] Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, ALRC Report 112, [8.53].

to Australia's understanding of the tactics, *modus operandi*, agents, relationships and activities of groups and individuals which pose a threat to Australia's national security and to international peace and security, and the ability to share such intelligence is critical to the national security of each State involved. However, the exchange of intelligence information between States is predicated upon mutual confidence in the ability of each country to protect sensitive information. Accordingly, maintaining the confidence of other States in Australia's ability to keep intelligence information confidential is fundamental to the functioning of Australia's intelligence-sharing relationships, and to Australia's national security.

3.17. These risks were summed up by the United Kingdom's House of Lords in *Regina v. Shayler* when the court said:

> There is much domestic authority pointing to the need for a security or intelligence service to be secure. The commodity in which such a service deals is secret and confidential information. If the service is not secure those working against the interests of the state, whether terrorists, other criminals or foreign agents, will be alerted, and able to take evasive action; its own agents may be unmasked; members of the service will feel unable to rely on each other; those upon whom the service relies as sources of information will feel unable to rely on their identity remaining secret; and foreign countries will decline to entrust their own secrets to an insecure recipient.[77]

3.18. The fact that the disclosure of even seemingly minor, inconsequential information can have grave consequences was clearly stated by the English courts in the 'Spycatcher' case:

> In an intelligence or counter-intelligence context, there is great difficulty in knowing what is and what is not trivial. Intelligence and counter-intelligence operations have much in common with a jigsaw puzzle. A single piece of information viewed in isolation may indeed appear trivial. Viewed in the context of other seeming trivia, it may remain trivial or it may be of vast significance as illuminating the entire picture.[78]

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[77] *Regina v. Shayler* [2002] 2 WLR 754, [25] [**Annex 4**].

[78] *Attorney General v. Guardian Newspapers Ltd and others (No. 2)* [1988] 2 WLR 805, [870F] [**Annex 5**].

3.19. Similarly, this was recognised in the United States case of *United States v. Marchetti* when the court stated:

> The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.[79]

3.20. In the case at hand, it is not possible to specify the nature of the risk exhaustively without being privy to all of the information which has been or is intended to be disclosed by 'K' and/or Mr Collaery. However, it is clear that the unauthorised disclosures already made by them give rise to serious national security concerns of the type which form the basis of criminal offences established under Australian law, including sections 39 and 41 of the *Intelligence Services Act 2001* (Cth), section 70 of the *Crimes Act 1914* (Cth), and section 91.1 of the *Criminal Code Act 1995* (Cth).

C. THE ACTIONS OF ASIO WERE A REASONABLE AND NECESSARY RESPONSE TO THE THREATS POSED BY THE ACTIONS OF 'K' AND MR COLLAERY

3.21. In the face of these threats, it was entirely reasonable for Australia to take steps to protect its nationals from harm and avoid further prejudice to its national security. The alternative was to entrust these matters to the conscience of Mr Collaery (and to the decisions of representatives of Timor-Leste), who have repeatedly disclosed sensitive information in a way that puts Australians at risk.[80]

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[79] *United States v. Marchetti*, 466 F 2d 1309 (1972), 1318 [**Annex 6**].

[80] E Alberici, 'Bernard Collaery, Lawyer for East Timor', *Lateline*, Australian Broadcasting Corporation, 3 December 2013; C Duffy, 'New details emerge in claims of spying on East Timor', *7.30*, Australian Broadcasting Corporation, 4 December 2013; T Allard, 'East Timor claims it knows which Australian spies bugged its offices', *Sydney Morning Herald*, 10 December 2013; R Le May, 'More whistleblowers in Timor spy scandal', *Sydney Morning Herald*, 9 December 2013; 'Raided East Timor Lawyer calls for Inquiry', *Australian Associated Press*, 4 December 2013; P Lloyd, 'ASIO raided office of lawyer representing East Timor in spying case', *ABC News*, Australian Broadcasting Corporation, 3 December 2013; M Wilkinson and P Cronau, 'Drawing the Line', *Four Corners*, Australian Broadcasting Corporation, 17 March 2014, (transcript), [**Annex 60**].

To be deprived of the capacity to protect its nationals in such circumstances would be unacceptable to any State.

3.22. Accordingly, following the receipt of information that Mr Collaery was facilitating the unauthorised disclosure of national security information to Timor-Leste, ASIO commenced an investigation. Consistent with its functions, the purpose of this investigation was to confirm whether that information was correct and thus provide a basis for ASIO to advise Ministers and Australian authorities about the national security threat thereby posed.

3.23. As a result of its initial investigations, ASIO concluded that it was necessary to request a warrant from the Attorney-General of Australia to allow it to enter and search the premises of Mr Collaery.

3.24. The circumstances in which a search warrant may be issued by the Attorney-General are regulated by the ASIO Act, section 25 of which provides that:

> (1) If the Director-General requests the Minister to do so, and the Minister is satisfied as mentioned in subsection (2), the Minister may issue a warrant in accordance with this section.
>
> *Test for issue of warrant*
>
> (2) The Minister is only to issue the warrant if he or she is satisfied that there are reasonable grounds for believing that access by the Organisation to records or other things on particular premises (the ***subject premises***) will substantially assist the collection of intelligence in accordance with this Act in respect of a matter (the ***security matter***) that is important in relation to security.[81] (emphasis in original)

3.25. A warrant may authorise ASIO to enter and search premises, inspect and examine records and other things found on the premises, and remove and retain records and other things.[82] The warrant may also authorise ASIO to access and

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[81] *Australian Security Intelligence Organisation Act 1979* (Cth), s 25(1) and (2) [**Annex 37**].

[82] *Australian Security Intelligence Organisation Act 1979* (Cth), s 25(4) [**Annex 37**].

use computer equipment on the premises, for example, when it is reasonably believed that data about the security matter is contained on that equipment.[83]

3.26. In this case, a search warrant was duly issued. Specifically, the Attorney-General declared he was satisfied that:

> … there are reasonable grounds for believing that access by [ASIO] to records or other things on the subject premises will substantially assist the collection of intelligence in accordance with this Act in respect of a matter (the security matter) that is important in relation to security.[84]

3.27. In accordance with section 25(4) of the ASIO Act, the Attorney-General authorised ASIO to:

> a. enter the subject premises 5 Brockman St, Narrabundah ACT 2604.
>
> b. search those premises for the purpose of finding records or other things relevant to the security matter and, for that purpose, opening any safe, box, drawer, parcel, envelope or any other container in which there is reasonable cause to believe that any such records or other things may be found.
>
> c. inspect or otherwise examine any records or any other things found in the premises, and to make copies or transcripts of any record so found that appears to be relevant to the collection of intelligence by the Organisation in accordance with the Act.
>
> d. remove and retain any record or other thing so found for the purposes of inspecting or examining it, and, in the case of a record, for the purposes of making copies or transcripts of it, in accordance with the warrant.
>
> e. do any thing reasonably necessary to conceal the fact that any thing has been done under the warrant.
>
> f. do any other thing reasonably incidental to any of the above.[85]

3.28. In addition, the Attorney-General declared that he was satisfied that there was:

> … reasonable cause to believe that data relevant to the security matter may be accessible by using a computer, other electronic equipment or data storage

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[83] *Australian Security Intelligence Organisation Act 1979* (Cth), s 25(5) [**Annex 37**].

[84] Search Warrant issued under Section 25, Australian Security Intelligence Organisation Act 1979, 2 December 2013 [redacted] [**Annex 83**].

[85] Search Warrant issued under Section 25, Australian Security Intelligence Organisation Act 1979, 2 December 2013 [redacted] [**Annex 83**].

> device brought to, or found on the subject premises or carried by Bernard Joseph Edward Collaery and those of any persons present on the residence.[86]

3.29. Under section 25(5) of the ASIO Act, the Attorney-General also authorised ASIO to:

> a. use any computer, or other electronic equipment or data storage device brought to or found in the subject premises for the purpose of gaining access to data relevant to the security matter, and, if necessary to achieve that purpose, to add, delete or alter other data in the computer or electronic equipment.
>
> b. use any computer, or other electronic equipment or data storage device brought to or found in the subject premises to do any of the following:
>
> (i) inspect and examine any data to which access has been obtained;
>
> (ii) convert any data to which access has been obtained, that appears to be relevant to the collection of intelligence by the Organisation in accordance with this Act, into documentary form and remove any such document;
>
> (iii) copy any data to which access has been obtained, that appears to be relevant to the collection of intelligence by the Organisation in accordance with this Act, to a storage device and remove the storage device.
>
> c. do any thing reasonably necessary to conceal the fact that any thing has been done under the warrant.
>
> d. do any other thing reasonably incidental to any of the above.[87]

3.30. The relevant search warrant was issued on 2 December 2013 and executed by ASIO on the following day.[88] Consistent with section 25(4C), ASIO does not appropriate or take ownership of the Materials. Provided such action would not be prejudicial to security, the Materials will be returned within a reasonable time in accordance with the ASIO Act.

3.31. For completeness, Australia notes that, pursuant to a second warrant, ASIO also entered and searched the premises of 'K' on 3 December 2013. That warrant, those premises and any materials removed therefrom, are not the subject of this dispute.

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[86] Search Warrant issued under Section 25, Australian Security Intelligence Organisation Act 1979, 2 December 2013 [redacted] [**Annex 83**].

[87] Search Warrant issued under Section 25, Australian Security Intelligence Organisation Act 1979, 2 December 2013 [redacted] [**Annex 83**].

[88] Search Warrant issued under Section 25, Australian Security Intelligence Organisation Act 1979, 2 December 2013 [redacted] [**Annex 83**].

D. THE WARRANT WAS EXECUTED TO MITIGATE THE RISKS POSED TO AUSTRALIA'S NATIONAL SECURITY AND DID NOT BENEFIT AUSTRALIA OR CAUSE DETRIMENT TO TIMOR-LESTE IN THE ARBITRATION

3.32. The reason for the execution of the search warrant was explained by the Solicitor-General at the Provisional Measures hearing on 22 January 2014. The Solicitor-General stated:

> The search warrant was issued on 2 December 2013 and executed the next day because by then, Australia was in possession of information indicating it was likely (in the sense of a real risk) that a person I have referred to as ['K']:
>
> - had made disclosures of information concerning Australia's security to Mr Collaery on behalf of Timor-Leste;
> - would make further such disclosures, disclosures which Australia could not control or confine in terms of subject-matter, purpose or recipients;
> - might leave Australia within a matter of days with no certainty of return; and
> - might destroy documents and data which might provide intelligence regarding such disclosures.
>
> They were the concerns which made it essential for three immediate interrelated steps to be taken: the first was that ['K's] passport had to be cancelled; the second was the warrant on ['K's] premises; the third was the warrant on Mr Collaery's premises. A view was taken that if those steps were not taken immediately, they may not be able to be taken later as effectively. [89]

3.33. Without risking further prejudice to Australia's national security, it is not possible to articulate further the precise reasoning for the execution of the warrant on this date. However, any accusation that the warrant was executed for the purpose of disadvantaging Timor-Leste in the Arbitration, notably in the course of the First Procedural Meeting held on 5 December 2013, is entirely unfounded. The legal team representing Australia at the First Procedural Meeting was not aware of the existence of the warrant. Furthermore, none of the Materials appear to have a connection with the procedural matters considered during that Meeting. In any case, on the day following the execution of the warrant, the Attorney-General undertook that none of the Materials would be provided to the

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[89] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Corrected Record CR 2014/4, 22 January 2014, [39] (Gleeson).

legal team conducting the Arbitration on behalf of Australia and he has since provided further undertakings which reinforce this commitment. Under these circumstances, it cannot be sustained that the execution of the warrant could have been intended to materially benefit Australia (or undermine Timor-Leste) in the First Procedural Meeting or in the course of the Arbitration more broadly.

Section II. Australia has implemented a range of measures to mitigate the potential risk to any plausible rights of Timor-Leste or others

3.34. As explained in the previous section, the execution of the warrant by ASIO was a reasonable and necessary response to protect Australian (and potentially other) lives and national security. Notwithstanding Australia's right to act in such a manner, the relevant authorities recognised the possibility that a claim to legal professional privilege under Australian domestic law might be made over some of the Materials by some of Mr Collaery's clients, including Timor-Leste. Accordingly, safeguards were put in place to mitigate the risk of any breach of such privilege, both in relation to the execution of the warrant and, subsequently, in respect of the way the Materials were handled by Australian officials. Timor-Leste has claimed that the 'inspection, seizure and retention … places Australia in a position in which it could cause damage to Timor-Leste's interests'.[90] As will be made clear below, Australia took numerous steps to avoid this, and has ensured that Timor-Leste's legitimate legal interests could not have been prejudiced.

A. SAFEGUARDS WERE PUT IN PLACE DURING THE EXECUTION OF THE WARRANT

3.35. As an initial measure, a legal officer accompanied the ASIO search team on 3 December 2013. Items removed from the premises were only briefly

[90] Timor-Leste, Memorial, [1.9].

inspected, so as to identify whether they were relevant to the subject matter of the search warrant (the identified threat to Australian national security), and to describe them on the Property Seizure Record. All documents were placed in Manilla envelopes and sealed prior to being placed in sealed see-through 'audit bags', thus requiring the breaking of two sets of seals prior to any further inspection of the documentation. The written Materials were labelled 'LPP' before being given an identification number, reflecting an underlying assumption that there could be a claim of legal professional privilege in those documents under Australian law.[91]

3.36. ASIO had a member of Mr Collaery's staff, who was present at the premises, sign to confirm that the Materials had been accurately described and recorded in the Property Seizure Record.[92] A copy of this record was provided to Mr Collaery's staff member. ASIO also maintained a record of the officers who were present at the execution of the search warrant and who had accessed particular materials in the course of the search.

3.37. With one exception (a mobile phone which was returned on 6 December 2013),[93] the audit bags in which the Materials were placed have remained sealed to the present day. Upon completion of the search, the Materials were placed in a locked container and have remained there.

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[91] Property Seizure Record No. A 228909- A 228915, 5 Brockman St, 3 December 2013 [redacted] [**Annex 84**].

[92] Property Seizure Record No. A 228909- A 228915, 5 Brockman St, 3 December 2013 [redacted] [**Annex 84**].

[93] A mobile phone belonging to a member of Mr Collaery's staff found not to be relevant to the investigation was returned on 6 December 2013.

B. THE ATTORNEY-GENERAL MADE A RANGE OF STATEMENTS, DIRECTIONS AND UNDERTAKINGS TO PRESERVE TIMOR-LESTE'S RIGHTS

3.38. Immediately following, and in the weeks after the execution of the warrant, the Attorney-General made a number of public statements, directions and undertakings to ensure that the Materials would be handled in such a way as to ensure that any plausible rights of Timor-Leste were not prejudiced.

Ministerial Statement of 4 December 2013

3.39. On 4 December 2013, the Attorney-General made a Ministerial Statement to the Australian Senate about the execution of the search warrant.

3.40. He explained that the search warrant had been issued 'at the request of ASIO, on the grounds that the documents and electronic data in question contained intelligence relating to security matters'.[94]

3.41. The Attorney-General further advised the Senate:

> I have given an instruction to ASIO that the material taken into possession in execution of the warrants is not under any circumstances to be communicated to those conducting the proceedings on behalf of Australia.[95]

3.42. It is evident from the Statement that, from the very time of execution of the warrant, safeguards were in place to avoid any disadvantage to Timor-Leste in the Arbitration. At no stage have the Materials been provided to anyone conducting the Arbitration on behalf of Australia.

Undertaking of 19 December 2013

3.43. The Arbitral Tribunal convened on 5 December 2013 in The Hague for its First Procedural Meeting.[96] At that meeting, Counsel for Timor-Leste raised the

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[94] Senator the Hon. George Brandis QC, Attorney-General, 'Ministerial Statement: Execution of ASIO Search Warrants', 4 December 2013, 1 [**Annex 52**].

[95] Senator the Hon. George Brandis QC, Attorney-General, 'Ministerial Statement: Execution of ASIO Search Warrants', 4 December 2013, 2 [**Annex 52**].

substance of the matter now before this Court. The Agent for Australia informed the Arbitral Tribunal that the Materials would be dealt with in accordance with Australian law, and would not be communicated to any persons conducting the Arbitration on behalf of Australia.[97] He also advised that the Materials could not be returned at that time, and that no undertaking could be made as to the date on which they might be returned.[98] A written copy of the statement made by the Agent was tendered to the Arbitral Tribunal.[99]

3.44. Timor-Leste also raised a concern that Australia had put itself in a position of advantage with respect to the Arbitration, and questioned how this would be handled. In particular, it sought an undertaking regarding the perceived conflict of interest, which turned on the role played by Australia's Attorney-General in both the Arbitration and the execution of the search warrant.[100] The Agent for Australia undertook to respond to the Arbitral Tribunal on that matter in writing by 19 December 2013.[101]

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[96] Permanent Court of Arbitration, 'Transcript of First Procedural Meeting between Timor-Leste and Australia at The Hague', *Arbitration under the Timor Sea Treaty*, 5 December 2013 [**Annex 85**].

[97] Permanent Court of Arbitration, 'Transcript of First Procedural Meeting between Timor-Leste and Australia at The Hague', *Arbitration under the Timor Sea Treaty*, 5 December 2013, 29 (line 19) to 36 (line 4) (Reid) [**Annex 85**].

[98] Permanent Court of Arbitration, 'Transcript of First Procedural Meeting between Timor-Leste and Australia at The Hague', *Arbitration under the Timor Sea Treaty*, 5 December 2013, 29 (line 19) to 36 (line 4) (Reid); 38 (line 13) to 39 (line 6) (Reid); and 40 (line 20) to 41 (line 9) (Reid) [**Annex 85**].

[99] Australia, 'Statement on Domestic Legal Processes', *Arbitration under the Timor Sea Treaty*, 5 December 2013 [**Annex 86**]; Permanent Court of Arbitration, 'Transcript of First Procedural Meeting between Timor-Leste and Australia at The Hague', *Arbitration under the Timor Sea Treaty*, 5 December 2013, 38 (lines 7-12) (Reid) [**Annex 85**].

[100] Permanent Court of Arbitration, 'Transcript of First Procedural Meeting between Timor-Leste and Australia at The Hague', *Arbitration under the Timor Sea Treaty*, 5 December 2013, 49 (line 8) to 51 (line 3) (Lowe) [**Annex 85**].

[101] Permanent Court of Arbitration, 'Transcript of First Procedural Meeting between Timor-Leste and Australia at The Hague', *Arbitration under the Timor Sea Treaty*, 5 December 2013, 72 (line 10) to 73 (line 9) (Reid) [**Annex 85**].

3.45. The Attorney-General subsequently provided a written undertaking to the Arbitral Tribunal dated 19 December 2013, as follows:

> I have given an instruction to ASIO that the content of the Material or any information derived from the Material, is not under any circumstances to be communicated to those conducting these proceedings on behalf of the Commonwealth of Australia.
>
> […]
>
> The Material will not be used by any part of the Australian Government for any purpose related to this arbitration.
>
> […]
>
> I UNDERTAKE to the Tribunal that:
>
> I will not make myself aware or otherwise seek to inform myself of the content of the Material or any information derived from the Material; and
>
> Should I become aware of any circumstances in which it may become necessary for me to inform myself of the Material, I will first bring that fact to the attention of the Tribunal, at which time further undertakings will be offered.[102]

Direction to the Director-General of ASIO on 23 December 2013

3.46. On 17 December 2013 (without waiting for Australia to provide its written undertaking in accordance with the timeframe established by the Tribunal), Timor-Leste filed its Application with the Court. In order to ensure that Timor-Leste's potential legal rights were equally protected in relation to these new proceedings, on 23 December 2013 the Attorney-General directed the Director-General of ASIO in writing that the Materials were not to be communicated to those conducting the proceedings on behalf of Australia before the Court and that the measures set out in the 19 December undertaking (in relation to the Arbitration) be implemented equally in relation to the proceedings instituted before this Court.[103]

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[102] Senator the Hon. George Brandis QC, Attorney-General of Australia, 'Written Undertaking', *Arbitration under the Timor Sea Treaty*, 19 December 2013 [**Annex 74**].

[103] Letter from Senator the Hon. George Brandis QC, Attorney-General of Australia, to Mr David Irvine AO, Director-General of Security, 23 December 2013 [**Annex 53**].

Undertaking of 21 January 2014

3.47. On 21 January 2014, the Attorney-General gave a further undertaking to the Court in which he clarified that the Materials would not under any circumstance be communicated to any person for any purpose other than national security purposes (which include potential law enforcement referrals and prosecutions).[104] In response to concerns Timor-Leste had raised before the Court on 20 January 2014, the Attorney-General specifically stated that this restriction included (but was not limited to) use of the Materials for any purpose relating to the exploitation of Timor Sea resources, related negotiations, proceedings before the Court and the Arbitration.

The Attorney-General's undertakings are supported by Australian law

3.48. These undertakings are reinforced by a robust legal framework for the prosecution of national security matters, which protects against the disclosure of the Materials in the interests of national security and law enforcement activities. In particular, any production of the Materials before an Australian court must conform with the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ('NSI Act').[105] Under the NSI Act, an Australian court can make orders which prevent the disclosure of information in federal criminal proceedings where the disclosure is likely to prejudice Australia's national security. Under section 8 of that Act, 'national security' includes matters relating to Australia's international relations.

3.49. In this case, given Timor-Leste's claims with respect to the Materials, an issue arises relating to Australia's international relations, and the Commonwealth

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[104] Senator the Hon. George Brandis QC, Attorney-General of Australia, 'Written Undertaking', *Questions relating to the Seizure and Detention of Certain Document and Data (Timor-Leste v. Australia)*, 21 January 2014 [**Annex 54**].

[105] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) [**Annex 41**].

Director of Public Prosecutions would undoubtedly seek orders under section 19(1A) of the NSI Act and also section 93.2 of the *Criminal Code Act 1995* (Cth).[106] This would include orders that the relevant Materials be produced in a confidential (*in camera*) hearing, that no person have access (whether before, during or after the hearing) to the Materials without the approval of the court, and that the Materials be held in accordance with strict security and handling requirements. Such orders would limit the dissemination of the Materials and ensure that Timor-Leste was not prejudiced by the use of the Materials in this way. In the unlikely event that the orders were not made, Australia has undertaken to revert to the Court before any further action is taken in Australia.[107]

3.50. Finally, Australian criminal law applies to the actions of Australian officials to prevent any unauthorised disclosure of such information.[108]

3.51. In addition to the statements, directions and undertakings of the Attorney-General, assurances have been given to DLA Piper, legal advisers acting for Timor-Leste, by the Australian Government Solicitor (AGS), legal advisers to the Australian Government. In correspondence to DLA Piper, AGS has stated on at least three occasions that the Australian Government was prepared to 'take no steps' in relation to the Materials while Timor-Leste considered its next action.[109] AGS outlined the process by which Timor-Leste could make a claim with regard to legal professional privilege in domestic courts, extending the assurance to 'take

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[106] *Criminal Code Act 1995* (Cth), Schedule, s 93.2 [**Annex 39**].

[107] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Corrected Record CR/2014/4, 22 January 2014, [50] (Gleeson).

[108] *Crimes Act 1914* (Cth), s 70 [**Annex 40**].

[109] Letter from the Australian Government Solicitor to DLA Piper, 16 December 2013 [**Annex 55**]; Letter from the Australian Government Solicitor to DLA Piper, 19 December 2013 [**Annex 56**]; Letter from the Australian Government Solicitor to DLA Piper, 24 December 2013 [**Annex 57**].

no further steps' to include a time period within which consideration of any potential claim could be completed.[110]

Section III. There is serious doubt as to the correct characterisation of the Materials

3.52. In fact, there is significant uncertainty concerning the Materials. Given the Court's Order of 3 March 2014 and the undertakings given, Australia is not in a position to resolve these uncertainties.

3.53. Timor-Leste has asserted rights over the Materials, not only in terms of confidentiality and 'legal professional privilege' (which, to the extent such rights exist, are qualified by the applicable law and subject to important limitations), but also in terms of ownership, inviolability and immunity (rights which Timor-Leste presents as unqualified and unlimited). The exercise of these rights, both generally and in the specific circumstances of this case, is discussed later in this Counter-Memorial. However, in any case, a necessary predicate to any of the claims listed above is a sufficient factual basis connecting the claimant to the claimed object (a point Timor-Leste now effectively concedes by abandoning claims as to individual items which it now accepts do not belong to it).[111] But in truth, only limited facts are available on which to establish the character of the Materials, and Timor-Leste, which is in a position to supplement the meagre factual record, has chosen not to do so. The result is that the available facts are insufficient to establish Timor-Leste's claims in respect of the Materials as a whole.

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[110] Letter from the Australian Government Solicitor to DLA Piper, 16 December 2013 [**Annex 55**].

[111] Timor-Leste, Memorial, [4.23(h)] and [4.23(o)].

3.54. In addition to the brief description of the Materials provided in the Property Seizure Record and in Mr Collaery's letter to Ambassador Fonseca,[112] the relevant facts available to the Court include the following:

(1) Mr Collaery is the sole principal of Collaery Lawyers and holds a practising certificate in the Australian Capital Territory[113]

(2) He carries on a legal practice at 5 Brockman Street, Narrabundah

(3) This practice is subject to the laws of the Australian Capital Territory, in particular the *Legal Profession (Solicitors) Rules 2007* (ACT),[114] made under the *Legal Profession Act 2006* (ACT)[115]

(4) 'K' has been a client of Mr Collaery since at least May 2008[116]

(5) Mr Collaery has been a Consultant to the Government of Timor-Leste since at least 2010[117]

(6) Since September 2012, work conducted by Mr Collaery for Timor-Leste has been subject to the terms of Mr Collaery's Consultancy Agreement with Timor-Leste[118]

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[112] Property Seizure Record No. A 228909 – A 228915, 5 Brockman St, 3 December 2013 [**Annex 84**]; Letter from Mr Bernard Collaery to Ambassador for Timor-Leste to the United Kingdom, Joaquim da Fonseca, 5 December 2013 [**Annex 87**].

[113] B Collaery, 'Bernard Joseph Edward Collaery, Resumé' (accessed at <http://www.cclaw.com.au/wp-content/uploads/2013/09/130916-Bernard-Collaery-Resume.pdf> on 20 July 2014).

[114] *Legal Profession (Solicitors) Rules 2007* (ACT) **[Annex 42**].

[115] *Legal Profession Act 2006* (ACT) [**Annex 43**].

[116] Letter from 'K' to Mr Ian Carnell, Inspector-General of Intelligence and Security of Australia, 12 May 2008 [**Annex 76**].

[117] Extract from Timor-Leste E-Procurement Portal showing list of contracts awarded to Bernard Collaery for 'Consultancy Services' since 2010 [**Annex 72**].

[118] *Formal Instrument of Agreement between the Government of the Democratic Republic of Timor-Leste and The Bernard Collaery & Associates, Trading as Collaery Lawyers represented by Bernard Collaery*, 17 September 2012, signed by Xanana Gusmão (on behalf of Timor-Leste) and Mr Bernard Collaery (Timor-Leste, Memorial, Annex 7).

(7) Mr Collaery has also acted for a range of other clients, concurrent with his work for Timor-Leste and 'K'[119]

(8) Mr Collaery's obligations under the applicable domestic laws of the Australian Capital Territory require him to retain many of his clients' records at his premises, including those of Timor-Leste, 'K' and other clients[120]

(9) The Materials which are the subject of the dispute were located in, and removed from, these premises,[121] and

(10) The Materials have not been seen by Australia's legal team and are under seal in accordance with the Court's Order of 3 March 2014.

3.55. What is clear from these facts is that there are several parties who may have a claim to, or interest in, the Materials including, but not limited to: Mr Collaery; 'K'; other clients of Mr Collaery; Australia; and Timor-Leste. Timor-Leste itself concedes that certain of the Materials may belong to other clients of Mr Collaery.[122] Nonetheless, in its Memorial, Timor-Leste claims without substantiation that it has:

(1) ownership over 'the bulk' of the Materials,[123] and

(2) a claim to confidentiality and 'legal professional privilege' over all the Materials.[124]

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[119] Collaery Lawyers website states that 'Collaery Lawyers has successfully litigated cases in most jurisdictions in the Australian Court hierarchy and our team is highly experienced in representing clients within, and beyond, the National Capital': Collaery Lawyers, Collaery Lawyers Homepage (accessed at <http://www.cclaw.com.au/> on 20 July 2014).

[120] See Chapter 5 below.

[121] See Sections I and II above.

[122] Timor-Leste, Memorial, [4.23], see particularly Items 002, 003, LPP006 and LPP013.

[123] Timor-Leste, Memorial, [4.15].

[124] Timor-Leste, Memorial, [4.15].

On this basis, Timor-Leste requests the Court to order that all of the Materials be 'returned' to Timor-Leste.[125] However, Timor-Leste has accepted in its Memorial that LPP006 and LPP013 do not belong to it.[126]

3.56. In these circumstances, the Court should take a cautious approach in attributing rights or interests in the Materials, especially the unsubstantiated claims made by Timor-Leste to ownership over, and other interests in, the Materials.

Onus of proof

3.57. In this regard, Timor-Leste bears the onus of proving its factual claims. The rule that the party seeking to rely on a fact has the burden to prove it has long been applied by international courts and tribunals[127] and has even been said to be a general principle of law.[128]

3.58. Timor-Leste must establish, in accordance with the Statute of the Court, that its claims are 'well founded in fact'.[129] To be well founded in fact, a claim should be accompanied by clear and convincing evidence.[130]

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[125] Timor-Leste, Memorial, Final Submissions, (1) and (3).

[126] Timor-Leste, Memorial, [4.23(h) and (o)].

[127] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction of the Court and Admissibility of the Application,* 26 November 1984, I.C.J. Reports 1984, 392 at [101]; *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment,* 20 April 2010, I.C.J. Reports 2010, 14 at [162].

[128] J L Simpson and H Fox, *International Arbitration* (Stevens and Sons Ltd, 1959), 194. See also: S Rosenne, *The Law and Practice of the International Court, 1920-2005, Volume III: Procedure* (4th ed., Brill Nijhoff, 2006), 1040; M Kazazi, *Burden of proof and related issues: a study on evidence before international tribunals* (Kluwer Law International, 1996), 369.

[129] *Statute of the International Court of Justice*, San Francisco, 26 June 1945, 33 UNTS 993 (entered into force 24 October 1945), Article 53(2).

[130] M Benzing, 'Evidentiary Issues', in A Zimmerman, C Tomuschat, K Oellers-Frahm and C Tams (eds.), *The Statute of the International Court of Justice: A Commentary,* (2nd ed., Oxford University Press, 2012), 1265 [**Annex 29**].

3.59. As set out above, there remains significant uncertainty regarding basic factual issues in this case: what is the content and purpose of each of the Materials, and do Timor-Leste's claims of ownership and privilege have a legitimate factual basis? As Australia will demonstrate in this Counter-Memorial, Timor-Leste has failed to satisfy the burden of proof as to certain facts at the very heart of this matter, particularly relating to the true character of the Materials. Without discharging this burden as to the relevant facts, it is not possible for Timor-Leste to establish its claims as a matter of law.

Chapter 4 – There is no unqualified right of confidentiality or legal professional privilege in communications between a State and its legal advisers

4.1. In its Order of 3 March 2014, the Court briefly identified as plausible a right of confidentiality of, and non-interference in, communications between a State and its legal adviser as one category of right asserted by Timor-Leste. Timor-Leste also asserts a right of legal professional privilege as a general principle of law,[131] which the Court identified but did not recognise as plausible. This Chapter will demonstrate that neither of these rights exist at international law, and that even if they did exist and applied to (some of) the Materials, the actions taken by Australia to safeguard the Materials must lead to the conclusion that no violation of Timor-Leste's rights has occurred.

4.2. Section I addresses the purported right of confidentiality of, and non-interference in, communications between a State and its legal adviser. It demonstrates that no such right has been recognised at international law. Further, if such a right is to be recognised, it must be appropriately defined and qualified, particularly where it circumscribes the ability of a forum State to exercise territorial sovereignty or to protect its legitimate national security interests. In particular, any such right should not be used for an improper purpose – including as a cover for a serious breach of confidentiality between a State and its former employee, and the consequent commission of criminal offences. Also, such a right cannot be asserted where the confidential information it purports to protect has already been voluntarily disclosed by the State seeking its protection.

4.3. Section II addresses the principle of legal professional privilege which is asserted by Timor-Leste. It identifies the lack of judicial or scholarly support for the assertion that legal professional privilege is a general principle of law. If a

[131] Timor-Leste, Memorial, [6.2], [6.6], [6.11].

specific right of legal professional privilege is found to exist at international law, its content should in any case be informed by domestic legal jurisprudence based on extensive experience with such problems. In this regard, the proper conclusion is that legal professional privilege does not apply where the relevant communications involve or facilitate a crime or fraudulent act (described here as the 'criminal offence exception').

4.4. Section III applies these conclusions to the facts in these proceedings. In short, a foreign State (Timor-Leste) cannot assert a right of confidentiality or non-interference as a shield from the lawful exercise of territorial jurisdiction by a forum State (Australia), undertaken to protect its national security. Further, Timor-Leste has waived its right to claim confidentiality over certain of the Materials by its public disclosure (through Mr Collaery) of the content of the affidavit of 'K'. In relation to the claim of legal professional privilege, the criminal offence exception applies to any of the Materials containing national security information disclosed by 'K', and hence Timor-Leste has no claim over that Material. This Section also establishes that, to the limited extent that certain Materials may be covered by a right of confidentiality or legal professional privilege, Australia has acted in good faith and taken all necessary steps to preserve any such right. There has been no violation of, or harm to, Timor-Leste's legal interests.

Section I. The purported right of confidentiality of, and non-interference in, communications between a State and its legal advisers should be approached cautiously

A. THERE IS NO UNQUALIFIED RIGHT OF CONFIDENTIALITY OF, AND NON-INTERFERENCE IN, COMMUNICATIONS BETWEEN A STATE AND ITS LEGAL ADVISERS

4.5. In its Order of 3 March 2014, the Court identified three categories of rights asserted by Timor-Leste:

(1) 'the rights to inviolability and immunity' of the Materials

(2) the 'right to the confidentiality of communications' between Timor-Leste and its legal advisers, and

(3) legal professional privilege.[132]

4.6. With respect to the latter two categories, the Court concluded that the right to confidentiality of communications between Timor-Leste and its legal advisers was plausible, but did not explicitly decide whether the asserted right of legal professional privilege was plausible.[133] The Court made no finding with respect to the asserted rights to inviolability and immunity.

4.7. In its Memorial, Timor-Leste conflates confidentiality and legal professional privilege, identifying no material difference between the two.[134] In this Chapter, Australia has retained the structure of the Court's identification of the two rights as separate. This Section addresses the first of these rights, the

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[132] Order on the Request for the Indication of Provisional Measures, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, 3 March 2014, [24].

[133] Order on the Request for the Indication of Provisional Measures, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, 3 March 2014, [28].

[134] Timor-Leste, Memorial, [6.2], [6.3].

claimed right to confidentiality of communications between Timor-Leste and its legal advisers.

4.8. In truth there is no unqualified right of general application which protects the confidentiality of, and non-interference in, communications between a State and its legal advisers.

4.9. This Court has never held that States enjoy a right of confidentiality and non-interference which protects absolutely their communications with their legal advisers, and none of the cases cited by Timor-Leste demonstrate that there is such a right of general application.[135] Even where those cases recognise a form of confidentiality or privilege attaching to such communications, those rights are qualified to ensure that they are not abused.[136]

4.10. There are recognised rights of confidentiality in international law, but these are codified in treaties or rules on confidentiality which set out the scope of the right, including any relevant qualifications. For example, there is a well-recognised right of confidentiality in relation to official communications between a foreign State and its diplomatic missions and consular posts which is set out in the *Vienna Convention on Diplomatic Relations 1961*[137] and the *Vienna Convention on Consular Relations 1963*.[138] In the context of international arbitration, rights of confidentiality are set out in some detail in the applicable procedural rules, including the *United Nations Commission on International*

[135] See discussion of the cases in Section II below.

[136] See discussion of the cases in Section II below.

[137] *Vienna Convention on Diplomatic Relations*, Vienna, 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964), Article 27.

[138] *Vienna Convention on Consular Relations*, Vienna, 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967), Article 35.

Trade Law Arbitration Rules,[139] the *International Chamber of Commerce Rules of Arbitration*[140] and the *London Court of International Arbitration Rules*.[141]

4.11. In contrast, Australia is aware of no treaties between States which explicitly set out a right of a State to enjoy confidentiality of communications with its legal advisers, and certainly not in the broad and unqualified terms asserted by Timor-Leste.

B. ANY RIGHT OF CONFIDENTIALITY OR NON-INTERFERENCE IS QUALIFIED AND MUST NOT BE USED FOR AN IMPROPER PURPOSE

4.12. Even if the Court were to recognise the existence of a right to confidentiality of, and non-interference in, communications between a State and its legal adviser at international law (which is not conceded by Australia), any such right must be appropriately defined and limited.

4.13. In particular, the scope of any such right of confidentiality should be appropriately qualified to ensure it cannot be abused by States or distort or contradict other rights recognised by international law. This is particularly important where a foreign State claims that its purported right of confidentiality applies in the territory of a forum State, where the forum State would ordinarily enjoy territorial sovereignty including the right to enforce and apply its criminal legislation. This is precisely the type of claim asserted by Timor-Leste in these proceedings. In particular, a foreign State cannot, by retaining a legal adviser in the forum State, immunise itself or its lawyer from the normal operation of the laws of the latter State relating to confidentiality and privilege. In such a case, the

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[139] See United Nations Commission on International Trade Law, *United Nations Commission on International Trade Law Arbitration Rules* (as revised in 2010), Articles 28(3) and 34(5).

[140] See International Chamber of Commerce, *ICC Rules of Arbitration*, 1 January 2012, Articles 22(3), 26(3) and Appendix I, Article 6.

[141] See London Court of International Arbitration, *LCIA Arbitration Rules*, 1 January 1998, Article 30.

choice to retain the local lawyer entails acceptance of the regulatory system applicable there.

4.14. Even if, in such a case, there is a supervening international law of professional practice (never before articulated), the scope of any right of confidentiality must necessarily exclude its use for an improper purpose, for example, to facilitate the commission of a crime. This is consistent with the scope of other privileges and rights exercised by a foreign State in the territory of a forum State, which cannot be used for an improper purpose. For example, the right of a foreign State to avoid having its diplomatic bag opened or detained on the territory of a forum State[142] cannot be used as a cover to facilitate a criminal offence, including the illegal import or export of drugs,[143] or the kidnapping of persons.[144] Nor can it be used in a way which would pose a threat to the public (for example, by attempting to transport explosives),[145] or to prevent legitimate action by a forum State to protect the safety of an aircraft.[146] Such uses of the diplomatic bag amount to an improper purpose, and (despite the accepted principle of inviolability of diplomatic correspondence) necessarily fall outside the scope of the right afforded to a foreign State on a forum State's territory.

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[142] *Vienna Convention on Diplomatic Relations*, Vienna, 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964), Article 27(3).

[143] 'Italy finds cocaine in Ecuador diplomatic pouch: Quito', *Agence France Presse*, 10 February 2012 [**Annex 62**]; J Bargent, 'Ecuador tightens controls on diplomatic mail after cocaine scandal', *Insight Crime*, 14 January 2013 [**Annex 63**]; R Tagg, 'Cocaine found in diplomats baggage', *The Sunday Times*, 26 October 2003 [**Annex 64**]; J Witherow, 'Embassy official jailed for drug smuggling', *The Times*, 16 October 1980 [**Annex 65**]; E Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations,* (3rd ed., Oxford University Press, 2008), 238, 242.

[144] E Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations,* (3rd ed., Oxford University Press, 2008), 242 citing 'Gagged man in diplomatic trunk', *The Times*, 18 November 1964 [**Annex 66**]; 'Italy charges U.A.R Embassy Men', *The Times*, 23 November 1964 [**Annex 67**]; 'Trunk man remanded in Israel', *The Times*, 27 November 1964 [**Annex 68**].

[145] E Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations,* (3rd ed., Oxford University Press, 2008), 243.

[146] Comments and Observations of the Government of Switzerland, *Yearbook of the International Law Commission 1988 Volume II Part 1*, A/CN.4/SER.A/1988/Add.1 (Part 1), 162.

4.15. Important qualifications of any right of confidentiality are reflected in many domestic legal systems, which recognise several categories of exceptions which prevail over any right of confidentiality. These exceptions arise particularly where there is the prospect of criminal conduct and consequent harm to an individual or the public. For example, the confidentiality or professional secrecy obligations which apply to lawyers are commonly voided where necessary to prevent the commission of serious crimes such as money laundering – including, as acknowledged in Timor-Leste's own cited reviews of domestic legislation, in France,[147] Austria,[148] Belgium,[149] Denmark,[150] Estonia,[151] Finland,[152] Greece,[153] Latvia,[154] Lithuania,[155] Malta,[156] Poland,[157] Portugal,[158] Romania,[159] Hong Kong[160] and also in Brazil,[161] China[162] and Spain.[163]

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[147] Norton Rose, *Disclosure and Privilege in the Asia-Pacific* (2009), 43 (Timor-Leste, Memorial, Annex 24).

[148] DLA Piper, *Legal Privilege Handbook 2013* (2013), 10 (Timor-Leste, Memorial, Annex 22).

[149] DLA Piper, *Legal Privilege Handbook 2013* (2013), 12 (Timor-Leste, Memorial, Annex 22).

[150] DLA Piper, *Legal Privilege Handbook 2013* (2013), 21 (Timor-Leste, Memorial, Annex 22).

[151] DLA Piper, *Legal Privilege Handbook 2013* (2013), 25-26 (Timor-Leste, Memorial, Annex 22).

[152] DLA Piper, *Legal Privilege Handbook 2013* (2013), 29 (Timor-Leste, Memorial, Annex 22).

[153] DLA Piper, *Legal Privilege Handbook 2013* (2013), 35 (Timor-Leste, Memorial, Annex 22).

[154] DLA Piper, *Legal Privilege Handbook 2013* (2013), 49-50 (Timor-Leste, Memorial, Annex 22).

[155] DLA Piper, *Legal Privilege Handbook 2013* (2013), 53 (Timor-Leste, Memorial, Annex 22).

[156] DLA Piper, *Legal Privilege Handbook 2013* (2013), 55 (Timor-Leste, Memorial, Annex 22).

[157] DLA Piper, *Legal Privilege Handbook 2013* (2013), 64 (Timor-Leste, Memorial, Annex 22).

[158] DLA Piper, *Legal Privilege Handbook 2013* (2013), 67-68 (Timor-Leste, Memorial, Annex 22).

[159] DLA Piper, *Legal Privilege Handbook 2013* (2013), 69 (Timor-Leste, Memorial, Annex 22).

[160] Norton Rose, *Disclosure and Privilege in the Asia-Pacific* (2009), 21 (Timor-Leste, Memorial, Annex 24).

[161] C M C Aidar and D P de Castro, 'Legal Privilege and Confidentiality in Brazil', in D Greenwald and M Russenberger (eds.), *Privilege and Confidentiality: An International Handbook* (2nd ed. Bloomsbury Professional, 2012), 36-37.

4.16. This being so, it is respectfully submitted that the Court should reject Timor-Leste's broad and unqualified assertion of a right of confidentiality and instead adopt a more measured approach consistent with the manner in which other rights under international law are appropriately defined and qualified.

C. ANY RIGHT OF CONFIDENTIALITY OR NON-INTERFERENCE IS WAIVED WHERE THE INFORMATION IS DISCLOSED BY THE RELEVANT PARTY

4.17. In defining the scope of any right to confidentiality of, or non-interference in, communications between a State and its legal advisers, it is necessary to consider the circumstances in which the right can be lost. A widely recognised circumstance where the right of confidentiality is lost, or waived, is where the relevant party discloses the substance of the confidential information to an opposing party or the public.[164] If that occurs, the information has lost its confidential character and the relevant party has waived its right to claim confidentiality. The rationale is that a party should not be permitted to assert the confidentiality of a communication where it has itself disclosed that communication (other than in the course of the lawyer-client relationship).

4.18. This is consistent with the limitations on the right to confidentiality in many domestic legal systems. The right of confidentiality is commonly waived

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[162] F Ning and S Huawei, 'Legal Privilege and Confidentiality in China', in D Greenwald and M Russenberger (eds.), *Privilege and Confidentiality: An International Handbook* (2nd ed., Bloomsbury Professional, 2012), 87-88.

[163] A Bravo and V Arias, 'Legal Privilege and Confidentiality in Spain', in D Greenwald and M Russenberger (eds.), *Privilege and Confidentiality: An International Handbook* (2nd ed., Bloomsbury Professional, 2012), 250 (referring to 19/2003 Act on Money Laundering (Spain)).

[164] See, for example, International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration* (2010), Article 9.3(d), which provides that in considering issues of legal impediment or privilege, a relevant consideration for arbitral tribunals is 'any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise'. The IBA Commentary states that 'Article 9.3(d) encapsulates an important exception to privilege in many countries, namely waiver': International Bar Association, *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration*, 25.

where the client discloses the relevant information to an opposing party or the public – including, as reflected in Timor-Leste's own cited reviews of domestic legislation, in Portugal,[165] Belgium,[166] the United Kingdom,[167] Hong Kong,[168] Saudi Arabia,[169] Thailand,[170] and also Australia,[171] Japan,[172] Spain[173] and Canada.[174]

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[165] DLA Piper, *Legal Privilege Handbook 2013* (2013), 66 ('Legal privilege does not include … facts known by the public … [or] facts described in public documents/deeds') (Timor-Leste, Memorial, Annex 22).

[166] Linklaters, *Privileged: Privilege review 2009* (2009), 4 ('the advice will lose its privileged status if it is treated non-confidentially by its author and its addressee') (Timor-Leste, Memorial, Annex 23).

[167] DLA Piper, *Legal Privilege Handbook 2013* (2013), 22 ('If documents which would otherwise be privileged contain information which is already in the public domain … privilege will be lost') (Timor-Leste, Memorial, Annex 22).

[168] DLA Piper, *Legal Privilege Handbook 2013* (2013), 37 ('documents which are in the public domain are not privileged') (Timor-Leste, Memorial, Annex 22); Norton Rose, *Disclosure and Privilege in the Asia-Pacific*, 20 ('The main means through which privilege is lost are … (b) loss of confidentiality; (c) conduct such as by bringing a document into the public domain') (Timor-Leste, Memorial, Annex 24).

[169] DLA Piper, *Legal Privilege Handbook 2013* (2013), 73 ('The privilege may be waived if the confidential communications are disclosed to third parties') (Timor-Leste, Memorial, Annex 22).

[170] Norton Rose, *Disclosure and Privilege in the Asia-Pacific* (2009), 35 ('How can legal privilege be lost? By voluntary disclosure') (Timor-Leste, Memorial, Annex 24).

[171] *Mann v. Carnell* (1999) 201 CLR 1, 13, 15 (Gleeson CJ, Gaudron, Gummow and Callinan JJ) [**Annex 7**]; *Evidence Act 1995* (Cth), s 122 [**Annex 44**].

[172] H Tezuka and M Yajima, 'Legal Privilege and Confidentiality in Japan', in D Greenwald and M Russenberger (eds.), *Privilege and Confidentiality: An International Handbook* (2nd ed., Bloomsbury Professional, 2012), 189-190.

[173] A Bravo and V Arias, 'Legal Privilege and Confidentiality in Spain', in D Greenwald and M Russenberger (eds.), *Privilege and Confidentiality: An International Handbook* (2nd ed., Bloomsbury Professional, 2012), 254.

[174] M Koehnen and E Cowling, 'Legal Privilege in Canada', in D Greenwald and M Russenberger (eds.), *Privilege and Confidentiality: An International Handbook* (2nd ed., Bloomsbury Professional, 2012), 54.

Section II. The 'right of legal professional privilege' is not a recognised concept of international law

A. LEGAL PROFESSIONAL PRIVILEGE IS NOT A GENERAL PRINCIPLE OF LAW

4.19. Timor-Leste asserts that legal professional privilege is a general principle of law within the meaning of Article 38(1)(c) of the Statute.[175] But there is no good evidence of this, and certainly no evidence that any such privilege has the absolute character that Timor-Leste attributes to it.

4.20. General principles of law within the meaning of Article 38(1)(c) of the Statute are generally derived from general principles of municipal jurisprudence, appropriately adapted to the international law sphere to avoid 'distortion'.[176]

4.21. Timor-Leste relies heavily on third party reviews of domestic legislation in its attempt to demonstrate that legal professional privilege is a general principle of law.[177] But the mere fact that a form of legal professional privilege exists in many domestic legal systems is not sufficient to generate a new general principle of international law, particularly one which would apply to relations between a State and an individual legal adviser who is a national of, resident in, and subject to the laws of, another State.

4.22. In addition, Timor-Leste makes no effort in its Memorial to explain how the domestic law principles should be appropriately adapted to the international law sphere without distortion, or how the specific and often complex procedures in domestic legal systems for the claiming and testing of privilege should be replicated under international law and before this Court. These are fundamental

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[175] Timor-Leste, Memorial, [6.2], [6.6], [6.11].

[176] R Jennings and A Watts (eds.), *Oppenheim's International Law* (9th ed., Oxford University Press, 1992), 37. This interpretation of general principles of law is cited with approval in J Crawford, *Brownlie's Principles of Public International Law* (8th ed., Oxford University Press, 2012), 34-35; see also M N Shaw, *International Law* (6th ed., Cambridge University Press, 2008), 98-100.

[177] Timor-Leste, Memorial, Annexes 22, 23 and 24.

points for consideration by the Court when deciding whether to recognise a new 'general principle of law', which by its very nature would apply to all States and not simply the Parties to these proceedings.

4.23. Legal professional privilege has never been described or accepted by this Court as a general principle of law. Further, none of the judicial decisions cited by Timor-Leste specifically recognise legal professional privilege as a general principle of law within the meaning of Article 38(1)(c) of the Statute. In relation to these decisions, Australia makes the following observations:

Bank for International Settlements case

4.24. In the *Bank for International Settlements* case, certain shareholders of the Bank for International Settlements brought a claim against the Bank for compensation resulting from a share recall. In the course of those proceedings, the Bank asserted privilege over certain documents which were subject to a request for production by the shareholders.[178] The primary issue was whether the Bank could assert a claim of privilege as against its shareholders.[179]

4.25. This is clearly distinguishable from the facts of this case. In the *Bank for International Settlements* case, the documents were sought by the claimants for use as evidence in the proceedings. In contrast, in these proceedings, there was no request for production and the Materials were *not* removed for use in the Arbitration or any future negotiations. In fact, as explained by the Attorney-General of Australia and set out in Australia's Written Observations,[180]

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[178] *Dr Horst Reineccius et al v. Bank for International Settlements* (Procedural Order No. 6 of 11 June 2002) (Permanent Court of Arbitration), 1-2.

[179] *Dr Horst Reineccius et al v. Bank for International Settlements* (Procedural Order No. 6 of 11 June 2002) (Permanent Court of Arbitration), 9.

[180] Senator the Hon. George Brandis QC, Attorney-General, 'Ministerial Statement: Execution of ASIO Search Warrants', 4 December 2013 [**Annex 52**]; Australia, Written Observations on Timor-Leste's Request for Provisional Measures, 13 January 2014, [13].

there is no relationship between the removal of the Materials and any current legal proceedings.

4.26. In any case, the Tribunal in the *Bank for International Settlements* case did not state that legal professional privilege was a general principle of law. To the extent that the Tribunal recognised a privilege, it recognised that any privilege is qualified and not absolute. In particular, the Tribunal recognised that any privilege will be waived if the relevant information is voluntarily publicised by the party claiming privilege, or in circumstances where the privilege is being abused and used in ways that would unfairly benefit the party entitled to claim the privilege.[181] The latter exception mirrors the 'shield and sword' exception recognised in the domestic jurisprudence of the United States.[182]

Libananco Holdings Co Limited v. Republic of Turkey

4.27. In *Libananco*, the primary concern raised by the claimant investor was the prospective use by the respondent, Turkey, of intercepted communications in the course of the arbitral proceedings.[183] There was no suggestion that the interception of communications by the Turkish authorities was unlawful, or that the act of interception itself was inconsistent with the investor's claim to legal professional privilege.

4.28. Once again, the Tribunal in *Libananco* did not recognise legal professional privilege as a general principle of law. In fact, the Tribunal explicitly recognised

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[181] *Dr Horst Reineccius et al v. Bank for International Settlements* (Procedural Order No. 6 of 11 June 2002) (Permanent Court of Arbitration), 10.

[182] *U.S. v. Bilzerian*, 926 F.2d 1285 (2nd Cir. 1991), 1292 [**Annex 8**]; see also *Dr Horst Reineccius et al v. Bank for International Settlements* (Procedural Order No. 6) (Permanent Court of Arbitration), 11 June 2002, 10.

[183] *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8, Decision on Preliminary Issues of 23 June 2008), 16-22.

the ongoing right of a State to investigate serious crimes under its domestic law, provided that it is exercised with a proper regard for any claim for privilege:

> The Tribunal takes it as a given, for example, that a sovereign State does indeed have a right and duty to pursue the commission of serious crime, and that that right and duty cannot be affected by the existence of an ICSID arbitration against it, or put into commission by the fact that an ICSID arbitration is begun against it.[184]

4.29. This measured approach is reflected in the orders made by the Tribunal, which excluded any privileged documents from the arbitration, and ordered that no information coming to the knowledge of Turkish criminal investigation authorities should be made available to any person having a role in the defence of the arbitration.[185] These orders largely mirror the terms of the undertakings voluntarily given by the Attorney-General (in relation to the Materials) to the Arbitral Tribunal on 19 December 2013 and to this Court on 21 January 2014.[186]

AM&S Europe Ltd v. Commission of the European Communities[187]

4.30. While the existence of a principle of legal professional privilege was affirmed in this decision, the European Court of Justice was *not* invited to consider whether that principle was a general principle of law within the meaning of Article 38(1)(c) of the Statute. Accordingly, the decision does not support Timor-Leste's assertion that the privilege is a general principle of law.

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[184] *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8, Decision on Preliminary Issues of 23 June 2008), [79].

[185] *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8, Decision on Preliminary Issues of 23 June 2008), [82].

[186] Senator the Hon. George Brandis QC, Attorney-General of Australia, 'Written Undertaking', *Arbitration under the Timor Sea Treaty*, 19 December 2013 [**Annex 74**]; Senator the Hon. George Brandis QC, Attorney-General of Australia, 'Written Undertaking', *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, 21 January 2014 [**Annex 54**].

[187] *AM&S Europe Ltd v. Commission of the European Communities,* (Court of Justice of the European Union, C-155/79, 18 May 1982).

4.31. In any event, the Court affirmed that the Commission in that case had a lawful right to exercise its investigative powers as it considered necessary, in order to bring to light an infringement of the relevant competition rules.[188] It held that the Commission's lawful investigative power is 'subject to a restriction imposed by the need to protect confidentiality' between the legal adviser and client.[189] This balanced approach is far removed from Timor-Leste's broad and unqualified formulation of the principle of legal professional privilege.

European Court of Human Rights cases

4.32. Timor-Leste cites certain decisions by the European Court of Human Rights to support its assertion that legal professional privilege is a general principle of law.

(1) These decisions all concerned articles of the *European Convention on the Protection of Human Rights and Fundamental Freedoms* ('European Convention'),[190] including Article 6 (right to a fair trial)[191] and Article 8 (respect for private and family life),[192] none of which purport to provide a right of legal professional privilege applicable

[188] *AM&S Europe Ltd v. Commission of the European Communities,* (Court of Justice of the European Union, C-155/79, 18 May 1982), [17].

[189] *AM&S Europe Ltd v. Commission of the European Communities,* (Court of Justice of the European Union, C-155/79, 18 May 1982), [27].

[190] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

[191] *Iliya Stefanov v. Bulgaria* (European Court of Human Rights, Chamber, Application No. 65755/01, 22 May 2008).

[192] *Niemietz v. Germany* (European Court of Human Rights, Chamber, Application No. 13710/88, 16 December 1992); *Campbell v. United Kingdom* (European Court of Human Rights, Chamber, Application No. 13590/88, 25 March 1992); *Elci and Others v. Turkey* (European Court of Human Rights, Chamber, Application No. 23145/93 and 25091/94, 13 November 2003; *Istratii and others v. Moldova* (European Court of Human Rights, Chamber, Application No. 8721/05, 0805/05 and 8742/05, 27 March 2007); *Golovan v. Ukraine* (European Court of Human Rights, Chamber, Application No. 41716/06, 5 July 2012); *Michaud v. France* (European Court of Human Rights, Chamber, Application No. 12323/11, 6 December 2012); *Iliya Stefanov v. Bulgaria* (European Court of Human Rights, Chamber, Application No. 65755/01, 22 May 2008).

between States and their legal advisers, let alone a general principle of law within the meaning of Article 38(1)(c) of the Statute.

(2) Where legal professional privilege is indirectly referenced in the decisions, it is in the context of the review and application of the principle as it is widely asserted under a State's *domestic* laws, not a review or application of such a principle under *international* law (which is at the heart of Timor-Leste's claim in the present proceedings).

(3) The decisions all relate to the rights of individuals as against State action, and in particular the human rights enjoyed by those individuals under the European Convention in the context of criminal proceedings against them. Plainly, the right of a State to claim legal professional privilege to prevent disclosure of relevant communications to another State is well outside the scope of these decisions.

4.33. It follows from the foregoing that the authorities cited by Timor-Leste do not support its claim that legal professional privilege is a general principle of law. Further, to the extent that the cases recognise some form of legal professional privilege, they reinforce Australia's position that the scope of any such privilege must be appropriately qualified and interpreted to take account of other legal rights enjoyed by States at international law.

B. ANY FORMULATION OF LEGAL PROFESSIONAL PRIVILEGE UNDER INTERNATIONAL LAW SHOULD BE APPROPRIATELY AND NARROWLY DEFINED

4.34. Even if one accepts that a right of legal professional privilege could exist under international law, the approach taken should be the same as that outlined above in respect of the purported right of confidentiality and non-interference: namely, the scope of any such right must be appropriately qualified to ensure it

cannot be abused by States or produce a distorted effect on other rights under international law.

4.35. Timor-Leste adopts an extraordinarily broad formulation of legal professional privilege, which it essentially asserts as an unqualified protection from interference in any and all communications between a State and its legal advisers.[193]

4.36. Such a broad and unqualified formulation cannot be supported. None of the domestic laws cited by Timor-Leste define legal professional privilege in these terms. None of the laws cited are without important caveats on the scope and content of the privilege, including the circumstances in which it can be asserted. This is shown in Australia's survey of approaches taken under domestic law to issues of legal professional privilege[194] and supported in the reviews of domestic law attached to Timor-Leste's Memorial.[195]

4.37. In fact, most domestic legal systems narrow the scope of communications which are privileged. For example, in Australia and many other States, privilege does not apply to *all* communications made between a legal adviser and client.[196] Rather, communications will only be privileged where the communication was made, or the document was prepared, in connection with the giving or obtaining of legal advice or in the provision of legal services.[197]

4.38. The Court should take a similarly measured approach to recognising any such principle at international law. This is particularly the case given that there

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[193] Timor-Leste, Memorial, [6.1], [6.2].

[194] Table: Summary of National Laws on Legal Professional Privilege/Confidentiality: Scope and Exceptions [**Annex 51**].

[195] Timor-Leste, Memorial, Annexes 22, 23 and 24.

[196] Table: Summary of National Laws on Legal Professional Privilege/Confidentiality: Scope and Exceptions [**Annex 51**].

[197] See, for example *Esso Australia Resources Ltd v. Commission of Taxation* (1999) 201 CLR 49, 73 [**Annex 9**]; see also *Evidence Act 1995* (Cth), ss 118-120 [**Annex 44**].

are no established fora or mechanisms for testing a claim to privilege under international law. To Australia's knowledge, this is the first time that a State has claimed anything approximating legal professional privilege before the Court, and as Timor-Leste implicitly acknowledges,[198] there are no procedures or procedural safeguards in place to assist the Court in independently ruling on such claims. In contrast, domestic legal systems have sophisticated and established mechanisms for the resolution of claims to privilege which can take into account, among other factors, the proper characterisation of relevant documents, and the application of appropriate exceptions (including the criminal offence exception).

C. THERE ARE EXCEPTIONS TO LEGAL PROFESSIONAL PRIVILEGE TO AVOID ABUSE OF PROCESS

4.39. Exceptions to a claim for legal professional privilege are widely adopted at domestic law so as to ensure that the privilege cannot be abused. As Sarvarian notes:

> the legal protection of such communication from the eyes of others creates a danger that it may be abused. Legal and ethical safeguards are accordingly needed, wherein the former allows for limited circumstances for a court to view confidential communications and the latter requires counsel to disclose such material in abusive circumstances.[199]

4.40. As a matter of international law, the same concern regarding abuse of process and upholding the rule of law applies. This was expressly stated by independent expert Spigelman in *St Marys VCNA, LLC v. Government of Canada*:

> [privilege] does not extend to communications which undermine the integrity of, or otherwise constitute an abuse of, the administration of justice. Documents that came into existence for such an improper purpose are not entitled to attorney-client privilege from the outset.

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[198] Timor-Leste, Memorial, [6.14].

[199] A Sarvarian, *Professional Ethics at the International Bar* (Oxford University Press, 2013), 132.

> This is a widely accepted proposition in the domestic law of many jurisdictions.[200]

4.41. This is also reflected in the *Bank for International Settlements* case, where the Tribunal recognised that legal professional privilege will be waived in circumstances where the privilege is being abused and used in ways that would unfairly benefit the party entitled to claim the privilege.[201]

4.42. There is also a second, related concern. An asserted right enjoyed by one State at international law must be considered in light of the rights enjoyed by other States. It follows that any right of a foreign State to claim legal professional privilege must be interpreted with regard to the prevailing right of a forum State to enforce its domestic criminal laws against its nationals within its territory where the communications further or facilitate a criminal offence. When foreign States choose to engage legal counsel overseas, they must respect the domestic laws, including domestic criminal law, of the State in whose jurisdiction they have chosen to seek such advice. This was expressly recognised by the Tribunal in *Libananco*, where the Tribunal affirmed the 'right and duty' of States to 'pursue the commission of serious crime'.[202]

D. THE CRIMINAL OFFENCE EXCEPTION IS WIDELY RECOGNISED AS AN EXCEPTION TO LEGAL PROFESSIONAL PRIVILEGE

4.43. Consistent with the above approach, it is important to identify the applicable exceptions which should apply with respect to any purported right of legal professional privilege found to exist at international law. Such a

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[200] James Spigelman, 'Report on Inadvertent Disclosure of Privileged Documents', *Arbitration under Chapter II of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules 1976 between St Marys VCNA, LLC v. Government of Canada*, 27 December 2012, 4.

[201] *Dr Horst Reineccius et al v. Bank for International Settlements* (Procedural Order No. 6 of 11 June 2002) (Permanent Court of Arbitration), 10.

[202] *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8, Decision on Preliminary Issues of 23 June 2008), [79].

determination should be made with regard to the domestic laws from which any right of legal professional privilege is said to be drawn.

4.44. Domestic jurisdictions widely recognise an exception to legal professional privilege where the relevant communication is made or prepared in furtherance of a fraud or a criminal offence, or was itself illegal or fraudulent (the criminal offence exception).[203] Indeed, the widespread existence of the criminal offence exception is reflected in the reviews of domestic laws attached to Timor-Leste's own Memorial, in which the criminal offence exception is explicitly acknowledged to apply in countries such as China,[204] France,[205] Latvia,[206] Lithuania,[207] Australia,[208] the United Kingdom[209] and Hong Kong.[210]

4.45. Where the exception arises, it defeats any claim for privilege. The rationale in adopting this exception is clear – the public interest of encouraging disclosure by clients to their legal advisers is outweighed where that interest is exercised in a manner which undermines the rule of law and jeopardises

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[203] Table: Summary of National Laws on Legal Professional Privilege/Confidentiality: Scope and Exceptions [**Annex 51**].

[204] DLA Piper, *Legal Privilege Handbook 2013* (2013), 17 (citing Article 38 of the Lawyer's Law and Article 46 of the Criminal Procedure Law) (Timor-Leste, Memorial, Annex 22); Norton Rose, *Disclosure and Privilege in the Asia-Pacific* (2009), 15 (Timor-Leste, Memorial, Annex 24).

[205] DLA Piper, *Legal Privilege Handbook 2013* (2013), 31 (Timor-Leste, Memorial, Annex 22); Linklaters, *Privileged: Privilege review 2009* (2009), 8 (Timor-Leste, Memorial, Annex 23); Norton Rose, *Disclosure and Privilege in the Asia-Pacific* (2009), 43 (Timor-Leste, Memorial, Annex 24).

[206] DLA Piper, *Legal Privilege Handbook 2013* (2013), 52 (Timor-Leste, Memorial, Annex 22).

[207] DLA Piper, *Legal Privilege Handbook 2013* (2013), 53 (Timor-Leste, Memorial, Annex 22).

[208] DLA Piper, *Legal Privilege Handbook 2013* (2013), 9 (Timor-Leste, Memorial, Annex 22); Norton Rose, *Disclosure and Privilege in the Asia-Pacific* (2009), 11 (Timor-Leste, Memorial, Annex 24).

[209] DLA Piper, *Legal Privilege Handbook 2013* (2013), 22 (Timor-Leste, Memorial, Annex 22); Norton Rose, *Disclosure and Privilege in the Asia-Pacific* (2009), 39 (Timor-Leste, Memorial, Annex 24).

[210] DLA Piper, *Legal Privilege Handbook 2013* (2013), 37 (Timor-Leste, Memorial, Annex 22).

a just outcome.[211] It should not afford protection to a client or its legal adviser where there is a serious breach of domestic criminal laws, and cannot be allowed to prevent the enforcement of those laws.

4.46. For these reasons, the criminal offence exception is a proper exception to any purported right of legal professional privilege at international law. This is consistent with the widespread recognition of the exception in a range of domestic systems, and other circumstances in which a State voluntarily accepts an obligation to uphold the domestic laws of another State – including, for example, where a State enters into a private commercial contract governed by the domestic laws of another State and is consequently obliged to respect those laws.[212]

4.47. For its part, Timor-Leste does not appear to admit or acknowledge any exception to the claimed principle of legal professional privilege. Such an unqualified application of the principle is not recognised in *any* domestic legal system which upholds legal professional privilege, and should not be recognised in any formulation of the principle at the international level.

Section III. Timor-Leste's claims must fail

A. THERE IS NO ESTABLISHED RIGHT OF CONFIDENTIALITY OR PRIVILEGE IN THE MATERIALS

4.48. As set out in Chapter 3, there is significant uncertainty about the character of the Materials. On the basis of the available evidence, in respect of Timor-Leste's purported claims of confidentiality or privilege, the Materials appear to fall into the following categories:

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[211] B Thanki QC (ed.), *The Law of Privilege* (Oxford University Press, 2011), 198 [**Annex 30**]; J Auburn, *Legal Professional Privilege: Law and Theory* (Hart Publishing, 2000), 159 [**Annex 31**].

[212] H Fox and P Webb, *The Law of State Immunity* (3rd ed., Oxford University Press, 2013), 402-404.

(1) Materials which are not subject to a claim of confidentiality or privilege by Timor-Leste, or are subject to a claim by third parties

(2) Materials over which any claim of confidentiality or privilege by Timor-Leste has been lost (due to the criminal offence exception, waiver by Timor-Leste, or the fact they were prepared for, or facilitate, an improper purpose), and

(3) Materials which may be subject to a claim of confidentiality or privilege by Timor-Leste.

Materials which are not subject to a claim of confidentiality or privilege by Timor-Leste, or are subject to a claim by third parties

(1) *LPP006: Folder labelled ICT product containing document titled 'Protocol for the operation of base stations'*. Timor-Leste has acknowledged that it 'does not appear from its description to relate to Timor-Leste'.[213] This item is not subject to a claim of confidentiality or privilege by Timor-Leste.

(2) *LPP013: Brief to Counsel re: Timor-Leste v Australia dated 19 November 2013*. Timor-Leste has stated that it believes this document is a brief to Mr Bernard Gross QC in respect of 'K', and that accordingly 'this document does not belong to Timor-Leste'.[214] On that basis, even if a claim of confidentiality or privilege could be made in respect of the item, it would be a claim by 'K' or Mr Collaery (neither of whom is a party to these proceedings) and not Timor-Leste. Such a claim is outside the scope of these proceedings and accordingly, item LPP013 is not eligible for a claim of confidentiality or privilege by Timor-Leste.

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[213] Timor-Leste, Memorial, [4.23(h)].

[214] Timor-Leste, Memorial, [4.23(o)].

(3) *Item 002: ACER Aspire Laptop black, bearing S/N 11600300725 and power supply*. Timor-Leste concedes that the Laptop is the property of Mr Collaery, and that it is likely that the Laptop contains a range of documents and other correspondence for a number of Mr Collaery's other clients.[215] Australia has received a letter from at least one of Mr Collaery's clients concerning the status of documents held by Mr Collaery, over which the client asserts claims to legal professional privilege.[216] Accordingly, in the absence of further substantiation, Timor-Leste cannot make an ambit claim for confidentiality or privilege over the entirety of the Laptop's contents. Delivering up the Laptop to Timor-Leste (as sought by Timor-Leste in its final submissions)[217] would jeopardise any claims by Mr Collaery's other clients in documents which are held on the Laptop.

(4) *Item 003: 4GB USB Verbatim thumb drive, black in colour, NG04G2513008819DML*. Timor-Leste concedes that it does not know whether any of the documents on this USB relate to Timor-Leste,[218] and also concedes that some of the documents may belong to Mr Collaery's other clients.[219] In the absence of any certainty that the documents on the USB relate to Timor-Leste, Timor-Leste cannot make an ambit claim for confidentiality or privilege over the USB. In addition, delivering up this item to

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[215] Timor-Leste, Memorial, [4.23(a)].

[216] Letter from Mr Collaery's client to Senator the Hon. George Brandis QC, Attorney-General of Australia, 12 December 2013 [redacted] [**Annex 88**].

[217] Timor-Leste, Memorial, Final Submissions, (3).

[218] Timor-Leste, Memorial, [4.13] – 'a USB stick, which *may* contain matters relating to Timor-Leste' (emphasis added); see also, Timor-Leste, Memorial, [4.23(b)].

[219] Timor-Leste, Memorial, [4.23(b)].

Timor-Leste would jeopardise any claims by Mr Collaery's other clients to documents held on this item.

Materials over which any claim of confidentiality or legal privilege by Timor-Leste has been lost

(1) *LPP012: Untitled document with hand written comment stating 'This is the statement of ****'*. Timor-Leste has described this item as 'the draft of a statement of a third party taken for legal proceedings involving Timor-Leste'.[220] Based on that description, this document is most likely a draft of 'K's affidavit, the final version of which has been provided to Australia and the Tribunal in the course of the Arbitration. It would therefore contain details of the evidence of 'K', unlawfully disclosed to Mr Collaery and Timor-Leste. Australia's position is that any right of confidentiality or privilege has been lost or waived by Timor-Leste, for the reasons set out below.[221] Further, given Mr Collaery was acting as legal representative for 'K', if any legal professional privilege were available, it is possible that this document would be subject to legal professional privilege on behalf of 'K', and not Timor-Leste.

(2) *LPP014: Documents: Affidavit of ****, related itineraries, diplomatic courier document and photo of sign saying Welcome to Central Maritime Hotel Dili*. The position with regard to LPP014 is the same as with respect to LPP012.

[220] Timor-Leste, Memorial, [4.23(n)].

[221] See [4.52] to [4.66] below.

Materials which may be subject to a claim of confidentiality or legal privilege by Timor-Leste

4.49. In respect of the other Materials,[222] Timor-Leste has broadly asserted that based on their descriptions, the items are legal advice provided to Timor-Leste and hence subject to the asserted legal professional privilege.[223] This may be correct. However, it could only be confirmed by inspecting the documents to determine whether they were communications between Timor-Leste and Mr Collaery in his capacity as Timor-Leste's legal adviser, being legal advice or legal communications relating to the course of anticipated or actual litigation, and that no relevant exceptions apply (including the criminal offence exception or waiver by Timor-Leste).

4.50. Finally, Australia makes the following observations with respect to LPP002 and LPP003:

(1) *LPP002: Document titled 'Memorandum to Counsel' (Sealed in yellow envelope).* There is no reference in the title to any matter relating to Timor-Leste: thus even if it is legal advice, the identity of the client is uncertain.

(2) *LPP003: Document entitled 'Timor Sea Treaty', Dili 20 May 2002 (Sealed in yellow envelope).* There is nothing in the title of the item to indicate whether it pertains to legal advice or other confidential communications between Timor-Leste and its legal advisers. It may well simply be a copy of the treaty.

[222] Items LPP001, LPP002, LPP003, LPP004, LPP005, LPP007, LPP008, LPP009, LPP010, LPP011 and LPP015.

[223] Timor-Leste, Memorial, [4.23] and [6.25].

B. TIMOR-LESTE HAS NO RIGHT OF CONFIDENTIALITY OR PRIVILEGE IN ANY MATERIALS THAT FACILITATE OR FURTHER A CRIMINAL OFFENCE

4.51. As set out above, there are two separate rights asserted in the Materials, being the purported rights of confidentiality and legal professional privilege. In respect of any right of confidentiality, Timor-Leste cannot claim confidentiality for an improper purpose (which includes, but is not limited to, abuse of confidentiality to cover a criminal offence), and cannot claim confidentiality where it has waived it by disclosure. In respect of legal professional privilege, there is an established exception in those domestic systems from which Timor-Leste has attempted to derive the principle which prevents it being claimed where it furthers or facilitates a criminal offence. Once these principles are properly applied to the facts, there is no basis for Timor-Leste's broad and unqualified assertion of confidentiality or privilege over all of the Materials.

Timor-Leste cannot claim confidentiality for an improper purpose

4.52. As set out in Chapter 3, based on publicly available media reports and Timor-Leste's own statements, Australia has a reasonable apprehension that unlawful disclosures, constituting serious criminal offences under Australian law, have been committed by 'K' and Mr Collaery.[224] This includes criminal offences under sections 39 and 41 of the *Intelligence Services Act 2001* (Cth), section 70 of the *Crimes Act 1914* (Cth) and section 91.1 of the *Criminal Code Act 1995* (Cth),

[224] E Alberici, 'Bernard Collaery, Lawyer for East Timor', *Lateline*, Australian Broadcasting Corporation (3 December 2013); C Duffy, 'New details emerge in claims of spying on East Timor', *7.30*, Australian Broadcasting Corporation (4 December 2013); T Allard, 'East Timor claims it knows which Australian spies bugged its offices', *Sydney Morning Herald* (9 December 2013); R Le May, 'More whistleblowers in Timor spy scandal', *Sydney Morning Herald*, (9 December 2013); 'Raided East Timor Lawyer calls for Inquiry', *Australian Associated Press* (4 December 2013); P Lloyd, 'ASIO raided office of lawyer representing East Timor in spying case', *Australian Broadcasting Corporation* (3 December 2013).

as set out in detail in Australia's Written Observations during the provisional measures phase.[225]

4.53. The effect of those provisions is that a document which contains unlawfully disclosed national security information is the product of a criminal offence under Australian law and that the transmission of that document is a further offence under Australian law.

4.54. As set out above, items LPP012 and LPP014 have each been described by Timor-Leste as 'the draft of a statement of a third party taken for legal proceedings involving Timor-Leste'.[226] Based on this information, and the titles of the items, it is reasonable to conclude that these items are drafts or final versions of the affidavit of 'K' submitted by Timor-Leste in the Arbitration. It follows that those items are each documents which purport to contain national security information unlawfully disclosed by 'K', and are therefore the product of a criminal offence.

4.55. Indeed, this was confirmed by Counsel for Timor-Leste at the First Procedural Meeting in the Arbitration on 5 December 2013, when he stated with reference to 'K', that 'it may be the case … that the disclosure at any point of a written statement from the witness would have legal significance as an act of publication'[227] and that it 'is possible that that disclosure may evidence an

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[225] Australia, Written Observations on Timor-Leste's Request for Provisional Measures, 13 January 2014, [55].

[226] Timor-Leste, Memorial, [4.23(n) and (p)].

[227] Permanent Court of Arbitration, 'Transcript of First Procedural Meeting between Timor-Leste and Australia at The Hague', *Arbitration under the Timor Sea Treaty*, 5 December 2013, 58 (lines 1-6) (Lowe) [**Annex 85**].

intention to reveal information contrary to Australian law, and that it would therefore be possible that it would prejudice the position of the witness'.[228]

4.56. Any assertion of a purported right of confidentiality by Timor-Leste over these documents would therefore be an attempt to use that right for an improper purpose – namely, to cover the commission of a reasonably apprehended crime under Australian law, and as a shield from the proper exercise of Australia's territorial sovereignty over such actions. That any right of confidentiality should be qualified in such circumstances is consistent with other examples cited above whereby a right exercised by a foreign State on the territory of a forum State must not be abused, particularly where there is criminal conduct and the risk of consequent harm to individuals and the public.[229]

4.57. Based on the available information, it is unclear which other Materials might contain the same or similar material to LPP012 and LPP014. To the extent that other documents contain part or all of the substance of the affidavit of 'K', or any other unlawfully disclosed national security information, any claim by Timor-Leste to confidentiality over part or all of those documents is defeated by this qualification to such a right.

Timor-Leste has waived any right of confidentiality over certain Materials by its public disclosures

4.58. Over the course of more than a year, Timor-Leste has, through its legal adviser Mr Collaery, repeatedly divulged and disseminated in the media the substance of the evidence of 'K'. In particular:

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[228] Permanent Court of Arbitration, 'Transcript of First Procedural Meeting between Timor-Leste and Australia at The Hague', *Arbitration under the Timor Sea Treaty*, 5 December 2013, 84 (lines 19-24) (Lowe) [**Annex 85**].

[229] See [4.14] above.

(1) On 29 May 2013, in an interview with *The Australian*, Mr Collaery gave details of how the alleged operation was ordered and carried out:

> "That treaty was negotiated in a number of sessions, and in negotiating … in October 2004, Australia clandestinely monitored the negotiation rooms occupied by the other party," Mr Collaery told *The Australian*. "So it was a Watergate situation. They broke in and they bugged, in a total breach of sovereignty, the cabinet room, the ministerial offices of then prime minister (Mari) Alkitiri and his government. They placed clandestine listening devices in the ministerial conference room, we call it a cabinet room."
>
> […]
>
> Mr Collaery claims that Mr Downer directly authorised the operation to listen covertly to the negotiations in a cabinet room built with Australian aid.[230]

(2) On 3 December 2013, in an interview with the Australian Broadcasting Corporation, Mr Collaery gave details of the purported evidence of 'K', including the following specific details:

> BERNARD COLLAERY: This Director, newly arrived Director, sent a technical team into Dili to liaise with an Australian aid construction team that were effecting renovations in the nation-building idea in East Timor: renovations to rooms that were to be used by the Timorese prime minister and his colleagues. Eventually, through a series of clandestine missions, bugs were inserted into a hollow wall and, for the actual negotiations that took place, there was a listening post. A transcript was carried across town.[231]

(3) On 4 December 2013, in an interview with the Australian Broadcasting Corporation, Mr Collaery gave further details of the purported evidence of 'K', including the following specific details regarding the alleged operation and extract from the affidavit of 'K':

> BERNARD COLLAERY, LAWYER FOR EAST TIMOR: The newly-arrived director of ASIS called the head of the technical area of ASIS to a meeting, and there, with his deputy, who I cannot name, he was instructed to undertake a

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[230] L Shanahan, 'Aussie spies accused of bugging Timor cabinet', *The Australian*, 29 May 2013 (accessed at < http://www.theaustralian.com.au/national-affairs/policy/aussie-spies-accused-of-bugging-timor-cabinet/story-fn59nm2j-1226652599040> on 20 July 2014).

[231] E Alberici, 'Bernard Collaery, Lawyer for East Timor', *Lateline*, Australian Broadcasting Corporation, 3 December 2013.

> mission in East Timor to clandestinely record the conversations that the then Timorese negotiating party. (sic)
>
> […]
>
> CONOR DUFFY: *7.30 has part of his crucial affidavit*, which says the then head of ASIS instructed him to plant a listening device in East Timor on the orders of then ASIS head and now ASIO boss, David Irvine.
>
> AFFIDAVIT FROM FORMER ASIS OFFICIAL (male voiceover): '*I was instructed by Mr Irvine to take a team to Dili and ensure that the conversations before and after each negotiating session were recorded, transcribed and delivered to the Australian negotiating team.*'[232] (emphasis added)

4.59. By providing this material to a prominent media organisation, Timor-Leste (through Mr Collaery) ensured that it was disseminated to the widest possible public audience. These were not limited disclosures in the context of a lawyer-client relationship – they were public releases of Australia's confidential information. The repeated disclosures were inconsistent with any desire to maintain confidentiality over the evidence of 'K'.

4.60. Indeed, Timor-Leste has itself admitted that the information which it has placed in the public domain was information which was received from 'K'. At a hearing in the Arbitration on 29 March 2014, in response to a question regarding the source of Mr Collaery's statements in his media interview of 4 December 2013, Counsel for Timor-Leste stated that:

> Mr Collaery was speaking from his own knowledge of the misconduct of the Australian Director-General *based on information that he had received from K.*
>
> […]
>
> I understand the position to be that the information was known to Mr Collaery well before the affidavit was drafted, and it was drawing upon that general knowledge of the background that he spoke.[233] (emphasis added)

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[232] C Duffy, "New details emerge in claims of spying on East Timor", *7.30*, Australian Broadcasting Corporation, 4 December 2013.

[233] Permanent Court of Arbitration, 'Transcript of Hearing on Australia's Application for an Order Disallowing the Giving of Potential Evidence', *Arbitration under the Timor Sea Treaty*, 29 March 2014, 96, lines 16-19 (Lowe); 97, lines 7-10 (Lowe) [**Annex 89**].

4.61. The 'information [which] was known' to Mr Collaery and which Mr Collaery then unlawfully chose to make public was obtained from one source only – the evidence of 'K'. It is the same evidence which Timor-Leste arranged to be documented in affidavit form and placed before the Arbitral Tribunal in the Arbitration. It is the same evidence which Timor-Leste has made public on repeated occasions since at least May 2013, which in turn has generated further publicity and repeating of the allegations in the evidence of 'K'.[234] It is the same evidence over which Timor-Leste now seeks to assert a right of confidentiality.

4.62. It follows that Timor-Leste has lost any right of confidentiality it may ever have had over Materials which contain the evidence of 'K'. This includes LPP012, LPP014 and any other Materials to the extent to which they contain unlawfully disclosed national security information from 'K'.

4.63. Timor-Leste's decision to disclose national security information through the media is also fatal to any claim it may have that it is prejudiced by the disclosure of Items LPP012 and LPP014. Indeed, having disclosed Australia's confidential information publicly, Timor-Leste now attempts to claim incongruously that the same information is Timor-Leste's own and should be protected. This argument cannot be sustained on the facts known to the Court.

Timor-Leste has lost any privilege in certain Materials due to the criminal offence exception

4.64. The attempt by Timor-Leste to assert privilege over Materials which contain national security information unlawfully disclosed by 'K' is precisely the type of situation where the criminal offence exception applies, and the claimed

[234] For example: P Cleary, 'How Canberra and Woodside 'bugged' Timor PM to strip fledgling nation of oil billions', *The Australian*, 6 January 2014 (accessed at <http://www.theaustralian.com.au/national-affairs/policy/how-canberra-and-woodside-bugged-timor-pm-to-strip-fledgling-nation-of-oil-billions/story-fn59nm2j-1226795417836> on 20 July 2014); J Pearlman, 'Australia's Timor spying row deepens', *Straits Times*, 10 January 2014 (accessed at <http://www.straitstimes.com/st/print/1937650> on 20 July 2014).

principle of legal professional privilege is qualified to avoid abuse of process – namely, where privilege invoked by a legal adviser and client would have the effect of covering up a criminal activity.

4.65. For the reasons set out above,[235] a document which contains unlawfully disclosed national security information is the product of a criminal offence under Australian law, and the transmission of that document is a further offence under Australian law. Since items LPP012 and LPP014 are reasonably apprehended to have been made and prepared in furtherance of a criminal offence, they fall squarely within the criminal offence exception. On that basis, Timor-Leste has lost any privilege it might otherwise have had over those items, and any other items to the extent to which they unlawfully disclose national security information or were otherwise prepared in furtherance of a criminal offence.

4.66. More broadly, an Australian lawyer conducting a legal practice in Australia under Australian legal regulations is not to be shielded from the consequences of criminal activity simply by virtue of the fact that the client was a foreign State. This would be inconsistent with the administration of justice and would amount to an unacceptable interference with Australia's territorial sovereignty.

C. IN ANY EVENT, AUSTRALIA HAS TAKEN ALL NECESSARY STEPS TO RESPECT ANY RIGHT OF CONFIDENTIALITY OR PRIVILEGE IN THE MATERIALS

Australia has respected Timor-Leste's purported rights in the Materials

4.67. Australia rejects Timor-Leste's allegation that it has violated Timor-Leste's purported rights in the Material. Any confidentiality or privilege which may reside in the Materials has been respected by Australia's undertakings not to inspect the Materials. In addition, Australia has put in place all procedural

[235] See Chapter 3 and [4.52]-[4.54] above.

safeguards necessary to preserve any purported rights of confidentiality or privilege.[236]

4.68. The Attorney-General's undertakings of 4, 19 and 23 December 2013 and 21 January 2014, freely given, comprise a package of undertakings which are comprehensive and respect any claim to privilege which may properly be brought by Timor-Leste, as described in detail in Chapter 3.[237] Pursuant to the undertakings, and the orders of the Court, the documents were sealed and will remain so until the conclusion of these proceedings and final judgment of the Court.

4.69. Accordingly, any confidentiality or privilege remains intact, and no harm could result to Timor-Leste, given that no Australian government official or Counsel involved in the defence of Australia in the Arbitration, or in the proceedings before this Court, has seen the Materials. There is no risk that the Materials will be opened or used by members of Australia's defence teams in these proceedings or the Arbitration. There is also no risk that the Materials will be used for any purpose relating to the exploitation of Timor Sea resources, or any related negotiations, as set out explicitly in the Attorney-General's undertaking of 21 January 2014. In so doing, Australia has preserved Timor-Leste's claims to confidentiality and privilege, and its opportunity to claim privilege before an Australian court.

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[236] See Chapter 3 above.

[237] Senator the Hon. George Brandis QC, Attorney-General, 'Ministerial Statement: Execution of ASIO Search Warrants', 4 December 2013 [**Annex 52**]; Senator the Hon. George Brandis QC, Attorney-General of Australia, 'Written Undertaking', *Arbitration under the Timor Sea Treaty*, 19 December 2013 [**Annex 74**]; Letter from Senator the Hon. George Brandis QC, Attorney-General of Australia, to Mr David Irvine AO, Director-General of Security, 23 December 2013 [**Annex 53**]; Senator the Hon. George Brandis QC, Attorney-General of Australia, 'Written Undertaking', *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, 21 January 2014 [**Annex 54**].

Australia has acted in good faith in respect of the Materials and the conduct of international negotiations and proceedings

4.70. Timor-Leste has attempted to link its claim to legal professional privilege with the principle of good faith, asserting that '[t]he fact that documents are protected as legal correspondence also requires that privilege be upheld, in accordance with the principle of good faith'[238] and that 'Australia has violated … the principle of good faith in the conduct of international negotiations or proceedings'.[239] But Timor-Leste has failed to demonstrate any breach of good faith by Australia, either in the context of Timor-Leste's asserted claim to legal professional privilege or Australia's conduct of the Arbitration proceedings.

4.71. It is presumed that States act in good faith,[240] as affirmed by this Court in its Order of 3 March 2014,[241] and accordingly Timor-Leste must provide more than mere generalisations to justify its assertion that Australia has acted contrary to good faith.

4.72. Australia's actions in respecting any potential rights of Timor-Leste during the course of the execution of the search warrant on 3 December 2014, and the subsequent procedural safeguards established by Australia, were described in Chapter 3 above. Those actions clearly demonstrate that Australia acted in good faith by ensuring the Materials were sealed, and that they have not been, and will not be, seen by any Counsel or Australian government official involved in the

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[238] Timor-Leste, Memorial, [6.15].

[239] Timor-Leste, Memorial, [6.29].

[240] See, for example, Lachs, who describes good faith as an 'underlying presumption of international relations': Lachs, 'Some thoughts on the role of good faith in international relations', in R J Akkerman, P J van Krieken and C O Pannenberg (eds.), *Declarations on Principles: A Quest for Universal Peace* (Academic Book Services Holland, 1977), 50; J F O'Connor, *Good faith in international law*, (Dartmouth Publishing Company, 1991), 99; 'International Tribunals generally accept that States must be presumed to have acted in good faith', *Lac Lanoux Arbitration (France v. Spain)* Award of 16 November 1957, XII RIAA 281 at [126] [**Annex 10**].

[241] Order on the Request for the Indication of Provisional Measures, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, 3 March 2014, [44].

Arbitration or these proceedings. In addition, Australia has repeatedly invited Timor-Leste to test its claim to privilege under Australian law.[242]

4.73. Australia also rejects Timor-Leste's implied assertion that Australia has acted contrary to good faith in the Arbitration. Notwithstanding the unlawful disclosures made by 'K' and Mr Collaery in the media and in the course of the Arbitration, Australia has taken great care to ensure that it has pursued its available rights through the proper procedural channels in the Arbitration. In particular, Australia brought an application for the exclusion of the evidence of 'K', and has complied in full with the Arbitral Tribunal's order that the evidence be admitted on a provisional basis only and a decision on its admissibility made after the oral hearing (from 27 September to 2 October 2014). In these circumstances, Australia has demonstrably acted in good faith and there is no prejudice to Timor-Leste in the Arbitration which has or could result from the removal of the Materials.

[242] Letter from the Australian Government Solicitor to DLA Piper, 16 December 2013 [**Annex 55**]; Letter from the Australian Government Solicitor to DLA Piper, 19 December 2013 [**Annex 56**]; Letter from the Australian Government Solicitor to DLA Piper, 24 December 2013 [**Annex 57**].

Chapter 5 – Timor-Leste has not shown any breach by Australia of the law relating to inviolability or immunity of State property

5.1. Separate from, and additional to, its claims of a purported right of confidentiality and legal professional privilege, Timor-Leste asserts a right of inviolability and immunity over the Materials. In this regard, Timor-Leste's claims are based on vague and unsupported assertions of principle and ignore the established international law frameworks which govern the scope and application of these principles.

5.2. Unlike the claimed rights of confidentiality and legal professional privilege discussed in the preceding Chapter, the principles of inviolability and immunity are well-established at international law, and their scope is clearly defined. As limitations on the sovereignty of a forum State, these principles are subject to appropriate qualifications, to ensure that the rights of a foreign State are not unjustifiably favoured over those of the forum State in question. As Australia will show in this Chapter, it is clear that these principles do not apply to the circumstances of this case.

5.3. Section I establishes that Timor-Leste cannot make any claim of inviolability or immunity over those Materials in which it has no proprietary rights.

5.4. Section II demonstrates that inviolability and immunity are separate legal concepts and should be distinguished as such. So distinguished, it is clear that the general 'inviolability of State property' asserted by Timor-Leste is not recognised under either customary international law or treaty law. Rather, inviolability attaches to particular types of State property in particular circumstances, and as established by specific legal regimes, none of which apply in this case.

5.5. Section III demonstrates that, to the extent that certain of the Materials may be subject to a claim of ownership by Timor-Leste, Australia has acted lawfully and in full compliance with its obligations under international law.

Section I. For those Materials which are not the property of Timor-Leste, no question of inviolability or immunity arises

5.6. In the absence of any proprietary rights or interests over property, a State cannot raise any claim to either inviolability or immunity in respect of that property. For Timor-Leste (or any other State) to claim an applicable immunity or inviolability over State property there must, as a matter of principle, be some proprietary connection between that State and the property in question.

5.7. As set out in Chapter 3, on the basis of the facts available to the Court, there are clearly several parties who may have plausible claims to rights over the Materials. In this regard, it is also relevant to note that in seeking to support its own claims to ownership, Timor-Leste has only selectively applied the law relevant to property rights (the *lex situs*). Australia submits that, when the relevant law is accurately applied, the available facts are insufficient to establish Timor-Leste's claims to ownership over the Materials which are the subject of this dispute.

5.8. Australia makes no claim to ownership over the Materials except, as shall be explained below, in respect of certain classified information which should be properly considered the property of Australia. The removal of the Materials by ASIO on 3 December 2013 was not an act of confiscation, but merely one involving inspection and retention on security grounds. Section 25(4C) of the ASIO Act provides that items removed pursuant to a warrant may only be retained insofar as the items present a threat to national security. Ownership does not vest in ASIO or Australia by reason of the removal of the Materials.

A. CLAIMS OF INVIOLABILITY OR IMMUNITY WITH RESPECT TO PROPERTY CAN ONLY ARISE WHERE THERE ARE ESTABLISHED PROPRIETARY RIGHTS

5.9. An assertion of State immunity necessarily requires some connection between the exercise of jurisdiction by a forum State's courts and a foreign State. Where a foreign State is directly impleaded in a proceeding, that connection is obvious. Where a foreign State is indirectly impleaded in a proceeding, and that proceeding relates to property over which the foreign State may have a proprietary right and over which some form of immunity may apply, the connection needs to be properly established so as to connect the foreign State to the relevant proceeding. This point is made clearly in *Oppenheim's International Law*:

> where a state claims an interest in property which is the subject of proceedings to which it is not a party, the mere assertion of such an interest is not sufficient to oust the jurisdiction of the court: in order to have that effect, the claim (unless admitted) must be supported by some evidence, although the state does not have to establish conclusive title to the property in question.[243]

5.10. Although the foreign State does not have to definitively establish ownership over the property, it must demonstrate that its claim is at least founded on a *prima facie* basis.[244] As the immunity granted to foreign States and certain classes of State property involves a diminution of the forum State's sovereignty, it is reasonable to require that a claim to immunity over property be accompanied by a legitimate right or interest over that property. To allow a situation to exist otherwise would be to privilege the unsubstantiated rights of foreign States over those of the forum State.

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[243] R Jennings and A Watts, *Oppenheim's International Law* (9th ed., Oxford University Press, 1992), 349.

[244] See for example, *State Immunity Act 1978* (United Kingdom), s 6(4) (accessed at <http://www.legislation.gov.uk/ukpga/1978/33/pdfs/ukpga_19780033_en.pdf > on 20 July 2014) which requires 'prima facie evidence' in support of the foreign State's claim. This reflects an evolution in the law towards a higher standard of proof regarding claims to property. For example, in the earlier case of *Juan Ysmael & Co. Inc. v. Government of Indonesia* [1955] AC 72 [**Annex 11**] the court held that a State must show 'its claim is not merely illusory, nor founded on a title manifestly defective' (at 4).

5.11. Similarly, for the principle of inviolability to apply to property as a question of international law, a sufficient connection needs to be established between the property and a State or individual, organisation or other body which enjoys inviolability under a specific regime of international law. In the absence of such proprietary rights or interests, the necessary connection between the property and a sovereign State is not met, and the rationale for protecting the property is not satisfied.

B. THE APPLICABLE LAW FOR DETERMINING RIGHTS OVER PROPERTY IS THE *LEX SITUS*

5.12. It is widely accepted that the applicable law for determining the ownership of moveable property is the *lex situs* (the law of the jurisdiction in which the property is situated).[245] As Staker writes:

> In matters concerning recognition of foreign-created property rights, State practice, in the form of municipal private international laws, is overwhelmingly consistent and uniform:
>
> > It is at present the universal principle, manifested in abundant decisions and recognised by all writers, that the creation, modification, and termination of rights in individual tangible physical things are determined by the law of the place where the thing is physically situated.
>
> If a State is required to determine ownership for international law purposes of an object not situated in its territory at the time, it will do so by reference to the municipal law of the State whose territory it is in.[246]

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[245] For example: Japan, see J Koshikawa, 'The Transfer of Chattels in the Conflict of Laws: Some Aspects of Transnational Law in Japan', (1972) 21 *The American University Law Review* 513, 514 [**Annex 32**]; the United Kingdom, see A Briggs, *The Conflict of Laws* (3rd ed., Oxford University Press, 2013), 303; India, see V C Govindaraj, *The Conflict of Laws in India* (Oxford University Press, 2011), 162-163; Canada, see J-G Castel, *Canadian Conflict of Laws* (2nd ed., Butterworths, 1986), 413-415.

[246] C Staker, 'Public International Law and the *Lex Situs* Rule in Property Conflicts and Foreign Expropriations' (1988) 58 *British Year Book of International Law 1987* 151, 163 [**Annex 33**], citing E Rabel, *The Conflict of Laws: A Comparative Study* (1958), volume 4, 66-69.

5.13. Australia and Timor-Leste are in agreement as to the applicability of the *lex situs* rule to the Materials.[247] In this case, the *lex situs* is the law of the Australian Capital Territory.

5.14. International tribunals are permitted to interpret and apply municipal law where it is incidental to their jurisdiction to adjudicate international disputes.[248] Since the Parties agree that the relevant law for determining ownership over the Materials is the law of the Australian Capital Territory, it is clear that the Court may apply that law incidental to its jurisdiction over the current dispute.

5.15. Mr Collaery is the sole principal of Collaery Lawyers and holds a practising certificate in the Australian Capital Territory. [249] His practice, and the ownership of the Materials the subject of this dispute, is regulated by the laws of the Australian Capital Territory, which includes the law of the Australian Capital Territory and Australian common law.

5.16. The ownership of client documents in the Australian Capital Territory is regulated by Rule 6 of the *Legal Profession (Solicitors) Rules 2007* (ACT),[250] a subordinate law made under the *Legal Profession Act 2006* (ACT).[251] The relevant parts of Rule 6 state:

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[247] Timor-Leste, Memorial, [4.16].

[248] *Certain German Interests in Polish Upper Silesia (Germany v. Polish Republic), Judgment,* P.C.I.J. Ser. A, No. 7, 19; *Nottebohm Case (second phase) (Liechtenstein v. Guatemala), Judgment,* I.C. J. Reports 1955*,* 4, 52 (Dissenting Opinion of Judge Guggenheim), at [4]; *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), Judgment,* I.C.J. Reports 1989*,* 15 at [62].

[249] B Collaery, 'Bernard Joseph Edward Collaery – Resumé', (accessed at <http://www.cclaw.com.au/wp-content/uploads/2013/09/130916-Bernard-Collaery-Resume.pdf> on 20 July 2014); ACT Law Society, Lawyers Directory, 'Bernard Joseph Edward Collaery' (accessed at <http://www.actlawsociety.asn.au/lawyers-directory/search/?command=viewEntity Contact&entityType=0&entitySerial=7534&membershipSerial=1232> on 20 July 2014.

[250] *Legal Profession (Solicitors) Rules 2007* (ACT), rule 6 [**Annex 42**]

[251] *Legal Profession Act 2006* (ACT) [**Annex 43**].

> 6. Ownership of Clients' Documents - Termination of Retainer
>
> 6.1 A practitioner must retain, securely and confidentially, documents to which a client is entitled, for the duration of the practitioner's retainer and at least seven years thereafter, or until such time as the practitioner gives them to the client or another person authorised by the client to receive them, or the client instructs the practitioner to deal with them in some other manner.
>
> […]
>
> 6.4 The documents to which a client of a practitioner should be entitled will usually include:
> (a) documents prepared by a practitioner for the client, or predominantly for the purposes of the client, and for which the client has been, or will be, charged costs by the practitioner; and
> (b) documents received by a practitioner from a third party in the course of the practitioner's retainer for or on behalf of the client or for the purposes of a client's business and intended for the use or information of the client.

5.17. As noted by Timor-Leste in its Memorial,[252] the principal Australian case dealing with the question of ownership over documents held by a solicitor is the decision of the New South Wales Court of Appeal in *Wentworth v. De Montfort*.[253] The *Australian Solicitors' Conduct Rules 2011 and Commentary* confirms that this case still relevantly illustrates the ownership rights over various types of documents that may be created by a solicitor during the course of work for a client.[254]

5.18. In *Wentworth*, the court applied a two limb test. Under the first limb, the court held that where a solicitor is acting only *as an agent for a client*, the ordinary rules of agency will apply and any document brought into existence or received by that solicitor whilst acting as an agent will belong to the client.[255] Under the second limb, the court found that where a solicitor is acting for a client *other than as agent*, property in the documents brought into existence or received by that solicitor on behalf of the client will depend on principles referable to the

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[252] Timor-Leste, Memorial, [4.17].

[253] *Wentworth v. De Montfort* (1988) 15 NSWLR 348 [**Annex 12**].

[254] Law Council of Australia, *Australian Solicitors' Conduct Rules 2011 and Commentary* (August 2013), 24 (accessed at < http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/SolicitorsConductRulesHandbook_Ver3.pdf > on 20 July 2014).

relationship of a *professional person and his client*.[256] The application of these principles thus rests, in part, on the question of the character of the relationship between Mr Collaery and Timor-Leste.

C. ON THE FACTS AVAILABLE, TIMOR-LESTE'S CLAIMS TO OWNERSHIP ARE NOT SUPPORTED BY THE *LEX SITUS*

5.19. The proceedings before the Court and in the Arbitration have shown that the nature of Mr Collaery's relationship with Timor-Leste has been characterised differently by Timor-Leste and Mr Collaery to suit their purposes in different situations.

(1) In the course of the Arbitration Mr Collaery has variously been held out as a 'Government of Timor-Leste's Legal team member',[257] 'Counsel' for Timor-Leste,[258] and 'legal adviser',[259] but specifically *not* as an 'agent'.[260]

(2) In the proceedings before this Court, Mr Collaery has been characterised as 'advisor'[261] and 'agent'[262] for Timor-Leste.

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[255] *Wentworth v. De Montfort* (1988) 15 NSWLR 348, [353F] [**Annex 12**].

[256] *Wentworth v. De Montfort* (1988) 15 NSWLR 348, [353F] [**Annex 12**].

[257] Merrill Corporation, 'Transcript of Meeting between Timor-Leste and Australia at Bangkok', *Arbitration under the Timor Sea Treaty*, 18 February 2013, 1 [**Annex 90**].

[258] Permanent Court of Arbitration, 'Transcript of Hearing on Australia's Application for an Order Disallowing the Giving of Potential Evidence', *Arbitration under the Timor Sea Treaty*, 29 March 2014, 3 [**Annex 89**].

[259] Permanent Court of Arbitration, 'Transcript of Hearing on Australia's Application for an Order Disallowing the Giving of Potential Evidence', *Arbitration under the Timor Sea Treaty*, 29 March 2014, 104 (Line 2) (Lowe) [**Annex 89**].

[260] Permanent Court of Arbitration, 'Transcript of Hearing on Australia's Application for an Order Disallowing the Giving of Potential Evidence', *Arbitration under the Timor Sea Treaty*, 29 March 2014, 103 (lines 23-25) to 104 (lines 1-2), 104 (lines 20-25) to 105 (lines 1-2) (Lowe) [**Annex 89**].

[261] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Corrected Record CR 2014/1, 20 January 2014, 4.

(3) Under the Consultancy Agreement between Collaery Lawyers and Timor-Leste, Mr Collaery is characterised as a 'consultant',[263] and specifically *not* as a legal representative or 'agent'.[264]

(4) As of 7 July 2014, it appears that neither Mr Collaery, nor Collaery Lawyers, are engaged as legal advisers for Timor-Leste in the Arbitration.[265]

5.20. The contradictions between these various positions are evident. The only thing that can be stated with certainty is that Mr Collaery's relationship with Timor-Leste is not one of agent and principal. The terms of the Consultancy Agreement between Mr Collaery and Timor-Leste (of which only a redacted version has been provided to the Court and to Australia)[266] clearly provide that Mr Collaery is not, under the terms of the Consultancy Agreement *or for any other reason*, to be considered the agent of Timor-Leste. Importantly, clause 13.8 of the Consultancy Agreement provides:

> **13.8 Relationship of the parties and Principal Employees**
>
> (a) This agreement is not intended to create a partnership, joint venture or agency relationship between RDTL and the Consultant or the Principal Employees.
>
> (b) The relationship between the Consultant and RDTL is and shall remain that of principal and independent Consultant and the Principal Employees *shall not be deemed to be the legal representative, agent, servant or employee of RDTL*

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[262] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Corrected Record CR 2014/1, 20 January 2014, [11] (Lauterpacht).

[263] *Formal Instrument of Agreement and the General Terms and Conditions of the Consultancy Agreement*, signed by Xanana Gusmão (on behalf of Timor-Leste) and Mr Bernard Collaery, 17 September 2012, i (Timor-Leste, Memorial, Annex 7).

[264] *Formal Instrument of Agreement and the General Terms and Conditions of the Consultancy Agreement*, signed by Xanana Gusmão (on behalf of Timor-Leste) and Mr Bernard Collaery, 17 September 2012, [13.8] (Timor-Leste, Memorial, Annex 7).

[265] Letter from Ambassador for Timor-Leste to the United Kingdom, Joaquim da Fonseca, to Legal Counsel to the Permanent Court of Arbitration Garth Schofield, 7 July 2014 [**Annex 82**].

[266] *Formal Instrument of Agreement and the General Terms and Conditions of the Consultancy Agreement*, signed by Xanana Gusmão (on behalf of Timor-Leste) and Mr Bernard Collaery, 17 September 2012 (Timor-Leste, Memorial, Annex 7).

> *for any purpose whatsoever, whether by virtue of this agreement or for any other reason*. (emphasis added)

5.21. This was confirmed by Counsel for Timor-Leste in the Arbitration when he stated:

> Mr Collaery is not the Agent for Timor, and I don't simply mean that in the technical sense of not being the Agent in this case. His relationship is not that of principal and agent: he is a legal adviser to Timor.
>
> […]
>
> What I was intending to say is that Mr Collaery had no general agency authority on the part of Timor-Leste. This does not affect Timor-Leste's claims in relation to the capacity in which Mr Collaery held the documents that were taken from his premises, which is the subject of the ICJ case. So there is no weakening, no change in that position there.[267]

5.22. It is not clear how Timor-Leste can state, on the one hand, that (1) Mr Collaery was not the agent of Timor-Leste, (2) he had no general agency authority in respect of Timor-Leste, and (3) Timor-Leste had explicitly excluded the possibility of such an arrangement through the Consultancy Agreement, and yet on the other hand hold that there is the possibility that such a relationship may have existed. In light of the wording of the Consultancy Agreement and the statement by Counsel for Timor-Leste in the Arbitration, Timor-Leste's claim that ownership of the Materials may vest in Timor-Leste by virtue of an agency relationship with Mr Collaery (on an application of the first limb of the *Wentworth* test)[268] is unsustainable.

5.23. Timor-Leste seeks support from the case of *Rahimtoola v. Nizam of Hyderabad*[269] to show that a State may hold property through its agent. That principle is not relevant to these proceedings since it is clear that Mr Collaery was

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[267] Permanent Court of Arbitration, 'Transcript of Hearing on Australia's Application for an Order Disallowing the Giving of Potential Evidence', *Arbitration under the Timor Sea Treaty*, 29 March 2014, 103 (lines 23-25) to 104 (lines 1-2), 104 (lines 20-25) to 105 (1-2) (Lowe) [**Annex 89**].

[268] Timor-Leste, Memorial, [4.22(a)].

[269] *Rahimtoola v. Nizam of Hyderabad* [1958] AC 379.

not an agent of Timor-Leste, and could not therefore hold the Materials for Timor-Leste in such a capacity.

5.24. The second limb of the *Wentworth* test provides that, where a solicitor is not acting as agent for a principal, the ownership of documents brought into existence or received by the solicitor is governed by the law concerning the relationship between professional and client. In its judgment, the court indicated that in determining ownership over such documents, relevant considerations include 'whether or not the client was charged for the creation of the document, and whether the solicitor created the document for his client's benefit and protection, or did so for his own benefit and protection'.[270]

5.25. In its Memorial, Timor-Leste offers this as the definitive method for determining whether documents held by a professional are the property of the client, and on this basis claims ownership of almost all the Materials.[271] However, this is a selective and incomplete application of the court's judgment in *Wentworth*. The court in *Wentworth* provided a more nuanced analysis than suggested in Timor-Leste's Memorial of how ownership should be determined, and this has been further developed by the High Court of Australia in *Breen v. Williams*.[272] In particular, Timor-Leste has had insufficient regard for the emphasis placed in those decisions on the importance of:

(1) documents being for the client's benefit and protection
(2) the implications of whether a given document has been paid for or not by the client, and
(3) the status of draft documents and communications of a client to a solicitor.

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[270] *Wentworth v. De Montfort* (1988) 15 NSWLR 348, [355G] [**Annex 12**].

[271] Timor-Leste, Memorial, [4.22] and [4.25].

[272] *Breen v. Williams* (1996) 186 CLR 71 [**Annex 13**].

5.26. When the judgments in *Wentworth* and *Breen v. Williams* are properly applied to the relationship between Mr Collaery and his clients, the effect is the reverse of that asserted by Timor-Leste: Timor-Leste's claims regarding ownership of the Materials cannot be sustained in the absence of further information.

Documents for the client's benefit and protection

5.27. In order to determine whether a document held by a solicitor or professional is the property of the client, it is essential that the document was created *for the client's* benefit and protection.[273] In its Memorial, Timor-Leste simply asserts that certain documents were created for it by Mr Collaery.[274] The only basis on which Timor-Leste makes this assertion is a superficial connection between the title of the document or its description in the Property Seizure Record and Timor-Leste itself.

5.28. Under section 6.1 of *Legal Profession (Solicitors) Rules* 2007, a solicitor in the ACT is required to keep client records for a period of seven years after the cessation of a retainer.[275] Mr Collaery has had clients other than Timor-Leste during the relevant period including, notably, 'K'. Following the removal of the Materials by ASIO, Australia received a letter from at least one of Mr Collaery's other clients concerning the status of documents held by Mr Collaery over which that client would have claims to ownership under the law of the ACT.[276]

5.29. Given the lack of information available, it is entirely possible that amongst the Materials are documents which were not created for Timor-Leste's benefit and

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[273] *Wentworth v. De Montfort* (1988) 15 NSWLR 348, [355G] [**Annex 12**].

[274] Timor-Leste, Memorial, [4.23].

[275] *Legal Profession (Solicitors) Rules 2007* (ACT), rule 6.1 [**Annex 42**].

[276] Letter from Mr Collaery's client to Senator the Hon. George Brandis QC, Attorney-General of Australia, 12 December 2013 [redacted] [**Annex 88**].

were in fact created for other clients of Mr Collaery. The mere mention of the name 'Timor' or 'Timor-Leste' in the title of a document is insufficient to establish that it was created for Timor-Leste.

Payment for a document and draft documents

5.30. The court in *Wentworth* also held that a relevant consideration in determining ownership is whether the client was charged for the document.[277] The court noted that:

> *where the basis of charging a client enables a conclusion* to be reached that the client has paid for all draft and copy documents and letters and things such as instructions and briefs in contentious matters, the client is entitled to the documents.[278] (emphasis added)

5.31. However, the court clarified this further, stating:

> If there were no special arrangement as to fees, I do not think that the solicitor would be entitled to charge for making [memoranda as to work done or work to be done]. If there is an arrangement that fees are to be charged upon a time basis which would include the time for making these records*, I do not think that on that account alone*, the records would become the property of the client. Thus a barrister may make written notes of arguments he proposes to submit to a court and if he charges upon a time basis for out of court work, the client has in a sense been charged for that work. However I do not think that that makes those notes the property of the client; they would be made by the barrister entirely for his own professional purposes even though they are made in the course of carrying out work for the client.[279] (emphasis added)

5.32. Accordingly, proof of payment to a solicitor is a relevant consideration, but it is not in itself sufficient to establish ownership over a document. Rather, it must be shown that:

(1) the solicitor has charged for the creation of the document in question, and
(2) even if the document has been charged for, it has been created predominantly for the benefit of the client, rather than for the

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[277] *Wentworth v. De Montfort* (1988) 15 NSWLR 348, [355F]-[355G] [**Annex 12**].

[278] *Wentworth v. De Montfort* (1988) 15 NSWLR 348, [355E] [**Annex 12**], citing *Cordery on Solicitors* (8th ed., 1988).

[279] *Wentworth v. De Montfort* (1988) 15 NSWLR 348, [359F]-[359G] [**Annex 12**].

professional purposes of the solicitor in the course of carrying out work for the client.

5.33. Thus draft documents should not be presumed to be the property of the client. If a solicitor is engaged as a professional to provide legal advice, then, in the absence of evidence to the contrary, it is the final legal advice which is paid for. This was further clarified by the High Court in *Breen v. Williams.* That case involved a patient seeking rights over medical records held by her doctor and the court sought, as in *Wentworth*, to distinguish the agent-principal relationship from that of professional-client. The court stated:

> If an agent brings into existence certain documents while in the employment of his principal, they are the principal's documents and the principal can claim that the agent should hand them over, but the present case is emphatically not one of principal and agent. It is a case of the relations between a client and a professional man to whom the client resorts for advice. I think it would be entirely wrong to extend to such a relation what may be the legal result of the quite different relation of principal and agent … *[The documents in question] are documents which he has prepared for his own assistance in carrying out his expert work, not documents brought into existence by an agent on behalf of his principal, and, therefore, they cannot be said to be the property of the principal.*[280] (emphasis added)

5.34. It is not possible to determine the basis upon which charges are calculated under Mr Collaery's Consultancy Agreement. Clause 4.1(c) provides that 'RDTL will pay the Consultancy Fees in accordance with schedule 2'.[281] However, Schedule 2 has been redacted by Timor-Leste such that it is impossible to determine the basis on which charges are calculated. There is, therefore, reasonable doubt as to which of the Materials Timor-Leste was charged for. The doubt over ownership is compounded in respect of draft documents, which, in the absence of proof that they have been paid for by the client, must be assumed to be the property of the solicitor, in this case, Mr Collaery.

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[280] *Leicestershire County Council v. Michael Faraday & Partners Ltd* [1941] 2 KB 205, 216 [**Annex 14**], as cited in *Breen v. Williams (*1996) 186 CLR 71, 101[**Annex 13**].

[281] *Formal Instrument of Agreement and the General Terms and Conditions of the Consultancy Agreement*, signed by Xanana Gusmão (on behalf of Timor-Leste) and Mr Bernard Collaery, 17 September 2012 (Timor-Leste, Memorial, Annex 7).

Communications from the client to the solicitor

5.35. The court in *Wentworth* cited the judgment in *Re Thomson*[282] in support of the rule that 'the solicitor is entitled to retain letters written to him from the client'.[283] Applying this rule, any letters or other communications written or made by Timor-Leste to Mr Collaery are the property of Mr Collaery.

Witness statement taken from a third party ('K')

5.36. The taking of a third party witness statement by a solicitor does not automatically give the client property rights over that statement.

5.37. The court in *Wentworth* held that it was not able to determine, on its face, whether a document relating to a telephone conversation between a solicitor and a person other than the client (but relating to the client's affairs) was the property of the client.[284] In this context, the court implied that a witness statement taken from a third party would be the property of the client, saying:

> a solicitor may interview a witness and take a statement from him. I would have thought that such a statement was taken for the benefit of the client as well as by the solicitor for his own purposes and undoubtedly the client would be charged for the taking of the statement.[285]

5.38. The key issue in this regard is whether the witness statement was taken for the benefit of the client and, as stated under the *Legal Profession (Solicitors) Rules 2007*, was taken 'in the course of the practitioner's retainer'.[286] In its Memorial, Timor-Leste claims that LPP012 and LPP014 are 'the draft of a statement of a third party taken for legal proceedings involving Timor-Leste'.[287]

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[282] *Re Thomson* [1855] 20 Beav 545 [**Annex 15**].

[283] *Wentworth v. De Montfort* (1988) 15 NSWLR 348, [354B] [**Annex 12**].

[284] *Wentworth v. De Montfort* (1988) 15 NSWLR 348, [359E] [**Annex 12**].

[285] *Wentworth v. De Montfort* (1988) 15 NSWLR 348, [358F] - [358G] [**Annex 12**].

[286] *Legal Profession (Solicitors) Rules 2007* (ACT), Rule 6.4(b) [**Annex 42**].

[287] Timor-Leste, Memorial, [4.23(n)] and [4.23(p)].

Australia submits that these documents comprise drafts of the affidavit of 'K'. This being the case, as discussed in Chapter 4, Australia submits that there are serious doubts as to the circumstances in which LPP012 and LPP014 were created. Such doubts raise significant questions concerning the rights which attach to these documents.

5.39. In this regard, Timor-Leste has insisted that it was a mere 'passive recipient' of the information provided by 'K'.[288] This seems implausible. At the very least, Timor-Leste has, through its legal adviser, Mr Collaery, played a facilitative role in 'K's alleged contraventions of Australian law. Clearly enough, through its legal adviser Mr Collaery or otherwise, Timor-Leste has been in active communication with 'K' to procure his preparation and signature of the affidavit, and to confirm his availability to be tested on the evidence in that affidavit at a hearing. Nonetheless, faced with Timor-Leste's dual assertions that it is (1) no more than a 'passive recipient' of the information provided by 'K', and yet (2) the owner of the Materials, the question must be asked: at what point does Timor-Leste consider, as a 'passive recipient', that it 'received' the affidavit and therefore acquired ownership over it?

5.40. In Australia's view, the giving and taking of the affidavit by 'K' and Mr Collaery appear to have constituted, at a minimum, an offence under sections 39 and 41 of the *Intelligence Services Act 2001* (Cth),[289] section 70 of the *Crimes Act 1914* (Cth)[290] and section 91.1 of the *Criminal Code Act 1995* (Cth).[291] Furthermore, under the *Legal Profession (Solicitors) Rules 2007* (ACT)

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[288] Timor-Leste, 'Response by Timor-Leste to the Application of Australia for an Order Disallowing the Giving of Potential Evidence', *Arbitration under the Timor Sea Treaty*, 28 February 2014, [48] [**Annex 91**].

[289] *Intelligence Services Act 2001* (Cth) [**Annex 38**].

[290] *Crimes Act 1914* (Cth) [**Annex 40**].

[291] *Criminal Code Act 1995* (Cth), Schedule, s 91.1 [**Annex 39**].

the chapeau paragraph to the section pertaining to 'Relations with Clients' states that:

> Practitioners should not, in the service of their clients, engage in, or assist, conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law.[292]

5.41. The Consultancy Agreement provides for grounds of termination in the event that Mr Collaery commits 'any act of serious misconduct, fraud or dishonesty'[293] or is convicted of 'a criminal offence which in the reasonable opinion of RDTL will detrimentally affect RDTL or any of its Related Corporations'.[294] It is plausible to conclude therefore that the taking of 'K's affidavit by Mr Collaery was outside the scope of the Consultancy Agreement, on the basis that it was contrary to his legal obligations as a solicitor given that the giving of the affidavit appears to have constituted a criminal offence.

5.42. If Timor-Leste contests this conclusion, then it is reasonable to ask:

(1) Did Timor-Leste pay for the affidavit?

If not, then it is not the property of Timor-Leste. If yes:

(2) Did Timor-Leste pay for its creation? Or, alternatively

(3) Did Timor-Leste pay to receive the completed affidavit?

5.43. If Timor-Leste paid for the affidavit, it was plainly not (contrary to its repeated assertions) merely a 'passive recipient' of the information. Moreover, it is inconceivable that it was not aware that its creation likely constituted a breach of Australian criminal law by 'K' and Mr Collaery. Timor-Leste clearly had

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[292] *Legal Profession (Solicitors) Rules 2007* (ACT), 6 [**Annex 42**].

[293] *Formal Instrument of Agreement and the General Terms and Conditions of the Consultancy Agreement*, signed by Xanana Gusmão (on behalf of Timor-Leste) and Mr Bernard Collaery, 17 September 2012, clause 10.1(c) (Timor-Leste, Memorial, Annex 7).

[294] *Formal Instrument of Agreement and the General Terms and Conditions of the Consultancy Agreement*, signed by Xanana Gusmão (on behalf of Timor-Leste) and Mr Bernard Collaery, 17 September 2012, clause 10.1(f) (Timor-Leste, Memorial, Annex 7).

within its possession the information divulged by 'K' by February 2013.[295] Timor-Leste continued to pursue its goal to have information, divulged by 'K' without authorisation, tabled in the Arbitration as late as March 2014.[296] This provided ample time and opportunity for Timor-Leste to inform itself of the legal circumstances surrounding the taking of 'K's affidavit.

5.44. Having been created outside of the professional-client relationship between Mr Collaery and Timor-Leste and contrary to Mr Collaery's obligations as a solicitor subject to the law of the ACT, it is not possible to characterise LPP012 or LPP014 as the property of Timor-Leste.

The Consultancy Agreement does not support Timor-Leste's claims to ownership over the Materials under the *lex situs*

5.45. Timor-Leste claims in its Memorial that the Consultancy Agreement supports its claims that the Materials are the property of Timor-Leste on the basis that the Agreement provides that all works created by, or on behalf of, the Consultant in the course of providing the Consultancy Services, are the property of Timor-Leste.[297] However, as a matter of the *lex situs*, the Consultancy Agreement cannot be determinative of ownership of the Materials.

5.46. The Australian High Court, in the case of *A v. Hayden*[298] has held that a contract prejudicial to national security[299] or the administration of justice[300] may

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[295] Merrill Corporation, 'Transcript of Meeting between Timor-Leste and Australia at Bangkok', *Arbitration under the Timor Sea Treaty*, 18 February 2013, 19 (line 20-22), 34 (line 49) to 35 (line 17) [**Annex 90**].

[296] Permanent Court of Arbitration, 'Transcript of Hearing on Australia's Application for an Order Disallowing the Giving of Potential Evidence', *Arbitration under the Timor Sea Treaty*, 29 March 2014, 55 (Lines 13 - 21) (Lowe) [**Annex 89**].

[297] Timor-Leste, Memorial, [4.25]; *Formal Instrument of Agreement and the General Terms and Conditions of the Consultancy Agreement*, signed by Xanana Gusmão (on behalf of Timor-Leste) and Mr Bernard Collaery, 17 September 2012, clause 9.1 (Timor-Leste, Memorial, Annex 7).

[298] *A v. Hayden* (1984) 156 CLR 532 [**Annex 16**].

be invalid on the grounds that it is contrary to public policy. Furthermore, a contract may be void where the performance of the contract is prohibited by legislation.[301]

5.47. Even if the Consultancy Agreement was not considered void under Australian law, it is likely that a court would refuse to enforce an action (such as the recovery of documents on an alleged claim of ownership) which relies on illegal conduct performed under contract. Such a refusal arises from the principle of *ex turpi causa non oritur actio* ('no cause of action arises out of illegality'). This principle operates to prevent the court being 'used to assist the commission (or furtherance) of illegal acts, which might be achieved by the enforcement of rights arising from illegal acts'.[302] The court may refuse to indulge the action, at least where the action pivots on illegal conduct, even where the contract itself is not considered void.[303]

Classified information is the property of the State

5.48. Classified information held by the State constitutes information created for and collected by the State for its own use. The way in which States obtain, retain and use classified information is such that classified information can only properly be considered the property of the State. States expend considerable resources in the collection and creation of classified information and carefully protect that information once obtained. In the same way that personal property is

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[299] *A v. Hayden* (1984) 156 CLR 532, 560 [**Annex 16**]. See also N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract* (10th ed., LexisNexis Butterworths, 2012), 971-972 [**Annex 34**].

[300] *A v. Hayden* (1984) 156 CLR 532, 553, 557 [**Annex 16**].

[301] N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract* (10th ed., LexisNexis Butterworths, 2012), 964-965 [**Annex 34**].

[302] G E Dal Pont (ed.), *Halsbury's Laws of Australia* (LexisNexis, March 2014), **[**110-7280] [**Annex 35**].

[303] *North v. Marra Developments Ltd* (1981) 148 CLR 42, 60 [**Annex 17**].

protected by laws against theft, classified information is protected by laws against its unauthorised disclosure. Such laws are widespread.[304]

5.49. States retain and protect classified information because of the benefits which flow from ownership and use of that information. These benefits include, but are not limited to, the maintenance of the State's national security and the protection of its nationals.

5.50. Accordingly, a State's interest in and rights over classified information are not extinguished by the unauthorised disclosure of that information. It is for the State alone to decide how and by whom classified information is to be used. A State has the right to protect its classified information, as its property, against unauthorised disclosure. A natural corollary is that the State continues to retain ownership of the classified information where it has been disclosed without authorisation.

5.51. The proposition that a State retains ownership of classified information divulged without authorisation has been applied by other States. For example, during the investigation and prosecution of Private Bradley Manning (now known as Chelsea Manning) by the United States, the charges stipulated that Private Manning had 'published on the internet intelligence belonging to the United States government'.[305]

5.52. Classified information must be considered the property of the State, and this position is reinforced as a matter of Australian law. As LPP012 and LPP014 constitute classified Australian information divulged by 'K' without authorisation, these items must therefore be considered the property of Australia.

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[304] See Table: National Offences for the Unauthorised Disclosure of Classified Information [**Annex 50**].

[305] Charge Sheet, Manning, Bradley, E., Additional Charge II (Violation of the UCMJ, Article 134), Specification 1 [**Annex 73**].

D. TIMOR-LESTE HAS NOT ESTABLISHED ITS CLAIMS TO OWNERSHIP

5.53. On the basis of the limited evidence available to the Court, and with a correct application of the law applicable to ownership, it cannot be established that Timor-Leste has proprietary rights over several of the other Materials in question. Australia submits that given the inherent uncertainty concerning the character of the Materials, conclusions as to ownership can only be drawn in the following ways:

(1) Materials which Timor-Leste concedes are not its property

(2) Materials over which Timor-Leste has failed to establish ownership, and

(3) Materials which, on their face, may be the property of Timor-Leste (but for which there is still little evidence supporting this conclusion).

5.54. Notwithstanding the uncertainty concerning the Materials, any of the Materials which constitute Australian classified information, protected by the laws of Australia, must be the property of Australia.

Materials which are not the property of Timor-Leste

5.55. Timor-Leste concedes that the following items are not its property.[306]

(1) *LPP006: Folder labelled ICT product containing document titled 'Protocol for the operation of base stations'*.

(2) *LPP013: Brief to Counsel re: Timor-Leste v Australia dated 19 November 2013*.

[306] Timor-Leste, Memorial, [4.23(h)] and [4.23(o)].

Materials over which Timor-Leste has failed to establish ownership

5.56. Australia submits that Timor-Leste has failed to adequately establish its claims to ownership over these Materials, and given the possibility that ownership may rest in another party, Timor-Leste's claims cannot be upheld.

(1) *Item 002: ACER Aspire Laptop black, bearing S/N 11600300725 and power supply*. Timor-Leste concedes that the Laptop is the property of Mr Collaery.[307] Timor-Leste asserts, without substantiation, that the Laptop contains extensive correspondence with Timor-Leste, including item LPP015. However, it is highly probable that the Laptop contains extensive information in which other parties would have an interest, including emails, correspondence and legal advice.

(2) *Item 003: 4GB USB Verbatim thumb drive, black in colour, NG04G2513008819 DML*. As with Item 002, Timor-Leste concedes that this item belongs to Mr Collaery.[308] The same uncertainty as to ownership of information on the Laptop, applies to the USB drive.

(3) *LPP012: Untitled document with hand written comments stating 'This is the statement of* ****.' In Australia's submission this is most likely a draft of the affidavit of 'K'. As set out above, it is not possible for a document created illegally or contrary to Mr Collaery's Consultancy Agreement to be the property of Timor-Leste.

(4) *LPP014: Documents: Affidavit of ****, related itineraries, diplomatic courier document and photo of sign saying Welcome to Central Maritime Hotel Dili*. As with respect to LPP012, Australia submits that this item is another copy of the affidavit of 'K'. For the same reasons this document cannot be the property of Timor-Leste.

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[307] Timor-Leste, Memorial, [4.23(a)].

[308] Timor-Leste, Memorial, [4.23(b)].

(5) *LPP015: Seven letters of varying stages of draft addressed to Ambassador Joaquim AML da Fonseca from B Collaery dated 20 November 2013*. Draft documents remain the property of the solicitor, as such, this item (and its constituent documents) remains the property of Mr Collaery.

Materials which, on their face, may be the property of Timor-Leste

5.57. The limited evidence available indicates that the remaining items may be the property of Timor-Leste. However, in the absence of further substantiation, and with regard for the potential rights of other parties in these Materials, the Court should approach the question of ownership over them with caution.

Section II. There is no general inviolability of State property, and specific legal regimes of inviolability do not apply in this case

5.58. Timor-Leste has made the unsupported claim that by issuing and executing the warrant, Australia has 'violated Timor-Leste's right under international law to inviolability and immunity in respect of the documents and data'.[309] However, as limitations on forum State sovereignty, the established principles of inviolability and immunity are carefully defined and have a limited scope. This is consistent with the underlying principle (stemming from the right of territorial sovereignty) that, in the absence of specific and compelling reasons, the rights of foreign States should not be unjustifiably favoured over those of the forum State in question. This principle is apposite in the circumstances of this case, in which the principles of inviolability and immunity have no relevant application.

[309] Timor-Leste, Memorial, Final Submissions, (1).

A. INVIOLABILITY AND FOREIGN STATE IMMUNITY ARE DIFFERENT CONCEPTS AND SHOULD NOT BE CONFUSED

5.59. It must be emphasised that inviolability and foreign State immunity are two distinct concepts at international law and are not to be conflated. As Denza notes, modern law 'draws a clear distinction between inviolability and immunity from jurisdiction'.[310]

5.60. In its Memorial, Timor-Leste confuses these concepts, using the terms interchangeably. Timor-Leste speaks of the development of the customary international law of inviolability of State property and State immunity, but only provides examples from the *United Nations Convention on the Jurisdictional Immunities of States and Their Property 2004* ('2004 Convention'), a document solely concerned with the jurisdictional immunities of States.[311] The 2004 Convention does not provide for the inviolability of State property in general, and certainly does not evidence a customary international law of inviolability of State property.

5.61. Inviolability is a distinct concept, which provides for wide-ranging and comprehensive protections specific to the subject of that inviolability, whether an individual, a building or other property. Inviolability at international law has two distinct aspects. The first provides for the exemption of the subject of the inviolability from any legal process or any enforcement action by officials of the forum State.[312] The second aspect of inviolability involves a positive duty on the part of the forum State to take necessary and appropriate steps to protect the

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[310] E Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (3rd ed., Oxford University Press, 2008), 154.

[311] Timor-Leste, Memorial, [5.3]-[5.14].

[312] Sir Ivor Roberts (ed.)*, Satow's Diplomatic Practice* (6th ed., Oxford University Press, 2009), 102. See also *The Queen on the Application of Louis Oliver Bancoult v. Secretary of State for Foreign and Commonwealth Affairs* [2014] EWCA Civ 708, [61], where the Court stated that the 'universal definition of "inviolability" is freedom from any act of interference on the part of the receiving state'.

subject of that inviolability from physical invasion or interference with their functions and from impairment of their dignity.[313] In this respect, it is a much broader category. Inviolability protects the subject not only from actions of the forum State, but also from interference by private citizens and other private actors. On this point, Lord Bridge in *Shearson Lehman Brothers Inc. v. Maclaine, Watson & Co Ltd* stated that:

> The underlying purpose of the inviolability conferred is to protect the privacy of diplomatic communications. If that privacy is violated by a citizen, it would be wholly inimical to the underlying purpose that the judicial authorities of the host State should countenance the violation by permitting the violator, or any one who receives the document from the violator, to make use of the document in judicial proceedings.[314]

5.62. State immunity, by contrast, refers to a procedural bar on the exercise of jurisdiction and orders of execution (including pre- and post-judgment orders) over a foreign State, by the national courts of a forum State.[315] The application of this procedural bar is not absolute, with a restrictive approach to immunity (a general rule with specified exceptions) now forming the basis of customary international law, on which basis the various domestic statutes and the 2004 Convention were drafted.

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[313] Sir Ivor Roberts (ed.), *Satow's Diplomatic Practice* (6th ed., Oxford University Press, 2009), 104; E Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, (3rd ed., Oxford University Press, 2008), 135. For further examples, see, *Vienna Convention on Diplomatic Relations*, Vienna, 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964), Article 22 and Article 29; *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgement*, I.C.J. Reports 1980, 3 at [76], where the Court found Iran to have been in breach of its international obligations to take steps to prevent the attack from taking place. The Court found that Iran had endorsed of the acts in question, and had continued to apply them. This, the Court held, 'clearly gave rise to repeated and multiple breaches of the applicable provisions of the Vienna Conventions even more serious than those which arose from their failure to stake any steps to prevent the attacks on the inviolability of these premises and staff'.

[314] *Shearson Lehman Brothers Inc. v. Maclaine, Watson & Co Ltd, International Tin Council Intervening (No 2)* [1988] 1 WLR 16 at [27G] [**Annex 18**].

[315] J Crawford, *Brownlie's Principles of Public International Law* (8th ed., Oxford University Press, 2012), 487.

5.63. The distinction between State immunity and inviolability is widely recognised. With regard to State property, this distinction is most clearly evidenced by reference to the restrictive approach to State immunity. *Inviolability* obliges the forum State to take all appropriate steps to prevent interference with certain categories of individuals, property or documents, for example by prohibiting arrest or seizure. In contrast, the restrictive approach to *State immunity* permits the courts of a forum State to exercise jurisdiction over a foreign State and its property in certain circumstances. Inviolability, when it applies, is absolute.[316] State immunity, on the other hand, is subject to clear exceptions.

5.64. By allowing the courts of a State to entertain proceedings against a foreign State's property, the international law relating to State immunity implicitly excludes the application of any principle such as that for which Timor-Leste contends – namely, a general inviolability over State property wherever it may be situated, in all circumstances.

B. THE LAW OF INVIOLABILITY APPLIES TO SPECIFIC SUBJECTS UNDER SPECIFIC LEGAL REGIMES

5.65. Given the categorical protections inviolability affords to a subject, its scope and application is necessarily limited. As such, there is no *general* inviolability afforded to States or to State property. Instead, as deemed appropriate by States for the proper functioning of international relations, inviolability attaches to specific categories of persons and property, under specific legal regimes. Timor-Leste does not even attempt to demonstrate that the Materials in question fall within one of these specific legal regimes and, in

[316] See for example, G E do Nascimento e Silva, 'Diplomatic and Consular Relations' in M Bedjaoui (ed.), *International Law: Achievements and Prospects* (Martinus Nijhoff Publishers, 1991), 443.

Australia's submission, could not do so in any event given what is known of the character of the Materials in question.

5.66. State property is not subject to any *general* regime of inviolability, but *specific* categories of persons or activities may attract inviolability. Property which falls within specific categories, such as diplomatic or consular property or the property of visiting armed forces, are subject to specific legal regimes. For example, the *Vienna Convention on Diplomatic Relations 1961*[317] sets out specific rules relating to the inviolability of diplomatic property and diplomatic archives and documents.[318]

5.67. However, foreign State property present within the territory of a forum State may extend well beyond these categories. Examples include: buildings and other forms of immovable property owned for the purposes of foreign investment, or to provide accommodation for that State's official visitors; former diplomatic premises which have not yet been assigned to a new use;[319] and bank accounts in the State's name and used for purposes ranging from commercial investment to reserves for the State's currency or sovereign wealth funds. In relation to these other categories of State property, there is no general requirement in international law which grants *inviolability* from governmental action by a forum State.[320]

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[317] *Vienna Convention on Diplomatic Relations*, Vienna, 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964).

[318] *Vienna Convention on Diplomatic Relations*, Vienna, 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964), Articles 22, 24 and 30.

[319] See for example, as to the former Iranian Embassy premises in London, *Westminster City Council v. Government of the Islamic Republic of Iran* [1986] 1 WLR 979 [**Annex 19**].

[320] On this point, Yang notes that given that immovable property is inseparable from the territory of a forum State, that property cannot be subject to any law other than that of the forum State in which it is located: X Yang, *State Immunity in International Law* (Cambridge University Press, 2012), 67. In this sense, immoveable property owned by a foreign State (other than property which falls within a specific legal regime, such as diplomatic property), cannot be inviolable with regard to actions taken against that property by a forum State. Similarly, the diplomatic property of a foreign State may lose its inviolability where that property is used in a manner incompatible with the functions of a diplomatic mission: E Denza, *Diplomatic Law: Commentary on the Vienna*

5.68. It is true that forum States respect the property of foreign States, situated in their territory, and treat it with special consideration. But all indications are that they do so out of courtesy, prudence and comity, and not as a result of any specific legal requirement, and *a fortiori* not in any principle of inviolability. Thus, State property:

> would seem to be liable to temporary seizure or to expropriation, may be the subject of orders restricting the foreign state's freedom to deal with the property or requiring it to deal with the property in a certain way, and may be subject to taxation. In these and similar respects the local governmental action must not be arbitrary.[321]

5.69. Timor-Leste's key argument in support of its contention of a general inviolability is that '[t]he inviolability and immunity of State property and papers is explicitly set forth in international conventions in particular fields, such as diplomatic and consular law, the law of special missions, and the law of international organisations'.[322] Timor-Leste goes on to cite provisions from a number of international conventions: the *Vienna Convention on Diplomatic Relations 1961*;[323] the *Vienna Convention on Consular Relations 1963*;[324] the *New York Convention on Special Missions 1969*;[325] and the *Convention on the Privileges and Immunities of the Specialized Agencies 1947*.[326]

Convention on Diplomatic Relations (3rd ed., Oxford University Press, 2008), 42-43. See also, R Jennings and A Watts, *Oppenheim's International Law* (9th ed., Oxford University Press, 1992), 363.

[321] R Jennings and A Watts, *Oppenheim's International Law* (9th ed., Oxford University Press, 1992), 363-364.

[322] Timor-Leste, Memorial, [5.55].

[323] *Vienna Convention on Diplomatic Relations*, Vienna, 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964).

[324] *Vienna Convention on Consular Relations*, Vienna, 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967).

[325] *Convention on Special Missions*, New York, 8 December 1969, 1400 UNTS 231 (entered into force 20 June 1985).

[326] *Convention on the Privileges and Immunities of the Specialised Agencies*, New York, 21 November 1947, 33 UNTS 261 (entered into force 2 December 1948).

5.70. It is true that these Conventions provide for the inviolability of certain documents and other property. But they do not evidence a general principle of inviolability of all State property in all circumstances, wherever such property may be located. Such a conclusion would be totally inconsistent with State practice, and lack any support under international law. Instead, these Conventions merely confirm the position that international law recognises specific classes of documents and other property which, due to their special status and purpose, require additional protection through the principle of inviolability.

5.71. For example, the *Vienna Convention on Diplomatic Relations 1961* provides for the inviolability of specific classes of diplomatic property, including the premises of the mission,[327] the archives and documents of the mission,[328] the residence of a diplomat[329] and the papers, correspondence and (subject to some limitations) the property of a diplomat.[330] The justification for the granting of such inviolability is to ensure the efficient performance of the functions of a diplomatic mission,[331] and the recognition of such inviolability does not support an unqualified rule of inviolability over State property generally.

5.72. Similarly, the *Vienna Convention on Consular Relations 1963* provides for the inviolability of consular premises[332] and consular archives and documents.[333]

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[327] *Vienna Convention on Diplomatic Relations*, Vienna, 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964), Article 22.

[328] *Vienna Convention on Diplomatic Relations*, Vienna, 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964), Article 24.

[329] *Vienna Convention on Diplomatic Relations*, Vienna, 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964), Article 30(1).

[330] *Vienna Convention on Diplomatic Relations*, Vienna, 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964), Article 30(2).

[331] Sir Ivor Roberts (ed.), *Satow's Diplomatic Practice* (6th ed., Oxford University Press, 2009), 100. See also, *Vienna Convention on Diplomatic Relations*, Vienna, 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964), Preamble.

[332] *Vienna Convention on Consular Relations*, Vienna, 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967), Article 31.

The *Convention on the Privileges and Immunities of the Specialised Agencies 1947* provides for the inviolability of all papers and documents held by representatives of member States while exercising their functions at meetings, and in transit to and from such meetings.[334] What is clear from the provisions of these Conventions is that inviolability is only afforded to limited and specific classes of property, and is not granted in general terms, such as would cover all categories of State property which may be present within the territory of a forum State.

5.73. Timor-Leste argues that 'it is of course common for a treaty in force (or a treaty not in force or draft articles) or some of its provisions to reflect customary law in a specific field'.[335] That is true as a general observation, but no *general* principle of inviolability of all State documents or State papers wherever or by whoever held has ever been articulated in any authoritative source. The assertion that these Conventions relied upon by Timor-Leste reflect a customary rule of international law that grants inviolability to State documents and archives generally is wholly implausible. If this assertion were correct, all the Conventions conferring inviolability in defined areas would be otiose, as would negotiation of any further agreements granting such inviolability.

5.74. Nor can Timor-Leste rely upon specific conventions relating to the operation of agencies of the United Nations as evidence of a general principle of law relating to States. The *Convention on the Privileges and Immunities of the Specialised Agencies 1947* does not address the issue of the privilege and immunities of States or their property. Inviolability only attaches under this regime to the property and assets of the listed specialised agencies of the

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[333] *Vienna Convention on Consular Relations*, Vienna, 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967), Articles 33 and 61.

[334] *Convention on the Privileges and Immunities of the Specialised Agencies*, New York, 21 November 1947, 33 UNTS 261 (entered into force 2 December 1948), Article V.

[335] Timor-Leste, Memorial, [5.58].

United Nations, in order to ensure their effective operation and the fulfilment of their functions.[336]

5.75. The specific regimes governing inviolability exist to ensure the effective functioning of diplomatic and consular relations between States and to ensure that certain international organisations and agencies are able to perform their functions free from interference. They do not operate so as to render all categories, classes and types of State property inviolable, wherever that property is found. Such a conclusion would extend the customary international law relating to inviolability well beyond its recognised scope. It would be unacceptable to the vast majority of States.

C. THERE IS NO STATE PRACTICE TO SUPPORT THE PROPOSITION THAT ALL STATE PROPERTY IS INVIOLABLE UNDER CUSTOMARY INTERNATIONAL LAW

5.76. Timor-Leste also seeks to rely on specific examples of State practice to support its assertion that State property is inviolable in all circumstances. Timor-Leste claims that the examples cited in its Memorial:

> reflect the fundamental principle that inviolability applies to State documents generally, wherever they may be and even though they are not State archives in the narrow sense, or archives of a diplomatic mission or consular post.[337]

5.77. The examples provided by Timor-Leste do no such thing. Instead, the examples cited are both irrelevant to the current case and easily distinguished, or they took place within the existing treaty regime provided by the *Vienna*

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[336] *Convention on the Privileges and Immunities of the Specialised Agencies*, New York, 21 November 1947, 33 UNTS 261 (entered into force 2 December 1948). Article III, section 4 provides that 'the specialized agencies, their property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity'. Article III, section 5 provides that '[t]he premises of the specialized agencies shall be inviolable. The property and assets of the specialised agencies wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action'.

[337] Timor-Leste, Memorial, [5.65].

Convention on Diplomatic Relations 1961, conferring inviolability on diplomatic documents and archives.

5.78. Timor-Leste asserts, citing *Oppenheim's International Law* in support, that the persons and official papers of agents without diplomatic or consular character are inviolable.[338] But any inviolability which may be enjoyed by agents without diplomatic or consular status is irrelevant to this case. When the learned editors of *Oppenheim's International Law* refer to 'agents without diplomatic or consular character', they are referring to those individuals which a State may send abroad other than diplomatic envoys, consuls and special missions. Amongst those individuals who fall within this categorisation are 'political agents, commercial agents, spies, members of commissions, and observers and inspectors'.[339] The particular reference cited by Timor-Leste in paragraph 5.62 of its Memorial concerns political agents, sent by States to negotiations of varied kinds. Quite apart from the confused manner in which Timor-Leste has variously described its relationship with Mr Collaery, clearly neither Mr Collaery nor 'K' could be considered political agents of Timor-Leste, and accordingly, the law regarding the inviolability or otherwise of a political agent's person or the papers and property in their possession is entirely irrelevant.

5.79. Timor-Leste misrepresents the statement made by the United States State Department Legal Adviser with regard to State property held by third parties.[340] That statement concerned diplomatic papers and cannot demonstrate a much broader legal principle conferring inviolability over all categories of State property. In any event, the State Department explicitly recognised that the

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[338] Timor-Leste, Memorial, [5.62].

[339] R Jennings and A Watts, *Oppenheim's International Law* (9th ed., Oxford University Press, 2008), 1174-1175.

[340] Timor-Leste, Memorial, [5.60]-[5.61].

question raised was 'novel and complex'[341] indicating that its position in that case was not reflective of a general rule of customary international law. With regard to Timor-Leste's alternative example, of official British correspondence interfered with while in transit,[342] the Foreign and Commonwealth Office did not make any mention of inviolability. It relied solely on the principles set out in the *Vienna Convention on Diplomatic Relations 1961*, principles which apply within the diplomatic context, to provide protection for certain documents within a clearly defined and specific legal regime.

5.80. State practice with regard to the seizure of foreign passports provides a clear example of the recognition that there is no general doctrine of inviolability for State property outside the specific legal regimes mentioned above. Passports are recognised as being the property of the issuing State and not the individual holder of the document. However, State practice demonstrates a willingness to allow the relevant authorities of a forum State to confiscate or seize (at least temporarily) the foreign passport of an individual.

5.81. For example, the United States Department of Homeland Security (DHS), in its Field Manual, instructs DHS agents who have taken custody of a foreign national's passport in certain circumstances to continue to hold that passport and not relinquish it to the relevant foreign national.[343] This is despite recognition in the Field Manual that the passport remains the property of the issuing State. Australian domestic law permits the seizure of foreign passports in certain

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[341] 'Vienna Convention on Diplomatic Relations: Saudi Arabian Embassy Documents' in S J Cummins and D P Stewart (eds.), *Digest of United States Practice in International Law 2002* (International Law Institute), 570 [**Annex 36**].

[342] Timor-Leste, Memorial, [5.63]-[5.64].

[343] Memorandum from Acting Director John Torres, to Field Office Directors, U.S. Immigration and Customs Enforcement, 'Detention and Deportation Officer's Field Manual, Update: Chapter 1', (27 March 2006), at 16.1(a) ('Do not return the passport of an alien whose departure is being enforced') (accessed at <http://www.immigration.com/sites/default/files/icedetention.pdf> on 20 July 2014).

circumstances for domestic or international law enforcement purposes.[344] Such seizures may be authorised for a number of reasons, including the regulation of immigration or for reasons of national security. An additional example is found in French law, which allows police to withhold the passport or other travel document of a foreign national, where that foreign national is an irregular immigrant.[345]

5.82. While Turack notes that, in many cases, States will not take custody of a foreign passport without prompt notification and return of the passport to representatives of the issuing State,[346] the level of protection afforded under inviolability is so high that any administrative or enforcement actions taken by the authorities of a forum State involving even the temporary seizure or confiscation of a foreign passport would clearly constitute a breach. This would be the case even if the issuing State were notified that the action had occurred. If there existed at customary international law a principle conferring inviolability on all State property, and in particular all State documents, wherever situated, it is

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[344] *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth) (Australia), s 16 [**Annex 45**]. See also, *Riener v. Bulgaria*, (European Court of Human Rights, Chamber, Application No. 46343/99, 23 March 2006), [23], which referred to an earlier decision of the Sofia City Court, which found that certain legislation, when applied in conjunction with relevant regulations, allowed the confiscation of a foreign (Austrian) passport as a legitimate measure in respect of an individual against whom a decision prohibiting departure from Bulgaria had been made.

[345] *Code de l'entrée et du séjour des étrangers et du droit d'asile* (France), Article L611-2 (accessed at <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070158> on 20 July 2014). See also, Article 56 of the *Code de procédure pénale* (France) (accessed at <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071154> on 20 July 2014), which authorises the seizure of certain documents in connection with a criminal offence, and has been used as the basis for the seizure of foreign passports. The operation of Article 56 was considered by the European Court of Human Rights in *Case of Baumann v. France,* (European Court of Human Rights, Chamber, Application No. 33592/96, 22 May 2001), [59] and [64], in which the French Government submitted that the seizure of the passport was entirely compatible with the relevant statutory requirements and was justified during the investigation phase.

[346] D C Turack, *The Passport in International Law* (Lexington Books, 1972), 226.

improbable that the practice with regard to foreign passports would continue to occur largely unprotested.[347]

5.83. The only possible conclusion is that there is no law of inviolability of general application to State property. Further, the specific legal regimes which confer inviolability upon certain persons and types of property are not relevant in this case. Accordingly, Timor-Leste's claims with regard to inviolability must be dismissed.

Section III. The law of State immunity does not apply in this case

A. The applicable law on State immunity as between the Parties is custom, of which the 2004 Convention is not an exhaustive statement

5.84. There is no treaty to which Australia and Timor-Leste are parties (and no treaty of general application) which establishes the law of State immunity as it applies between them. The relevant law as between the Parties will necessarily be customary international law, as it was in the *Jurisdictional Immunities* case.[348] In that case, the Court held that as between the parties, any entitlement to immunity could only be derived from customary international law rather than treaty; it was for the Court to determine the existence of international custom, as

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[347] There are few examples of protest by States regarding the seizure of foreign passports. In 2011, Australia did not protest the seizure of an Australian national's passport by Jordanian authorities: see D Welch, 'Australian's passport seized in Jordan', *The Sydney Morning Herald*, 14 November 2011 [**Annex 69**]. In 2010, Guatemala made an official protest after Guatemalan passports were seized and inspected by United States officials in Florida: see J Preston, 'Guatemala protests arrest of 3 in Florida over passports', *The New York Times*, 19 January 2010 [**Annex 70**]. However, the protest was due to the apparent detention of Guatemalan citizens, the disruption of dealings between Guatemala and those citizens, and a lack of notification. The protest was not made on the basis of inviolability of State documents. Also in 2010, Pakistan threatened to protest the seizure of a Pakistani citizen's passport by Indian authorities, on the basis that a court case should not have been filed against a Pakistani citizen, not on the basis that the passport was inviolable: see 'Pak may protest seizure of Shoaib's passport', *The Indian Express*, 5 April 2010 [**Annex 71**].

[348] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, *Judgment*, I.C.J. Reports 2012, 99 at [54].

evidence of a general practice accepted as law conferring immunity on States and, if such immunity existed, its scope and extent.[349]

5.85. In its Memorial, Timor-Leste relies extensively on the 2004 Convention as a reflection of the customary international law of State immunity. However, the 2004 Convention should not be considered an exhaustive statement on the customary international law of State immunity. To date, the 2004 Convention has only been signed by 28 States (and ratified by 16), and has not yet received the 30 ratifications required to enter into force.[350] Australia has not signed the 2004 Convention. Timor-Leste has signed (but not ratified) it. The Court itself noted in the *Jurisdictional Immunities* case the limited acceptance that the 2004 Convention has received from States.[351]

5.86. The lack of enthusiasm on the part of non-signatory States to sign up to the obligations in the 2004 Convention undermines Timor-Leste's conclusion that the Convention as a whole reflects customary international law. Still less would it be correct to assume that it can be used by analogy to generate new rules of law in relation to subjects (administrative detention of documents, not held by a foreign State, in a matter concerning the territorial State's security and/or its administration of the criminal law) with which it plainly does not deal.

5.87. Timor-Leste cites certain domestic statutes on State immunity as evidence that the 2004 Convention has been regarded as an influential expression of customary law in national jurisdictions.[352] However, the statutes cited from the United Kingdom, the United States of America and Australia were each enacted prior to the publication of the International Law Commission's draft articles in

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[349] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, *Judgment*, I.C.J. Reports 2012, 99 at [55].

[350] Number of signatories and parties to the 2004 Convention correct as at 20 July 2014.

[351] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, *Judgment*, I.C.J. Reports 2012, 99, at [54].

[352] Timor-Leste, Memorial, [5.16], footnote 94.

1991, and well before the adoption of the 2004 Convention. With regard to the *Foreign Sovereign Immunity Act 1976* (United States of America) and the *State Immunity Act 1978* (United Kingdom), these statutes were enacted before the topic was considered in any great detail by the International Law Commission.[353] Timor-Leste has manifestly failed to demonstrate through its examples the extent to which national legislation is reflective of, and consistent with, the provisions of the 2004 Convention. Further, its citation implies that Australia, the United Kingdom and the United States of America are amongst the very limited number of States which have ratified the 2004 Convention. This is clearly incorrect, as none of these States are amongst the 16 States which have ratified the 2004 Convention.

5.88. Moreover, the adoption of the 2004 Convention should not be regarded as halting the continued development of customary international law. State immunity has already undergone a significant development, progressing from a broad-ranging concept of absolute application, to a restricted immunity subject to a range of important situations in which it does not apply. As Shaw notes '[t]he enumeration of non-immunity situations is so long, that the true situation of a rapidly diminishing exception to jurisdiction should be appreciated'.[354]

5.89. There are already examples of State practice in which further exemptions *not* included in the 2004 Convention have been enacted in domestic statutes. For example, the United States of America and Canada have both enacted provisions which provide an exception to State immunity in the event of alleged

[353] The United Nations General Assembly did not decide to include the topic of jurisdictional immunity of States and their property until 1977. The International Law Commission first considered the topic in its thirty-first session, in 1979.

[354] M N Shaw, *International Law* (6th ed., Cambridge University Press, 2008), 749.

involvement by a foreign State in an act of terrorism.[355] In discussing State immunity under the United States *Foreign Sovereign Immunities Act*, Damrosch explains that:

> the [2004] Convention cannot preclude the existence and progressive development of a parallel body of customary international law on immunity, which need not be the same as the Convention's rules. Only between treaty partners, and only to the extent that the Convention's provisions reflect an intent to specify an exclusive list of exceptions to immunity, would it be reasonable to conclude that immunity must be allowed if an express exception has not been made.[356]

5.90. The New Zealand case of *Controller and Auditor-General v. Sir Ronald Davison*[357] illustrates the same point in a different context. It concerned documents belonging to a foreign State and located in New Zealand, which were alleged to demonstrate the involvement of the foreign State in a large-scale scheme of tax evasion. Immunity was denied on other grounds, but four separate judgments nonetheless expressed support for a 'public policy' exception in the common law of State immunity.[358] These statements indicate that the range of exceptions to State immunity which may exist at international law is not fixed by the 2004 Convention.

5.91. Accordingly, while commentary and judicial decisions before domestic courts suggest that the provisions of the 2004 Convention may reflect 'an international consensus on state immunity',[359] this view has primarily been expressed with reference to the adoption at international law of the restrictive

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[355] *Foreign Sovereign Immunities Act 1976*, 28 United States Code (United States of America), s 1605A; *State Immunity Act 1985* (Canada), s 6.1.

[356] L F Damrosch, 'Changing the International Law of Sovereign Immunity Through National Decisions' (2011) 44 *Vanderbilt Journal of Transnational Law* 1185, 1191.

[357] *Controller and Auditor-General v. Sir Ronald Davison* [1996] 2 NZLR 278 [**Annex 20**].

[358] *Controller and Auditor-General v. Sir Ronald Davison* [1996] 2 NZLR 278, 290 (per Cooke P), 304-307 (per Richardson J, McKay J concurring), 309 (per Henry J), 310 (per Thomas J) [**Annex 20**].

[359] J Crawford, *Brownlie's Principles of Public International Law* (8th ed., Oxford University Press, 2012), 490. See also *Oleynikov v. Russia,* (European Court of Human Rights, Chamber, Application No. 36703/04, 14 March 2013).

approach to State immunity and the abolition of an 'absolute immunity of foreign States' in civil proceedings brought against the State as a party. It is respectfully submitted that the Court should be very cautious in seeking to apply by analogy immunities applicable in civil proceedings to the quite different context of the present case.

B. THE LAW OF STATE IMMUNITY DOES NOT APPLY IN THIS CASE, SINCE THERE IS NO RELEVANT 'PROCEEDING' AGAINST A STATE OR STATE AGENT

5.92. Timor-Leste makes vague and unsupported assertions that Australia's actions impinged upon the immunity of Timor-Leste's property. But the customary law of State immunity does not apply in this case. Nor does the 2004 Convention (even if it were in force) purport to do so.

5.93. State immunity refers to immunity from the *jurisdiction of the courts of another State*, and from measures of enforcement *connected to a proceeding before the courts of another State*. Moreover it is confined to cases in which the State, or a State agent, is an actual or necessary party: it is an immunity *in personam*. With regard to the jurisdictional immunity of State property, customary international law provides that such property is immune from measures of constraint at both the pre-judgment and post-judgment stage of a proceeding before a court of the forum State. In this sense, whether a foreign State is directly impleaded, or is indirectly impleaded through measures against its property, there must exist a proceeding before a court of the forum State. Issuing and executing the warrant does not constitute the exercise of jurisdiction by an Australian court, and the law of State immunity does not apply.

5.94. Further, even if a proceeding were on foot in this matter, it would constitute a criminal proceeding. As established in Chapter 3, Australia's actions were in direct response to the *prima facie* unlawful disclosure of confidential information by 'K' and Mr Collaery. If any future proceeding were to take place,

it would involve criminal prosecution against these Australian nationals, neither of whom are employees or agents of a foreign State acting in the exercise of its sovereign authority. The law on which Timor-Leste seeks to rely in order to establish its claim for State immunity does not apply to criminal proceedings, and is irrelevant in this case.

A critical element of the law of State immunity is the existence of a proceeding before a court

5.95. States and their property enjoy immunity in the form of a procedural bar to the exercise of jurisdiction by the national courts of another State, and from orders of execution in connection with proceedings before those courts.[360] In this regard, State immunity provides for the performance of public functions by a foreign State and its representatives by preventing them from being sued or prosecuted in *proceedings before a foreign domestic court*.[361] State immunity 'precludes the *courts of the forum state* from exercising adjudicative and enforcement jurisdiction in certain classes of case in which a foreign state is a party'[362] (emphasis added).

5.96. Sucharitkul recognises the necessary connection between a proceeding and a court in the forum State as an essential element of the law of State immunity: '[o]nly when a proceeding is instituted against a State before the court of another

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[360] J. Crawford, *Brownlie's Principles of Public International Law* (8th ed., Oxford University Press, 2012), 487.

[361] See J Crawford, *Brownlie's Principles of Public International Law* (8th ed., Oxford University Press, 2012), 487; X Yang, *State Immunity in International Law* (Cambridge University Press, 2012), 34; C Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' in *Recuil des Cours: Collected Courses of The Hague Academy of International Law* (Martinus Nijhoff Publishers, 2001), 176; A Aust, *Handbook of International Law* (2nd ed., Cambridge University Press, 2010), 145; A Cassese, *International Law* (2nd ed., Oxford University Press, 2005), 98; P Stoll, 'State Immunity', *Max Planck Encyclopaedia of Public International Law* (online version), [1] and [22].

[362] J Crawford, *Brownlie's Principles of Public International Law* (8th ed., Oxford University Press, 2012), 487.

State could it be said that the question of enjoyment of immunity has arisen'.[363] While Sucharitkul goes on to state that the notion of 'being impleaded' should be liberally construed, what remains essential is that a 'proceeding in effect seeks to compel the State to submit to the jurisdiction or to bear the consequences of *judicial determination*'[364] (emphasis added). Dupuy writes that:

> There is a procedural objection to territorial jurisdiction according to which a State or an international intergovernmental organisation may not be sued in the domestic courts of the territorial State.[365]

5.97. Fox and Webb reiterate this point, stating that State immunity prevents a foreign State from being made a party to proceedings in a national court of another State, either directly or indirectly through proceedings against its property.[366]

5.98. The necessary relationship between State immunity and a proceeding before a court of the forum State is confirmed in international jurisprudence and treaty law. In the *Jurisdictional Immunities* case, the Court stated:

> 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 State.[367] (emphasis added)

5.99. The necessary connection between the exercise of jurisdiction by a court and the immunity enjoyed by a foreign State and its property is also highlighted in

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[363] S Sucharitkul, 'Immunity of States' in M Bedjaoui (ed.), *International Law: Achievements and Prospects* (Martinus Nijhoff Publishers, 1991), 333.

[364] S Sucharitkul, 'Immunity of States' in M Bedjaoui (ed.), *International Law: Achievements and Prospects* (Martinus Nijhoff Publishers, 1991), 333.

[365] P Dupuy, *Droit international public* (8th ed., Dalloz, 2006), 126 ('Elle est une exception de procédure opposée à la compétence territoriale d'après laquelle un État ou une organisation internationale intergouvernementale ne peuvent être attraits devant les tribunaux internes de l'État territorial') (with English translation).

[366] H Fox and P Webb, *The Law of State Immunity* (3rd ed., Oxford University Press, 2013), 11. See also, R Jennings and A Watts, *Oppenheim's International Law* (9th ed., Oxford University Press, 1992), 342, 348-349.

[367] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, *Judgment*, I.C.J. Reports 2012, 99 at [93].

the 2004 Convention. Under Article 5 of the 2004 Convention, State immunity is immunity 'from the *jurisdiction of the courts* of another State' (emphasis added). In this regard, this provision merely provides a bar to *judicial proceedings*, rather than any substantive non-liability under the domestic law applied by the courts of the forum State.[368] Article 6 provides that a State must give effect to this immunity: '… by refraining from exercising jurisdiction in a *proceeding before its courts* against another State …' (emphasis added). Articles 18 and 19 prohibit 'measures of constraint, such as attachment or arrest, against property' but only 'in connection with a proceeding before a court'.

5.100. The International Law Commission stated in the commentary to Article 1 of the *Draft Articles on the Jurisdictional Immunities of States and Their Property* that:

> [t]he phrase "of the courts" in the present text is designed to confirm the understanding that the scope of the current topic is confined primarily to immunity from the jurisdiction "of the courts" of States.[369]

5.101. The position is essentially the same with regard to domestic State immunity statutes. The Australian *Foreign States Immunities Act 1985* ('FSI Act') provides that, subject to certain exceptions, a foreign State is immune from the 'jurisdiction of the courts of Australia in a proceeding'.[370] In the United Kingdom, immunity is granted to a foreign State from the jurisdiction of the courts of the United Kingdom;[371] in Argentina, foreign States 'are immune

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[368] R O'Keefe and C Tams (eds.), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press, 2013), 101.

[369] Report of the International Law Commission on the work of its forty-third session, 29 April – 19 July 1991, Official Records of the General Assembly, Forty-sixth session, Supplement No. 10, A/46/10, *Yearbook of the International Law Commission 1991 Volume II Part 2*, A/CN.4/SER.4/1991/Add.1 (Part 2), 13 (accessed at < http://legal.un.org/ilc/documentation/english/A_46_10.pdf> on 20 July 2014).

[370] *Foreign States Immunities Act 1985* (Cth), s 9 [**Annex 46**].

[371] *State Immunity Act 1978* (United Kingdom), s 1(1).

from the jurisdiction of Argentinian Courts';[372] under the Canadian *State Immunity Act*, 'a foreign state is immune from the jurisdiction of any court in Canada';[373] in Singapore, a foreign State is immune from the 'jurisdiction of the courts of Singapore';[374] and under the *Foreign Sovereign Immunity Act 1976* (United States of America), a foreign state shall be immune from the jurisdiction 'of the courts of the United States and of the States'.[375]

5.102. The existence of a proceeding before a court is also a necessary corollary of State immunity from measures of constraint. In the context of State immunity, measures of constraint are coercive or enforcement measures taken by a 'court either to restrain the foreign State in the disposition of its property', or 'otherwise to attach, arrest or seize the property of the foreign State'.[376] Further, State immunity from measures of constraint is broadly conceptualised in the 2004 Convention to cover all forms of *judicially ordered* measures of constraint.[377]

5.103. Domestic legislation similarly requires a connection between the claimed immunity from a measure of constraint and a proceeding before a court. For example, the FSI Act provides that:

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[372] *Immunity of foreign States from the jurisdiction of Argentinian Courts*, *Law no. 24,488* (Argentina), Artículo 1 (Translation provided in A Dickinson, R Lindsay and J Loonam, *State Immunity: Selected Materials and Commentary* (Oxford University Press, 2004), 465-468).

[373] *State Immunity Act 1985* (Canada), s 3(1) (accessed at <http://laws-lois.justice.gc.ca/eng/acts/S-18/> on 20 July 2014).

[374] *State Immunity Act 1979* (Singapore), s 3(1) (accessed at <http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=DocId%3A%221be1a8f7-0968-4fcc-ac26-39d3a51b7b70%22%20Status%3Ainforce%20Depth%3A0;rec=0> on 20 July 2014).

[375] *Foreign Sovereign Immunities Act 1976*, 28 United States Code (United States of America), s 1604 (accessed at <http://www.law.cornell.edu/uscode/text/28/part-IV/chapter-97> on 20 July 2014).

[376] X Yang, *State Immunity in International Law* (Cambridge University Press, 2012), 343.

[377] C Brown and R O'Keefe, 'Part IV: State Immunity from Measures of Constraint in Connection with Proceeding before a Court', in R O'Keefe and C Tams (eds.), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press, 2013), 287.

> the property of a foreign State is not subject to any process or order (whether interim or final) of the courts of Australia for the satisfaction or enforcement of a judgment, order or arbitration award or, in Admiralty proceedings, for the arrest, detention or sale of the property.[378]

5.104. The United Kingdom *State Immunity Act 1978* provides that the 'property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award'.[379] The terms 'enforcement of a judgment or arbitration award' provide a necessary implication regarding proceedings. Under Israel's *Foreign States Immunity Law*, the 'assets of a foreign state shall have immunity from proceedings for execution of a judgment or other decision of a court in Israel'.[380]

5.105. Clearly, the application of the international law of State immunity is dependent on the existence of a civil proceeding before the domestic courts of a forum State. Accordingly, three essential elements must be met before the law of State immunity will be applicable. First, there must be a 'proceeding'. Second, that proceeding must be before a 'court' of the forum State. Third, the proceeding must be against a foreign State or an agent of a foreign State, or the State must be an indispensable party to the proceeding. As demonstrated below, the issue and execution of the warrant in question could not, on any basis, be characterised as a proceeding before a court. In the absence of a proceeding before a 'court' of the forum State, State immunity does not apply to the Materials in this case.

<u>The domestic legal framework in which a body operates is determinative in establishing whether that body is a 'court'</u>

5.106. State immunity relates to the adjudicative and enforcement jurisdiction of national courts. Its requirements are governed by international law, but the

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[378] *Foreign States Immunities Act 1985* (Cth), s 30 [**Annex 46**].

[379] *State Immunity Act 1978* (United Kingdom), s 13(2)(b). A similar provision is contained in the *State Immunity Act 1979* (Singapore), s 15(2).

[380] *Foreign States Immunity Law 5769-2008* (Israel), s 15(a) (see Timor-Leste, Memorial, Annex 18).

individual national law of the forum State determines the precise extent and manner of application.[381] As Hess writes, '[i]t is the special feature of State immunity that it is at the point of intersection of international law and national procedural law'.[382]

5.107. It is the domestic legal and constitutional framework of the forum State which is determinative in establishing whether a particular body is capable of being considered a 'court' of the forum State. Courts are constituted under, and derive their jurisdictional powers and functions from, the domestic legal frameworks in which they operate. These frameworks must be decisive in ascertaining whether a body is a 'court' capable of exercising judicial or quasi-judicial powers for the purpose of State immunity.

5.108. In its Memorial, Timor-Leste argues that what matters under customary international law in determining whether a body is acting as a court is the function and nature of the act and procedures in question. As Timor-Leste notes in its Memorial, Article 2(1)(a) of the 2004 Convention defines a 'court' as 'any organ of a State, however named, entitled to exercise judicial functions'. The term 'judicial functions' is explained in the commentary to the *Draft Articles on Jurisdictional Immunities of States and Their Property*. Relevantly, the commentary provides:

> that such functions vary under different constitutional and legal systems. For this reason, the Commission decided not to include a definition of the term "judicial functions" in the present article … Although judicial functions are determined by the internal organizational structure of each State, the term does not, for the purposes of the present articles, cover the administration of justice in

[381] H Fox and P Webb, *The Law of State Immunity* (3rd ed., Oxford University Press, 2013), 17.

[382] B Hess, 'The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property' (1993) 4 *European Journal of International Law* 269, 271.

> all its aspects which, at least under certain legal systems, might include other functions related to the appointment of judges.[383]

5.109. The Commentary goes on to provide that that definition of a 'court' may:

> *under different constitutional and legal systems*, cover the exercise of the power to order or adopt enforcement measures (sometimes called "quasi-judicial functions") by specific administrative organs of the State.[384] (emphasis added)

5.110. During the 1749th Meeting of the Commission, the Chairman of the Drafting Committee, Mr Sompong Sucharitkul, said that the expressions 'organ' and 'judicial functions' had been found sufficiently flexible to encompass the varied characteristics that might be attributed to them under the internal law of States.[385] The Commission's definition of a 'court' in the context of State immunity, provided sufficient flexibility to account for differences in State judicial frameworks. In this regard, it is also worth noting the comments of Chile that:

> 'Court' means any organ of a State, however named and situated, entitled, under the domestic law of that State, and provided it is acting in that capacity, to exercise judicial functions (or to hear, resolve and enforce judgments in civil, criminal and administrative cases).[386]

5.111. What is evident from these statements is the clear intention of the Commission to capture the full range of judicial and quasi-judicial functions exercised by the courts of a State, based upon the characterisation of judicial and

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[383] Report of the International Law Commission on the work of its forty-third session, *Yearbook of the International Law Commission 1991 Volume II Part 2,* A/CN.4/SER.4/1991/Add.1 (Part 2), Draft Article 2 Commentary (3), 14.

[384] Report of the International Law Commission on the work of its forty-third session, *Yearbook of the International Law Commission 1991 Volume II Part 2,* A/CN.4/SER.4/1991/Add.1 (Part 2), Draft Article 2 Commentary (4), 14.

[385] 1749th Meeting of the International Law Commission, A/CN.4/L.342, 20 July 1982, *Yearbook of the International Law Commission 1982 Volume I*, 317 at [23]-[24].

[386] Convention on jurisdictional immunities of States and their property, Report of the Secretary-General, A/55/298, 17 August 2000, [18]-[19]. The definition of 'court' was not otherwise widely commented on by States. Lebanon stated that the use of functional, 'and not the organic criterion' in defining the term 'court' was acceptable (See Convention on jurisdictional immunities of States and their property, Report of the Secretary-General, A/54/266, 19 August 1999, 3).

quasi-judicial functions under that State's individual constitutional and legal frameworks.

5.112. Accordingly, what is imperative in establishing whether a State has been impleaded in a proceeding before a 'court' for the purposes of State immunity is whether the body in question is exercising judicial or quasi-judicial powers under the legal system of the forum State in a case in which the State is an actual or necessary party. Under the FSI Act, a 'proceeding' is defined as a 'proceeding in a court', but does not include 'a prosecution for an offence or an appeal or other proceeding in the nature of an appeal in relation to such a prosecution'.[387] A 'court' is defined as 'a tribunal or other body (by whatever name called) that has functions, or exercises powers, that are judicial functions or powers or are of a kind similar to judicial functions or powers'.[388] The Australian Law Reform Commission, in its report on foreign State immunity on which the FSI Act is based, recommended that the definition of 'courts' be broad enough to cover any body in Australia which exercises judicial functions.[389] Those actions which would ultimately constitute the 'judicial functions' in a particular State must be determined on the basis of the constitutional and legal frameworks in place in that State.

The Attorney-General was not exercising judicial or quasi-judicial functions under Australian domestic law

5.113. The relevant action at issue in this case is the issuance of a warrant by the Attorney-General of Australia, and the subsequent execution of that warrant to search Mr Collaery's premises for the purpose of substantially assisting the collection of intelligence in respect of a security matter. Timor-Leste asserts that

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[387] *Foreign States Immunities Act 1985* (Cth), s 3(1) [**Annex 46**].

[388] *Foreign States Immunities Act 1985* (Cth), s 3(1) [**Annex 46**].

[389] Australian Law Reform Commission, *Foreign State Immunity*, ALRC Report 24, [76] (accessed at <http://www.austlii.edu.au/au/other/lawreform/ALRC/1984/24.html> on 20 July 2014).

the issuing and execution of 'a warrant for the seizure of property is quintessentially a judicial function'.[390] However, under the relevant constitutional and legal framework of Australia, the Attorney-General, in acting under the ASIO Act, was not performing judicial or quasi-judicial functions under Australian law. As a consequence, the Attorney-General's issuance of the search warrant at issue in this dispute cannot constitute a 'proceeding' for the purpose of the law of State immunity.

5.114. Section 71 of the Australian Constitution provides that the judicial power of the Commonwealth of Australia can only be vested in the High Court and 'in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction'. Further, and consistent with the separation of powers doctrine, under Australian law judicial power must be exercised independently of the other branches of the Commonwealth, including the executive branch. Therefore, as a matter of Australian law, the Attorney-General cannot and does not exercise judicial powers.

5.115. The exercise of judicial power normally entails the resolution of disputes about existing rights and obligations. This involves determining what parties' rights and obligations are by applying legal principles to ascertained facts. This has been held in a number of Australian judicial decisions to be a key factor in determining whether judicial powers have been exercised.[391] Similarly, inquiry into and determination of matters in issue 'is a judicial function if its object is the

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[390] Timor-Leste, Memorial, [5.41].

[391] *Precision Data Holdings Ltd v. Wills* (1991) 173 CLR 167, 188-189 [**Annex 21**], citing *Re Ranger Uranium Mines Pty Ltd*; *Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656, 666 [**Annex 22**]; *Attorney-General (Commonwealth) v. Alinta Ltd* (2008) 233 CLR 542, [94] [**Annex 23**] citing *R v. Trade Practices Tribunal*; *Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 [**Annex 24**].

ascertainment of legal rights and obligations'.[392] Additionally, a judicial determination obliges the parties to recognise the force and effect of the determination, subject to any available appeal.[393]

5.116. While the issuing of a warrant is a function which can be conferred on a court, it does not necessarily constitute an exercise of judicial power. The position in Australian law was highlighted in *Grollo v. Palmer*, where the High Court of Australia held that the power to issue a warrant is not part of the judicial power of the Commonwealth because it did not involve an adjudication to determine the rights of the parties.[394] The High Court of Australia made the important distinction between the exercise of judicial power, and the need to exercise a non-judicial power 'judicially', in the sense that the power ought to be exercised fairly and without bias.[395] The decision to issue a search warrant is a power of the latter kind, namely a non-judicial power, exercised fairly and without bias. Australia is not unique in this sense. For example, the Irish Law Reform Commission has written that it is well established in Irish law that the issuing of a search warrant is an administrative, rather than judicial, function.[396] Similarly, in

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[392] *Precision Data Holdings Ltd v. Wills* (1991) 173 CLR 167, 189-190 [**Annex 21**], citing *Re Ranger Uranium Mines Pty Ltd*; *Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656, 666 [**Annex 22**].

[393] *Attorney-General (Commonwealth) v. Alinta Ltd* (2008) 233 CLR 542, [158]-[159], [173] [**Annex 23**].

[394] *Grollo v. Palmer* (1995) 184 CLR 348, 360 [**Annex 25**]. In *Love v. Attorney-General (NSW)*, the High Court of Australia held that the power conferred by a State law on the Supreme Court of New South Wales to issue a warrant authorising the use of a listening device was an administrative not a judicial power. Nor was the act of exercising the power a judicial act in the sense of an adjudication to determine the rights of parties: *Love v. Attorney-General (NSW)* (1990) 169 CLR 307, 320-322 [**Annex 26**].

[395] *Grollo v. Palmer* (1995) 184 CLR 348, 359-360 [**Annex 25**].

[396] Irish Law Reform Commission, *Search Warrants and Bench Warrants* (2009), [4.16] (accessed at <http://www.lawreform.ie/_fileupload/consultation%20papers/cpSearchWarrantsand BenchWarrants.pdf> on 20 July 2014). The *Criminal Justice (Search Warrants) Act 2012* (Ireland) (accessed at <http://www.irishstatutebook.ie/2012/en/act/pub/0033/sec0001.html#sec1> on 20 July 2014) authorises certain members of the Garda Síochána (the Irish police force) to issue search warrants, provided they are independent of the investigation concerning the offence to

the Canadian case of *Minister of National Revenue v. Coopers and Lybrand*, the court found that the Minister's powers to authorise the entry and search of buildings were investigatory, rather than adjudicatory, and should accordingly be considered 'fundamentally administrative'.[397]

5.117. The non-judicial nature of search warrants and other similar classes of warrants is also recognised in the domestic laws of a number of other States, which grant members of the executive government or other non-judicial office holders the power to issue a warrant for the search of premises or the interception of telecommunications. For example, under the *Code de la sécurité intérieure* (France), the Prime Minister can issue a written authorisation (akin to a warrant) allowing the interception of telecommunications for a range of purposes including national security and the prevention of terrorism. The authorisation is given based on a request from the Minister for Defence, the Interior Minister or the Minister for Customs (or their delegates).[398] In Switzerland, a search warrant may be issued by a limited number of designated public servants.[399] There is no requirement that such persons be judicial. In the United Kingdom, the *Regulation of Investigatory Powers Act 2000* provides that interception warrants are to be

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which the warrant relates. In *Bucnys v. Ministry of Justice* [2013] UKSC 71, the United Kingdom Supreme Court considered whether a Ministry of Justice or other non-judicial body could be considered a 'judicial authority' for the purposes of the Council Framework Decision 2002/584/JHA regarding the issue of a European arrest warrant. The court in that case found that a Ministry of Justice could only be regarded as a judicial authority if it was acting on the request of a court, or a person or body capable of being properly regarded as a judicial authority. The Ministry of Justice of a foreign State acting of its own motion, or at the request of a non-judicial authority, could not be regarded as a judicial authority for the purposes of the Framework Decision (at [66]).

[397] *Minister of National Revenue v. Coopers and Lybrand* [1979] 1 SCR 495, 507.

[398] *Code de la sécurité intérieure* (France), Article L242-1 (accessed at <http://www.legifrance.gouv.fr/affichCode.do;jsessionid=183CC8F37AD10FB8273C8589B2325AF7.tpdjo09v_2?idSectionTA=LEGISCTA000025508244&cidTexte=LEGITEXT000025503132&dateTexte=20120618> on 20 July 2014).

[399] *Loi fédérale sur le droit pénal administratif du 22 mars 1974* (Switzerland), Article 48(3) (accessed at <http://www.admin.ch/opc/fr/classified-compilation/19740066/201305010000/313.0.pdf> on 20 July 2014).

issued by the Secretary of State.[400] Finally, the *New Zealand Security Intelligence Service Act 1969* provides that the Minister responsible for the New Zealand Security Intelligence Service and the Commissioner of Security Warrants may jointly issue a warrant, authorising the seizure of communications or documents.[401]

5.118. Timor-Leste cites the Court's decision in the *Arrest Warrant* case as evidence that the 'mere issue' of a warrant constitutes a judicial action and a violation of immunity.[402] However, the Court's reasoning in the *Arrest Warrant* case can be distinguished on this point, as it concerned the breach of inviolability enjoyed by a serving Foreign Minister under international law.[403] Such inviolability confers upon the relevant subject protection from all forms of jurisdiction in the forum State, including non-judicial forms of jurisdiction. As such, the Court's decision in the *Arrest Warrant* case was not reliant on a determination of the judicial character of the issuance of the warrant. There is no general inviolability with regard to State property, and the *Arrest Warrant* case is quite different from the current case before the Court. Further, the Court in the *Arrest Warrant* case gave due consideration to the 'nature and purpose' of the warrant in question, including the fact that the warrant had been issued by the judicial authorities of Belgium.[404] In this case, no judicial authority in Australia was involved in the issuing or execution of the search warrant the subject of the dispute.

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[400] *Regulation of Investigatory Powers Act 2000* (United Kingdom), s 7(1) (accessed at <http://www.legislation.gov.uk/ukpga/2000/23/pdfs/ukpga_20000023_en.pdf> on 20 July 2014).

[401] *New Zealand Security Intelligence Service Act 1969*, s 4A (accessed at <http://www.legislation.govt.nz/act/public/1969/0024/latest/whole.html#DLM391815> on 20 July 2014).

[402] Timor-Leste, Memorial, [5.42].

[403] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, *Judgment*, I.C.J. Reports 2002, 3 at [70].

[404] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, *Judgment*, I.C.J. Reports 2002, 3 at [70].

5.119. The Attorney-General, in exercising powers under section 25 of the ASIO Act, has not exercised judicial or quasi-judicial functions under Australia's legal and constitutional framework. The mere act of issuing a warrant does not constitute the exercise of judicial or quasi-judicial functions. As Judge *ad hoc* Callinan observed in his dissenting opinion, the Attorney-General:

> is no more exercising a judicial power or quasi-judicial power in satisfying himself that a search warrant should be issued than is a police officer or a medical officer in requiring or taking a blood or other sample from the person of a criminal suspect, an intrusive requirement routinely enforced in countries all over the world.[405]

5.120. For these reasons, in the absence of a 'proceeding before a court' in the forum State, the law of State immunity does not apply. Timor-Leste has not been impleaded, either directly or indirectly, in a proceeding before a court, and as a result, Timor-Leste's claims with regard to State immunity must be dismissed.

C. EVEN IF SUCH PROCEEDING DID EXIST, THAT PROCEEDING WOULD BE CRIMINAL AND WOULD NOT ATTRACT IMMUNITY

5.121. Even if there was a proceeding, it would properly be categorised as criminal in character and would not be brought against Timor-Leste or its organs or agents. On this point, Timor-Leste has not provided any legal authority regarding the scope of immunity for State property in criminal proceedings. Instead, Timor-Leste extensively cites the 2004 Convention and various domestic statutes that expressly do not cover criminal proceedings.

5.122. The clear intention of the UN members voting for the adoption of the 2004 Convention was that its provisions would not cover criminal proceedings.[406]

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[405] Order on the Request for the Indication of Provisional Measures, *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, 3 March 2014, Dissenting Opinion of Judge *ad hoc* Callinan, [29].

[406] Nothing in the 2004 Convention itself clarifies the intention to restrict its provisions to civil proceedings though the Commentary states: 'Although the draft articles do not define the term "proceeding", it should be understood that they do not cover criminal proceedings' (see Report of the International Law Commission on the work of its forty-third session, *Yearbook of the*

Without exception, the legislation in countries with State immunity statutes excludes criminal proceedings from the application of those statutes.[407] There is thus a clear distinction both at international and domestic law between civil and criminal proceedings. Timor-Leste claims that 'customary law on the immunity of the State and its property has developed so as to allow for exceptions only in civil proceedings'.[408] Further, Timor-Leste claims that:

> in relation to criminal (and any other non-civil) proceedings, customary international law dictates the absolute inviolability and immunity of a State and its property from domestic jurisdiction, whatever its nature, whenever the customary exceptions are not applicable.[409]

However, Timor-Leste does not provide any support for this assertion, which has been questioned.[410]

International Law Commission 1991 Volume II Part 2, A/CN.4/SER.4/1991/Add.1 (Part 2), Draft Article 2 Commentary (2), 14). UN General Assembly Resolution 59/38 expressly states that the General Assembly 'agrees with the general understanding reached in the Ad Hoc Committee that the 2004 Convention on Jurisdictional Immunities of States and their Property does not cover criminal proceedings' (*UN General Assembly Resolution 59/38*, 'United Nations Convention on Jurisdictional Immunities of States and Their Property', A/RES/59/38, 2 December 2004). This is in accordance with a recommendation of the Ad Hoc Committee expressly mentioned in Mr Hafner's statement in the Sixth Committee when introducing the report of the Ad Hoc Committee and which itself is referred to in the Resolution. (See Summary Record of the 13th meeting of the Sixth Committee, New York, 25 October 2004, A/C.6/59/SR.13, [32]).

[407] The *State Immunity Act 1978* (United Kingdom) is expressly stated not to apply to criminal proceedings (s 16(4)). Similar provisions exist in the *State Immunity Act 1979* (Singapore), s 19(2)(b); the *State Immunity Ordinance 1981* (Pakistan), s 17(2)(b), in A Dickinson, R Lindsay and J Loonam, *State Immunity: Selected Materials and Commentary* (Oxford University Press, 2004), 496-503; the *State Immunity Act 1982* (Canada), s 18 (this Act does not apply to criminal proceedings or proceedings in the nature of criminal proceedings). The *Foreign States Immunities Act 1985* (Cth), s 3(1) defines a proceeding as not including 'a prosecution for an offence or an appeal or other proceeding in the nature of an appeal in relation to such a proceeding' [**Annex 46**]. The *Foreign Sovereign Immunities Act 1976*, 28 United States Code (United States of America), s 1330(a) expressly limits jurisdiction to 'any nonjury civil action'.

[408] Timor-Leste, Memorial, [5.21].

[409] Timor-Leste, Memorial, [5.28].

[410] In this regard, see R Higgins, *Themes & Theories: Selected Essays, Speeches, and Writings in International Law* (Oxford University Press 2009), 327. Higgins states that 'there remains uncertainty as to whether States are indeed obliged to grant the same immunities when infringements of criminal law are concerned'.

5.123. There is so far no practice of holding foreign States criminally liable in the courts of a forum State. In the *Jurisdictional Immunities* case, the Court cited the English case of *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia*, in which Lord Bingham held that:

> A state can only act through servants and agents; their official acts are the acts of the state; and the state's immunity in respect of them is fundamental to the principle of state immunity. This error [of the Court of Appeal] had the effect that while the Kingdom was held to be immune, and the Ministry of Interior, as a department of the government, was held to be immune, the Minister of the Interior (the fourth defendant in the second action) was not, a very striking anomaly.
>
> […]
>
> *A state is not criminally responsible in international or English Law, and therefore cannot be directly impleaded in criminal proceedings*.[411] (emphasis added)

5.124. But Australia does not seek to hold Timor-Leste (or any Timorese officials) criminally liable before Australian domestic courts. That is in itself a sufficient answer on this point, without the Court having to inquire further. The action taken by Australia does not implead Timor-Leste, or Timor-Leste's officials, in a criminal case.[412]

5.125. With regard to the immunity of State property from criminal proceedings, Timor-Leste has not provided any legal authority for the proposition that State

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[411] *Jones v. Ministry of the Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* [2006] UKHL 26, [30] – [31].

[412] Australia notes that Timor-Leste materially misquotes Australia at paragraph 5.24 of its Memorial. Timor-Leste stated that 'Counsel for Australia then laid down the prospective procedure that would follow the investigation already under way: "Firstly, an Australian court would inspect the documents and decided whether the crime/fraud exception applies to any privilege claim"'. However, Mr Gleeson did not make the statement quoted by Timor-Leste, but rather stated that '[f]irstly, an Australian court could *not* inspect the documents' (emphasis added) (*Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Corrected Records CR 2014/2, 21 January 2014, [33] (Gleeson)). Further, Timor-Leste has misrepresented the import of this statement. The Solicitor-General was not laying down the 'prospective procedure' of an ongoing investigation, but rather was making the point that Timor-Leste's request to the Court at provisional measures would prevent Australian courts from discharging their normal function of testing a claim of legal professional privilege under domestic law (*Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Corrected Record CR 2014/2, 21 January 2014, [33] (Gleeson)).

property enjoys immunity from use for evidentiary purposes in such proceedings nor for the proposition that (if such immunity exists) it would be absolute. The proposition that a State is entitled to require unconditionally the immediate return of property, located in a forum State, removed from private premises in accordance with the law of the forum State, and which constitutes material evidence in actual or apprehended criminal proceedings in that State, is one for which there is no authority.

5.126. With respect to the specific category of diplomatic property, which is covered by a specific regime under international law, State practice is conflicting. In the Canadian case of *Rose v. The King*, the court held that the general inviolability of mission documents was subject to an exception in the case of documents which put the safety of the State to which the mission was accredited in peril. In that case, once seized by the Canadian State, the documents lost the privilege of immunity and were subsequently tendered as evidence against a Canadian national.[413] This case was distinguished (but not rejected) in the British case of *Fayed v. Al-Tajir*.[414]

5.127. While these examples are not directly applicable in this case (since the Materials are not diplomatic property and do not attract the protection of that regime), they are nonetheless illuminating. The fact that exceptions have been contemplated to the inviolability of diplomatic documents (which are subject to more extensive protections than any other form of State property) suggests that the immunity of other types of State property tendered as evidence in criminal proceedings is doubtful as a matter of customary international law.

5.128. Moreover, there must be a distinction between foreign State property being the *subject* of criminal proceedings (for example, criminal confiscation) and

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[413] *Rose v. The King* [1947] 88 CCC 114, 147 (per Bissonette J) [**Annex 27**].

[414] *Fayed v. Al-Tajir* [1988] 1 QB 712 [**Annex 28**].

foreign State property as *evidence* in criminal proceedings. The use of documents as evidence in a criminal proceeding does not seek to subject that property to the exercise of jurisdiction by a court. The implication of State property being admissible as evidence is not that the court would issue an order or measure of constraint against that property. In that regard, the use of property as evidence can again be distinguished from the issue of jurisdictional immunity.

D. TIMOR-LESTE'S CLAIMS WITH REGARD TO INVIOLABILITY AND IMMUNITY ARE UNFOUNDED AND SHOULD BE DISMISSED

5.129. For these reasons, the law of State immunity is inapplicable in this case, in particular due to the absence of any exercise of jurisdiction by an Australian court in a proceeding in which Timor-Leste or one of its organs or officials is a party or which indirectly impleads Timor-Leste. Nor is there any international law principle providing inviolability over documents created in or brought within the forum State, lawfully seized under its law and held as relevant evidence of serious crimes apparently committed there by private parties. Australia respectfully requests that the Court dismiss those claims of Timor-Leste which are founded on the law of immunity or inviolability.

Chapter 6 – Conclusion

6.1. In this Chapter, Australia will conclude its submissions with some final observations.

6.2. Section I summarises Australia's key arguments. Section II submits that, even if the Court considers that certain of Timor-Leste's claims can be made out, the remedies sought by Timor-Leste are unnecessary and disproportionate and should not be ordered.

Section I. Australia's key arguments

6.3. For the reasons given in this Counter-Memorial, the actions of ASIO were a legitimate and lawful exercise of Australia's territorial sovereignty, undertaken for a proper purpose and accompanied by steps to mitigate the risk of harm to any potential rights of Timor-Leste. As a matter of law, any exceptions to the exercise of such territorial sovereignty must have a proper legal basis, and their scope must be appropriately limited. As a matter of fact, any such exceptions must be properly shown to apply in the circumstances of the case.

6.4. In Australia's submission, the rights claimed by Timor-Leste in these proceedings are not established at international law, and they do not, in any case, apply in these circumstances as a matter of fact.

6.5. First, Timor-Leste claims an unqualified right of confidentiality (which it conflates with a right of legal professional privilege), with a broad scope which would preclude Australia from exercising jurisdiction over Australian nationals in respect of acts committed within Australia's territory – acts which are criminal under the law of all, or almost all, States. Timor-Leste seeks to apply this purported right with no exceptions, which would allow it (and any other State) to use such a right for an improper purpose, including as a shield for the commission of criminal offences.

6.6. In Australia's submission, there is no unqualified right of confidentiality or legal professional privilege such as that proposed by Timor-Leste, and no basis for asserting that either right is a general principle of law. But even if such an unprovenanced right did exist, its scope must necessarily be limited to appropriately recognise Australia's territorial jurisdiction, in particular, in a way which would prevent it being used for an improper purpose. Moreover, even if the scope of such a right was so broad as to protect the actions of Mr Collaery from the exercise of Australia's jurisdiction in this case, the measures put in place by Australia are clearly sufficient to prevent any harm to Timor-Leste in the Arbitration. Further, and in any case, Timor-Leste has waived any right of confidentiality over certain Materials by its public disclosures (through Mr Collaery) of confidential national security information.

6.7. Second, Timor-Leste makes a largely unsupported claim to ownership over the Materials, and asserts that they are protected by a general principle of inviolability and immunity of foreign State property with apparently unlimited application. In contrast to the purported rights of confidentiality and legal professional privilege (the existence and scope of which have not been established), the principles of inviolability and immunity are well-established at international law, but their scope is clearly defined and limited. Importantly, they are separate and distinct principles, with separate and distinct application. They have no application in the circumstances of this case.

6.8. In Australia's submission, the principle of inviolability applies with respect to specific, limited categories of persons and property, none of which are remotely in issue in this case. Similarly, the principle of foreign State immunity only applies with respect to proceedings before a court or equivalent judicial instance in which the foreign State is directly or indirectly impleaded; it operates as a procedural bar to protect foreign States from the jurisdiction of forum States in certain circumstances. There is no such proceeding in this case, nor any other

relevant process in which immunity could operate to provide a procedural bar. To accept Timor-Leste's claims in this respect would be to create a new, expansive and unprecedented category of foreign State immunity. It would restrict the capacity of forum States to exercise the rights inherent in sovereignty to an unacceptable extent, precluding them from executing warrants over private premises located on their own territory, with respect to their own nationals whose actions posed risks to the safety of their own citizens. These claims must also fail.

Section II. Response to remedies sought by Timor-Leste

6.9. Timor-Leste has failed to establish that the actions of ASIO on 3 December 2013 violated its rights under international law. In the absence of an internationally wrongful act, Timor-Leste is not entitled to the relief which it requests in its Final Submissions. But in any case, the relief sought by Timor-Leste is unnecessary and disproportionate to its claims.

A. AN ORDER FOR THE RETURN OR DESTRUCTION OF THE MATERIALS IS UNWARRANTED

6.10. Setting aside Timor-Leste's baseless accusation that Australia has passed the Materials to others, Timor-Leste seeks restitution in the form of the return of the Materials and the destruction beyond recovery of all copies thereof.[415]

6.11. The return of the Materials and their destruction is not necessary to restore Timor-Leste to the position it was in before the execution of the ASIO warrant, since there has been no change to Timor-Leste's position as a consequence of the acts of ASIO:

(1) Timor-Leste retains access to the information contained in the Materials. The vast majority of the Materials are unlikely to be unique copies, and it is very likely that duplicates containing the same

[415] Timor-Leste, Memorial, Final Submissions, (3).

information are held (in either electronic or hard copy form) by Timor-Leste, Mr Collaery, or other Counsel representing Timor-Leste (as acknowledged by Counsel for Timor-Leste at the First Procedural Meeting),[416] and

(2) Timor-Leste's position in the Arbitration is not prejudiced in any way. In accordance with the undertakings given by the Attorney-General of Australia, the Materials have not been and will not be made available to anyone involved in conducting the Arbitration (or these proceedings) on behalf of Australia.

6.12. It is therefore evident that with respect to its current relations with Australia, Timor-Leste remains in the position which it was in prior to 3 December 2013: the content of the Materials remains available to Timor-Leste and its legal advisers, but is not available to Australia for the purposes of the Arbitration.

6.13. Moreover, Timor-Leste's position with respect to any hypothetical future negotiations with Australia has not been prejudiced in any way. In accordance with the Attorney-General's undertaking, the Materials will not be made available to any part of the Australian Government for any purpose other than national security purposes (which would, in effect, consist of investigation and potential prosecution of the unlawful disclosures as discussed in Chapter 3 of this Counter-Memorial) until final judgment in this proceeding, or further or earlier order of the Court.

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[416] Permanent Court of Arbitration, 'Transcript of First Procedural Meeting between Timor-Leste and Australia at The Hague', *Arbitration under the Timor Sea Treaty*, 5 December 2013, 39 (lines 14-20) and 42 (lines 8-11) (Lowe) [**Annex 85**].

6.14. There is thus no need for the Materials to be returned or destroyed to effect restitution since, in effect, Timor-Leste remains in 'the situation which would, in all probability, have existed if that act had not been committed'.[417]

6.15. Further, Timor-Leste has conceded that it has no claims to ownership (and therefore no inviolability or immunity) in respect of some of the Materials. In addition, despite Timor-Leste's broadly-framed assertions regarding confidentiality and legal professional privilege, Timor-Leste has admitted that at least some of the Materials were generated for other clients of Mr Collaery, or are not otherwise subject to such a claim by Timor-Leste. Accordingly, there are a number of items over which Timor-Leste has at best doubtful and indirect claims and Australia respectfully submits that no order for return to Timor-Leste should be made in respect of these items.

6.16. Finally, Australia respectfully notes that any order for return of the Materials should be framed so as to provide for their return to Mr Collaery (from whose premises they were removed, and to whose other clients some of the Materials also relate), and not to Timor-Leste.

B. THE COURT SHOULD ADHERE TO THE NORMAL RULE CONCERNING COSTS

6.17. In Australia's submission, costs should not be awarded in favour of Timor-Leste. The clear presumption under Article 64 of the Statute of the Court is that each party shall bear its own costs. The Court has never in its history awarded costs, despite costs having been requested by parties in various cases. Nor did the Permanent Court ever award costs. The established practice is that parties to proceedings before the Court bear their own costs, and that persuasive reasons must exist before the Court will make an order departing from this

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[417] *Case concerning the factory at Chorzow (Germany v. Poland)*, *Judgement*, P.C.I.J. Ser. A, No. 17, 47.

practice. Timor-Leste has not provided any reasons in support of its request that the Court should depart from this established practice.

Submissions

For the reasons given in this Counter-Memorial, and reserving the right to supplement or amend the present submissions, Australia requests the Court adjudge and declare that the claims brought against Australia by Timor-Leste and the consequential orders sought by Timor-Leste be dismissed.



J. D. Reid

Agent of Australia

21 July 2014

Certification

I certify that the Annexes are true copies of the documents referred to and that the translations provided are accurate.



J. D. Reid

Agent of Australia

21 July 2014

Appendix – The Arbitration and the Timor Sea treaty regime

1. This Appendix responds to the remarks in Timor-Leste's Memorial regarding the Arbitration and the Timor Sea treaty regime in order to correct a number of errors and omissions. In particular:

(1) the details of these matters are not relevant to the dispute before the Court

(2) Timor-Leste's remarks about these matters are selective and incomplete, and

(3) Timor-Leste repeats as fact allegations which have not been proved and which are yet to be tested before the Arbitral Tribunal.

Section I. The details of the Arbitration are not relevant to this case

2. Although Timor-Leste states that the Arbitration is 'quite separate from the present case',[418] it devotes considerable time and effort to repeating before this Court the arguments which it makes in the Arbitration. In particular, in Chapter III of its Memorial, Timor-Leste repeats large parts of the Statement of Claim which it has submitted in the Arbitration (and goes so far as to annex almost the entire Statement of Claim to the Memorial).[419] Timor-Leste does this because, it asserts, the Arbitration 'forms part of the background'[420] to this case and because some of the Materials inspected and retained by ASIO 'were prepared by Timor-Leste's legal Counsel for the [Timor Sea Treaty] Arbitration'.[421]

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[418] Timor-Leste, Memorial, [1.8].

[419] Timor-Leste, Memorial, [3.4] and Annex 5.

[420] Timor-Leste, Memorial, [3.1].

[421] Timor-Leste, Memorial, [3.8].

3. The details of the Arbitration and the submissions of the Parties in the Arbitration are irrelevant and should not be taken into account by the Court. First, the details of Timor-Leste's pleadings in the Arbitration are unable to establish the content or purpose of the Materials or shed any further light on the issues in dispute between the Parties in these proceedings. Second, Timor-Leste's pleadings state the case of only one of the Parties and, as such, cannot be accepted as an objective representation of the facts. Finally, Australia submits that Timor-Leste's Statement of Claim, is, and should remain, confidential to the Parties to the case (noting that the Arbitral Tribunal will be making final orders on this following the conclusion of the Arbitration).

4. As reflected in Chapter 3 of this Counter-Memorial, there are only two key facts about the Arbitration which are relevant to this case:

(1) there is currently an Arbitration between Australia and Timor-Leste, and

(2) Mr Collaery was at one point engaged by Timor-Leste to assist with legal matters in the Arbitration, although he is apparently no longer so engaged.

5. For completeness, Australia will provide some brief, additional information in response to Timor-Leste's selective and incomplete submissions on the Arbitration.

6. On 23 April 2013, Timor-Leste initiated Arbitration under Article 23 of the Timor Sea Treaty,[422] in which it argues that the *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea 2006* ('CMATS') is invalid. Australia submitted a Response to Timor-Leste's Notice of Arbitration on 19 June 2013 and continues to actively

[422] Timor-Leste, 'Notice of Arbitration', *Arbitration under the Timor Sea Treaty*, 23 April 2013 [**Annex 92**].

and constructively engage in the Arbitration. Timor-Leste filed its Statement of Claim on 18 February 2014 and Australia filed its Statement of Defence on 19 May 2014. Timor-Leste filed its Reply on 18 July 2014, and Australia will file its Rejoinder on 18 August 2014. The Arbitral Tribunal will hear oral submissions commencing on 27 September 2014. The final decision of the Arbitral Tribunal will be delivered in due course.

7. In the Arbitration, Timor-Leste contends that CMATS is invalid because of alleged spying by Australia during the negotiations on that treaty, and relies on the purported evidence of 'K'. Australia does not agree that CMATS is invalid for reasons of both fact and law. As a long-standing matter of policy, Australia will neither confirm nor deny specific allegations about intelligence matters. This is consistent with the practice of other States. In the Arbitration, Australia has challenged the purported evidence of 'K' on several grounds.[423] The Arbitral Tribunal is yet to reach its final decision in the Arbitration, including with respect to the admissibility of the purported evidence of 'K'.

8. As such, Timor-Leste's allegations with respect to the Arbitration should be disregarded in their entirety by this Court. This applies in particular to the purported evidence of 'K', which is indirect, unsubstantiated and should not be accepted as fact.

Section II. Timor-Leste's submissions on the Timor Sea treaty regime are misleading and need to be corrected

9. The Timor Sea treaty regime represents the outcome of a series of negotiations between Australia and Timor-Leste in which both States made constructive compromises to achieve mutually satisfactory outcomes consistent with international law. Timor-Leste negotiated and freely entered into these

[423] Australia, 'Application for an Order Disallowing the Giving of Potential Evidence', *Arbitration under the Timor Sea Treaty*, 31 January 2014 [**Annex 93**].

treaties, consistent with its rights at international law to enter into binding international commitments (a core aspect of its sovereignty).

A. OUTLINE OF THE TIMOR SEA TREATY REGIME

10. Australia and Timor-Leste have not delimited the maritime zones in the Timor Sea between the two States on a permanent basis. As a result of extended negotiations – throughout which Timor-Leste had the benefit of expert advice – Australia and Timor-Leste are party to three bilateral treaties which, consistent with the *United Nations Convention on the Law of the Sea 1982* ('UNCLOS'),[424] establish and regulate the joint development of the petroleum resources of the Timor Sea. These treaties are the *Timor Sea Treaty between the Government of East Timor and the Government of Australia 2002* ('Timor Sea Treaty')[425], the *Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise and Troubadour Fields 2003* ('IUA')[426] and CMATS. They are 'provisional arrangements' within the meaning of Article 83(3) of UNCLOS.[427]

11. The Timor Sea Treaty establishes a joint development zone in the Timor Sea. The IUA creates the framework for the integrated development of the Sunrise and Troubadour gas fields (known collectively as the Greater Sunrise gas fields), which extend beyond the joint development zone into an area of seabed subject to exclusive Australian jurisdiction, thus requiring unitisation. CMATS

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[424] *United Nations Convention on the Law of the Sea*, Montego Bay, 10 December 1982, 1835 UNTS 3 (entered into force 16 November 1994).

[425] *Timor Sea Treaty between the Government of East Timor and the Government of Australia*, Dili, 20 May 2002, 2258 UNTS 3, (entered into force 2 April 2003).

[426] *Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise and Troubadour Fields*, Dili, 6 March 2003, 2483 UNTS 317 (entered into force 23 February 2007).

[427] *United Nations Convention on the Law of the Sea*, Montego Bay, 10 December 1982, 1835 UNTS 3 (entered into force 16 November 1994), Articles 74(3) and 83(3).

substantially increases Timor-Leste's share of revenue from the Greater Sunrise gas fields, extends the duration of the Timor Sea Treaty and applies a temporary moratorium to the pursuit of maritime claims. Collectively the treaties establish a practical solution which provides the certainty necessary to enable the petroleum resources of the Timor Sea to be developed cooperatively and expeditiously for the benefit of both States at the earliest possible time.

12. A short summary of the negotiations leading to the adoption of each of these treaties is set out below, to provide a more accurate picture of the negotiation of the treaties comprising the Timor Sea treaty regime.

B. THE 2002 TIMOR SEA TREATY

13. Following Timor-Leste's separation from Indonesia in 1999, Australia entered into treaty arrangements with the United Nations Transitional Administration in East Timor ('UNTAET') to allow Australia and Timor-Leste to benefit from the continuation of petroleum activities in the Timor Sea. [428] Senior representatives of Timor-Leste participated in negotiations between Australia and UNTAET in relation to the Timor Sea.

14. Australia also commenced negotiations regarding the Timor Sea with representatives of Timor-Leste, including Mari Alkatiri and José Ramos-Horta, who became Prime Minister and Foreign Minister, respectively, on Timor-Leste's independence. Timor-Leste's representatives received extensive advice from experts throughout these and subsequent negotiations.[429] Timor-Leste's conduct

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[428] *Exchange of Notes constituting an Agreement between the Government of Australia and the United Nations Transitional Administration in East Timor (UNTAET) concerning the continued Operation of the Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia of 11 December 1989*, Dili, 10 February 2000, [2000] ATS 9 (entered into force 10 February 2000 with effect from 25 October 1999).

[429] Timor-Leste's delegation and advisers included: Dr Nuno Antunes – then a Portuguese Navy lawyer whose University of Durham PhD thesis and MA focused on maritime delimitation;

of the negotiations was subject to the oversight of Xanana Gusmão, Timor-Leste's former resistance leader, subsequently the first President of Timor-Leste and current Prime Minister.

15. The negotiations led to the *Memorandum of Understanding of Timor Sea Arrangement* ('Timor Sea Arrangement'), which was signed on 5 July 2001,[430] and was specifically designed to be suitable for adoption as a treaty upon Timor-Leste's formal independence. The Timor Sea Treaty itself, which is almost identical in terms to the Timor Sea Arrangement, was signed in Dili on 20 May 2002, the date of Timor-Leste's independence. Australia and Timor-Leste also signed an Exchange of Notes to give interim effect to the Timor Sea Treaty pending its entry into force.[431]

16. Consistent with Articles 74(3) and 83(3) of UNCLOS, the Timor Sea Treaty is a provisional arrangement of a practical nature which does not prejudice the final delimitation of maritime boundaries between Australia and Timor-Leste.[432] It establishes a joint development zone, the Joint Petroleum

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Niny Borges – an Australian-trained Timorese lawyer who had previously worked for the Timor Gap Joint Authority and the Timor Sea Designated Authority; Paul Cleary – an experienced Australian journalist; Kathryn Khamsi – a US lawyer, who completed her studies at Harvard University and McGill University; Dr Jonathon Morrow – an Australian lawyer with a PhD from Monash University; Philip Daniel – a British resource economist with several decades of experience advising States on resource issues and who completed post-graduate studies at Oxford University and Cambridge University; Dato Dominic Puthucheary – an experienced Malaysian constitutional lawyer; Einar Risa – a Norwegian oil industry expert, who had several decades of experience working for the Norwegian Foreign Ministry and the Norwegian national oil company, Statoil; Alistair Watson – an expert in taxation and fiscal affairs; and Geir Ytreland – a Norwegian geologist with several decades of experience working on oil and gas exploration and production for companies including Unocal and Saudi Aramco.

[430] *Memorandum of Understanding of Timor Sea Arrangement*, Dili, 5 July 2001 (accessed at <http://www.austlii.edu.au/au/other/dfat/special/MOUTSA.html> on 20 July 2014).

[431] *Exchange of Notes Constituting an Agreement between the Government of Australia and the Government of the Democratic Republic of East Timor concerning Arrangements for Exploration and Exploitation of Petroleum in an Area of the Timor Sea between Australia and East Timor*, Dili, 20 May 2002, [2002] ATS 11 (entered into force 20 May 2002).

[432] *Timor Sea Treaty between the Government of East Timor and the Government of Australia*, Dili, 20 May 2002, 2258 UNTS 3 (entered into force 2 April 2003), Article 2.

Development Area ('JPDA'), in a defined area of the Timor Sea[433] and provides that Timor-Leste has title to 90% of the petroleum produced in the JPDA and Australia to 10%.[434] Provisions of the Timor Sea Treaty govern legal, administrative, fiscal and other matters.

17. The Timor Sea Treaty entered into force on 2 April 2003 but, in accordance with Article 25(b), it was taken to have effect and apply from the date of signature, on 20 May 2002.

18. In its Memorial, Timor-Leste makes a baseless and irrelevant assertion that 'Australia threatened to withhold ratification of the [Timor Sea Treaty] notwithstanding the fact that the royalties provided for in it were needed by the impoverished Timor-Leste'.[435] Timor-Leste also alleges that by withholding ratification, the Australian Prime Minister 'coerce[d] a poor and weak neighbour, through blackmail'.[436] These allegations are without foundation. No such threats were made, the ratification of the Timor Sea Treaty was not delayed, and no royalties were denied to Timor-Leste. Royalties and other revenue from the JPDA were flowing to Timor-Leste when the Timor Sea Treaty was signed on 20 May 2002 – and continued to flow to Timor-Leste after that time.[437]

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[433] See Map 1a (line): Consolidated Maritime Arrangements between Australia, Indonesia and Timor-Leste [**Annex 94**]; Map 1b (image): Consolidated Maritime Arrangements between Australia, Indonesia and Timor-Leste [**Annex 95**].

[434] *Timor Sea Treaty between the Government of East Timor and the Government of Australia*, Dili, 20 May 2002, 2258 UNTS 3 (entered into force 2 April 2003), Article 4(a); Map 2: Joint Petroleum Development Area (JPDA) under the *Timor Sea Treaty (2002)* [**Annex 96**].

[435] Timor-Leste, Memorial, [2.28].

[436] See Timor-Leste, Memorial, [2.28] footnote 34, citing Senator the Hon. Bob Brown. See Timor-Leste, Memorial, Annex 2.

[437] This was pursuant to the *Exchange of Notes Constituting an Agreement between the Government of Australia and the Government of the Democratic Republic of East Timor concerning Arrangements for Exploration and Exploitation of Petroleum in an Area of the Timor Sea between Australia and East Timor*, Dili, 20 May 2002, [2002] ATS 11 (entered into force 20 May 2002).

Arrangements put in place between the Parties[438] meant that revenue had been flowing to Timor-Leste since October 2000.[439] This included royalties and tax revenue, as Timor-Leste was permitted to apply its taxation laws to 90% of petroleum produced in the JPDA from 20 May 2002, although the Timor Sea Treaty was yet to enter into force.[440]

19. Further, to ensure that the Timor Sea Treaty could be given effect from its signature on 20 May 2002,[441] and as agreed by the Parties in the Exchange of Notes,[442] a portion of revenue due to Timor-Leste under the Timor Sea Treaty was placed in an escrow account and paid to Timor-Leste once the Timor Sea Treaty entered into force. This meant that Timor-Leste received the full amount of

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[438] *Exchange of Notes constituting an Agreement between the Government of Australia and the United Nations Transitional Administration in East Timor (UNTAET) concerning the continued Operation of the Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia of 11 December 1989*, Dili, 10 February 2000 (entered into force 10 February 2000 with effect from 25 October 1999).

[439] United Nations Transitional Administration in East Timor Media Release, 'East Timor receives first royalty payment from oil exploitation in Timor Gap', 24 October 2000 (accessed at <http://www.un.org/en/peacekeeping/missions/past/etimor/news/N241000.htm> on 20 July 2014); 'Table 11. Timor-Leste: Oil/gas Revenues, FY2000/01-FY2004/05', in V Fichera, A Bhundia and Y K Kim, 'Democratic Republic of Timor-Leste: Selected Issues and Statistical Appendix', *International Monetary Fund Country Report No. 05/250*, 31 May 2005, 51 (accessed at <http://www.imf.org/external/pubs/ft/scr/2005/cr05250.pdf> on 20 July 2014).

[440] *Exchange of Notes Constituting an Agreement between the Government of Australia and the Government of the Democratic Republic of East Timor concerning Arrangements for Exploration and Exploitation of Petroleum in an Area of the Timor Sea between Australia and East Timor*, Dili, 20 May 2002, [2002] ATS 11 (entered into force 20 May 2002), [4(a)] and [4(b)].

[441] *Timor Sea Treaty between the Government of East Timor and the Government of Australia*, Dili, 20 May 2002, 2258 UNTS 3 (entered into force 2 April 2003), Article 25(b).

[442] *Exchange of Notes Constituting an Agreement between the Government of Australia and the Government of the Democratic Republic of East Timor concerning Arrangements for Exploration and Exploitation of Petroleum in an Area of the Timor Sea between Australia and East Timor*, Dili, 20 May 2002, [2002] ATS 11 (entered into force 20 May 2002), [4(c)] and [4(d)].

royalties to which it was entitled under the Timor Sea Treaty as from the date of its conclusion (and would have done so even if ratification had been delayed).[443]

20. Based on its selective outline of the initial treaty arrangements, Timor-Leste also suggests that:

> Timor-Leste's exercise of its sovereign rights in relation to the resources of the continental shelf adjacent to its coasts has been frustrated by the refusal of Australia to negotiate a maritime delimitation agreement, compounded by the terms of the series of treaties which Australia made concerning the Timor Sea (first, purportedly with Indonesia; then with the United Nations Transitional Administration in East Timor ("UNTAET"); then – on the very day of its independence – with Timor-Leste itself)…[444]

21. There are four reasons why this particular submission is incorrect and/or misleading:

(1) First, the fact is that the seabed of the Timor Sea is the subject of competing claims by Timor-Leste and Australia. It is misleading for Timor-Leste to refer to 'its sovereign rights' as though they are a matter of fact in the absence of any delimitation.

(2) Second, from the time of Timor-Leste's separation from Indonesia in 1999 until 2006, Australia and Timor-Leste entered into a series of negotiations in good faith in an effort to resolve their competing claims. At no time has Australia refused to negotiate maritime boundaries or any aspect of the Timor Sea regime with Timor-Leste.

(3) Third, Timor-Leste's representatives and advisers were informed and active participants in the negotiation of all of the treaties and arrangements entered into by UNTAET and Timor-Leste. In particular, Australia and Timor-Leste were able to reach agreement on

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[443] *Timor Sea Treaty between the Government of East Timor and the Government of Australia*, Dili, 20 May 2002, 2258 UNTS 3 (entered into force 2 April 2003), Article 25(b).

[444] Timor-Leste, Memorial, [1.7].

a treaty regime which accommodated almost all of the objectives that Timor-Leste communicated to Australia.

(4) Fourth, the treaty regime enables the cooperative exercise of sovereign rights sooner rather than later, so that the resources of the Timor Sea can be developed for the benefit of both States, in a way which is perfectly consistent with the procedures specified in UNCLOS for such situations. The exercise of sovereign rights has not been 'frustrated'.

C. THE INTERNATIONAL UNITISATION AGREEMENT

22. The IUA establishes the framework for the integrated development and exploitation of the Greater Sunrise gas fields as a single entity.[445] These fields are located partly in the JPDA and partly in an area of seabed subject to Australian jurisdiction. Consistent with the apportionment ratio agreed under Article 9 and Annex E of the Timor Sea Treaty, the IUA provides that 79.9% of petroleum production in these fields shall be attributed to Australia.[446] In many respects, the IUA is a product of the Timor Sea Treaty, as explained below.

23. Article 9 of the Timor Sea Treaty creates a specific obligation for Australia and Timor-Leste to 'work expeditiously and in good faith' to reach a further agreement on the development of petroleum reservoirs extending beyond

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[445] *Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise and Troubadour Fields*, Dili, 6 March 2003, 2483 UNTS 317 (entered into force 23 February 2007); Map 3: Unitisation and Apportionment for the Greater Sunrise gas fields under the *Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise and Troubadour Fields (2007)* [**Annex 97**].

[446] *Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise and Troubadour Fields*, Dili, 6 March 2003, 2483 UNTS 317 (entered into force 23 February 2007), Article 7; Map 3: Unitisation and Apportionment for the Greater Sunrise gas fields under the *Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise and Troubadour Fields (2007)* [**Annex 97**].

the JPDA. When negotiating this provision, Australia and Timor-Leste had in mind the Greater Sunrise gas fields, which had been discovered in 1974 and about which the Parties were well-informed.[447] As set out in Annex E of the Timor Sea Treaty, Australia and Timor-Leste specifically agreed to unitise the Greater Sunrise gas fields on the basis that 20.1% would be attributed to the JPDA and 79.9% would be attributed to Australia.[448] It is evident that these provisions of the Timor Sea Treaty led directly to the negotiation of the IUA.

24. When signing the Timor Sea Treaty on 20 May 2002, Australia and Timor-Leste also signed a Memorandum of Understanding which reaffirmed Article 9 and Annex E of the Timor Sea Treaty and committed to concluding an agreement on the arrangements for the unitised exploitation of the Greater Sunrise gas fields by 31 December 2002.[449] Timor-Leste selectively omits any reference in its Memorial to Article 9 and Annex E of the Timor Sea Treaty which is the source of the agreed ratio. Instead, it focuses on the Memorandum of Understanding, and in so doing attempts to show that it was 'coerced' into accepting the apportionment ratio in the IUA.[450] This is false: Timor-Leste and Australia had already settled the apportionment ratio in the Timor Sea Treaty itself. The IUA simply creates the technical framework for the development of the gas fields as a single resource.

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[447] Woodside Petroleum Ltd, *Sunrise LNG* (accessed at <http://www.woodside.com.au/our-business/sunrise/Pages/default.aspx> on 20 July 2014).

[448] See Map 3: Unitisation and Apportionment for the Greater Sunrise gas fields under the *Agreement between the Government of Australia and the Government of the Democratic Republic of Timor-Leste relating to the Unitisation of the Sunrise and Troubadour Fields (2007)* [**Annex 97**].

[449] *Memorandum of Understanding between the Government of Australia and the Government of the Democratic Republic of East Timor Concerning an International Unitisation Agreement for the Greater Sunrise field*, Dili, 20 May 2002 (accessed at <http://www.austlii.edu.au/au/other/dfat/special/etimor/MOU_EastTimor_17_May_02.htm> on 20 July 2014).

[450] Timor-Leste, Memorial, [2.27]-[2.28].

25. Australia and Timor-Leste commenced negotiations of the IUA in July 2002. Negotiations concluded with the adoption and signature of the IUA on 6 March 2003.

26. Consistent with the obligation to 'expeditiously and in good faith' reach agreement on the unitisation of the Greater Sunrise gas fields, Australia took steps to ratify the IUA shortly after signature. As a first step, on 14 May 2003 the IUA was tabled in the Australian Parliament together with a National Interest Analysis, specifying the reasons for Australia to become a party to the IUA and the requirements for its domestic implementation.[451]

27. In contrast, Timor-Leste delayed its ratification as leverage to pressure Australia to negotiate a further, even more favourable deal. Timor-Leste ratified the IUA in February 2007, at the same time as it ratified CMATS and almost four years after signing the IUA.

D. The Treaty on Certain Maritime Arrangements in the Timor Sea

28. In 2003, faced with Timor-Leste's failure to ratify the IUA and a consequent impasse over the cooperative development of the Greater Sunrise gas fields, Australia agreed to enter into further negotiations with Timor-Leste, which ultimately led to the adoption of CMATS. In light of the difficulties and delays the Parties had experienced in resolving the development of the Greater Sunrise gas fields (and Timor-Leste's desire for additional revenue), as set out in its preamble,[452] CMATS was intended to establish a long-term basis for petroleum activities in the area of seabed between Australia and Timor-Leste, which would

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[451] Australian Government, Department of Foreign Affairs and Trade, *National Interest Analysis No. 6 of 2003*, tabled on 14 May 2003 (accessed at <http://www.austlii.edu.au/au/other/dfat/nia/2003/6.html> on 20 July 2014).

[452] *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea*, Sydney, 12 January 2006, 2483 UNTS 359 (entered into force 23 February 2007), Preamble.

benefit both States and would strengthen the friendly relations between them by resolving a contentious issue.

29. CMATS does not fundamentally alter the joint development regime established by the Timor Sea Treaty and IUA. Rather, CMATS incorporates several changes which were actually sought by Timor-Leste, pursued consistently by Timor-Leste throughout the negotiations, and were accommodated by Australia in the spirit of constructive compromise. These changes include:

(1) a 50-year moratorium on maritime boundary claims[453]

(2) an extension in the duration of the Timor Sea Treaty to match that of CMATS (a benefit to Timor-Leste since it extends the period for which Timor-Leste is certain to receive 90% of JPDA revenue),[454] and

(3) an alteration to the division of revenue from the Greater Sunrise gas fields so that the revenue from the entire deposit (including the 79.9% subject to Australia's jurisdiction) is shared equally between Timor-Leste and Australia.[455]

30. In its Memorial, Timor-Leste portrays CMATS as harmful to its interests.[456] Yet, from as early as January 2003 and before the start of the negotiations, it was Timor-Leste which advocated the equal sharing of revenue from Greater Sunrise, the extension of the Timor Sea Treaty and the deferral of

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[453] *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea*, Sydney, 12 January 2006, 2483 UNTS 359 (entered into force 23 February 2007), Article 4.

[454] *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea*, Sydney, 12 January 2006, 2483 UNTS 359 (entered into force 23 February 2007), Article 3.

[455] *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea*, Sydney, 12 January 2006, 2483 UNTS 359 (entered into force 23 February 2007), Article 5(1); See Map 4: Upstream revenue sharing and water column jurisdiction under the *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea (2007)* [**Annex 98**].

[456] Timor-Leste, Memorial, [1.8].

permanent maritime boundary negotiations. Indeed, during the early stage of these negotiations, Australia sought to negotiate permanent maritime boundaries, but this was rejected by Timor-Leste. Throughout the negotiations Timor-Leste repeated these objectives to Australia diplomatically, during negotiation rounds and publicly. It is evident that CMATS incorporates almost all of Timor-Leste's objectives for those negotiations. It is surprising that despite the fact that Timor-Leste consistently pursued the key elements of CMATS, it now claims it never wanted the treaty and that it was somehow forced upon Timor-Leste.

31. A particular focus of Timor-Leste's submissions is the potential for some of the petroleum resources of the Timor Sea, particularly the Greater Sunrise gas fields, to be exhausted while the treaty regime is in force. In support of these submissions, Timor-Leste has annexed to its Memorial a report by Gaffney, Cline and Associates which relies on a large number of contestable assumptions and which Australia has challenged in the Arbitration. These submissions should not be accepted as fact. Australia will show before the Arbitral Tribunal that:

(1) the extension of the Timor Sea Treaty was one of Timor-Leste's objectives, which it pursued throughout the negotiation of CMATS, and which was agreed to by Australia

(2) Timor-Leste and its expert advisers were aware of the estimated petroleum resources of the Greater Sunrise gas fields and actively engaged in the negotiation of the moratorium with the intention of ensuring CMATS applied for a sufficient period of time, to allow for the full exploitation and exhaustion of the Greater Sunrise petroleum resources

(3) Timor-Leste's assertion that the fields will have been exhausted by 2056 was well known by both Parties at the time of the negotiations

and the 50 year deferral of maritime claims was designed with this timeframe specifically in mind, and

(4) it is possible that further discoveries of petroleum in the JPDA and the surrounding seabed will be made.

32. In conclusion, Timor-Leste's submissions about the Arbitration and the Timor Sea treaty regime are in important respects false, and in others selective and incomplete. They are also irrelevant to the present proceedings, and should be disregarded by the Court.

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COMMISSION I General Provisions

Committee 1 Preamble, Purposes, and Principles

REPORT OF RAPPORTEUR OF SUBCOMMITTEE I/1/A TO COMMITTEE I/1

Chapter II

The leading phrase in Chapter II, "In pursuit of the purposes mentioned in Chapter I, the organization and its members should act in accordance with the following principles," was retained unanimously.

Two observations are due here:

(1) "In pursuit" does not indicate an idealistic approach to purposes, as was incidentally mentioned in one of our committee meetings, but it indicates a practical and effective endeavor of the Organization and its members.

(2) The key-note of collectivity is common to what precedes and follows this phrase, having set clearly in text, "The Organization and its members."

Paragraph 1

The Subcommittee presents the text of paragraph 1, with its "sovereign equality" unchanged. I hope that the committee will feel satisfied with this text, after I put before you the explanation which was made to be presented with it. The essence of that explanation is that the contents of the amendments submitted by various delegations, specifically those of Uruguay and Peru, were explicitly or implicitly contained in other provisions of the Charter, particularly under Purposes and Principles.

The Subcommittee voted to keep the terminology, "sovereign equality," on the assumption and understanding that it conveys the following:

(1) That states are juridically equal;

(2) That they enjoy the rights inherent in their full sovereignty;

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(3) That the personality of the state is respected, as well as its territorial integrity and political independence;

(4) That the state should, under international order, comply faithfully with its international duties and obligations.

The votes to keep the paragraph as it is, and consequently to reject amendments, were made on the aforesaid clear understandings.

I now firmly hope that the explanation which accompanies the text satisfies the committee.

Paragraph 2

To some members of the subcommittee, paragraph 2 seemed superfluous at first, but after consideration, that opinion was forsaken, even by those who first held it.

Why did we keep it, and why did we give it the new tenor in which it is presented to you?

Paragraph 2 was kept to emphasize that rights and privileges in this Charter match with duties and obligations. That emphasis was deemed necessary in view of past experience, where States, especially in the period between the two wars, had come to place more emphasis on their rights than on their duties, and the practice had developed of subscribing blithely to certain obligations and then forgetting them in a moment of international crisis, or under the urge of a State's own interests. Furthermore, the Dumbarton Oaks Proposals became familiar to people, and if that paragraph should be cut off, some might be found in the future to affirm that the change had been made for sinister motives.

But there is still a more important reason for keeping such a text as paragraph 2.

The paragraph does not merely mean that one member which fulfills its duties and obligations may exercise certain privileges and rights, but it means also that if all members of the Organization fulfill their obligations, all members receive the benefit. Thus, the non-fulfillment of the duties and obligations by one State makes, in fact, other States deprived of some of the benefits.

So much for the reasons of retaining this paragraph.

The tenor in which it comes calls for some observations. By comparing the two texts, you could see that it sounded rather hollow in the original text to say something like this:

"I undertake to fulfill the obligations I assume." The new text avoids that.

The original text seemed to lay an extra stress on obligations. The new text is more appropriate to show that membership involved rights, duties, benefits, and obligations inseparably, and does not place any emphasis upon obligations in contradistinction to rights. The words "in order" in the present text were inserted partly for convenience of drafting, and partly with the sense of purpose to show solidarity or the interdependence of concept between the rights and duties of members. In that same order of ideas, the word "shall fulfill" took the place of the words "undertake to fulfill."

Paragraph 3

As I introduce to the committee paragraph 3, I should start, to be fair, by mentioning that the text you have was voted by a majority exceeding two-thirds.

The relevant amendments of Bolivia and Ethiopia, however, were not rejected by a majority attaining two-thirds. Therefore, there was no proper decision so far as the rejection or inclusion of these amendments is concerned.

The Bolivian amendment states, "All members of the Organization shall be bound to settle their disputes by peaceful means in such a manner that international peace, security and justice are not endangered." The new term of that amendment is justice.

The Ethiopian amendment is to add to the original text at its end, "and on the basis of respect for justice, treaties, and international law."

That amendment received five votes against six out of eleven present and voting.

This is the situation.

The subcommittee not being a representative but a working body, the committee by its final vote can easily elucidate the situation. Let me first submit and explain as a rapporteur, the text of paragraph 3 as presented. I will later resume very briefly and for the purpose of your information, the gist of the discussion on justice and international law as suggested by the Bolivian and Ethiopian amendments. The paragraph states that "all members shall settle their disputes by peaceful means." Therefore, one nation will not be permitted to solve its dispute by force, and to fight in order to impose its own solution to a controversy. The paragraph establishes the principle of peaceful solution versus coercive solution. In that same order of ideas, parties to a dispute shall be encouraged to settle disputes themselves by peaceful means.

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Disputes are to be settled, too, in such a way that "international peace and security are not endangered"; therefore, that no conditions would be created by which members at dispute endanger the peace of others.

Going further, not to the text of paragraph 3 itself, but to its relation to other parts of the Chapter, it is clear that the Organization should intervene ex officio to settle disputes whenever they are not made by peaceful means or may endanger peace. The Organization and the members are bound to abide by this principle.

If, however, a dispute, of a nature that does not endanger peace, arises, there will be nothing in this article to prejudice the rights and duties of members to bring that dispute before the Organization, in the manner provided for by the Charter.

It has been said in subcommittee that paragraph 2 is sufficient to offer adequate protection against settlements of the Ethiopian, Munich, and Albanian type because such settlements, being unjust, create the condition leading to hostilities.

It was said, too, that we need go no further to establish justice as an end in the solution of disputes, because justice is very vague and difficult to ascertain.

This is not, however, the sense of the Ethiopian and Bolivian amendments as you see them stated. Ethiopia, speaking probably out of its bitter experience, likes to see that disputes should be settled by peaceful means on the basis of justice, treaties, and international law.

The question is before the committee.

Paragraph 4

The subcommittee decided unanimously to include the Australian amendment in paragraph 4. The paragraph now reads:

> "All members of the Organization shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any member or state or in any other manner inconsistent with the purposes of the United Nations."

Other amendments were read and rejected.

The discussion on the Norwegian amendment was very enlightening, and it helped to clarify the Australian amendment itself. It therefore helps to explain the present text, and I would like to add a few words about it.

The Norwegian Government proposed that no force should be used if not approved by the Security Council.

The sense of approval was considered ambiguous, because it might mean approval before or after the use of force. It might thus curtail the right of states to use force in legitimate self-defense, while it was clear to the subcommittee that the right of self-defense against aggression should not be impaired or diminished.

It was furthermore clear that there will be no legitimate wars in any sense.

It was on these understandings that the subcommittee voted the text submitted to you.

The New Zealand amendment numbered 4a, page 32 of the English text, reads:

> "All members of the Organization undertake collectively to resist every act of aggression against any member."

Such a notion is to be found in many other amendments. The New Zealand amendment was rejected by a majority not attaining two-thirds.

The main reasons for the bare majority rejecting this amendment were two:

(1) The key-note for collectivity is found in the opening words of this Chapter. The Organization and its members should act in accordance with these principles.

(2) The amendment limits itself to the collective resistance of every act of aggression, aggression not being defined.

The rejection or acceptance of this amendment rests with the Committee.

The New Zealand Delegate, as well as another delegate, reserved explicitly their right to speak on that amendment before the Committee.

That reservation is, however, unnecessary because any delegation can at any time take up its amendment, or any other amendment. Amendments once submitted belong to all members.

Paragraphs 5 and 6

Paragraph 5 was voted unanimously, with hardly any discussion. It is clear enough.

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The first section of paragraph 6 was voted unanimously. It was made a separate paragraph in order to allow the second section to take number 7.

After voting these two paragraphs, the French amendment about the status of neutrality was taken up.

The French Delegation proposed to add to paragraph 5 of Chapter II the following phrase which was conceived in the French text as follows: "sand qu'un Etat Puisse, pour s'y soustraire, invoquer un statut de neutralité." The French Delegate explained that what he meant by "statut de neutralité" was that of permanent neutrality. From the discussion that ensued, it was understood in subcommittee that the statute of permanent neutrality is incompatible with the principles declared in paragraphs 5 and 6 of Chapter II, in that no state can avail itself of the statute of permanent neutrality to be freed from the obligations of the Charter. The subcommittee, on that understanding, tacitly accepted that the vote taken on paragraphs 5 and 6 covers the French amendment.

Paragraph 7

The second section of paragraph 6 was voted unanimously, but the subcommittee was not unanimous in its decision to give it a distinct number.

The subcommittee, by recommending a distinct number to that section, intended to establish it more clearly as a general principle of a general application, and not limited only to refraining from giving the assistance mentioned in the first section of the original text of paragraph 6.

The vote was taken on the understanding that the association of the United Nations, representing the major expression of the international legal community, is entitled to act in a manner which will insure the effective cooperation of non-member states with it, so far as that is necessary for the maintenance of international peace and security.

Paragraph 8

When the subcommittee had considered paragraphs 1 to 7 of Chapter II and the corresponding amendments, a joint meeting was held with the subcommittee of Committee III/2, to decide which subcommittee should discuss Chapter VIII, A, 7, of the Dumbarton Oaks draft, and ChapterII, 7, of the text as amended by the sponsoring governments, both of which referred to the question of domestic jurisdiction. The joint meeting decided that the principle of domestic jurisdiction should be discussed by the subcommittee of Committee I/1, but that, if that subcommittee in its proceadings so amended the text as to make it no longer suitable for inclusion in the Chapter on Principles, the draft so amended should be returned to Committee III/2 for further consideration.

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The main reason for that decision was that changing the place of that proposal from Chapter VIII, Section A, to Chapter II on Principles, made it a general principle and hence widened the scope of its application. The change of place in this case involved a change in the portée of the text.

On the basis of that decision and without impairing it, the subcommittee voted agreement that the principle of domestic jurisdiction be included in Chapter II and started to discuss it as amended by the sponsoring governments, together with the relevant amendments of various delegations.

For your information, I would like to state that four important questions were, more than others, the subject of discussion:

(1) The extension of the scope of the principle by changing its place to Chapter II;

(2) To establish international law as a criterion for the distinction between domestic and international concern;

(3) To keep the word "soleley" as appeared in the original text, or to substitute for it the word "essentially" as appears in the amendment of the sponsoring governments;

(4) Which organ can decide whether a given matter falls within the scope of domestic jurisdiction or not.

The subcommittee, however, took account of the fact that the committee had not had the opportunity of taking cognizance of the amendments proposed to Chapter VIII, Section A, of the original Dumbarton Oaks text. The subcommittee therefore hesitated to take a formal vote on the text presented by the sponsoring governments and preferred to place before the full committee a recommendation in principle that the committee should give consideration to the sponsoring governments' text of Chapter II, 7, amended to read as follows:

"7. Nothing contained in this Charter shall authorize the Organization to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under this Charter; but this principle shall not prejudice the application of Chapter VIII, Section B."

The New Zealand Delegation desires it to be mentioned that it moved that the discussion on domestic jurisdiction be reserved for the committee, and abstained from voting, in the said conditions, on the subject.

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The United Nations Conference on International Organization

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COMMISSION I General Provisions

Comité 1 Préambule, Buts et Principes

RAPPORT DU RAPPORTEUR DU SOUS-COMITE I/1/A AU COMITE I/1

Chapitre II

La phrase principale du Chapitre II, "Dans la poursuite des buts visés au Chapitre I, l'Organisation et ses membres devraient agir conformément aux principes suivants," est retenue à l'unanimité.

Il convient de faire ici deux observations:

(1) L'expression "dans la poursuite" ne veut pas dire qu'on envisage de poursuivre les buts proposés d'une façon idéaliste, comme il a été affirmé incidemment dans une des séances de notre Comité, mais elle implique, de la part de l'Organisation et de ses membres l'intention de faire un effort pratique et effectif.

(2) L'idée dominante de collectivité se retrouve à la fois dans ce qui précède et dans ce qui suit cette expression, et est exprimée clairement par ce membre de phrase "l'Organisation et ses membres."

Paragraphe 1

Le Sous-Comité présente le texte du paragraphe 1 en maintenant l'expression "égalité souveraine". J'espère que le Comité sera satisfait de ce texte après avoir pris connaissance de l'explication qui a été présentée en même temps. Cette explication se réduit essentiellement à ceci, c'est que le contenu des amendements proposés par plusieurs délégations, en particulier celle de l'Uruguay et du Pérou,

se retrouve explicitement ou implicitement dans d'autres dispositions de la Charte, spécialement dans le Chapitre "Buts et Principes."

Un vote du Sous-Comité décide de garder la terminologie "égalité souveraine" étant entendu qu'elle exprime ce qui suit:

(1) Que les états sont égaux juridiquement;

(2) Qu'ils jouissent de tous les droits qui découlent de leur souveraineté;

(3) Que la personnalité de l'état est respectée ainsi que son intégrité territoriale et son indépendance politique;

(4) Que l'état devra, dans un ordre international, s'acquitter fidèlement de ses devoirs et obligations internationales.

Le vote décidant de conserver le paragraphe tel qu'il se présente et de rejeter tout amendement a été émis à la lumière des considérations qui précèdent.

J'ai le ferme espoir que l'explication qui accompagne le texte aura l'approbation du Comité.

Paragraphe 2

Tout d'abord, le paragraphe 2 a semblé superflu à quelques membres du Sous-Comité, mais, après examen, cette opinion a été abandonnée même par ceux qui ont été les premiers à la défendre.

Pourquoi l'avons-nous gardé et pourquoi lui avons-nous ajouté cette nouvelle note avec laquelle il vous est présenté?

Le paragraphe 2 a été conservé pour souligner qu'aux droits et privilèges conférés aux termes de la Charte, correspondent des devoirs et des obligations. Il a été jugé nécessaire d'insister là-dessus à cause de l'expérience du passé, lorsque des Etats, particulièrement dans la période d'entre les deux guerres, en étaient arrivés à insister davantage sur leurs droits que sur leurs devoirs et qu'on avait pris l'habitude de souscrire, à la légère, à certaines obligations pour les oublier ensuite dans un moment de crise internationale ou sous la pression des

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intérêts personnels d'un état. En outre, le public a pris connaissance des Propositions de Dumbarton Oaks, et si ce paragraphe était supprimé, certaines personnes pourraient être amenées plus tard à affirmer que le changement a été fait avec de mauvaises intentions.

Mais il existe une raison encore plus importante pour conserver un tel texte au paragraphe 2.

Le paragraphe ne signifie pas simplement qu'un membre qui remplit ses devoirs et obligations peut exercer certains privilèges et droits, mais aussi que, si tous les membres de l'Organisation remplissent leurs obligations, tous les membres en bénéficient. Ainsi, le fait qu'un seul Etat faillirait à ses devoirs et obligations priverait, en réalité, les autres Etats d'une partie de ces avantages.

Tels sont les motifs en faveur du maintien de ce paragraphe.

La teneur dans laquelle il est présenté appelle quelques remarques. En comparant les deux textes, vous conviendrez que dire quelque chose comme ceci, dans le texte original, sonnait plutôt creux: "Je m'engage à remplir les obligations que j'assume". Cela est évité dans le nouveau texte.

Le texte original semblait insister spécialement sur les obligations. Le nouveau texte montre mieux que la qualité de membre entraine des droits, des devoirs, des avantages et des obligations qui sont inséparables, et ne met en aucun cas l'accent sur les obligations, par opposition aux droits. Le mot "afin", dans le présent texte, a été inséré en partie pour des raisons de rédaction et en partie dans le but de faire ressortir la solidarité ou l'interdépendance des droits et des devoirs des membres. Dans le même ordre d'idées, le mot "rempliront" a pris la place des mots "s'engagent à remplir".

Paragraphe 3

En présentant le paragraphe 3 au Comité, je devrais, pour être juste, commencer par mentionner que le texte qui vous est soumis a été adopté à une majorité supérieure aux deux-tiers.

Par contre, les amendements à ce texte de la Bolivie et de l'Ethiopie, n'ont pas été rejetés par une majorité atteignant les deux-tiers. En conséquence, il n'y a pas de décision valable en ce qui concerne le rejet ou l'inclusion de ces amendements.

L'amendement bolivien stipule que "Tous les membres de l'Organisation régleront leurs différends par des moyens pacifiques; de telle manière que la paix, la sécurité et la justice internationales ne soient pas mises en danger." Le nouveau terme de cet amendement est "la justice."

L'amendement éthiopien consiste à ajouter, à la suite du texte original "sur la base du respect de la justice, des traités et du droit international."

Cet amendement obtint cinq voix contre six, sur les onze membres présents et votants.

Telle est la situation.

Le Sous-comité n'étant pas un organe représentatif, mais un instrument de travail, le Comité, par son vote définitif peut aisément trancher la question. Permettez-moi en premier lieu de soumettre et d'expliquer, en qualité de rapporteur, le texte du paragraphe 3 tel qu'il est présenté. Je résumerai ensuite très brèvement pour votre information l'essence de la discussion sur les termes la justice et le droit international suggérés par les amendements bolivien et éthiopien. Le paragraphe stipule que "tous les membres de l'Organisation règleront leurs différends par des moyens pacifiques." En conséquence, il ne sera pas permis à une nation de résoudre son différend par la force, ni de se battre pour imposer sa propre solution à une controverse. Le paragraphe établit le principe des solutions pacifiques, par opposition aux solutions de force. Dans le même ordre d'idées, des parties à un différend seront encouragées à régler elles-mêmes les différends par des moyens pacifiques. Les différends devront également être réglés "de telle manière que la paix et la sécurité internationales ne soient pas mises en danger," de sorte qu'aucune condition ne sera créée par laquelle des membres impliqués dans un différend mettraient en danger la paix des autres.

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De plus, si l'on considère non le texte même du paragraphe 3, mais ses rapports avec d'autres parties du Chapitre, il est clair que l'Organisation devrait intervenir ex officio pour régler des différends chaque fois qu'ils ne sont pas réglés par des moyens pacifiques ou qu'ils risquent de mettre la paix en danger. L'Organisation, et les membres, sont tenus de se conformer à ce principe.

Si, cependant, il s'élevait un différend qui ne soit pas de nature à mettre la paix en danger, rien dans cet article ne s'oppose aux droits et devoirs des membres de soumettre ce différend à l'Organisation, de la façon prévue par la Charte.

L'avis a été émis au Sous-comité que le paragraphe 2 est suffisant pour offrir une protection adéquate contre des règlements du genre de ceux qui intervinrent à l'égard de l'Ethiopie, de l'Albanie, et à Munich, car de tels règlements, étant injustes, créent des conditions qui mènent à la guerre.

Il fut également déclaré que nous ne devrions pas poursuivre l'idée d'établir la justice comme un but dans le règlement de différends, car la justice est vague et difficile à déterminer.

Tel n'est pas, cependant, le sens des amendements de l'Ethiopie et de la Bolivie qui vous sont soumis. L'Ethiopie, sans doute inspirée par sa cruelle expérience, aimerait que les différends soient réglés par des moyens pacifiques basés sur la justice, les traités et le droit international.

Il appartient au Comité de décider.

Paragraphe 4

Le Sous-comité a décidé à l'unanimité d'inclure l'amendement australien au paragraphe 4. Le paragraphe a maintenant la teneur suivante:

"Tous les membres de l'Organisation s'abstiendront, dans leurs relations internationales, de recourir aux menaces ou à l'emploi de la force contre l'intégrité territoriale ou l'indépendance politique de tout membre ou de tout Etat, ou de toute autre façon incompatible avec les buts des Nations Unies."

Le Gouvernement Norvégien proposa qu'il ne soit fait aucun emploi de la force non approuvé par le Conseil de Sécurité. La notion de l'approbation fut estimée ambigue, car elle pouvait signifier approbation antérieure ou postérieure à l'usage de la force. Elle risquait ainsi de limiter le droit des Etats de faire usage de la force en cas de légitime défense, alors qu'il était évident au Sous-Comité que le droit de légitime défense contre un agresseur ne devait pas être entravé ou diminué.

Il est clair en outre qu'il ne pourra y avoir de guerres légitimes.

C'est en tenant compte de ces considérations que le Sous-Comité a voté le texte qui vous est soumis.

L'amendement de la Nouvelle-Zélande portant le numéro 4a, à la page 32 du texte anglais est ainsi conçu:

> "Tous les membres de l'Organisation s'engagent collectivement à résister à tout acte d'agression dirigé contre l'un de ses membres."

On trouve la même idée dans un grand nombre d'autres amendements. L'amendement de la Nouvelle-Zélande a été rejeté par un majorité n'atteignant pas les deux-tiers.

Deux raisons principales ont incité cette majorité à rejeter l'amendement:

(1) On trouve déjà l'idée dominante de la collectivité dans les premiers mots du présent Chapitre. "L'Organisation et ses membres devraient agir conformément aux principes suivants."

(2) L'amendement lui-même est limité à la résistance collective contre tout acte d'agression, celle-ci n'étant pas définie.

Il appartient au Comité de rejeter ou d'accepter cet amendement.

Le Délégué de la Nouvelle-Zélande, ainsi qu'un autre délégué, ont réservé formellement leur droit de prendre la parole au Comité au sujet de cet amendement.

Cette réserve est d'ailleurs inutile puisque toute délégation peut à un moment quelconque reprendre son amendement ou un autre amendement. Les amendements qui ont déjà été présentés appartient à tous les membres.

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Paragraphes 5 et 6

Le paragraphe 5 a été voté à l'unanimité, presque sans discussion. Il est suffisamment clair.

La première partie du paragraphe 6 a été votée à l'unanimité. On en a fait un paragraphe separé afin de donner à la seconde partie du paragraphe le numéro 7.

A la suite du vote sur ces deux paragraphes, le Sous-comité a abordé l'examen de l'amendement français sur le statut de neutralité.

La délégation française a proposé d'ajouter au paragraphe 5 du Chapitre II la phrase suivante: "sans qu'un Etat puisse, pour s'y soustraire, invoquer un statut de neutralité." Le Délégué français a expliqué que les termes "statut de neutralité" devaient être entendus comme s'appliquant à la neutralité permanente. Dans la discussion qui s'ensuivit, le Sous-comité reconnut que le statut de la neutralité permanente est incompatible avec les principes énoncés aux paragraphes 5 et 6 du Chapitre II, en ce sens qu'aucun Etat ne peut se prévaloir du statut de la neutralité permanente pour se libérer des obligations de la Charte. Le Sous-comité, à la suite de ces explications, admit tacitement que le vote émis sur les paragraphes 5 et 6 englobait l'amendement français.

Paragraphe 7

La seconde partie du paragraphe 6 fut votée à l'unanimité. Mais le Sous-comité ne fut pas unanime dans sa décision de donner à ce paragraphe un numéro distinct.

Le Sous-comité, en recommandant d'attribuer à cette partie un numéro distinct, a voulu lui donner nettement le caractère d'un principe général d'une application générale, au lieu de la limiter à l'obligation pour les membres de s'abstenir de prêter assistance, mentionnée dans la première partie du texte original du paragraphe 6.

En prenant cette décision, le Sous-comité a admis que l'association des Nations Unies, représentant l'expression la plus élevée de la communauté légale internationale, a le droit d'agir d'une façon qui permette d'assurer la collaboration effective des Etats non-membres dans la mesure nécessaire pour le maintien de la paix et de la sécurité internationales.

Paragraphe 8

Lorsque le Sous-comité a examiné les paragraphes 1 à 7 du Chapitre II ainsi que les amendements y relatifs, il a tenu une séance commune avec le Sous-comité du Comité 2 de la Commission III pour décider quels seraient les sous-comités chargés de discuter le paragraphe 7 de la Section A du Chapitre VIII des Propositions de Dumbarton Oaks, et le paragraphe 7 du Chapitre II du texte modifié par les Gouvernements Invitants, ces paragraphes se rapportant tous deux à la question de la juridiction nationale. La réunion commune décida que le principe de la juridiction nationale serait examiné par le Sous-comité du Comité I/1, mais que, si ce Sous-comité modifiait le texte de telle façon qu'il ne puisse plus être inséré dans le Chapitre sur les Principes, ce texte ainsi modifié serait renvoyé au Comité III/2 pour nouvel examen.

La principale raison de cette décision était qu'en transférant ce paragraphe du Chapitre VIII, Section A, au Chapitre II sur les Principes, on en fait un principe général et on étend par là même le champ de son application. Dans ce cas le changement de place entraîne une modification de la portée du texte.

Sur la base de cette décision et sans y porter atteinte, le Sous-comité a décidé que le principe de la juridiction nationale serait inséré au Chapitre II et a commencé la discussion de ce principe dans la forme amendée par les Gouvernements Invitants, ainsi que celle des autres amendements s'y rapportant, présentés par les diverses délégations.

A titre d'information pour le Comité, il convient d'indiquer que la discussion porta principalement sur les quatre importantes questions suivantes:

(1) L'extension de la portée du principe résultant de son transfert au Chapitre II;

(2) L'établissement d'un droit international comme critère servant à distinguer les affaires intérieures des affaires internationales;

(3) Garder le mot "exclusive" qui figure dans le texte original ou le remplacer par le mot "essentiellement" qui se trouve dans l'amendement des Gouvernements Invitants;

(4) Quel sera l'organisme chargé de décider si une question déterminée est ou non du domaine de la compétence nationale?

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Toutefois le Sous-comité a tenu compte du fait que le Comité n'avait pas eu la possibilité de prendre connaissance des amendements proposés à la Section A du Chapitre VIII du texte original de Dumbarton Oaks. Le Sous-comité a donc hésité à prendre une décision formelle au sujet du texte présenté par les Gouvernements Invitants et a préféré recommander au Comité d'examiner le texte du Chapitre II, paragraphe 7, des Gouvernements Invitants, conçu comme suit:

> "7. Rien dans la présente Charte n'autorisera l'Organisation à intervenir dans des questions qui sont essentiellement de la compétence nationale de l'Etat intéressé, ni n'obligera les membres à soumettre ces questions pour règlement en vertu de la Charte, mais ce principe ne portera pas atteinte à l'application du Chapitre VIII, Section B."

La délégation de la Nouvelle-Zélande a exprimé le désir que l'on indique qu'elle avait proposé de réserver au Comité lui-même la discussion sur la compétence nationale, et que dans ces conditions, elle s'est abstenue de voter.

Annex 2: The United Nations Conference on International Organization, V*erbatim minutes of Second Meeting of Commission I*, Doc. 1123 I/8, 20 June 1945.

The United Nations Conference on International Organization

Doc. 1123 (ENGLISH)
I/8
June 20, 1945

COMMISSION I General Provisions

VERBATIM MINUTES OF SECOND MEETING OF COMMISSION I

Opera House, June 15, 1945, 10:30 a.m.

PRESIDENT (Mr. Rolin, Belgium): The meeting is opened.

PRESIDENT (speaking in French; English version as delivered by interpreter follows): May I call on the Chairman of Committee 1, Mr. Manuilsky, and the Rapporteur, Mr. Zeineddine, kindly to take their places at the rostrum, and Mr. McClintock, the Secretary, also. We shall take up the examination of the report where we left it yesterday, that is, the conclusions of the "Purposes of the Organization".

PRESIDENT (speaking in English): May I ask the Executive Officer, Mr. Malcolm Davis, to read the text which was adopted by the Committee?

EXECUTIVE OFFICER: Paragraph 2, "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples and to take other appropriate measures to strengthen universal peace."

PRESIDENT (speaking in French; English version as delivered by interpreter follows): There is no speaker listed; if there are no remarks, I shall declare the proposal adopted. No remarks. Adopted. Third paragraph, Chapter 1.

EXECUTIVE OFFICER: "To achieve international cooperation in the solution of international problems of an economic, social, cultural, or humanitarian character and promotion and encouragement of respect for human rights and for fundamental freedoms for all without distinction as to race, language, religion or sex."

PRESIDENT (speaking in French; English version as delivered by interpreter follows): No speakers? No remarks? Adopted.

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EXECUTIVE OFFICER: "To be a center for harmonizing the actions of nations in the achievement of these common ends."

PRESIDENT (speaking in French; English version as delivered by interpreter follows): No speaker? No remarks? Adopted. We have now concluded the examination of Chapter I, "Purposes" We now take up Chapter II, "Principles". Mr. Malcolm Davis will now read the first three lines in the first paragraph.

EXECUTIVE OFFICER: "In pursuit of the purposes mentioned in Chapter I, the Organization and its members should act in accordance with the following principles: First, the Organization is based on the principle of sovereign equality of all its members."

PRESIDENT (speaking in French; English version as delivered by interpreter follows): I call upon Mr. Belaunde, the Delegate of Peru.

MR. BELAUNDE: Mr. Chairman, Delegates, Ladies and Gentlemen, I am going to make a declaration on behalf of the Peruvian Delegation. The Peruvian Delegation has presented a text, a substitute text, for this article. We have studied thoroughly the question of the basis of the Organization. The Organization ought to be based on international order. We have this as an idea coming down from our Latin traditions. An international order is constituted in its essence by respect for the personality of the states, with its attributes of sovereignty, political independence, juridical equality, and territorial integrity.

We proposed this definition in the third article, but we were blocked by the argument that the definition which you have heard is contained in a very important document, that is, in the Moscow Declaration. The definition presented by Peru, although heartily approved by the French Delegate, André Siegfried, as you know very well, and by our President, Professor Rolin, was put aside.

Of course, I have a great respect for the Moscow Declaration, but I believe that the proposal has minimized the Moscow Declaration, in making a quotation that is not complete, as it is altered. The Moscow Declaration says that they recognize the necessity for establishing at the earliest practical date a general organization, based on the principle of the sovereign equality of all peace-loving states and open to membership by all such states, large and small, for the maintenance of international peace and security. That is very good, except, of course, for sovereign equality. That is a newly coined phrase

that has no technical or scientific meaning. I believe that the declaration, the Moscow Declaration, stands by itself. When we tried to put a part of the Atlantic Charter in the Preamble, the objection was made, I remember, by the Russian Delegate, who said, "No, the Atlantic Charter has a value in itself; why quote the Atlantic Charter in the document?" And I say now, why quote, and in other ways undermine its meaning. The declaration in the first principle ought by all reason to have a scientific and technical character.

This error has had a tremendous importance and effect which I ought to present very clearly in behalf of the Peruvian Delegation. We have put aside this main idea, the idea of personality. We have put aside the idea of sovereignty, because of the authority dealt with essentially in another article. And we have put aside the scientific term of juridical equality.

I have a duty to present to you the importance of the word "personality". International order is based on the personality of the states as the juridical order is based on the personality of the man. States ought to be respected, not only because they are sovereign and have territory. The elements that ought to be respected in states are not only the political elements embodied in the physical state, and the material element, that is the territory. The states are a living synthesis of moral values which assume other elements, and the elements of the state most worthy of respect are its cultural values, which are the essence of personality.

Every country has a personality, and this personality ought to be respected. Because a country is a personality, it is sovereign and has the right to juridical equality and has a right to territory. I may say, for instance, regarding the United States, that we ought to respect the United States not only because it is a political power, because it is a territory, but chiefly because the United States represents moral values. Every state represents moral values. If you ask me what are the moral values of the United States, I will answer immediately--the love of freedom, the love of justice, the respect for private initiative, the proclivity for service, and human love. These are characteristics of the personality of the States; and every country has a personality. Lincoln was fighting not only for the liberation of the slaves, but to preserve the personality of the nation that is called the United States. Personality means unity, permanency, and at the same time freedom within the law. It seems to me that all modern culture is based on the idea of personality, and I deeply regret that some of our delegates have an allergy to the word "personality". You know there are biological allergies, and I may say that there are also intellectual allergies. If some persons hear the word personality, they will say, no, that is a philosophical notion. Not at all. It is a philosophical notion, and at the same time a reality. In reality,

what will the small countries demand? Not only respect for our political institutions and respect for our material attributes, such as territory, but the small countries chiefly ask respect for their moral personalities.

It was a great mistake to put aside personality. Personality was accepted in the Declaration of Lima. You know the origin of this declaration was the proposal of de Mello Franco, the great Brazilian statesman, and Juan Mayo, one of the greatest jurists of South America. And coming down from the Declaration of Lima, the word "personality" regarding the states was put in the Act of Chapultepec. It seems to me that the Chapultepec Act is as deserving of respect as the Moscow Declaration; perhaps it will even have the same importance in the sequence of events of the world.

Besides that, my dear President, allow me to speak on this further matter. With regard to Article 4, you have put aside sovereignty connected with personality, and territorial integrity connected with sovereignty and juridical equality. You have substituted for sovereign equality Article 4, in order to establish respect for sovereignty and territorial integrity. These elements were inserted incidentally in Article 4, which reads as follows:

"All members of the Organization shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any member of a state or any other member inconsistent with the purpose of the United Nations."

When the ideas of sovereignty and territorial integrity are dealt with only in relation to the use of force, there is not the absolute respect which in other cases would have been established. This is the result of this incidental and casual insertion of these two elements in Article 4. The consequence was this.

The article in the Dumbarton Oaks Proposals was perfect. "All members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organization."

That is perfect. No exception about the use of force. Force ought to be used only in accord with the purposes of the Organization; and this wording has been severely criticized.

The United States Delegate, in reading the wording of this article, says it is awkward. The Delegate of Norway says it is illogical, because it comprises two negations. The illustrious Delegate of Brazil says it is equivocal. Her illustrious President said--if I am not mistaken--"It is unhappy". We have this

result, we have a poor reading in the first article, and we have an awkward, unhappy, equivocal wording in the fourth article. That is the result. Of course, Ladies and Gentlemen, there is an intellectual consciousness and there is a moral consciousness. I cannot accept this wording without some protest. I should like my declaration to be presented to the Coordination Committee, if it is possible to do something in this matter. I do not wish to resubmit this question to another vote at this long meeting; but I finish by saying that personality has been the keystone of international law, and it is now the keystone of Christian culture.

RAPPORTEUR (Mr. Zeineddine, Syria): May I start, Sir, by thanking the eminent jurist from Peru on the judicious remarks that he has presented before this Committee. The Committee has had the opportunity to consider the Peruvian amendment on this question, to hear these remarks, and to consider them fully. It, of course, considered other amendments similar to this one, including some very important amendments to determine the meaning of the new term "sovereign equality". I refer in particular to the amendment of the Government of Uruguay. New terms, such as "sovereign equality", usually incite discussion. On the other hand, they call for an explanation. When the Committee was considering this subject, it passed the article, the paragraph before you as it stands with the explanation that is made in the report to accompany it. That explanation fully gives, I think, satisfaction to these amendments, in substance if not in form. The term "sovereign equality" was kept as a new terminology, but at the same time it was intended and made clear that that term would be inclusive of the following elements: First, that the states are juridically equal; second, that each state enjoys the right inherent in full sovereignty; and third, that the personality of the state is respected as well as its territorial integrity and political independence. That respect for territorial integrity and political independence went into Article 4 as amended by the Australian Delegation. And the fourth element, that the states should, under international order, comply faithfully with their international duties and obligations. So I may submit, Sir, that the substance, the contents which some delegations wanted to put into the Charter as a basis for international relations between member states and between the Organization and these states, was clearly explained by those four elements that I have the honor to mention here.

PRESIDENT (speaking in French; English version as delivered by interpreter follows): The Honorable Delegate of Egypt, Mr. Saba.

MR. SABA (speaking in French: English version as delivered by interpreter follows): Among the purposes of the International Organization being created, we wish that we had laid stress on

the advancement and promotion of international law. We stress this in our points of view expressed and the statements made yesterday, and our remarks this morning fall within the scope of that point of view.

We express a vehement desire that law and equity be clearly incorporated within the framework of justice for which the International Organization should stand. It is true that it is to stand for the purpose of contributing to prevent conflicts. One of the weaknesses of international law in the past, has been that it has lacked the power to apply sanctions. Now we are creating an organization that shall have force, armed force, at the service of law. Now it is necessary clearly to proclaim to all the world that force shall be used only for the advancement and promotion of law.

In the Chapter on Principles, it is true that we are concerned with the codification of international law and with the application of the principles of justice. This application must be insured with guarantees. The problem is greater. It does not call only for the codification of international law, but for a clear and solemn proclamation to all the world that force will be used by the International Organization only to apply law and achieve justice.

I agree with you, Mr. President, that we must make all sacrifices for the sake of International Organization, save one--justice must not be sacrificed. We must endeavor to work for the advancement of law. I regret that I do not find this expression solemnly made here in this Chapter on purposes and principles. I hope, however, that our Organization will clearly stand for the promotion of law and justice throughout the world.

PRESIDENT (speaking in French; English version as delivered by interpreter follows): You have listened to some interesting remarks. There are no further speakers enrolled, and I believe that we can soon proceed to take a vote on this matter. Our Rapporteur has clearly pointed out the four ideas that are incorporated in the term "equality of sovereignty", or equal sovereignty: (1) that states are juridically equal; (2) that each state enjoys the right inherent in full sovereignty; (3) that the personality of the state is respected, as well as its territorial integrity and political independence; (4) that the state should, under international order, comply faithfully with its international duties and obligations.

I feel, Ladies and Gentlemen, that if we have succeeded in expressing these four concepts in two words, "sovereign equality", we have broken the record for conciseness.

It is true that a certain skepticism was in the minds of some of the delegations with relation to this matter. We hope

that the Coordination Committee will be able to deal with this satisfactorily to all, this matter of equal rights of peoples, for it is a matter of great concern to us.

Any observations? The resolution is adopted.

EXECUTIVE OFFICER: Paragraph 2: "All members of the Organization shall fulfil the obligations assumed by them in accordance with the Charter in order to insure to all of them the rights and benefits resulting from membership in the Organization."

And a different version, according to an amendment from the Colombian Delegation for paragraph 2;

"All members of the Organization shall fulfil in good faith the obligations assumed by them in accordance with the Charter in order to insure to all of them the rights and benefits resulting from membership in the Organization."

PRESIDENT (speaking in French; English version as delivered by interpreter follows): I call upon Professor Yepes, Delegate of Colombia, to defend his amendment.

MR. YEPES (speaking in French; English version as delivered by interpreter follows): The amendment proposed by the Delegation of Colombia is self-explanatory. The intention is to introduce the principle of full good faith, which we wish to add among the principles already incorporated in the Charter. This principle will, it seems from certain viewpoints, develop into the "leit motif" of the new International Organization after years in which bad faith seems to have been the basis of the conduct adopted by the states that plunged the world into the chaos in which we find ourselves today.

The United Nations have undertaken to reinstate international ethics in the Preamble which has been drafted, and in the two chapters approved by our Commission. We find already some of these essential principles of all society, which is truly and organically international in a sense. With certain limitations which were perhaps necessary, we have succeeded in inspiring into the Dumbarton Oaks Proposals something like a soul-power, which was so strongly lacking in the document. Strangely so, but it lacks still one thing, the principle of full good faith in which our work must rest, for on that it can stand. Otherwise, it stands on void. That is the reason why we feel that it is necessary to bring it here before the plenary session of the Commission. The members of the Organization contract certain obligations in virtue of the Charter. To state that such obligations will be fulfilled is not enough. On the contrary, it is a little dangerous.

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It is necessary to add that they must be carried out in full good faith, the reason being that this clause, if omitted, would leave a certain juridical vacuum in the document. It is not exact to state that good faith is implicit in all obligations of an international character, because, on the contrary, there is a whole school of false political philosophy which makes an interest, legitimate or illegitimate, of the state the supreme moderator of international life. For that school, good faith does not count.

It did not count for Bismarck, the Iron Chancellor, who said that all international treaties constituted just a provision of a short duration, limited by the interest of the state itself. Was it not also a German chancellor who coined this other expression: "The triumph of bad faith according to which treaties are nothing but scraps of paper"? Was it not the authentic successor of those princes of bad faith according to our politics expressed in "Mein Kampf" who coined that cynical phrase: "Righteousness or the just is that which is useful to my German people." There is, therefore, a pretended political philosophy that preconizes bad faith as a rule of conduct among states and governments.

The United Nations must react against such inadmissible concepts and must proclaim that international life requires a minimum of morality as a normative principle of conduct for peoples. This minimum cannot be anything else than full good faith and respect for the pledged word. The Colombian amendment, therefore, has a profound spiritual meaning. It symbolizes this new spirit of loyalty, of full good faith, of good neighborliness and honesty in international life. This must be put into our work, because good neighborliness, unless it is practiced in full good faith, will not be fruitful in the relations between men and peoples. The expression "in full good faith" is a standard expression of international law. The great English jurist, Westlake, said: "Good faith is the great moral ligament which binds together the states of the world in a system of law". The same expression is found in Article XIII, paragraph 4, of the Covenant of the League of Nations.

If we should in this Charter abandon this expression, our action would be construed as meaning that we are abandoning not only a phrase already consecrated by juridical tradition, but a concept which must be the root of all international life, and it would be deplorable. World public opinion would pass hard judgment on us if it realized some day that we have here put the light under a bushel. This is a fundamental idea of our civilization established on the law of contract. This expression "in full good faith" binds itself also in the project published the first of January 1944 by the more than two hundred

American jurists. This project, which has the endorsement both scientific and ethical of all the professors of international law of the United States and which is considered as one of the great juridical monuments of our times, expresses in Article VIII, which follows and which is in full accord with the Colombian amendment: "Each State has a legal duty to carry out in full good faith its obligations under international law."

On the other hand, as all jurists know, in the civil code of all modern nations there is a principle according to which private obligations must be carried out in full good faith. By analogy we can conclude that the same principle must be expressly recognized in international obligations. Therefore, Mr. President and Fellow Delegates, these are the reasons on which we base our amendment, and we hope that it will be unanimously accepted by our Commission and incorporated in due time in the constitutional Charter of the United Nations.

PRESIDENT (speaking in French; English version as delivered by interpreter follows): The Rapporteur wishes to say a few words.

RAPPORTEUR: Mr. Chairman, I do not intend to contradict the amendment submitted by the Honorable Delegate from Colombia; nor can one have the courage to contradict a statement of good faith in the respect that it comes before us here; nor can I stand to do so, because there is no formal decision of the Committee to that effect. Therefore, nothing was mentioned about it in the report. This, however, is not the case in the previous paragraph about sovereign equality, about which I had the chance a few moments ago to speak. On that question, as on other questions of the report, may I submit that the report was accepted unanimously and therefore it stands as it is. On the subject of the Colombian amendment which comes before us now, the Committee discussed the question and did not formulate any serious objections to it. The Committee felt, however, I may say, that including such a statement, such a phraseology, as "in full good faith" would be--shall I venture to say--superfluous because it is implicit in the very text of the paragraph as it stands before you: "In full good faith", there is something which each state, or each contracting party should do, and when it fulfils its obligations, then it has done all that it should do. If somebody owes you a debt on "such and such a date", and on that very date he pays the debt fully, as is stated in the contract, then, whether he does it in "full good faith" or not the execution has taken place and that is sufficient. However, it was found at the same time that using this phraseology "in full good faith" might be more or less a supposition that some member states may not exercise "full good faith", and when I had the occasion to hear the examples given just now here, on the way Bismarck and Hitler have tried

to execute their obligations not "in full good faith", I think it would be still more appropriate to take into consideration this fact: that it is taken for granted and each state found here would be ready to fulfil its obligations "in good faith" whether we mention it or not. So, Sir, I cannot, by any means, on behalf of the Committee object to this amendment; but I have tried simply to let the other point of view--which was by no means the majority or the minority point of view, because there was no vote--be heard at the same time with the point of view that the Honorable Delegate from Colombia has so eloquently exposed here.

PRESIDENT (speaking in French; English version as delivered by interpreter follows): The statement just made by the Rapporteur is not exact, is neither for nor against the proposal, and it simply tends to have it rejected as being unnecessary. I shall now call upon a second speaker for the proposal, but I should like first of all to draw the Rapporteur's attention to the fact that Mr. Malcolm Davis, when he read the Colombian amendment said, "in good faith", and not "in full good faith". As a matter of fact, "in full good faith" appears superfluous. The word "full" appears superfluous. The rule "in good faith" is far from being superfluous; on the contrary, it is a principle of interpretation of obligations. If two interpretations are possible, but one allows a literal carrying out of the obligation which is not consistent with "good faith", it must be rejected, and such a principle is embodied in our civilian code and also in the Covenant of the League of Nations as regards commitments. Professor Yepes has declared that he has accepted the interpretation given by the President and that he has agreed that the words should be "in good faith" and not "in full good faith".

I now call on Dean Gildersleeve, as second speaker in favor.

MISS GILDERSLEEVE: Mr. President, Ladies and Gentlemen, on behalf of the United States Delegation, I should like to say that we have been convinced by the arguments of our friends and are now eager to support this amendment. We had not realized exactly what the words meant to those who have lived and worked in the great tradition of the Roman law. We had thought they were quite unnecessary. We had assumed that all the members of this Organization would observe all their obligations "in good faith". We thought that that went without saying, as we put it, that it was implicit. But now we realize that this is a customary phrase, which, to our friends of the Latin countries especially, conveys the meaning that we are all to observe these obligations, not merely the letter of them, but the spirit of them, and that these words do convey an assurance without which the principle would seem unsatisfactory

to these friends of ours, and so on behalf of the United States Delegation, I have risen to say that we expect to vote for this amendment.

PRESIDENT (speaking in French; English version as delivered by interpreter follows): I call upon Mr. Manuilsky, Chairman of the Committee, to speak against the proposal. Mr. Manuilsky replies, "Not quite."

MR. MANUILSKY (speaking in French; English version as delivered by the interpreter follows): At our Committee a number of delegates were against the amendment proposed by Mr. Yepes. The reasons were very simple. Under international law, all obligations undertaken must be fulfilled "in good faith", but good faith is more or less compulsory. It is an essential element of international law. And, therefore, some of us wondered why, in such an important document as the Charter, things so simple and so elementary, which will be found in any elementary book on international law, should be repeated. We thought it was unnecessary. Today Professor Yepes has mentioned Bismarck, has mentioned Hitler, but thank God, this is no longer the time of Bismarck, this is no longer the time of Hitler. We are now in the time of President Truman, of Prime Minister Churchill, of Stalin. We are now convinced that our times have changed. We have won this war because all the agreements concluded between the three big powers have been kept, the agreements of Teheran, the agreements of Moscow, and even that of Yalta give examples of "good faith". And this is a further reason why we thought that the words "good faith" were unnecessary. But since then, certain things happened which now would oblige me to change my viewpoint, because during the discussion of the Yalta agreements, certain delegates have tried to impose on the great powers the necessity of violating the Yalta agreements.

For the Ukrainian Delegation, the delegation of a country which has suffered considerably from the war, we are of the opinion that this agreement must be fulfilled in good faith, like any other agreement, and now I ask this question: Why do we want at the very beginning of our organization to violate the agreements of Yalta? And may I point out that Professor Yepes himself was among those who tried to obtain from the great powers a departure from the Yalta agreement. And this is the reason why we shall now support the proposal made by Mr. Yepes.

PRESIDENT (speaking in French; English version as delivered by interpreter follows): Mr. Yepes might perhaps want to give an explanation, but I shall supply the explanation myself. Neither Professor Yepes nor any other delegate has thought of asking the great powers to make a departure from the Yalta

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agreement, but they considered that this agreement was a commitment binding on the great powers who had signed it and not the other delegations. They considered, therefore, that they were entitled to make use of their own freedom, but certain delegations bowed when they found that Yalta only applied to it, only applied to the question of the basis of the Organization; but no delegation has ever thought of evading the carrying out of their obligations in good faith.

PRESIDENT (speaking in English): I now call on Lord Cranborne.

LORD CRANBORNE: Mr. President, Ladies and Gentlemen, I should like in a very few brief words, on behalf of His Majesty's Government in the United Kingdom, to support the amendment which has been moved by the distinguished Delegate of Colombia. I believe that the words which he proposes to insert in the form in which he has now introduced them will prove a valuable addition to this chapter.

The distinguished Delegate of the Ukraine who has just spoken indicated that he felt personally that they were needless. Well, I personally cannot agree with him. We are, I think, here apt to assume that everybody acts in good faith but that, Ladies and Gentlemen, was not the unhappy experience of the world in the years before the war. On the contrary, we were faced with the spectacle of one nation, one great nation, Germany, which made breaches of faith the basis of her whole foreign policy and who used each successive repudiation of her pledged world as a jumping-off place for further aggression and infamies.

I hope that that will never happen again, but it seems to me that there never was a time when it was more important for the nations of the world to reaffirm in no uncertain fashion the principle of good faith. As the distinguished Delegate of the United States and the Delegate of the Ukraine both said in their speeches, this principle might be regarded as implicit in the whole Charter; and, of course, that is absolutely true. But I believe that it is a principle that cannot be too strongly underlined or emphasized. I feel, therefore, Ladies and Gentlemen, that this is an amendment which should certainly be accepted, and I am very glad on the part of His Majesty's Government to give it my full support.

PRESIDENT: I now call on Mr. Evatt to make a declaration on the subject.

MR. EVATT: Mr. President, if this were merely a question of legal interpretation, I should have thought there was no answer whatever to the speech of the distinguished Chairman of the Delegation of the Ukraine. The obligation assumed under

this is an obligation to fulfil the obligations of the Charter; and if countries fulfil the obligations created by international law, then the main purpose of the Charter is served. Reference has been made to Hitler. Certainly, Hitler lacked "good faith", but Hitler did not fulfil the obligations that he entered into. It is not usual in the jurisprudence which operates in some of our countries to make investigations as to the "good faith" of persons to carry out their obligations. It is very important that they should carry out their obligations, but when they do so--when, as the learned Rapporteur says, "They pay their debt on the due day, you don't question the motives of the person who pays." The trouble in the pre-war days was that Hitler and the forces of Fascism and Nazism were such that they carried out none of their obligations. So, if it were a question merely of jurisprudence, especially Anglo-Saxon jurisprudence, I would entirely agree with the president of the Committee who has taken charge of our deliberations for so long and done such a splendid job. But, as Dean Gildersleeve says, those trained in another class of learning, the jurisprudence, the great jurisprudence of the civil law, and our friends from Latin America, and also our distinguished President regard the insertion of words such as "fulfil in good faith obligations" as being of themselves important. The Anglo-Saxon view would be that if you fulfil the obligation, you show your good faith. However, we must on occasions like this, as I think Dean Gildersleeve mentioned, we must yield to that view; and if it is a matter of importance to the Latin American countries to add those words, I think they should be added. I only wish to add this final word, Mr. President, and it relates to the words of the Chairman of the Ukrainian Delegation with reference to Yalta and the Yalta formula and the Yalta agreement. Yalta is a long way from San Francisco, and I do not think we should go to Yalta this morning. There has been no attempt by any of the powers to change the Yalta formula, even on voting. There has been an attempt by the powers, first of all, to ascertain what the formula meant; and it was something of an achievement to find, after some weeks, that there was an agreement between those who made the Yalta formula as to what that agreement meant. However, we will return from Yalta to San Francisco, and out of deference and homage to my friends from Colombia although, as I say, a lawyer trained in an Australian school--all lawyers trained in the school of law in our country--would stand up and protest, and say, "if you discharged your obligation, that is enough." You want the words, "in good faith" and our distinguished President wants the words, "in good faith". We shall vote for the words "in good faith".

PRESIDENT (speaking in French; English version delivered by interpreter as follows): The statements which we have just heard enable us to foresee what will be the result of the vote. But, I have received another request by Professor Alfaro,

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Delegate of Panama; and we have fought together so many battles which we have lost, that I should not like to deprive him of the pleasure of sharing in a battle which will be a victory.

MR. ALFARO: Mr. President, Fellow Delegates, Ladies and Gentlemen. The very encouraging words we have heard from the eminent Delegates from the United States, from the United Kingdom, from Australia, from the Ukraine, and from our Rapporteur, assure the passage of this amendment, and I have no doubt that this amendment will be voted unanimously.

But we have heard a great deal about the argument which has been used to oppose this amendment, and I ask for the privilege of saying a few words on those arguments.

Mr. Chairman, to some of our delegates this amendment may seem of little importance. I believe it has an enormous psychological and juridical importance. It is pointed out that "good faith" is implicit in all private contracts and in all public treaties. My answer is that if the phrase is implicit, it will do no harm; and if it does not do any harm, let us retain it by all means, because it will do a lot of good.

It is true that both in the municipal or civil law and in international law, contractual obligations must be discharged in good faith. But it is also true that in the great majority of the cases where obligations of a general nature are agreed upon, the element of good faith is nearly always stated in an express manner. I would recall the arbitration conventions where it is customary to state not only that the award of the arbitrater shall be observed in good faith, but it is customary to pledge the national honor of the countries going to arbitration.

I might quote many examples showing that it is customary to use the phrase "in good faith" when reference is made to the observance of treaties, but that would be tiresome. It is unnecessary to quote examples of that.

I might simply recall that very important work of some two hundred of the most eminent jurists of the United States and also of Canada, and also of some other countries, which were gathered under the leadership of the eminent judge of the International Court, Manley O. Hudson. In that work on postulates, principles, and recommendations which was intended to contain the international law of the future and which was the basis--the evident basis--of many of the articles of the Dumbarton Oaks Proposals, this language was used in Article First of "Principles." Each state has a legal duty to carry out in full good faith its obligations under international law.

Mr. President, it would have a devastating effect upon the public opinion of the world to hear that it was proposed to state in the Charter that the United Nations shall comply their obligations in good faith, and that the proposal was defeated in this Commission--as it was formally or informally defeated in Committee 1 of this Commission.

When the Dumbarton Oaks Proposals were circulated among the peoples of the world, many thinking persons were astonished to note that the phrase "international law" did not appear one single time in the two chapters on Purposes and Principles of the Organization; that in the whole document it appeared only once; and that the word "justice" appeared, only attached to the title of the World Court, and not standing alone, detached, in all its sacred meaning. But amendments began to pour in, in which those words and other equally encouraging words were to be found, among them amendments of the sponsoring powers, for which they deserve unstinted recognition and credit. Thanks to that, and thanks to that admirable Preamble drafted by the great statesman from South Africa, Marshal Smuts, our Charter will not be simply the written symbol of the big stick or the decalogue of the international policemen.

During our discussions in committees and subcommittees, many delegates gained a painful impression that we were afraid of mentioning the great conceptions which constitute the luminous and cheerful features of international life. That impression must be dispelled. Our Charter must be--and I feel confident it will be--a great instrument of peace and faith and hope. The distinguished Chairman of the Ukraine Delegation, Mr. Manuilsky, has asked why it should be necessary to insert those words. My answer is that we must show to the world that we are not afraid of those magic words that carry tranquillity to the soul and comfort to the spirit. The people will never be tired of hearing about independence, self-determination, international law, justice, human rights, human freedom, human brotherhood.

And, with regard to the principle of the sanctity of treaties and the sanctity of the pledged word, man will never tire of hearing repeated over and over again that good faith shall be the chief element of the observance of treaties.

So, fellow delegates, I appeal to you to have this amendment passed by a unanimous vote. Let us, as an act of faith--as an act of good faith--state to the world that the United Nations intend to comply with their obligations, with the obligations of the Charter, in good faith.

Thank you.

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PRESIDENT (speaking in French; English version as delivered by interpreter follows): We shall now take a vote. Those in favor of the Colombian amendment, please stand up. Sit down, please. Those against? Adopted unanimously.

Thus, Article 2 of Chapter II is adopted as amended by the Colombian Delegation. The Executive Officer will now read paragraph 3.

EXECUTIVE OFFICER: "All members of the Organization shall settle their international disputes by peaceful means in such a manner that international peace, security, and justice are not endangered."

PRESIDENT (speaking in French; English version as delivered by interpreter follows): No speakers? Any remarks? Adopted.

Mr. Malcolm Davis will read the fourth paragraph.

EXECUTIVE OFFICER: "All members of the Organization shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any member or state or in any other manner inconsistent with the purposes of the Organization."

PRESIDENT: The Chairman of the Delegation of New Zealand, Prime Minister Peter Fraser, has asked to address the Assembly on this subject.

MR. FRASER: Mr. President, may I be permitted--and this will be the only occasion that I will make any remarks in the Commission--to associate myself with the distinguished Delegate from the United States, Dean Gildersleeve, and Lord Halifax, in regard to the necessity for instilling more life and soul and spirit into the preamble. Might I suggest that it is not a work--this preamble that should be a part of the finest language at the disposal of men in all the languages--that it is not necessarily a job for the draftsmen or for those who are versed in law. I have no objection to what is in the preamble, but I think it is more important that there should be life and soul and spirit than mathematical exactitude. And I would suggest that the State Department, that can do so much and has done so much--along with the Secretariat--to make this Conference such a success, should enlist the services of Mr. MacLeish and others who are distinguished literary men, so that we will get a document comparable with the Declaration of Independence and the Atlantic Charter.

As a matter of fact, it was my privilege along with others to see the first draft of Field Marshal Smuts' declaration of the Preamble and I am sorry that it wasn't adopted as it was first drafted. A great deal has been sacrificed and I

trust that our earnest petitions will be granted to get a great document, a lasting document that will continue to inspire generations after generation yet unborn, and indeed for all time.

Sir, I would like to congratulate the President, the Chairman, the Rapporteur, and the Secretary of the Committee, for the ability and expedition with which they have got through the work of the Committee. There were difficulties, but these were overcome and the result is very credible.

Mr. President, in my address in the plenary session I laid stress on the fact that the nations of the world should have an international rule of conduct set before them clearly and simply. I added that in the opinion of the New Zealand Government this could be done only by the universal pledge, by each and every nation, that all acts of aggression be resisted. And in the Rapporteur's report in the work of Committee 1 there is cited the text of an amendment proposed by the New Zealand Delegation for the insertion after paragraph 4 in Chapter II of a new paragraph as follows: "All members of the Organization undertake collectively to resist every act of aggression against any member".

It will be observed that this proposal implies no definition of the term "aggression". It leaves entirely to the Security Council, of which the Great Powers are all and always members, each with a full right of veto, to decide for itself when in its opinion aggression has actually taken place. The New Zealand proposal is limited to this point, and this point only, that when the Security Council by a specified majority and with the concurring votes of all its permanent members has decided that an act of aggression against one of the members of the Organization has taken place, there will immediately result a clear and unmistakable duty on every member of the Organization, great and small, to resist and defeat that aggression by the means laid down by the Security Council.

In view of the importance which the consideration of this proposal assumed in the Committee, the New Zealand Delegation desires through this declaration before Commission I to place on public record the fact that despite the restricted time made available for its discussion in the Committee, the New Zealand amendment received 26 votes in its favor against 18 contrary votes. It is clear that this vote, while falling short by a very small margin of the two-thirds majority required for the submission of a text to the Commission, shows a substantial majority which cannot be ignored in favor of the proposal which in the opinion of the New Zealand Delegation is of fundamental importance if this Organization is to function effectively.

The New Zealand Delegation does not propose to move an amendment in the Commission but in view of the very definite expression of the Committee's opinion in support of the New Zealand amendment, it calls the attention of the nations assembled at the Conference to what it considers to be a great defect in the principles of the Charter. We do this with the earnest hope that the Security Council in its work of resisting aggression and establishing and maintaining international peace and justice, with the support of all the United Nations, and with increasing experience and competence, will find it possible and advantageous to accept the New Zealand proposal in practice as a guiding and basic principle in what I devoutly trust will be its realistic approach to the problems with which it will have to deal.

PRESIDENT (speaking in French; English version as delivered by interpreter follows): Are there no speakers on Article 4? Any remarks? Adopted.

Paragraph 5 will now be read by Mr. Malcolm Davis.

EXECUTIVE OFFICER: "All members of the Organization shall give every assistance to the Organization in any action undertaken by it in accordance with the provisions of the Charter."

PRESIDENT (speaking in French; English version as delivered by interpreter follows): No speaker? No remarks? Adopted.

Paragraph 6.

EXECUTIVE OFFICER: "All members of the Organization shall refrain from giving assistance to any state against which preventive or enforcement action is being undertaken by the Organization".

PRESIDENT (speaking in French; English version as delivered by interpreter follows): No speaker? No remarks? Adopted.

We shall take the last proposal on our agenda today, paragraph 7.

EXECUTIVE OFFICER: The Committee approved alternative wordings for paragraph 7, referring to the Coordination Committee the question as to which of these wordings it might be more advisable, finally, to use.

The paragraph, consequently, read: "The Organization shall insure (or should insure) that states not members of the

Organization act in accordance with these principles so far as may be necessary for the maintenance of international peace and security".

PRESIDENT (speaking in French; English version as delivered by interpreter follows): I will give a few explanations on these two alternatives.

If we adopt "shall", this means that we mark more strongly the obligations of the Organization as regards its own members. But certain delegates, members of the Committee, pointed out that it would be rather paradoxical that the Organization should impose obligations on itself, and that it would be preferable just to mark a tendency. But this is only a matter of form, of drafting, rather than of substance, and we thought it preferable to have it settled by the competent committee, that is, the Coordination Committee.

No speakers? Any remarks? Adopted.

There remains in this Chapter II a last paragraph, number 8, which was adopted only yesterday by our Committee, but it will--it must--form the subject of a special report. We shall examine this report when the report on Chapter III is submitted to our Commission.

We have now concluded our agenda, and I have now the duty to thank you all for this demonstration of free public debate.

The meeting is adjourned. (12:55 p.m.)

The United Nations Conference on International Organization

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JUNE 20, 1945

COMMISSION I General Provisions

PROCES-VERBAL DE LA DEUXIEME SEANCE DE LA COMMISSION I

Théâtre de l'Opera, le 15 Juin 1945, à 10 h 30

LE PRESIDENT, M. Rolin (Belgique), parlant en anglais; texte de l'interprétation en français: Je demande à M. Manuilsky a M. Farid Zeineddine et au Secrétaire du Comité, M. McClintock, de bien vouloir monter à la tribune.

Nous reprenons maintenant l'examen des conclusions de la Commission I, Comité 1, où nous les avons laissées hier, c'est-à-dire deuxieme paragraphe du Chapitre I, "les buts de l'Organisation."

LE PRESIDENT (parlant an anglais; texte de l'interprétation en français): M. Malcolm W. Davis lira le texte adopté par le Comité.

LE SECRETAIRE ADMINISTRATIF, parlant en anglais; texte français: "Développer entre les nations des relations amicales fondées sur le respect du principe de l'égalité des droits et du droit des peuples à disposer d'eux-mêmes, et prendre toutes autres mesures propres à consolider la paix du monde."

LE PRESIDENT: Il n'y a pas d'orateurs inscrits. S'il n'y a pas d'observations, je déclare le paragraphe adopté.

Le paragraphe 2 est adopté.

M. Malcolm W. Davis va maintenant lire le paragraphe 3 du Chapitre I.

LE SECRETAIRE ADMINISTRATIF (parlant en anglais; texte français): "Réaliser la coopération internationale en vue de résoudre les problèmes internationaux de caractère économique, social, culturel ou humanitaire, et développer et encourager le respect des droits de l'homme et des libertés fondamentales communes à tous sans distinction de race, de langue, de religion ou de sexe."

LE PRESIDENT: Il n'y a pas d'orateurs inscrits? Pas d'observations?

Le paragraphe 3 est adopté.

M. Malcolm W. Davis va lire le paragraphe 4.

LE SECRETAIRE ADMINISTRATIF (parlant en anglais; texte français): "Constituer un centre destiné à harmoniser les efforts des nations en vue de parvenir à ces fins communes."

LE PRESIDENT: Pas d'orateurs inscrits? Pas d'observations?

La proposition est adoptée.

Nous en avons terminé avec le Chapitre I qui a trait aux buts et à l'Organisation. Nous passons au Chapitre II qui concerne les principes.

La parole est à M. Malcolm W. Davis pour lecture des premières lignes et du paragraphe 1.

LE SECRETAIRE ADMINISTRATIF (parlant en anglais; texte français):

"Dans la poursuite des buts visés au Chapitre I, l'Organisation et ses membres doivent agir conformément aux principes suivants:

1. L'Organisation est fondée sur le principe de l'égalité souveraine de tous ses membres."

LE PRESIDENT: La parole est à M. V.A. Belaunde, Délégué du Pérou.

M. BELAUNDE (parlant en anglais; texte de l'interprétation en français): J'ai à faire une déclaration au nom de la Délégation péruvienne, qui va présenter un texte pour cet article.

Nous avons étudié à fond la question de la base de l'Organisation, fondée sur l'ordre international. Cette idée est née d'une tradition latine. L'Ordre international est constitué essentiellement par le respect de la personnalité de l'Etat avec tous ses attributs de personnalité, de souveraineté, d'indépendance politique et d'intégrité territoriale.

Nous avions d'abord proposé cette définition à l'Article 3; mais nous avions été bloqués par cet argument, que la définition que nous proposons maintenant était contenue dans la déclaration de Moscou. Pour cette raison, la définition proposée par la Délégation péruvienne, bien qu'approuvée par le Délégué de la France, M. André Siegfrid, et notre éminent Président, fut rejetée.

J'éprouve le plus grand respect pour la déclaration de Moscou. Mais je déclare que la proposition minimise la valeur de cette déclaration.

Le texte de la déclaration de Moscou est le suivant:

"Les gouvernements des Etats-Unis, du Royaume-Uni, de l'Union Soviétique et de la Chine, reconnaissant la nécessité d'établir, dès que possible, une Organisation générale internationale fondée sur le principe de l'égalité souveraine de tous les Etats épris de paix..."

Ce texte est excellent, sauf en ce qui concerne la notion de l'égalité souveraine, qui est dénuée de signification technique ou scientifique. D'autre part, la déclaration de Moscou constitue un tout à part.

Lorsque nous avons voulu, à un moment donné, mentionner certaines parties de la Charte de l'Atlantique dans notre Charte, la Délégation soviétique nous a dit: "Non; pourquoi citer la Charte de l'Atlantique? Elle forme un tout à part."

J'en dirai autant en ce qui concerne la déclaration de Moscou et je ne vois pas la nécessité de reproduire une expression prise dans son texte.

Nous avons écarté l'idée essentielle de la personnalité, de la souveraineté, traitée dans un autre article, de même que nous avons écarté un terme scientifique à savoir celui de l'égalité juridique. L'ordre international doit être fondé essentiellement sur la personnalité de l'Etat. L'Etat doit être respecté non seulement parce qu'il est souverain et parce qu'il a un territoire; l'Etat est essentiellement la synthèse des valeurs morales culturelles et des nuances de la personnalité. La personnalité de l'Etat doit être respectée et, parce que l'Etat a une personnalité, il est souverain.

Lincoln luttait non seulement pour libérer les esclaves

mais encore pour préserver la personnalité de sa nation. Personnalité signifie à la fois unité, souveraineté et liberté. Je regrette que certains délégués aient, en cette matière, souffert de ce que je pourrais qualifier d'allergie intellectuelle.

C'était une grave erreur d'écarter ainsi la notion de personnalité qui avait été acceptée dans la déclaration de Lima, idée qui avait été mise en avant par Mello Franco et DeCarneiro et qui, de la déclaration de Lima, est passée dans l'Acte de Chapultepec.

L'Article 4 du Chapitre II, qui a pour objet d'établir le respect de l'indépendance politique et de l'intégrité territoriale, dit:

"Les membres de l'Organisation s'abstiendront dans leurs relations internationales de recourir à la menace ou à l'emploi de la force contre l'intégrité territoriale ou l'indépendance politique de tout membre ou de tout Etat, ou d'agir de toute autre manière incompatible avec les buts de l'Organisation."

La notion d'intégrité territoriale et d'indépendance politique se trouve ainsi traitée uniquement en rapport avec l'usage de la force. Cette insertion a eu pour résultat de remplacer un article qui nous paraissant parfait par un texte qui l'est moins. Le texte primitif des Propositions de Dumbarton Oaks était ainsi conçu:

"Tous les membres de l'Organisation s'abstiendront, dans leurs relations internationales, de recourir aux menaces ou à l'emploi de la force incompatibles; en toute hypothèse, avec les buts de l'Organisation."

Le nouvel article 4 a été critiqué par de nombreux délégués, notamment ceux des Etats-Unis, de la Norvège et par notre Président. Je ne saurais accepter l'insertion de cet article sans élever une protestation. S'il le faut, bien que je ne veuille pas soumettre la question au vote, je présenterai ma déclaration au Comité de Coordination.

LE PRESIDENT: La parole est à M. le Rapporteur.

LE RAPPORTEUR (M. Zeineddine, Syrie, parlant en anglais; texte de l'interprétation en français): Je veux remercier M. le Représentant du Pérou de ses observations. Notre Comité a eu l'occasion d'examiner cette question et d'entendre les observations de l'honorable Délégué du Pérou qui s'est exprimé au fond et de manière détaillée sur son

amendement ainsi que sur plusieurs autres qui nous étaient présentés.

Il est notamment question de terminologie, de l'égalité souveraine des membres de l'Organisation. En ce sens, plusieurs délégués se sont exprimés, notamment M. le Représentant de l'Uruguay.

Lorsque le Comité a examiné cette question, il a adopté le paragraphe qui vous est soumis en donnant, dans son rapport, une explication qui, je crois, devrait donner satisfaction à l'honorable Délégué du Pérou.

En effet, il a été indiqué dans le rapport concernant le paragraphe 1 que le Comité a décidé de maintenir la terminologie "égalité souveraine" , étant entendu qu'elle contient les éléments suivants: 1o. que les Etats sont égaux juridiquement; 2o. qu'ils jouissent de tous les droits qui découlent de cette souveraineté; 3o. que la personnalité de l'Etat est respectée ainsi que son intégrité territoriale et son indépendance politique; 4o. que l'Etat devra s'acquitter fidèlement de ses devoirs et de ses obligations internationales.

Je crois qu'avec ces indications, contenues dans le rapport, le Représentant du Pérou aura satisfaction. Nous croyons notamment que certaines observations que des représentants au Comité auraient voulu voir inclure dans la Charte en ce qui concerne les relations entre l'organisme, d'une part, et les Etats membres, d'autre part, ont été clairement exposées dans le rapport et que, par conséquent, nous pourrions adopter ce texte.

LE PRESIDENT: La parole est à M. Hanna Saba, Délégué de l'Egypte.

M. SABA: Monsieur le Président, messieurs les délégués: La délégation égyptienne a estimé dès le début de cette conférence que, parmi les buts que la nouvelle Organisation se propose de réaliser, devrait figurer l'avancement et le développement du droit international public.

Les déclarations qui vous ont été faites hier vous ont démontré que, quelles que soient les divergences d'opinion sur la portée, la rédaction ou la place d'un amendement, le désir unanime des Nations Unies est bien de placer les relations internationales sous l'égide du droit et de l'équité; de régler les conflits et de maintenir la paix dans le cadre de la justice.

Or, les règles du droit des gens, élaborées au cours d'une longue évolution, ont souvent contribué à éviter des conflits armés entre Etats et à développer entre eux des relations pacifiques. La grande faiblesse du droit international par rapport aux autres branches du droit résidait dans son défaut de sanction. Aujourd'hui, la force est enfin mise à la disposition d' ne organisation mondiale qui est elle-même l'aboutissement"de cette longue évolution du droit des gens et son expression la plus moderne.

Il devient plus que jamais nécessaire pour cette organisation,qui reçoit la sanction de la force,de proclamer que son objectif est l'avancement du droit.

Le Comité chargé d'examiner les Chapitres de la Charte relatifs aux fonctions de l'Assemblée, a retenu, il est vrai, qu'il entrerait dans les attributions de l'Assemblée de veiller a la codification du droit international.

L'on a voulu par cette coopération permettre aux divers organes des Nations Unies d'appliquer les principes de justice dont la réalisation doit constituer leur objectif avec toutes les garanties que comporte l'affirmation de regles supérieures.

Mais le problème est en réalité plus vaste. Il ne s'agit pas uniquement de prévoir une codification, alors même que cette codification tiendrait compte de l'évolution progressive de la conscience internationale.

Il s'agit de proclamer solennellement que l'Organisation nouvelle des Nations Unies,qui n'a reçu la sanction de la force que pour appliquer le droit et qui, comme vous l'a rappelé hier votre Président, doit faire à la paix tous les sacrifices, sauf un seul, celui de la justice, se proposera comme l'un de ses principaux objectifs l'avancement et le développement du droit.

La Délégation égyptienne regrette de constater qu'aucune mention expresse n'a été faite à cet égard dans le Chapitre des Buts de l'Organisation. Elle émet le voeu que l'Organisation nouvelle, en dépit de l'absence d'un texte formel,tendra par tous ses efforts à l'avancement du droit international et à la réalisation de ses principes.

LE PRESIDENT: Il n'y a plus d'orateurs inscrits. Mesdames, Messieurs, vous avez entendu des observations intéressantes. Mais il n'y a pas de proposition. Dans ces conditions, nous pouvons procéder au vote.

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Je veux cependant faire une petite réserve. Le Rapporteur nous a dit, rappelant son rapport, que les mots "egalité souveraine" qui ont provoqué certaines critiques de la part de M. Andréa Belaunde, contenaient les éléments suivants: "que les Etats sont égaux juridiquement; qu'ils jouissent de tous les droits qui découlent de leur souveraineté; que la personnalité de l'Etat est respectée ainsi que son intégrité territoriale et son indépendance politique; que l'Etat devra, dans un ordre international, s'acquitter de ses devoirs et obligations internationales."

Si nous avons réussi à dire tout cela en deux mots: "souveraine égalité", nous avons battu tous les records de la concision. Mais certains d'entre nous, même au comité - et c'est la réserve que je voudrais faire, - ont conservé à cet égard un certain scepticisme et ils rapprochent les mots "égalité souveraine" d'une part, de certaines dispositions qui figureront dans le Chapitre relatif au Conseil de Sécurité et qui semblent s'inspirer d'une vue plus réaliste des choses, d'autre part, des termes employés dans les Chapitres I et IX qui parlent plus simplement des "droits égaux des peuples".

Ces membres ont conservé l'espoir que le Comité de Coordination trouvera le moyen de formuler le principe d'égalité qui nous est cher, d'une façon plus modeste et plus sincère.

Personne ne demande plus la parole?

Je mets la resolution aux voix.

La résolution est adoptée.

Je prie M. Malcolm Davis de donner lecture du paragraphe suivant:

LE SECRETAIRE ADMINISTRATIF (parlant en anglais; texte français):

"Paragraphe 2: Les membres de l'Organisation doivent remplir les obligations assumées par eux aux termes de la Charte afin d'assurer à chacun d'eux la jouissance des droits et des avantages résultant de sa qualité de membre."

Voici maintenant une version différente conforme à un amendement colombien:

"Les membres de l'Organisation doivent remplir de bonne foi les obligations assumées par eux aux termes de

la Charte afin d'assurer à chacun d'eux la jouissance des droits et des avantages résultant de sa qualité de membre."

LE PRESIDENT: La parole est à M. le Professeur Yepes, Délégué de la Colombie, pour défendre cet amendement.

M. YEPES: Monsieur le Président, messieurs les délégués, mesdames, messieurs: l'amendement proposé par la Colombie est extrêmement simple: il consiste exclusivement à introduire la notion de la bonne foi dans la Charte des Nations Unies.

Nous l'avons présenté au sein du Comité, mais accompagné d'autres modifications qui, elles, ne furent pas acceptées. C'est pourquoi nous nous sommes vus obligés de le détacher de l'ensemble pour insister aupres de la Commission plénière afin que notre Charte ne soit pas privée d'un élément essentiel.

D'ailleurs, l'amendement colombien s'explique de lui-même. Le principe de la bonne foi que nous voudrions ajouter aux postulats déjà incorporés dans la Charte devrait devenir, d'apres nous, le leitmotiv de la nouvelle Organisation internationale créée après tant d'années où la mauvaise foi était la règle de la conduite suivie par les Etats qui ont plongé le monde dans le chaos où nous nous trouvons encore aujourd'hui.

Les Nations Unies ont entrepris de restaurer la morale internationale. Déjà, dans le Préambule que nous avons élaboré et dans les deux Chapitres approuvés par notre Commission, se trouvent quelques-uns des principes essentiels de toute société internationale vraiment organique. Dans un certain sens, et avec certaineslimitations imposées par les circonstances, nous avons réussi à insouffler au plan de Dumbarton Oaks ce supplément d'âme dont il manquait si étrangement. Mais il y manque encore le principe de la bonne foi sans lequel toute notre oeuvre reposera sur le vide et sur le néant. C'est ce qui justifie que nous le portions devant la Commission plénière pour mettre celle-ci en face de ses responsabilités.

Les membres de l'Organisation internationale contractent certaines obligations en vertu de la Charte. Ce n'est pas fortifier ces obligations, mais au contraire les affaiblir dangereusement que de dire qu'elles seront remplies, cela va sans dire. Mais en ajoutant qu'elles doivent être

en pleine bonne foi "in full good faith", nous donnerons la raison d'être de notre disposition sans quoi elle n'aurait aucun sens juridique.

Il n'est pas exact de dire que la bonne foi est sous-entendue ou implicite (implied) dans toutes les obligations internationales, car il y a, au contraire, toute une école de fausse philosophie politique qui fait de l'intérêt, légitime ou illégitime, de l'Etat le suprême régulateur de la vie internationale. Pour cette école, la bonne foi ne compte pas.

N'était-ce pas Bismark, le chancelier de fer, qui disait que les traités internationaux, "consituent un provisoire qui n'a qu'une durée momentanée et limitée aux intérêts mêmes de l'Etat"? N'était-ce pas un autre chancelier allemand qui a employé cette autre expression, comble de la mauvaise foi, selon laquelle les traités ne sont que des "chiffons de papier"? Et n'était-ce pas le successeur authentique de ces princes de la mauvaise foi et de la Macht-Politik qui osait écrite dans Mein Kampf ce mot cynique: "le juste est ce qui est utile a mon peuple allemand" (Recht is was meinem deutschen volk nutzt)?

Il y a donc une prétendue école de philosophie politique qui préconise la mauvaise foi comme regle de conduite des Etats et des gouvernements. Les Nations Unies se doivent de réagire contre ces conceptions inadmissibles et proclamer, au contraire, que la vie internationale exige un minimum de moralité comme principe normatif de conduite pour les peuples. Ce minimum ne saurait être autre chose que la bonne foi et le respect de la parole donnée.

L'amendement colombien a donc une profonde signification spirituelle. Il symbolise cet esprit nouveau de loyauté, de bonne foi, de bon voisinage et d'honnêteté, dont la vie internationale doit désormais s'inspirer. Car le bon voisinage, qu'est-ce, sinon la bonne foi appliquée aux rapports entre les hommes et entre les peuples?

L'expression "de bonne foi" (in good faith) est une expression standard du droit international. Le grand juriste anglais, Westlake, disait qu'elle était "le grand lien moral qui attache les uns aux autres tous les Etats du monde vivant sous un régime de droit". Westlake disait textuellement: "Good faith is the great moral ligament which binds together the States of the World in a system of Laws."

Cette expression se trouve à l'article 13, l'alinéa 4 du Covenant de l'ancienne Société des Nations. En l'abandonnant dans la Charte, nous donnerions l'impression fâcheuse

d'abandonner non seulement un mot consacré par la tradition juridique universelle, mais ce qui est pire, une conception qui doit être à la base de toute la vie internationale. Cela serait tres grave car l'opinion publique mondiale pourrait nous juger sévèrement et justement si elle réalisait un jour que nous avons mis sous veilleuse ici une idée fondamentale de toute notre civilisation basée sur la loi du contrat.

Cette expression "infull good faith" se trouve enfin dans le projet publié le 1er janvier 1944, au moment le plus noir de la guerre, par les deux cents plus grands juristes américains. Ce projet qui est couvert par l'autorité juridique et morale de tous les professeurs de droit international des Etats-Unis et qui est considéré comme l'un des plus grands monuments juridiques de notre temps, dit à son article 8 ce qui suit, qui est tout-à-fait en accord avec l'amendement colombien: "Each State has a legal duty to carry out in full good faith its obligations under international Law". (Tout Etat a le devoir légal d'exécuter en pleine bonne foi ses obligations sous la loi internationale). Ce document que je tiens à la disposition de la Conférence a été publié, comme je l'ai déjà dit, le 1er janvier 1944, d'une façon tout-à-fait confidentielle. J'y relève les signatures de tout ce qu'il y a de plus grand dans les chaires de droit international des Universités américaines. Je vois les noms de plusieurs juges de la Cour Suprême des Etats-Unis, du juge américain de la Cour Permanente de Justice internationale de La Haye et les signatures de quelques-uns des membres de la très illustre délégation des Etats-Unis à cette Conférence de San Francisco.

Comme tous les juristes le savent, dans le Code civil de toutes les nations modernes, il y a un principe selon lequel les obligations privées doivent être exécutées de bonne foi. Par analogie, nous pouvons conclure que le même principe doit être expressément reconnu pour les obligations internationales.

Voilà, Monsieur le Président, et messieurs les délégués, quelques-unes seulement des raisons pour lesquelles la Délégation colombienne ose espérer que cet amendement sera unanimement accepté par notre Commission et incorporé par la suite dans la Charte constitutionnelle des Nations Unies.

LE PRESIDENT: Le Rapporteur désire-t-il prendre la parole?

La parole est à M. le Rapporteur.

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LE RAPPORTEUR (parlant en anglais; texte de l'interprétation en français): Je n'ai pas l'intention, ici, de m'opposer à l'amendement qui vient d'être suggéré par le représentant de la Colombie, ou d'y contredire. En effet, au cours des discussions du Comité, aucune décision formelle ne fut prise sur cet amendement; par conséquent, il n'a pas été mentionné dans le rapport au même titre que, par exemple, l'amendement précédent qui traitait de l'égalité souveraine, premier paragraphe, et qui, lui, avait été discuté et sur lequel une décision avait été prise.

Quant a l'amendement colombien, le Comité a examiné la suggestion mais n'a pas pris de décision formelle. Il a estimé qu'il suffisait de dire que les membres de l'Organisation doivent remplir leurs obligations, sans qu'il soit nécessaire d'ajouter les mots "de bonne foi".

Bien que cette opinion n'ait été partagée que par une partie seulement des membres du Comité, j'estime qu'il est superflu de mentionner ces termes, puisqu'ils sont implicites dans le paragraphe que vous avez sous les yeux.

En effet, toutes les obligations internationales doivent logiquement être conclues de bonne foi et ce qui importe c'est que les engagements qui sont pris soient respectés. Si un débiteur vous paie sa dette au moment convenu, l'engagement est rempli et vous ne vous demandez pas s'il a été rempli de bonne foi ou non.

Par ailleurs, nous avons entendu M. Yepes rappeler l'exemple de Bismark et de Hitler, qui n'ont pas rempli leurs obligations et qui ont fait preuve d'une absence totale de bonne foi. Ce rappel m'a confirmé dans mon opinion. Que nous mentionnions ces mots ou non, le résultat, lorsqu'il s'agit de contractants de mauvaise foi, restera le même.

Par conséquent, je ne veux pas m'opposer à l'amendement de M. Yepes, mais je voulais rappeler ce qui a été discuté, à ce sujet, au Comité.

LE PRESIDENT: Mesdames, Messieurs, les déclarations de M. le Rapporteur, sans prendre position nettement contre la proposition, tendent certainement a la faire rejeter comme inutile. Dans ces conditions, je donnerai la parole a un deuxième orateur qui appuiera l'amendement.

Avant de le faire, je tiens à attirer l'attention de M. le Rapporteur sur un fait que nous aurions dû souligner:

c'est que tout-à-l'heure, quand M. Davis a lu le texte il a dit: "In good faith" et non "in full good faith".

Effectivement, l'expression "in full good faith" peut paraître superflue alors que la formule "in good faith" est loin d'être inutile.

Je ne sais pas quel est le cas pour les pays de langue anglo-saxonne, mais c'est un principe d'interprétation de droit romain qu'une obligation s'exécute de bonne foi et que si elle est susceptible de deux interprétations, dont l'une permet l'exécution littérale mais qui n'est pas conciliable avec la bonne foi, cette interprétation doit être écartée. C'est pourquoi notre code civil contient ce principe formel: "les obligations doivent s'exécuter de bonne foi", qui s'est trouvé reproduit dans le pacte de la Société des Nations en ce qui concerne les engagements.

Pas plus que M. le Rapporteur, je ne prends parti, mais c'est naturellement dans cet esprit que M. Yepes a déposé sa proposition.

M. YEPES: J'accepte votre interprétation.

LE RAPPORTEUR: Dans le texte que nous avons, il est dit: "in full good faith".

M. YEPES: J'accepte qu'il soit dit: "in good faith" et non "in full good faith".

LE PRESIDENT: La parole est à Mlle Gildersleeve, Délégué des Etats-Unis, deuxième orateur "pour".

MLLE GILDERSLEEVE (parlant en anglais; texte de l'interprétation en français): Au nom de la Délégation des Etats-Unis, je tiens à déclarer que nous avons été convaincus par les arguments fournis par nos amis en faveur de cet amendement, que nous sommes désireux d'appuyer.

Au début, nous ne nous étions pas exactement rendus compte du sens de ces mots "de bonne foi". Ils sont conformes, ainsi qu'on nous l'a expliqué, à la tradition du droit romain. Nous les jugions inutiles; nous présumions que cela allait sans dire, que les obligations devaient être exécutées de bonne foi et que la chose était implicite.

Mais nous constatons que c'est là une expression traditionnelle dans les pays latino-américains et qu'elle

signifie qu'il ne faut pas se contenter d'exécuter les obligations à la lettre mais encore dans leur esprit. Ces mots donnent une assurance sans laquelle le principe n'apparaît pas satisfaisant pour nos amis. C'est pour ces raisons que nous avons décidé de voter en faveur de l'amendement.

LE PRESIDENT: La parole est à M. le Président du Comité, pour combattre la proposition.

M. MANUILSKY: Pas exactement cela.

Monsieur le Président, mesdames et messieurs, lorsque le Comité a discuté cette question, une partie des délégués se sont opposés à l'amendement de M. Yepes. Pour quelles raisons? Les raisons étaient simples: dans le droit international, toutes les obligations qui sont conclues doivent être remplies avec bonne foi. La bonne foi des obligations conclues, c'est l'élément essentiel du droit international.

Nous pensions alors: pourquoi répéter des choses élémentaires que chacun peut trouver dans tous les bouquins sur le droit international? Pourquoi les introduire dans une Charte, dans un document aussi important?

Voilà pourquoi nous avons cru que cet amendement était inutile.

D'autre part, M. Yepes a rappelé l'époque de Bismark et cité Hitler. Grâce à Dieu nous ne sommes plus à l'époque de Bismark, ni à celle de Hitler (applaudissements). Grâce à Dieu! après avoir liquidé Hitler et l'Allemagne vaincue, nous sommes maintenant à l'époque du Président Truman, de M. Churchill et de M. Staiin. Cette époque, qu'a-t-elle démontré?

Messieurs, si nous avons vaincu dans cette guerre, c'est parce que tous les accords qui ont été conclus entre les trois puissances au cours de cette guerre ont été tenus. Il y a une chose qui caractérise notre époque: les accords de Teheran, les accords de Moscou et même les accords de Yalta qui ont créé et contribué à la naissance de cette Conférence, voilà des accords qui ont donné l'exemple de la bonne foi.

Voilà pourquoi nous étions d'avis que l'adjonction proposée était inutile.

Depuis, certains événements se sont produits qui m'ont amené, moi aussi, Monsieur le Président, à changer d'avis.

Au cours de la discussion sur les accords de Yalta, comme vous le savez, la Délégation de Colombie et la Délégation belge ont demandé qu'il fût indiqué dans notre Charte que tous les traités et la parole donnée soient considérés comme saints. Nous avons accepté.

Mais au cours de la discussion sur la procédure de vote au Conseil de Sécurité, certains délégués ont voulu imposer aux grandes puissances de violer l'accord conclu à Yalta et, parmi eux, M. Yepes, de la Délégation colombienne (sourires). Oui!

Pour nous, qui avons en Ukraine tant souffert pendant cette guerre, ce n'est pas une simple question.

Nous estimons que l'accord doit être vraiment rempli de bonne foi.

Aussi, quand une Délégation vient ici prêcher la bonne foi, nous sommes tous prêts à accepter. Mais je demande alors: Pourquoi avez-vous voulu, dès l'origine de notre Organisation, imposer aux grandes puissances la violation de l'accord conclu à Yalta?

Voilà ce que je ne trouve pas logique dans votre position.

C'est pourquoi, après en avoir discuté, notre Délégation demande maintenant que la proposition de M. Yepes soit acceptée.

LE PRESIDENT: Mesdames, messieurs, M. Yepes pourrait demander la parole pour un fait personnel, mais pour l'en dispenser je vais donner moi-même l'explication qu'il donnerait certainement s'il en avait l'occasion.

M. YEPES: Je vous en remercie vivement, Monsieur le Président.

LE PRESIDENT: Ni M. Yepes, ni aucun Délégué n'a demandé aux grandes puissances de se départir de l'accord de Yalta. Celles-ci ont estimé seulement que cet accord ne liait qu'elles-mêmes, les grandes puissances, qui y avaient participé (applaudissements) et ne liait pas les autres délégues. Elles ont cru pouvoir faire usage à la Conférence de leur liberté.

Un certain nombre d'entre elles se sont par la suite inclinées lorsqu'elles se sont rendu compte de l'accord que Yalta portait sur les bases essentielles de l'Organisation, mais aucune d'elles n'a jamais songé à se soustraire à l'exécution de bonne foi d'engagements quelconques.

LE PRESIDENT (parlant en anglais; texte de l'interprétation en français): La parole est maintenant à Lord Cranborne.

LORD CRANBORNE: (parlant en anglais; texte de l'interprétation en français): J'aimerais, au nom du Gouvernement de Sa Majesté Britannique, brièvement appuyer l'amendement qui a été présenté par le Délégué de la Colombie. Je crois que la formule qu'il suggère d'ajouter dans sa forme actuelle serait une addition utile à notre texte.

Le Représentant de l'Ukraine, lorsqu'il a pris la parole il y a quelques instants, a exprimé l'avis qu'il n'était peut-être pas nécessaire d'insérer les termes de "bonne foi" dans notre texte. Je ne suis pas d'accord avec lui et j'estime que, bien que nous soyons tous convaincus que les obligations internationales doivent être accomplies de bonne foi, il pourrait être utile d'indiquer ici cette notion d'une manière plus précise. L'expérience des dernières décades nous a montré que ce n'était pas toujours le cas et que la bonne foi n'était pas respectée par certaines nations. Une grande nation, en particulier, a fait de la mauvaise foi la base même de sa politique internationale. Nous espérons que cela ne se reproduira plus dans l'avenir. Mais nous ne croyons pas qu'il soit inutile d'insister ici sur le principe de la bonne foi dans l'accomplissement des obligations assumées par les nations.

Le Représentant des Etats-Unis d'Amérique et celui de l'Ukraine nous ont tous deux indiqué que la bonne foi était implicitement contenue dans les déclarations de la Charte. Je suis d'accord avec eux, mais j'estime que l'on ne soulignera jamais suffisamment la nécessité d'agir de bonne foi et par conséquent je vous propose d'accepter la suggestion qui est faite par le Représentant de la Colombie et, au nom de la Délégation du Royaume-Uni, je l'appuie ici chaleureusement.

LE PRESIDENT (parlant en anglais; texte de l'interprétation en français): Je donne maintenant la parole à M. Evatt, qui a une déclaration à faire sur cette question.

M. EVATT: S'il s'agissait seulement ici d'une question d'interprétation, je ne serais pas venu à la tribune

faire quelques brèves observations. L'obligation qui est prévue dans le paragraphe 2 que nous examinons maintenant est une obligation de remplir certains engagements prévus par la Charte. Et nous estimons - nous basant sur la formation juridique que nous avons reçue dans les pays anglo-saxons - que si les pays remplissent ces obligations le but même de l'engagement est rempli. On a rappelé ici l'exemple de Hitler mais je tiens à souligner que Hitler n'a pas rempli ses obligations et qu'il s'agit là d'une situation légèrement différente. Les pays fascistes dans l'ensemble n'ont pas rempli les obligations qu'ils avaient assumées, qu'il s'agisse de bonne foi ou non.

Nous sommes en présence de deux écoles juridiques: l'une - celle des pays latins selon laquelle la jurisprudence estime que l'insertion des mots "de bonne foi" est nécessaire et importante; l'autre - l'école anglo-saxonne - qui estime que la mention même de ces termes n'est pas nécessaire. Cependant, si comme il apparait d'apres les déclarations de notre Président et d'autres représentants au Comité, il est important pour la jurisprudence latine d'insérer les termes "de bonne foi" je crois que nous devons accepter cette suggestion.

Je voudrais ajouter simplement ceci: on a fait référence dans les déclarations précédentes à l'accord de Yalta. Nous sommes ici, à San Francisco, très loin de Yalta et je ne voudrais pas y retourner ce matin. Je voudrais simplement dire qu'aucun pays n'a essayé de changer les accords de Yalta ni même la formule de vote prévue par ces accords. Ce que nous avons simplement fait, c'est d'essayer de comprendre ce que voulait dire cette formule et il a fallu quelques semaines pour y arriver.

En revenant à San Francisco, je voudrais simplement, en hommage au Représentant de la Colombie, malgré l'hésitation que j'ai en qualité de juriste australien éduqué à une école différente, dire que nous votons pour l'adjonction des mots: "de bonne foi".

LE PRESIDENT: Mesdames, Messieurs, les déclarations que vous venez d'entendre nous permettent d'envisager déjà quel sera le résultat du vote et nous y passerions tout de suite si je n'avais encore reçu une demande du Docteur Alfaro, Délégué du Panama. Nous avons livré ensemble tant de batailles perdues que je ne veux pas le priver du plaisir d'être associé à une victoire. Je vais donc lui donner la parole.

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M. ALFARO (parlant en anglais, texte de l'interprétation en français): Monsieur le Président, mesdames, messieurs, nous avons entendu des paroles encourageantes prononcées par les Délégués des Etats-Unis, du Royaume-Uni, de l'Australie et de l'Ukraine, ainsi que par le Rapporteur. Ces paroles semblent nous apporter l'assurance que l'amendement qui va être soumis au vote sera non seulement adopté mais voté à l'unanimité.

Mais nous avons entendu aussi beaucoup d'arguments contre, et c'est à ce propos que je voudrais dire quelques mots.

Pour certains délégués, il peut sembler que cet amendement soit de peu d'importance. Je suis convaincu qu'il en a, au contraire, une considérable au point de vue psychologique et juridique. On a fait observer que la bonne foi était implicite dans tous les contrats privés ainsi que dans tous les traités publics. Je réponds que, si ces mots sont implicites, il vaut mieux les maintenir car ils ne feront aucun mal, mais feront, au contraire, beaucoup de bien.

Il est vrai que, dans le droit municipal aussi bien que dans le droit international, les obligations contractuelles doivent etre exécutées de bonne foi. Mais il est vrai également que, dans la majorité des cas où l'on s'accorde sur des obligations d'un caractère général, l'élément de bonne foi est toujours exprimé d'une maniere explicite.

Je rappellerai les conventions d'arbitrage où il est dit, d'ordinaire, non seulement que les parties au litige exécuteront la décision de l'arbitre avec une entière bonne foi, mais encore que, ce faisant, elles engagent également l'honneur national. Je pourrais trouver d'autres exemples, car il en existe un grand nombre; mais il est inutile de les citer tous. Je rappellerai seulement l'oeuvre de deux cents juristes éminents des Etats-Unis, du Canada et d'autres pays qui, sous la présidence de M. Manley O. Hudson, juge à la Cour Permanente de Justice Internationale, ont accompli un travail qui est à la base de nombreux articles des Propositions de Dumbarton Oaks. L'article premier de ce travail dit que chaque Etat a le devir juridique d'exécuter en pleine bonne foi ses obligations telles qu'elles découlent du droit international.

Le rejet de la proposition de la Colombie aurait eu un effet dévastateur sur l'opinion publique. Lorsque le texte de Dumbarton Oaks a été rendu public, l'opinion du monde entier a été étonnée de constater que le droit

international n'était mentionné qu'une seule fois dans ce document et qu'en tout cas il n'apparaissait pas dans les deux chapitres relatifs aux buts et aux principes.

Quant au mot "justice", on a constaté également qu'il n'était employé que parce qu'il faisait partie du titre de la Cour Internationale de Justice et qu'il ne l'était pas pour lui-même avec le sens sacré qu'il comporte. C'est alors qu'ont commencé à pleuvoir les amendements dans lesquels ces mots ainsi que d'autres tout aussi encourageants figuraient. Parmi ces amendements, il y avait ceux des Puissances invitantes, ce dont nous devons les remercier sans réserve.

Grâce à ces textes, grâce à l'admirable Préambule rédigé par le grand homme d'Etat qu'est le Maréchal Smuts, notre Charte ne sera pas seulement le symbole écrit du "gourdin" ou du Décalogue du gendarme international.

Au cours de nos discussions au sein du Comité et du Sous-comité, de nombreux délégués ont fini par avoir l'impression pénible que nous craignions de mentionner les grands concepts qui constituent les traits lumineux de la vie internationale. Il faut dissiper cette impression. Notre Charte doit être - et je suis persuadé qu'elle le sera - le plus grand instrument de paix, de foi et d'espoir.

Je réponds d'un mot à une observation de M. Manuilsky. Nous devons montrer au monde que nous ne sommes pas effrayés de ces paroles magiques qui apportent la tranquillité à l'âme et le réconfort à l'esprit. Les peuples ne seront jamais fatigués d'entendre parler d'indépendance, de droit à se gouverner eux-mêmes, de droit international, de justice, de droits de l'homme, de fraternité, de liberté, de sainteté des traités et de la parole donnée.

Je vous demande donc d'accepter l'amendement qui vous est proposé par un vote unanime, comme un acte de foi et de bonne foi. Vous direz ainsi que les Nations Unies entendent exécuter leurs obligations de bonne foi.

LE PRESIDENT: Personne ne demande plus la parole?

Je mets aux voix l'amendement de la Délégation de Colombie.

L'amendement est adopté à l'unanimité. (Applaudissements)

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Ainsi se trouve voté l'article 2 du Chapitre II des Principes dans la forme où il a été amendé par la Délégation de Colombie.

Je demande à M. Malcolm Davis de donner lecture du paragraphe 3:

LE SECRETAIRE ADMINISTRATIF (parlant en anglais; texte français): "3. Les membres de l'Organisation règleront leurs différends internationaux par des moyens pacifiques, de telle manière que la paix et la sécurité internationales ainsi que la justice ne soient pas mises en danger."

LE PRESIDENT: Il n' a pas d'orateurs inscrits sur ce paragraphe.

Je le mets aux voix.

Ce texte est adopté.

Je prie M. Malcolm Davis de lire le quatrième paragraphe.

LE SECRETAIRE ADMINISTRATIF (parlant en anglais; texte français): "4. Les membres de l'Organisation s'abstiendront dans leurs relations internationales, de recourir à la menace ou à l'emploi de la force contre l'intégrité territoriale ou l'indépendance politique de tout membre ou de tout Etat, ou d'agir de toute autre manière incompatible avec les buts de l'Organisation."

LE PRESIDENT: Le Président de la Délégation néo-zélandaise, le premier ministre Peter Fraser, a demandé la parole sur ce paragraphe. Je la lui donne.

M. FRASER: (parlant en anglais; texte de l'interprétation en français) Je voudrais tout d'abord m'associer aux observations qui ont été faites ici par Mme. Gildersleeve et, à une autre occasion, par Lord Halifax, sur la nécessité de mettre plus de vie dans le Préambule de notre Charte. Ce Préambule devrait être rédigé dans la meilleure forme possible, en toutes langues, et ce n'est pas là, nécessairement, une tâche de juristes.

Il nous paraît particulièrement important que le texte de ce Préambule satisfasse l'esprit autant que la raison. Et je crois que nous pourrions demander au département d'Etat des Etats-Unis, en insistant, de recourir

à la collaboration d'hommes de lettres d'une réputation telle que celle de M.Mac Leish. Ainsi aurions-nous finalement un document dont le texte serait comparable, en importance et en valeur littéraire et morale, à la Charte de l'Atlantique.

Je regrette, par conséquent, que la première rédaction qui avait été présentée et qui était l'oeuvre du Maréchal Smuts, n'ait pu être retenue. Nous voudrions obtenir un document qui inspire réellement les générations futures et nous voudrions insister sur la nécessité de lui donner la meilleure forme possible.

Je voudrais également remercier le Président, le Rapporteur et le Secrétariat de notre Comité des efforts qu'ils ont faits en vue de nous permettre de terminer rapidement nos travaux. Grâce à leur inlassable activité, nous sommes arrivés à un excellent résultat en un temps très court.

Monsieur le Président, dans mon discours prononcé au cours de la session plénière, j'ai souligné le fait que les nations du monde devraient avoir une règle internationale de conduite qui leur soit présentée clairement et simplement. J'ajoutais que, dans l'opinion du gouvernement de la Nouvelle-Zélande, cela ne pouvait être réalisé que par l'engagement universel pris par chacune et par toutes les nations de s'opposer à tous les actes d'agression.

Dans le rapport sur le travail du premier Comité figure le texte de l'amendement qui a été proposé par la Délégation néo-zélandaise, tendant à insérer, après le paragraphe 4 du Chapitre II, le texte suivant:

"Tous les membres de l'Organisation s'engagent collectivement à résister à tout acte d'agression dirigé contre l'un de ses membres."

On constatera que cette proposition n'implique aucune définition du terme "agression"; elle laisse entièrement au Conseil de Sécurité, dont les grandes puissances sont toujours membres avec, chacune, leur plein droit de veto, le soin de décider si, à son avis, une agression s'est en réalité produite. La proposition de la Nouvelle-Zélande est limitée à ce point et à ce point seulement: à savoir que si le Conseil de Sécurité, par sa majorité qualifiée et avec le vote de tous ses membres permanents, a décidé

qu'un acte d'agression contre l'un des membres de l'Organisation s'est produit, il en résultera immédiatement le devoir clair, pour tous les membres petits et grands de l'Organisation de résister et de mettre fin à l'agression par les moyens prévus et déterminés par le Conseil de Sécurité.

En raison de l'importance que l'examen de cette proposition a présentée dans le Comité, la Délégation de Nouvelle-Zélande désire, par cette déclaration devant la Commission I, faire état publiquement du fait qu'en dépit du temps limité qui était à la disposition du Comité pour ces discussions, l'amendement de la Nouvelle-Zélande a été approuvé par 26 voix contre 18. Il est clair que ce vote, tout en n'atteignant pas la majorité des deux-tiers qui était exigée pour la soumission du texte à la Commission, témoigne d'une majorité substantielle qui ne peut être ignorée, en faveur d'une proposition qui, de l'avis de la Délégation de la Nouvelle-Zélande, doit présenter une importance fondamentale si l'Organisation doit fonctionner d'une manière efficace.

La Délégation de la Nouvelle-Zélande ne se propose pas, maintenant, de présenter un amendement à la Commission. Mais tenant compte de l'opinion qui a été très précisément formulée par le Comité à l'égard de cet amendement, elle désire attirer l'attention des nations assemblées à la Conférence sur ce qu'elle considère comme un défaut grave dans les principes de la Charte. Si nous le faisons, c'est dans l'espoir que le Conseil de Sécurité, lorsqu'il commencera ses travaux et s'occupera de la résistance à l'agression de même que de l'établissement et de maintien de la paix et de la justice internationales, avec l'appui de toutes les Nations Unies et l'expérience accrue qu'il aura à ce moment, estimera possible et avantageux d'accepter les propositions de la Nouvelle-Zélande, dans la pratique, comme un principe de base. Ainsi, j'espère, pourrait-il procéder à un examen réaliste des problèmes dont il sera saisi.

LE PRESIDENT: Il n'y a plus d'orateur inscrit sur le paragraphe 4. Personne ne demande plus la parole sur ce paragraphe?...Le paragraphe 4 est adopté.

M. Malcolm Davis va donner lecture du paragraphe 5:

LE SECRETAIRE ADMINISTRATIF (parlant en anglais; texte français): "5. Les membres de l'Organisation donneront pleine assistance à l'Organisation dans toute action

entreprise par elle conformément aux dispositions de la Charte."

LE PRESIDENT: Il n'y a pas d'orateur inscrit sur le paragraphe 5. Personne ne demande la parole sur ce paragraphe?... Le paragraphe 5 est adopté.

M. Malcolm Davis va donner lecture du paragraphe 6.

LE SECRETAIRE ADMINISTRATIF (parlant en anglais; le texte français):"6. Les membres de l'Organisation s'abstiendront de prêter assistance à tout Etat contre lequel l'Organisation aura entrepris une action préventive ou coercitive."

LE PRESIDENT: Il n'y a pas d'orateur inscrit sur le paragraphe 6. Personne ne demande la parole sur ce paragraphe?... Le paragraphe 6 est adopté.

Nous arrivons au dernier paragraphe du Chapitre II.

LE SECRETAIRE ADMINISTRATIF (parlant en anglais; texte de l'interprétation en français): Le Comité a établi deux variantes au début de ce texte: "L'Organisation doit" ou: "L'Organisation devrait".

LE PRESIDENT: Ces deux variantes ont la portée que vous devinez. Dans le cas où le mot "devrait" serait retenu, nous marquerions certainement de façon plus forte l'obligation de l'Organisation à l'égard de ses membres; certains membres du Comité ont cependant estimé qu'il serait assez paradoxal que l'Organisation prétendît s'imposer à elle-même des obligations et qu'il était tout aussi naturel que l'on indique la tendance dans laquelle l'Organisation agirait.

Comme il s'agit d'une question de forme et non d'une question de fond, nous avons cru superflu de procéder à un vote et nous avons laissé au Comité de Coordination le soin de nous départager.

Personne ne demande la parole sur le paragraphe 7?.

Le paragraphe 7 est adopté.

Il reste au Chapitre II un paragraphe 8 dont le texte a été adopté hier en Comité, mais ce texte devra faire l'objet d'un rapport. Lorsqu'il nous sera présenté, la question

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nous sera soumise avec le Chapitre III, au cours de la même séance.

Notre ordre du jour est épuisé. Il me reste à vous remercier, Mesdames et Messieurs, du concours que vous avez donné à la présidence pour cette démonstration de libre discussion en public.

La séance est levée à 12 h 55.

Annex 3: The United Nations Conference on International Organization, *Report of the Rapporteur of Commission I to Plenary Session*, Doc. 1179, 24 June 1945.

The United Nations Conference on International Organization

SAN FRANCISCO, CALIFORNIA
APRIL 25 TO JUNE 26, 1945

SELECTED DOCUMENTS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1946

7425A

DEPARTMENT OF STATE

PUBLICATION 2490

CONFERENCE SERIES 83

For sale by the Superintendent of Documents
Government Printing Office, Washington 25, D. C.

Price $2.75

Note. Copies of *Facsimile of the Charter of the United Nations, Statute of the International Court of Justice, and Interim Arrangements in Five Languages* (Department of State publication 2368, Conference Series 76) and *The International Court of Justice* (Department of State publication 2491, Conference Series 84) may be obtained from the Superintendent of Documents, United States Government Printing Office, Washington 25, D.C., at 60 cents and $1.00 a copy, respectively.



This Opera House is to return to its original destination, and what is going to be heard here in the future will probably be much more harmonious than what we heard in the course of these meetings.

I hope, however, that in San Francisco you will remember the great effort which was made here by men of good-will coming from 50 different nations to try and build a basis for an International Organization. I believe that in the course of these few weeks we have added a new sail to the ship which is going to start on its course from this Pacific port whose name is symbolically associated with the work we did here.

I am particularly glad that Dr. Evatt should have reminded us today of the two great American statesmen who were pioneers in this work of international organization, President Woodrow Wilson and President Franklin Delano Roosevelt. It was my privilege to know President Wilson when in Paris at the Peace Conference of 1919, at the Hotel Crillon. He used to take the Chair in a number of sessions, I believe about twenty in number, at the end of his long day's work, and, to the best of his intelligence and his understanding, tried to draft the Covenant of the League of Nations. His life, like that of President Roosevelt, was undoubtedly shortened by the great effort he made to have his admirable ideas adopted and put into practice in world organization.

And I cannot help but remember the words spoken many years ago by President Hymans, the Belgian Delegate, who was President of the First Assembly of the League of Nations. He said that at that Assembly we were starting on a great experiment. I believe we may say exactly the same thing here. The first experiment attempted eventually failed, but we are starting here again, and I believe we have better chances than we had 20 years ago for the very reason that the first experiment was made and failed, and those experiments mankind is going to start again always until final success is reached.

However, we must realize that we are only making a start, and whatever effort we may have made here, we must realize that far greater efforts will be needed in the future if the Organization is to meet the hopes which we all put into the new Organization. In the years to come we shall have to do away with a great many misunderstandings; we shall have to seek new solutions for problems for which the solutions adopted here will not have proved satisfactory. We shall have to go on strengthening that spirit of mutual understanding, mutual confidence, and unity, which has already led us to two great victories and which we hope will soon lead us to a third one, that spirit which is the essential condition if we want to establish international peace and security in the world.

The meeting stands adjourned.

Report of Rapporteur of Commission I to Plenary Session

Doc. 1179, June 24

A

Commission I at its first, second, and third meetings, on June 14, 15, and 19, gave consideration to the work of Committee I/1 dealing with Preamble, Purposes, and Principles. The Commission approved the

report of the Committee's Rapporteur, Mr. Farid Zeineddine (Syria), (Doc. 944, I/1/34 (1)[22], as supplemented by Doc. 1070, I/1/34 (1) (d)[23]), with minor exceptions as noted below.

1. Preamble

The Commission at its first meeting on June 14 unanimously accepted the Preamble as submitted by Committee I/1. However, it seemed to be the general feeling of the meeting, as voiced by the United States Delegate, and reiterated at the Commission's second meeting on June 15 by the New Zealand Delegate, that the phraseology of the Preamble needed considerable improvement so as to imbue it with more soul and greater popular appeal. In particular the United States Delegate desired that the opening phrase "We the peoples of the United Nations" be retained by the Coordination Committee.

2. Chapter I

Article 1 of Chapter I was scrutinized by the Commission at its first session. At this time the Egyptian Delegation submitted the following substitute proposal:

> To maintain international peace and security, *in conformity with the principles of justice and international law;* and to that end to take effective collective measures for the prevention and removal of threats to the peace and the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, adjustment or settlement of international disputes or situations which may lead to a breach of the peace.

After extensive debate, the Delegates in favor of the Egyptian amendment, being those of Egypt, Panama, and Uruguay, and the Delegates opposed, the United Kingdom and the United States, the Egyptian amendment received 21 votes in favor and 21 against, thus failing to obtain the necessary two-thirds majority.

The Commission then unanimously approved the text of paragraph 1 of Chapter I, as submitted by Committee I/1.

At the Commission's second session on June 15 Articles 2, 3, and 4 of Chapter I received unanimous approbation.

3. Chapter II

The Peruvian Delegate made a declaration with reference to Article 1 of Chapter II, as submitted by Committee I/1, stressing the belief of his Delegation that this article of the Charter should have contained a reference to the "personality of states"; he likewise expressed misgivings as to the meaning of the phrase "sovereign equality". The Rapporteur of Committee I/1 in reply pointed out that the sense of the Committee was that the phrase "sovereign equality" comprised four elements: (1) that states are juridically equal; (2) that each state enjoys the rights inherent in sovereign equality; (3) that the territorial integrity of the state must be respected; and (4) that a state must faithfully fulfil its international obligations.

Article 1 as submitted by the Committee was unanimously adopted.

Under Article 2 of Chapter II, the Colombian Delegation proposed an amendment to change Article 2 to read as follows:

[22] *Ante*, p. 490.
[23] *Ante*, p. 501.

All members of the Organization shall fulfil in full good faith the obligations assumed by them in accordance with the Charter in order to insure to all of them the rights and benefits resulting from membership in the Organization.

The President of the Commission suggested that the word "full" modifying the phrase "good faith" seemed redundant. The Colombian Delegate agreed with the President, and this word was removed from the amendment. Support for the Colombian draft of Article 2 came from the Delegates of the United States, the United Kingdom, Australia, and Panama, while the Ukrainian Delegation, although explaining its earlier opposition to the Colombian amendment, concluded by giving it support. The Commission thereupon adopted the Colombian amendment by a unanimous vote.

Article 3 of Chapter II, as submitted by Committee I/1, was approved unanimously.

The Delegate of New Zealand in commenting on Article 4 of Chapter II, as submitted by the Committee, made a statement for the record. He recalled that his Delegation had sought to amplify Article 4 by the phraseology, "all members of the Organization undertake collectively to resist any aggression against any member", and that in the Committee this proposal had received 26 favorable votes as against 18 negative votes. It was thus clear that the New Zealand proposal, while falling short by a few votes of the required two thirds, did have a substantial majority in its favor, which could not be ignored if the Organization were to function effectively.

Article 4, as well as Articles 5, 6, and 7, of Chapter II as submitted by Committee I/1 was thereupon unanimously adopted by the Commission.

At its third meeting on June 19, Commission I considered the text of Article 8 of Chapter II as approved by Committee I/1. The Delegates of Uruguay and Belgium explained their adverse votes on this article in the Committee. The Delegate of Uruguay suggested that failure to establish the rule of international law as a criterion of what matters were essentially within domestic jurisdiction, and of not indicating what body should have competence to pass on cases involving the principle of domestic jurisdiction, were retrograde steps. The Belgian Delegate likewise deplored the fact that international law should not be mentioned as the criterion of determining the scope of domestic jurisdiction, but was satisfied that the new text would not interfere with the settlement of disputes by the International Court of Justice or arbitral tribunals on the basis of international law. The Peruvian Delegate requested that it be noted in the report of the Rapporteur that the Peruvian Delegation (as well as a number of other delegations) had proposed that the International Court of Justice should determine whether a matter pertained to domestic jurisdiction or not. Following these explanations, Article 8 of Chapter II was adopted by the Commission.

B

At its third and fourth meetings on June 19, Commission I also considered the work of Committee I/2 concerning Membership, Principal Organs, Secretariat, and Amendments. The Commission approved the reports of the Committee's two Rapporteurs: that of Mr. Gérard E. Lescot (Haiti), on Membership (Doc. 1178, I/2/76(2)[24]);

[24] *Ante*, p. 504.

and those of Sayyid Jamil Daoud (Saudi Arabia), on Principal Organs (Doc. 1072, I/2/75[25]); on the Secretariat (Doc. 1155, I/2/74 (2)[26]); and on Amendments (Doc. 1154, I/2/73(2)[27]).

1. Chapter III

The text on membership, as recommended by Committee I/2 and adopted by Commission I, consists of provisions for original membership, admission of new members, suspension, and expulsion. Original members, it is quite clear, will be those nations participating in the Conference, which ratify the Charter. New members will be admitted only if they are recognized as peace-loving, accept the obligations contained in the Charter, and, upon scrutiny by the Organization, are judged able and ready to carry out these obligations. With respect to the admission of new members, Commission I has approved by acclamation the following interpretative commentary, originally submitted on June 19, 1945 by the Delegation of Mexico, and supported by the Delegations of France, Australia, Belgium, Ukrainian Soviet Socialist Republic, Byelorussian Soviet Socialist Republic, United States, Uruguay, Guatemala, and Chile.

> It is the understanding of the Delegation of Mexico that paragraph 2 of Chapter III cannot be applied to the states whose regimes have been established with the help of military forces belonging to the countries which have waged war against the United Nations, as long as those regimes are in power.

The Commission accepts the principles of suspension and expulsion recommended by Committee I/2. The Organization may apply the provision on suspension to any member of the Organization against which preventive or enforcement action shall have been taken by the Security Council. This provision foresees the restoration of the exercise of the rights and privileges of the suspended member.

As regards the principle of expulsion, Commission I envisages the application thereof only in exceptional circumstances when it may be enforced against any member which persistently violates the principles contained in the Charter, and because of that ceases to appear as "peace-loving" or "willing to carry out the obligations of the Charter".

The Commission does not recommend any text on withdrawal for inclusion in the Charter. However, the absence of such a clause is not intended to impair the right of withdrawal, which each state possesses on the basis of the principle of the sovereign equality of the members. The Commission would deplore any reckless or wanton exercise of the right of withdrawal but recognizes that, under certain exceptional circumstances, a state may feel itself compelled to exercise this right. Consequently, Commission I has included the following commentary on withdrawal, as recommended by Committee I/2, with some changes in its wording:

> The Committee adopts the view that the Charter should not make express provision either to permit or to prohibit withdrawal from the Organization. The Committee deems that the highest duty of the nations which will become Members is to continue their cooperation within the Organization for the preservation of international peace and security. If, however, a Member because of exceptional circumstances feels constrained to withdraw, and leave

[25] *Ante*, p. 509.
[26] *Ante*, p. 512.
[27] *Ante*, p. 519.

the burden of maintaining international peace and security on the other Members, it is not the purpose of the Organization to compel that Member to continue its cooperation in the Organization.

It is obvious, particularly, that withdrawals or some other forms of dissolution of the Organization would become inevitable if, deceiving the hopes of humanity, the Organization was revealed to be unable to maintain peace or could do so only at the expense of law and justice.

Nor would a Member be bound to remain in the Organization if its rights and obligations as such were changed by Charter amendment in which it has not concurred and which it finds itself unable to accept, or if an amendment duly accepted by the necessary majority in the Assembly or in a general conference fails to secure the ratification necessary to bring such amendment into effect.

It is for these considerations that the Committee has decided to abstain from recommending insertion in the Charter of a formal clause specifically forbidding or permitting withdrawal.

2. Chapter IV

The chapter on Principal Organs consists of three paragraphs. The first paragraph enumerates the Principal Organs: A General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat. The second paragraph establishes the constitutional authority for the creation of subsidiary agencies.

The third paragraph assures that the Organization shall not discriminate between men and women in their eligibility to participate in any capacity in the principal and subsidiary organs of the Organization. The women delegates in the Commission guided our work on this subject in a friendly atmosphere of mutual regard and understanding.

3. Chapter X

The Commission recommends the text for the chapter on the Secretariat as submitted by Committee I/2. In the words of the Canadian Delegate, this chapter is in itself a "Charter for an international civil service". It provides for a Secretariat comprising a Secretary-General and such staff as may be required. The Secretary-General, who will be appointed by the General Assembly upon nomination by the Security Council, is to be the chief administrative officer of the Organization. In this capacity he will perform such functions as are or may be entrusted to him by the Organization, in addition to his making an annual report to the General Assembly on the work of the Organization.

Significantly, the Secretary-General is empowered to bring to the attention of the Security Council any matter which in his opinion might threaten international peace and security. The assignment of this authority to the Secretary-General manifests our deep trust in the Secretary-General to perform his tasks impartially and in the interests of the world at large.

Further paragraphs of the chapter assure the international character, the highest standards of efficiency, competence, integrity, and broad geographical representation. With these essential characteristics, it is believed the Secretariat will serve the Organization in harmony with the spirit and purposes of the Organization.

4. Chapter XI

The chapter on Amendments concludes the tasks of Commission I. On this subject, the Commission feels that the making of amendments

to the Charter must not be too easy or too difficult. That is to say, the Charter should neither impose undue rigidity nor permit dangerous instability. Consequently, the procedures for amendment, as submitted by Committee I/2, which the Commission recommends, follow a sound middle course.

The text recommended by Commission I provides that a two-thirds majority of the Assembly may adopt an amendment to the Charter and this amendment will come into force when it is ratified in accordance with their respective constitutional processes by two thirds of the members of the Organization including all of the permanent members of the Security Council.

Taking cognizance of the facts that the Charter being prepared at San Francisco could not be perfect and that the delegates could not anticipate all eventual developments in international affairs, Commission I recommends for inclusion in the Charter provisions for a special conference on the revision of the Charter. Many delegates believed that this provision would increase the acceptability of the Charter.

The special conference may be held at a date and place to be fixed by a two-thirds vote of the General Assembly with the concurrence of any seven members of the Security Council. It is also provided that, in case the conference is not held before the tenth annual meeting of the Assembly following the entry into force of the Charter, the proposal to call such a conference is to be placed on the agenda of that meeting of the Assembly, and a conference may be called by a simple majority of the Assembly with the concurrence of any seven members of the Security Council.

In this connection the Turkish Delegation suggested that the conference 10 years hence be held in the city of San Francisco, in recognition of the excellent manner in which the present conference was managed by the Government of the United States of America, and in gratitude for the great hospitality shown by the officials and people of the State of California, and the officials and inhabitants of this city by the Golden Gate. This suggestion met with general approval.

The procedure for ratification of the revisions which may result from such a conference would be the same as for ordinary amendments.

With respect to ratification, the provision to have two thirds of the members ratify before amendments or revisions come into effect strengthens amendments which do come into force and, at the same time, prevents amendments coming into force without the approval of a considerable number of members who are not permanent members of the Security Council. If a member finds it impossible to accept an amendment which has come into force without its ratification or if an amendment duly accepted by the necessary majority in the Assembly or in a general conference fails to secure the ratification necessary to bring it into effect, the faculty of withdrawal is available to that member.

Accompanying the report are the reports of the Rapporteurs of Committees 1 and 2,[28] and the texts of the Charter provisions adopted by the Committees and approved by the Commission.

[28] *Ante*, pp. 490, 504, 509, 512, 519, and 527.

House of Lords

Regina *v* Shayler

[2002] UKHL 11

2002 Feb 4, 5, 6; March 21

Lord Bingham of Cornhill, Lord Hope of Craighead, Lord Hutton, Lord Hobhouse of Woodborough and Lord Scott of Foscote

Crime — Official secrets — Disclosure without lawful authority — Former member of security service prosecuted for disclosing documents and information to newspaper — Whether able to argue defence that disclosure necessary in public or national interest — Whether ban on disclosure of information incompatible with right to freedom of expression — Official Secrets Act 1989 (c 6), ss 1(1), 4(1) — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 10

Crown Court — Practice — Preparatory hearing — Judge ruling that defences of duress, necessity of circumstances and public interest not available to defendant — Whether entitled to make ruling at preparatory hearing — Criminal Procedure and Investigations Act 1996 (c 25), s 29

The defendant was a member of the security service from November 1991 to October 1996. At the outset of his service he signed a declaration pursuant to the Official Secrets Act 1989, acknowledging the confidential nature of documents and other information relating to security or intelligence that might come into his possession as a result of his position, and an acknowledgement that he was under a contractual obligation not to disclose, without authority, any information that came into his possession by virtue of his employment. On leaving the service he signed a further declaration acknowledging that the provisions of the Act continued to apply to any information, documents or other articles relating to security or intelligence which might have come into his possession as a result of his previous employment. In 1997 the defendant disclosed a number of documents relating to security or intelligence matters to a national newspaper. Shortly thereafter he left the country. In August 2000 he returned to the United Kingdom and was charged with disclosing documents or information without lawful authority, contrary to sections 1 and 4 of the 1989 Act[1]. In the course of a preparatory hearing under section 29 of the Criminal Procedure and Investigations Act 1996[2], the trial judge ruled that the defence of duress or necessity of circumstances was not open to the defendant, having by implication been excluded by the 1989 Act, nor could he argue, at common law or as a result of the coming into force of the Human Rights Act 1998[3], that his disclosures were necessary in the public interest to avert damage to life or limb or serious damage to property. The Court of Appeal dismissed the defendant's appeal and ruled that the defence of duress or necessity of circumstances was available to a person who committed an otherwise criminal act to avoid an imminent danger to life or serious injury to himself or to individuals for whom he reasonably regarded himself as being responsible, but that the defence was not available to the defendant since there was no sufficient nexus between his disclosures and possible injury to members of the public, that having regard to national security the restrictions placed

[1] Official Secrets Act 1989, ss 1, 4: see post, para 13.

[2] Criminal Procedure and Investigations Act 1996, s 29: "Where it appears to the judge of a Crown Court that an indictment reveals a case of such complexity, or a case whose trial is likely to be of such length, that substantial benefits are likely to accrue from a hearing—(a) before a jury are sworn . . . he may order that such a hearing . . . shall be held."

S 31: "(1) At the preparatory hearing the judge may . . . (3) . . . make a ruling as to—(a) any question as to the admissibility of evidence; (b) any other question of law relating to the case."

[3] Human Rights Act 1998, Sch 1, Pt I, art 10(1): see post, para 22.

Art 10(2): see post, para 23.

was underpinned by statute. Article 10(1) of the Convention, so far as relevant, provides:

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

Section 12 of the 1998 Act reflects the central importance which attaches to the right to freedom of expression. The European Court of Human Rights for its part has not wavered in asserting the fundamental nature of this right. In paragraph 52 of its judgment in *Vogt v Germany* (1995) 21 EHRR 205 the court said:

> "The court reiterates the basic principles laid down in its judgments concerning article 10:
>
> "(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to article 10(2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."

It is unnecessary to multiply citations to the same effect. Thus for purposes of the present proceedings the starting point must be that the appellant is entitled if he wishes to disclose information and documents in his possession unless the law imposes a valid restraint upon his doing so.

Article 10(2)

23 Despite the high importance attached to it, the right to free expression was never regarded in domestic law as absolute. Publication could render a party liable to civil or criminal penalties or restraints on a number of grounds which included, for instance, libel, breach of confidence, incitement to racial hatred, blasphemy, publication of pornography and, as noted above, disclosure of official secrets. The European Convention similarly recognises that the right is not absolute: article 10(2) qualifies the broad language of article 10(1) by providing, so far as relevant to this case:

> "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime . . . for the protection of the . . . rights of others, for preventing the disclosure of information received in confidence . . ."

It is plain from the language of article 10(2), and the European Court has repeatedly held, that any national restriction on freedom of expression can be consistent with article 10(2) only if it is prescribed by law, is directed to one or more of the objectives specified in the article and is shown by the state concerned to be necessary in a democratic society. "Necessary" has been strongly interpreted: it is not synonymous with "indispensable", neither has

it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable": *Handyside v United Kingdom* (1976) 1 EHRR 737, 754, para 48. One must consider whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authority to justify it are relevant and sufficient under article 10(2): *The Sunday Times v United Kingdom* (1979) 2 EHRR 245, 277–278, para 62.

24 In the present case there can be no doubt but that the sections under which the appellant has been prosecuted, construed as I have construed them, restricted his prima facie right to free expression. There can equally be no doubt but that the restriction was directed to objectives specified in article 10(2) as quoted above. It was suggested in argument that the restriction was not prescribed by law because the procedure for obtaining authorisation was not precisely specified in the OSA 1989, but I cannot accept this. The restriction on disclosure is prescribed with complete clarity. A member or former member of any of the security or intelligence services wishing to obtain authority to disclose could be in no doubt but that he should seek authorisation from his superior or former superior in the relevant service or the head of that service, either of whom might no doubt refer the request to higher authority. It was common ground below, in my view, rightly, that the relevant restriction was prescribed by law. It is on the question of necessity, pressing social need and proportionality that the real issue between the parties arises.

25 There is much domestic authority pointing to the need for a security or intelligence service to be secure. The commodity in which such a service deals is secret and confidential information. If the service is not secure those working against the interests of the state, whether terrorists, other criminals or foreign agents, will be alerted, and able to take evasive action; its own agents may be unmasked; members of the service will feel unable to rely on each other; those upon whom the service relies as sources of information will feel unable to rely on their identity remaining secret; and foreign countries will decline to entrust their own secrets to an insecure recipient: see, for example, *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 118C, 213–214, 259A, 265F; *Attorney General v Blake* [2001] 1 AC 268, 287D–F. In the *Guardian Newspapers Ltd (No 2)* case, at p 269E–G, Lord Griffiths expressed the accepted rule very pithily:

> "The Security and Intelligence Services are necessary for our national security. They are, and must remain, secret services if they are to operate efficiently. The only practical way to achieve this objective is a brightline rule that forbids any member or ex-member of the service to publish any material relating to his service experience unless he has had the material cleared by his employers. There is, in my view, no room for an exception to this rule dealing with trivia that should not be regarded as confidential. What may appear to the writer to be trivial may in fact be the one missing piece in the jigsaw sought by some hostile intelligence agency."

As already shown, this judicial approach is reflected in the rule laid down, after prolonged consideration and debate, by the legislature.

26 The need to preserve the secrecy of information relating to intelligence and military operations in order to counter terrorism, criminal activity, hostile activity and subversion has been recognised by the European

Commission and the Court in relation to complaints made under article 10 and other articles under the Convention: see *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, paras 100–103; *Klass v Federal Republic of Germany* (1978) 2 EHRR 214, para 48; *Leander v Sweden* (1987) 9 EHRR 433, para 59; *Hadjianastassiou v Greece* (1992) 16 EHRR 219, paras 45–47; *Esbester v United Kingdom* (1993) 18 EHRR CD 72, 74; *Brind v United Kingdom* (1994) 18 EHRR CD 76, 83–84; *Murray v United Kingdom* (1994) 19 EHRR 193, para 58; *Vereniging Weekblad Bluf! v The Netherlands* (1995) 20 EHRR 189, paras 35, 40. The thrust of these decisions and judgments has not been to discount or disparage the need for strict and enforceable rules but to insist on adequate safeguards to ensure that the restriction does not exceed what is necessary to achieve the end in question. The acid test is whether, in all the circumstances, the interference with the individual's Convention right prescribed by national law is greater than is required to meet the legitimate object which the state seeks to achieve. The OSA 1989, as it applies to the appellant, must be considered in that context.

27 The OSA 1989 imposes a ban on disclosure of information or documents relating to security or intelligence by a former member of the service. But it is not an absolute ban. It is a ban on disclosure without lawful authority. It is in effect a ban subject to two conditions. First of all, the former member may, under section 7(3)(a), make disclosure to a Crown servant for the purposes of his functions as such.

(1) The former member may make disclosure to the staff counsellor, whose appointment was announced in the House of Commons in November 1987 (Hansard (HC Debates) 2 November 1987, written answers col 512), before enactment of the OSA 1989 and in obvious response to the grievances ventilated by Mr Peter Wright in *Spycatcher*. The staff counsellor, a high ranking former civil servant, is available to be consulted: "by any member of the security and intelligence services who has anxieties relating to the work of his or her service which it has not been possible to allay through the ordinary processes of management—staff relations." In February 1989 the role of the staff counsellor was further explained: see the judgment of the Court of Appeal [2001] 1 WLR 2206, para 39.

(2) If the former member has concerns about the lawfulness of what the service has done or is doing, he may disclose his concerns to (among others) the Attorney General, the Director of Public Prosecutions or the Commissioner of Metropolitan Police. These officers are subject to a clear duty, in the public interest, to uphold the law, investigate alleged infractions and prosecute where offences appear to have been committed, irrespective of any party affiliation or service loyalty.

(3) If a former member has concerns about misbehaviour, irregularity, maladministration, waste of resources or incompetence in the service he may disclose these to the Home Secretary, the Foreign Secretary, the Secretary of State for Northern Ireland or Scotland, the Prime Minister, the Secretary to the Cabinet or the Joint Intelligence Committee. He may also make disclosure to the secretariat, provided (as the House was told) by the Home Office, of the parliamentary Intelligence and Security Committee. He may further make disclosure, by virtue of article 3 of and Schedule 2 to the Official Secrets Act 1989 (Prescription) Order 1990 (SI 1990/200) to the

Annex 5: *Attorney-General v. Guardian Newspapers Ltd and others (No. 2)* [1988] 2 WLR 805.

A [COURT OF APPEAL]

ATTORNEY-GENERAL v. GUARDIAN NEWSPAPERS LTD. AND OTHERS (No. 2)
ATTORNEY-GENERAL v. OBSERVER LTD. AND OTHERS
ATTORNEY-GENERAL v. TIMES NEWSPAPERS Ltd. AND ANOTHER

B

1987 Nov. 23, 24, 25, 26, 27, 30; Dec. 1, 2, 3, 4, 7; 21
1988 Jan. 18, 19, 20, 21, 22, 25; Feb. 4; 10

Scott J.

Sir John Donaldson M.R., Dillon and Bingham L.JJ.

C *Confidential Information—Breach of confidence—Public interest—Disclosure by former Crown servant of alleged illegal activities of British Security Service—Information freely available outside United Kingdom—Balancing public interest in freedom of speech against public interest in maintaining confidentiality—Whether injunction against publication to be granted*

D W., a former member of the British Security Service M.I.5, who had gone to live in retirement in Tasmania, was the author of the book *Spycatcher* which contained an account of alleged irregularities in, and alleged unlawful activities carried out by, members of M.I.5 during his period of service with the Security Service. By reason of the terms of his contract of service with the Crown and the provisions of the Official Secrets Act 1911 there was no possibility of the book's publication in the United Kingdom. Accordingly, W. entered into an agreement with the E Australian subsidiary of an English publishing company for the book's publication in Australia. In September 1985 the Crown commenced proceedings in New South Wales to prevent such publication, but it appeared that interim relief obtained in New South Wales did not prevent W. and his Australian publisher from publishing the book outside Australia. Accordingly, steps were taken to have the book published in the United States F where in the circumstances, no injunctive relief could be obtained to prevent publication. On 22 June and 23 June 1986 respectively, the "Observer" and "The Guardian" newspapers published in the United Kingdom an outline of W.'s allegations. On 11 July 1986 Millett J. granted injunctions against the newspapers restraining them from disclosing or publishing any information obtained by W. in his capacity as a member of the British Security Service and which they knew or had reasonable G grounds to believe to have come or been obtained directly or indirectly from W. The order contained two provisos, one of which allowed disclosure of any material disclosed in open court in the Crown's proceedings before the Supreme Court of New South Wales unless prohibited by the judge there sitting or which, after the trial, was not prohibited from publication. On 25 July 1986 the Court of Appeal dismissed the newspapers' appeals from Millett J. with certain minor modifications.

H On 27 April 1987 "The Independent" newspaper published a major summary of allegations contained in *Spycatcher* and on the same day two London evening newspapers published parts of what had appeared in "The Independent." Thereupon the Attorney-General took proceedings against those newspapers for alleged contempt of court. Subsequently "The Guardian" and the "Observer" applied for the discharge of the injunctions against them on the grounds that there had been a significant change of circumstances since July 1986. On 2 June 1987 Sir

by making public disclosure of confidential information that, in the interests of national security, should remain secret. For these reasons I am in sympathy with the purpose of the proposed injunction. But it is an established rule of long-standing that the courts do not answer hypothetical questions and do not grant injunctions on issues that have not yet arisen. None of the newspapers has threatened to publish "Spycatcher 2." There is nothing to suggest that "Spycatcher 2" has yet been written. No one knows what, if it has been written, it contains. No one knows what part or parts of it, if it has been written, the newpapers may want to publish. So I decline to grant the injunction. I would draw attention, however, to the availability of the remedy of an account of profits and the deterrent effect of that remedy.

Injunctions in all three actions refused. Order for account of profits in third action.

S. W.

APPEALS from Scott J.

By a notice of appeal dated 11 January 1988 the Attorney-General appealed on the grounds, inter alia, that (1) the judge, having found that Mr. Wright was in breach of his duty of confidence and that he and his agents remained under a continuing duty of confidence which was not affected by the publication of *Spycatcher* abroad, or its limited dissemination in the United Kingdom, should have found that the defendants were likewise under a continuing duty of confidence notwithstanding such publication and limited dissemination; (2) the judge, having found that the information contained in the book had already been placed before the public by reason of certain previous publications and broadcasts wrongly held that that was relevant to the extent to which the defendants came under a duty of confidence and failed to distinguish between books written by "outsiders" and "insiders," who, he found, carried a ring of authenticity; (3) the judge wrongly held that the defendants were entitled to publish allegations of iniquity notwithstanding that some of the principal allegations had already been investigated; (4) the judge ought to have found that the allegations of iniquity justified disclosure only to the proper authority and that there was no justification for further publication of the book or its contents either by Mr. Wright and his agents or anyone else; (5) the judge erred in approaching the issue whether the publication of the book in the U.S.A. and its subsequent worldwide dissemination negated any duty upon the defendants by seeking to strike a balance between national security needs on the one hand and public interest in the freedom of the press on the other.

By a respondent's notice dated 13 January 1988 Times Newspapers Ltd. sought to cross-appeal against the decision that they had acted in breach of a duty of confidence by publishing extracts from *Spycatcher* on 12 July 1987 and ordering an account of profits on the grounds that (1) the judge had erred in law and fact by finding that prior to the publication of the extracts on 12 July 1987 neither the editor of the "The Sunday Times" nor any member of his staff gave any critical assessment

as to what parts of *Spycatcher* raised issues of "important matters of public interest" on which the public should form a judgment for themselves, that the contents of the extract published on 12 July included a good deal of material that could not be represented as raising any issue on which the public should be invited to judge or in respect of which the public interest to be served by disclosure could be thought to outweigh the interests of national security, and that the extracts published had been indiscriminate or represented a breach of duty; (2) the judge had erred in failing to find that from 10 July 1987 copies of the book had been distributed to bookshops throughout the U.S.A. so that the contents were no longer secret or the loss of secrecy was imminent and inevitable.

By a respondent's notice dated 14 January 1988 Guardian Newspapers Ltd. and Observer Ltd. sought to contend that Scott J.'s decision should be affirmed on the additional grounds that (1) the judge ought to have found that (with one exception) the allegations published in the articles were allegations of iniquity that could not be subject to an obligation of confidence, being allegations concerning activities by the Security Service which were unlawful or did not comply with the United Kingdom's treaty obligations or which were outside the scope of the activities of the Security Service as defined by the Maxwell Fyfe directive; (2) the judge ought to have found that that (with three exceptions) the allegations as summarised in the articles were at the time of publication already in the public domain so as not to be subject to an obligation of confidence; (3) the judge ought to have found that the allegation concerning the unsuccessful attempt at seduction on Soviet instructions by Mr. Guy Burgess was too trivial to be subject to an obligation of confidence.

Robert Alexander Q.C., *John Laws* and *Philip Havers* for the Attorney-General.

Charles Gray Q.C., *Desmond Browne* and *Heather Rogers* for Guardian Newspapers Ltd. and Observer Ltd.

Anthony Lester Q.C. and *David Pannick* for Times Newspapers Ltd.

Cur. adv. vult.

10 February. The following judgments were handed down.

SIR JOHN DONALDSON M.R.

Introduction

This appeal from a judgment of Scott J. constitutes the latest, but assuredly not the last, episode in the *Spycatcher* saga. Previously the courts have been concerned with two quite different aspects of the problem. The first was how to preserve the status quo or "hold the ring" pending a full investigation of the legal rights and duties of all those concerned—"the interlocutory proceedings." These ended in the House of Lords in July 1987: see *Attorney-General v. Guardian Newspapers Ltd.* [1987] 1 W.L.R. 1248. The second concerned the effect of injunctive orders upon third parties and took the form of contempt proceedings

against "The Independent" and two other newspapers: *Attorney-General v. Newspaper Publishing Plc.* [1987] 3 W.L.R. 942. These proceedings—"the contempt proceedings"—have not yet reach a final conclusion. Contempt proceedings have also been brought against "The Sunday Times," but are temporarily in abeyance. The judgment of Scott J. and this appeal, by contrast, are concerned with the final determination of the rights and duties of the parties.

I mention this at the outset lest it be thought that this court is not free to reach decisions which might be thought to be inconsistent with its earlier decisions or inconsistent with those of the House of Lords in the interlocutory proceedings. This would be a profound misconception. The earlier decisions were concerned with different situations and different principles applied. The only exception to this general proposition is that this court is bound by its earlier decision in the contempt proceedings that an injunction addressed to one defendant newspaper may bind all the media of communication. This is only relevant to this appeal to the extent that it requires the court to take account of this potentially wider effect, if it contemplates imposing any injunction.

The history

Scott J., in section 2 of a judgment of conspicuous clarity, has reviewed the history of *Spycatcher*. I could not begin to improve upon it and gratefully adopt it. My only comment is that, as I understand the position, the government's decision not to apply the statutory powers available to prohibit specific imports of *Spycatcher* probably stems from doubts whether the use of such powers in the unique situation which has arisen was within the intendment of the legislation and a consideration of whether the resources of the Customs service should be diverted from other essential duties for the purpose of enforcing such a prohibition. Nevertheless the fact that there is no such prohibition is an important factor of which full account should be taken.

The domestic law of confidentiality

This is the subject of an exhaustive report by the Law Commission, Report on the Law of Breach of Confidence (1981) (Cmnd. 8388), but for present purposes I think that it can be summarised as follows.

(1) A right to have the confidentiality of information maintained is well recognised in the domestic law of this country.

(2) The right can arise out of a contract whereby one party ("the confidant") undertakes that he will maintain the confidentiality of information directly or indirectly made available to him by the other party ("the confider") or acquired by him in a situation, e.g. his employment, created by the confider. But it can also arise as a necessary or traditional incident of a relationship between the confidant and the confider, e.g., priest and penitent, doctor and patient, lawyer and client, husband and wife. Finally, I would agree with Lord Widgery C.J. in *Attorney-General v. Jonathan Cape Ltd.* [1976] Q.B. 752, 769 that "the court must have power to deal with publication which threatens national security." In other words, the Crown, as the embodiment of the nation as a whole, has an enforceable right to the maintenance of confidentiality arising out of the very nature of such information and the consequences of its disclosure without regard to any contract binding the confidant to

any relationship between him and the Crown or to the Official Secrets Act 1911 or any other legislative provision. This special right in the Crown is not relied upon in the present proceedings, but it is right that it should be noted and affirmed.

(3) As a general proposition, that which has no character of confidentiality because it has already been communicated to the world, i.e., made generally available to the relevant public, cannot thereafter be subjected to a right of confidentiality: *O. Mustad & Son v. Dosen (Note)* [1964] 1 W.L.R. 109. However, this will not necessarily be the case if the information has previously only been disclosed to a limited part of that public. It is a question of degree: *Franchi v. Franchi* [1967] R.P.C. 149, 152–153, *per* Cross J. Furthermore, if the confidant could by great exertion have acquired the information for himself, but the confider is in fact the source of the confidant's knowledge, the law may confer a right of confidentiality unless and until the information is acquired by the confidant from other sources: *Schering Chemicals Ltd. v. Falkman Ltd.* [1982] Q.B. 1.

(4) Since the right to have confidentiality maintained is an equitable right, it will (in legal theory and practical effect if the aid of the court is invoked) "bind the conscience" of third parties, unless they are bona fide purchasers for value without notice (*per* Nourse L.J. on 25 July 1986 in the interlocutory proceedings: *Attorney-General v. Observer Ltd.*, Court of Appeal (Civil Division) Transcript No. 696 of 1986).

(5) The right will be lost or, at all events, the courts will not uphold and enforce it, if there is just cause or excuse for communicating the information in circumstances which would otherwise constitute a breach of the right. However the nature and degree of the communication must be proportionate to the cause or excuse. Thus communication to those who have a duty to receive and act upon the information may be justified in circumstances in which indiscriminate communication would not: *Francome v. Mirror Group Newspapers Ltd.* [1984] 1 W.L.R. 892.

(6) The right will also be lost if the information, which is subject to a right of confidentiality, is published to the world by or with the consent of the confider, but it will not necessarily be lost if such publication is by or with the consent of the confidant: *Speed Seal Products Ltd. v. Paddington* [1985] 1 W.L.R. 1327.

(7) There is an inherent public interest in individual citizens and the state having an enforceable right to the maintenance of confidence. Life would be intolerable in personal and commercial terms, if information could not be given or received in confidence and the right to have that confidence respected supported by the force of law. In the context of state confidentiality, the safety of the realm would be threatened if the confidentiality of secret security information could *never* be safeguarded. Equally, the processes of government would become impossible if, for example, the confidentiality of advice could *never* be safeguarded. But the weight to be attached to this factor will vary greatly according to the circumstances of the confidant and the nature of the case. However, there will be just cause or excuse for breaking confidence when there are countervailing public interests supporting publication which outweigh those supporting the right to confidentiality.

The Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969)

The United Kingdom has ratified this Convention, article 10 of which provides:

A "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, B conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining C the authority and impartiality of the judiciary."

The starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law, including the law of contract, or by statute. If, therefore, someone wishes to assert a right to confidentiality, the initial burden of establishing circumstances giving rise to this right lies upon him. The substantive D right to freedom of expression contained in article 10 is subsumed in our domestic law in this universal basic freedom of action. Thereafter, both under our domestic law and under the Convention, the courts have the power and the duty to assess the "pressing social need" for the maintenance of confidentiality "proportionate to the legitimate aim pursued" against the basic right to freedom of expression and all other relevant factors. In so doing they are free to apply "a margin of E appreciation" based upon local knowledge of the needs of the society to which they belong: see *The Sunday Times v. United Kingdom* (1979) 2 E.H.R.R. 245 and *Lingens v. Austria* (1986) 8 E.H.R.R. 407. For my part I can detect no inconsistency between our domestic law and the Convention. Neither adopts an absolute attitude for or against the maintenance of confidentiality. Both contemplate a balancing of F competing private and public interests.

The contents of Spycatcher and prior publication

In section 3 of his judgment, ante, p. 822D et seq., Scott J. summarised the contents of *Spycatcher*, reviewed the evidence of the extent to which Mr. Wright's allegations had previously been made G publicly by others and indeed by Mr. Wright himself in the Granada T.V. programme broadcast on 16 July 1984 and chronicled the opportunities which the Attorney-General had had of seeking to restrain such publications by injunction. Again I should like to express my admiration for the comprehensiveness and clarity of the judge's exposition and, being wholly unable to improve upon it, to adopt it in toto.

H

The appeal

Despite the fact that there have been times when the *Spycatcher* story has seemed to have an unique quality in its ability to raise blood pressures, metaphorically if not literally, and that no-one could ever accuse any of the parties of understating their respective cases, the arguments before us were models of moderation, succinctness and

assistance to the court. I am sure that I speak for my brethren as well as for myself when I say that we are very much indebted to all concerned.

The position of Mr. Wright

Before Scott J. the Crown contended that (1) Mr. Wright owed a duty to the Crown not, unless authorised to do so, to disclose any information obtained by him in the course of his employment in M.I.5. The duty derived from the nature of his employment in M.I.5 and the requirements of national security. (2) Mr. Wright broke that duty by writing *Spycatcher* and submitting it for publication in 1985. (3) The publication of the book in July 1987 and its subsequent dissemination represented a further and continuing breach by Mr. Wright of that duty.

The judge held that all three propositions were established and that, notwithstanding the worldwide distribution of the book, the Attorney-General would be entitled to an injunction against Mr. Wright, or any agent of his, restraining publication of *Spycatcher* in this country: ante, p. 855G.

In reaching this conclusion he accepted that "the requirements of national security and the need for secrecy about the affairs of M.I.5 are of very great weight indeed" (ante, p. 840H), that upon entering the service members of M.I.5 come under an obligation of secrecy of which they would not be relieved by lapse of time (ante, p. 854D–E) or by publication, however widespread, for which they were responsible; (ante, p. 855D–E). However, he rejected the absolutist approach that nothing connected with a member's life in the service could be considered too trivial to be subject to a strict obligation of secrecy and that no countervailing consideration of public interest could ever override this obligation.

Quite apart from the fact that no one had challenged these conclusions, I think that they are plainly correct, subject to two comments.

The first comment is in relation to triviality. In an intelligence or counter-intelligence context, there is great difficulty in knowing what is and what is not trivial. Intelligence and counter-intelligence operations have much in common with a jigsaw puzzle. A single piece of information viewed in isolation may indeed appear trivial. Viewed in the context of other seeming trivia, it may remain trivial or it may be of vast significance as illuminating the entire picture. Indeed only a few members of the security service may know the full potential significance of particular pieces of information, if, as I assume to be the case, the service operates a strict policy of limiting the internal dissemination of information on a "need to know" basis. A fortiori it will be difficult, if not impossible, for outsiders to assess what is and is not trivial. Nevertheless, subject to the difficulty inherent in classifying any particular information as trivial, the judge was obviously right.

The second concerns "just cause or excuse" for publishing information which prima facie was subject to a life-long obligation of secrecy. One such excuse would be that the publication was authorised. As the judge pointed out, ante, p. 855A, it was open to Mr. Wright to have sought authority to publish his memoirs. This has been done by others, and, subject to deletions in the interests of national security, permission has on occasion been granted. Mr. Wright did not adopt this course and it is nothing to the point to consider what, if anything, he would have been

authorised to publish had he done so. Whatever else may be in doubt, it is clear that he would never have been authorised to publish the entire book which, as the judge found, was "in clear and flagrant breach of [Mr. Wright's] duty of confidence": ante, p. 854c.

Equally, even if it is possible to imagine a situation in which a member or ex-member of the service would be justified in publishing information about some part of his work without authority—the "iniquity" defence, a matter which I shall have to consider later—no one could suggest, or does suggest, that Mr. Wright was justified in publishing *Spycatcher* as a whole and against it is nothing to the point to consider what would have been his position if he had published a quite different and much abbreviated edition.

Fortunately or unfortunately, Mr. Wright is not a party to those proceedings. The reason is that, in view of the Crown, there were insuperable procedural difficulties in the way of joining him as a party, when not only was he resident outside the jurisdiction but also the Crown had already begun proceedings against him in New South Wales. This may well be correct, but the likely position of Mr. Wright if he had been a party is not without relevance.

The issues

There are five live issues.

(1) Were the "Observer" and "The Guardian" in breach of their duty of confidentiality when, on 22 and 23 June 1986, they respectively published articles on the forthcoming hearing in Australia? If so, would they have been restrained from publishing if the Attorney-General had been able to seek the assistance of the court? The judge held that they were not in breach of this duty, ante, pp. 856D–E, 859A–C, and accordingly no question arose of their being liable to be restrained.

(2) Was "The Sunday Times" in breach of its duty of confidentiality when, on 12 July 1987, it published the first extract of an intended serialisation of *Spycatcher?* The judge held that it was and that at that time the Attorney-General was entitled to injunctions to restrain "The Sunday Times" from continuing with the serialisation: ante, p. 859G.

(3) Is the Attorney-General now entitled to such an injunction (a) in relation to the "Observer" and "The Guardian" and (b) in relation to "The Sunday Times," with special consideration to further serialisation? The judge held that he was not: ante, pp. 860D—863G.

(4) Is the Attorney-General entitled to an account of the profits accruing to "The Sunday Times" as a result of the serialisation of "Spycatcher?" The judge held that he was: ante, p. 859H.

(5) Is the Attorney-General entitled to some general injunction restraining future publication of information derived from Mr. Wright or other members or ex-members of the Security Service? The judge held that he was not: ante, p. 865A–B.

Reports by the "Observer" and "The Guardian" in June 1986

In 1985 the Attorney-General had begun proceedings in New South Wales seeking an injunction restraining the disclosure of any information obtained by Mr. Wright in his capacity as an officer of the Security Service. The Australian courts were faced with the same problem as was to confront the British courts at a later date, namely, that if the

UNITED STATES of America, Appellee,

v.

Victor L. MARCHETTI, Appellant, (two cases).

Nos. 72-1586, 72-1589.

United States Court of Appeals, Fourth Circuit.

Argued May 31, 1972.

Decided Sept. 11, 1972.

Certiorari Denied Dec. 11, 1972. See 93 S.Ct. 553.

Action by United States against former employee of Central Intelligence Agency to enjoin the former employee from publishing a proposed book in violation of secrecy agreement and secrecy oath. The United States District Court for the Eastern District of Virginia, at Alexandria, Albert V. Bryan, Jr., J., granted preliminary injunction and the former employee appealed. The Court of Appeals, Haynsworth, Chief Judge, held that secrecy agreement executed by employee at commencement of his employment was not in derogation of his constitutional rights and its provision for submission of material to the agency for approval prior to publication was enforceable, provided the agency acted promptly upon such submissions and withheld approval of publication only of classified information which had not been placed in public domain by prior disclosure.

Affirmed and remanded.

Craven, Circuit Judge, concurred and filed opinion.

1. Courts ⇐302

By virtue of the presence of the United States as a party, federal court had jurisdiction of United States' suit against former Central Intelligence Agency employee to enforce a secrecy agreement which prohibits the publication of any article or book about the agency without the agency's prior written authorization. U.S.C.A.Const. Amend. 1; 28 U.S.C.A. § 1345.

2. United States ⇐124

The government's interest in protecting the national security gave it standing to bring action against former employee of Central Intelligence Agency to enforce secrecy agreement to prohibit the publication of articles or books about the agency without the agency's prior consent. U.S.C.A.Const. Amend. 1; 28 U.S.C.A. § 1345.

3. Constitutional Law ⇐90

The First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements upon its employees and enforce requirements with system of prior censorship. U.S.C.A.Const. Amend. 1.

4. Constitutional Law ⇐90

The First Amendment precludes secrecy agreements calling for prior censorship with respect to information in possession of government employee which is unclassified or officially disclosed. U.S.C.A.Const. Amend. 1.

5. Constitutional Law ⇐90

Free speech is not so absolute or irrational a conception as to imply paralysis of the means for effective protection of all the freedoms secured by the Bill of Rights. U.S.C.A.Const. Amend. 1.

6. Constitutional Law ⇐90

The unconditional phrasing of the First Amendment was not intended to protect every utterance and does not bring either libel or obscenity within the protection intended for speech and press. U.S.C.A.Const. Amend. 1.

7. Constitutional Law ⇐90

Threats and bribes are not protected by the First Amendment simply because they are written or spoken and extortion is a crime although it is verbal. U.S.C.A.Const. Amend. 1.

8. United States ⇐33

Gathering intelligence information and the other activities of the Central Intelligence Agency, including clandestine affairs against other nations, are all within the President's constitutional responsibility for the security of the na-

tion as the Chief Executive and as Commander in Chief. U.S.C.A.Const. art. 2, § 2.

9. Constitutional Law ⇐90

Although citizens have the right to criticize the conduct of our foreign affairs, the government also has the right and duty to strive for internal secrecy about the conduct of governmental affairs in areas in which disclosure may reasonably be thought to be inconsistent with the national interest. U.S.C.A. Const. art. 2, § 2; Amend. 1.

10. Constitutional Law ⇐90

Although the First Amendment protects criticism of the government, nothing in the Constitution requires the government to divulge information. U.S.C.A.Const. Amend. 1.

11. United States ⇐36

Secrecy agreements with employees provided reasonable means for Central Intelligence Agency to protect intelligence sources and methods. 5 U.S.C.A. § 552(b)(1); Executive Order No. 10501, 50 U.S.C.A. § 401 note and § 403(d)(3).

12. United States ⇐41

The government's need for secrecy in the area of intelligence sources and methods justified system of prior restraint against disclosures by employees and former employees of Central Intelligence Agency concerning classified information obtained during the course of employment. 5 U.S.C.A. § 552(b)(1); Executive Order No. 10501, 50 U.S.C.A. § 401 note and § 403(d)(3).

13. Constitutional Law ⇐90

Employee, by accepting employment with Central Intelligence Agency and by signing a secrecy agreement, did not surrender his right of free speech. U.S.C.A.Const. Amend. 1.

14. United States ⇐126

Secrecy oath signed by Central Intelligence Agency employee at the time he left the employment would not be enforced to the extent that it purported to prevent disclosure of unclassified information. U.S.C.A.Const. Amend. 1; 5 U.S.C.A. § 552(b)(1); Executive Order No. 10501, 50 U.S.C.A. § 401 note and § 403(d)(3).

15. United States ⇐66

Oath of secrecy which Central Intelligence Agency employee signed at the termination of his employment was unenforceable where there was no consideration for the oath. 5 U.S.C.A. § 552(b)(1); Executive Order No. 10501, 50 U.S.C.A. § 401 note and § 403(d)(3).

16. United States ⇐41

Former employee of Central Intelligence Agency retained right to speak and write about the agency and its operation and to criticize it as any other citizen might, but he was not entitled to disclose classified information obtained by him during the course of his employment which was not already in the public domain.

17. Injunction ⇐205

Under injunction which required former employee of Central Intelligence Agency to submit manuscript to the Agency to examine for classified information, the maximum period in which the agency must respond after former employee submitted manuscript for approval should not exceed 30 days. U.S.C.A.Const. Amend. 1; 5 U.S.C.A. § 552(b)(1); Executive Order No. 10501, 50 U.S.C.A. § 401 note and § 403(d)(3).

18. United States ⇐40

Former employee of Central Intelligence Agency would be entitled to judicial review of any action by the agency in disapproving publication of material submitted by former employee in advance of publication. U.S.C.A.Const. Amend. 1; 5 U.S.C.A. § 552(b)(1); Executive Order No. 10501, 50 U.S.C.A. § 401 note and § 403(d)(3).

19. Constitutional Law ⇐72

The operations of the Central Intelligence Agency, generally, are an executive function beyond control of the judicial power. U.S.C.A.Const. art. 2, § 2.

20. Constitutional Law ⇐72

If, in the conduct of Central Intelligence Agency operations, the need for secrecy requires system of classification of documents and information, the process of classification is part of the executive function beyond scope of judicial review. U.S.C.A.Const. art. 2, § 2; 5 U.S.C.A. § 552(b)(1); Executive Order No. 10501, 50 U.S.C.A. § 401 note and § 403(d)(3).

21. Constitutional Law ⇐90

If information, though classified, has been publicly disclosed, former employee of Central Intelligence Agency would have as much right as anyone else to republish it. U.S.C.A.Const. Amend. 1; 5 U.S.C.A. § 552(b)(1); Executive Order No. 10501, 50 U.S.C.A. § 401 note and § 403(d)(3).

22. United States ⇐40

Issue upon judicial review of agency disapproval of materials submitted to it by former employee for approval prior to publication is limited to whether the information was classified and, if so, whether, by prior disclosure, it had come into the public domain. U.S.C.A.Const. Amend. 1; 5 U.S.C.A. § 552(b)(1); Executive Order No. 10501, 50 U.S.C.A. § 401 note and § 403(d)(3).

Melvin L. Wulf, New York City (Sanford Jay Rosen, John Shattuck, New York City, American Civil Liberties Union Foundation, and Philip J. Hirschkop, Alexandria, Va., on brief), for appellant.

Irwin Goldbloom, Atty., Dept. of Justice, (Harlington Wood, Jr., Asst. Atty. Gen., Walter H. Fleischer, and Daniel J. McAuliffe, Attys., Dept. of Justice, on brief), for appellee.

(Irwin Karp and Osmond K. Fraenkel, New York City, on brief), for The Authors League of America, Inc., amicus curiae.

(Edward C. Wallace, Marshall C. Berger, Heather Grant Florence, and Weil, Gotshal & Manges, New York City, on brief), for Association of American Publishers, Inc., amicus curiae.

Before HAYNSWORTH, Chief Judge, and WINTER and CRAVEN, Circuit Judges.

HAYNSWORTH, Chief Judge:

The question for decision is the enforceability of a secrecy agreement exacted by the government, in its capacity as employer, from an employee of the Central Intelligence Agency. Marchetti contends that his First Amendment rights foreclose any prior restraint upon him in carrying out his purpose to write and publish what he pleases about the Agency and its operations. Relying on a secrecy agreement signed by Marchetti when he became an employee of the Agency and on a secrecy oath signed by Marchetti when he resigned from the Agency, the District Court ordered Marchetti to submit to the Agency thirty days in advance of release to any person or corporation, any writing, fictional or non-fictional, relating to the Agency or to intelligence and ordering him not to release any writing relating to the Agency or to intelligence without prior authorization from the Director of Central Intelligence or from his designated representative. Marchetti was also ordered to return any writing or other property of the United States he had acquired while employed by the Agency.

We affirm the substance of the decision below, limiting the order, however to the language of the secrecy agreement Marchetti signed when he joined the Agency. We find the contract constitutional and otherwise reasonable and lawful.

This action was initiated on April 18, 1972, when the United States was granted an ex parte temporary restraining order against Marchetti by the District Court. A hearing was set for April 28, 1972, on the Government's motion for a preliminary injunction. On April 21, 1972, Marchetti moved to have the District Court dissolve the temporary restraining order. After that motion had been denied, an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) was sought in this court. After oral argument, this

panel denied the request for an interlocutory appeal and for writs of mandamus and prohibition, but directed the United States not to interfere with prospective witnesses for Marchetti. Counsel for Marchetti subsequently sought a postponement until May 14, 1972 of the hearing on the preliminary injunction. In granting this postponement, the District Court ordered the trial on the merits consolidated with the hearing on the motion for the preliminary injunction. The trial, held on May 15, was followed on May 19, 1972 by the District Court's Memorandum Opinion and Order granting the injunction sought by the United States.

Marchetti was an employee of the Central Intelligence Agency from October 3, 1955 until he resigned effective September 5, 1969. The positions he held included the post of Executive Assistant to the Deputy Director. When he joined the Agency, he signed a secrecy agreement promising not to divulge in any way any classified information, intelligence or knowledge, except in the performance of his official duties, unless specifically authorized in writing by the Director or his authorized representative.[1] Marchetti also signed a secrecy oath when he resigned from the Agency in 1969.[2]

1. The relevant provisions of the agreement are:

"SECRECY AGREEMENT

1. I, Victor L. Marchetti, understand that by virtue of my duties in the Central Intelligence Agency, I may be or have been the recipient of information and intelligence which concerns the present and future security of the United States. This information and intelligence, together with the methods of collecting and handling it, are classified according to security standards set by the United States Government. I have read and understand the provisions of the espionage laws, Act of June 25, 1948, as amended, concerning the disclosure of information relating to the National Defense and I am familiar with the penalties provided for violation thereof.

2. I acknowledge, that I do not now, nor shall I ever possess any right, interest, title or claim, in or to any of the information or intelligence or any method of collecting or handling it, which has come or shall come to my attention by virtue of my connection with the Central Intelligence Agency, but shall always recognize the property right of the United States of America, in and to such matters.

"3. I do solemnly swear that I will never divulge, publish or reveal either by word, conduct, or by any other means, any classified information, intelligence or knowledge except in the performance of my official duties and in accordance with the laws of the United States, unless specifically authorized in writing, in each case, by the Director of Central Intelligence or his authorized representatives. * * *"

2. The relevant provisions of the oath are:

"SECRECY OATH

I, _____, am about to terminate my association with the Central Intelligence Agency. I realize that, by virtue of my duties with that Agency, I have been the recipient of information and intelligence which concerns the present and future security of the United States of America. I am aware that the unauthorized disclosure of such information is prohibited by the Espionage Laws (18 USC secs. 793 and 794), and by the National Security Act of 1947 which specifically requires the protection of intelligence sources and methods from unauthorized disclosure. Accordingly, I SOLEMNLY SWEAR, WITHOUT MENTAL RESERVATION OR PURPOSE OF EVASION, AND IN THE ABSENCE OF DURESS, AS FOLLOWS:

1. I will never divulge, publish, or reveal by writing, word, conduct, or otherwise, any information relating to the national defense and security and particularly information of this nature relating to intelligence sources, methods and operations, and specifically Central Intelligence Agency operations, sources, methods, personnel, fiscal data, or security measures to anyone, including but not limited to, any future governmental or private employer, private citizen, or other Government employee or official without the express written consent of the Director of Central Intelligence or his authorized representative.

* * * * *

3. I do not have any documents or materials in my possession, classified or unclassified, which are the property of, or in custodial responsibility of the

After his resignation, Marchetti published a novel, entitled *The Rope Dancer* concerning an agency called the "National Intelligence Agency." Marchetti has also published an article in the April 3, 1972 issue of the magazine, The Nation. Entitled "CIA: The President's Loyal Tool," the article criticized some policies and practices of the Agency. In March, 1972, Marchetti submitted to Esquire magazine and to six other publishers an article in which he reports some of his experiences as an agent. According to the United States, this article contains classified information concerning intelligence sources, methods and operations. Marchetti has appeared on television and radio shows and has given interviews to the press. He has submitted to a publishing house an outline of a book he proposes to write about his intelligence experiences.

I

Jurisdiction

[1, 2] Jurisdiction arises from the presence of the United States as a party. 28 U.S.C. § 1345. "The government can sue even if there is no specific authorization. In such cases, however, it must have some interest to be vindicated sufficient to give it standing." C. A Wright, Federal Courts 68 (2d ed. 1970), ch. 3, § 22. Standing arises from the government's interest in protecting the national security.[3]

II

The Freedom of Speech and of the Press are not Absolute

Marchetti claims that the present injunction is barred by the Supreme Court decision in the Pentagon Papers case because the Government has failed to meet the very heavy burden against any system of prior restraints on expression. New York Times Co. v. United States, 403 U.S. 713, 714, 91 S.Ct. 2140, 29 L. Ed.2d 822.

[3, 4] We readily agree with Marchetti that the First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements upon its employees and enforce them with a system of prior censorship. It precludes such restraints with respect to information which is unclassified or officially disclosed, but we are here concerned with secret information touching upon the national defense and the conduct of foreign affairs, acquired by Marchetti while in a position of trust and confidence and contractually bound to respect it.

In order to protect freedom of speech and of the press, the First Amendment has been applied beyond its express terms, which were directed solely to Congress:

> "The first amendment provides that 'Congress shall make no law * * * abridging the freedom * * * of the press,' and there has been common disposition to apply the amendment to the Executive and the courts as well. [Citing: Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 143 [–144, 71 SCt. 624, 95 L.Ed. 817] (Black, J., concurring), 199 [, 71 S.Ct. 624] (Reed, J., dissenting) (1951); Watkins v. United States, 354 U.S. 178, 188 [, 77 S.Ct. 1173, 1 L.Ed.2d 1273] (1957); West Virginia [State] Bd. of Educ. v. Barnette, 319 U.S.

Central Intelligence Agency, having come into my possession as a result of my duties with the Central Intelligence Agency, or otherwise. * * *"

3. Cf. In re Debs, 158 U.S. 564, 584, 15 S.Ct. 900, 906, 39 L.Ed. 1092, 1102:
"Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court."

624, 642 [, 63 S.Ct. 1178, 87 L.Ed. 1628] (1943). *See also* Beauharnais v. Illinois, 343 U.S. 250, 386 [, 72 S. Ct. 725, 96 L.Ed. 919] (Douglas, J., dissenting) (1952); Reid v. Covert, 354 U.S. 1, 17 [, 77 S.Ct. 1222, 1 L. Ed.2d 1148] (1957).] But the import of the first amendment is as uncertain and undefined in regard to the freedom of the Press as to the other rights and freedoms that it protects, and, indeed, the courts have had far fewer occasions to define the freedom of the Press, than, say, freedom of speech." Henkin, The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers, 120 U.Pa.L. Rev. 271, 277 (1971).

[5, 6] Nonetheless, "[f]ree speech is not so absolute or irrational a conception as to imply paralysis of the means for effective protection of all the freedoms secured by the Bill of Rights." Bridges v. California, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (Frankfurter, J., dissenting).[4] In applying the First Amendment to actions taken by the judicial and executive branches, the Supreme Court has followed a flexible approach. As Mr. Justice Brennan wrote in Roth v. United States, 354 U.S. 476, 483, 77 S. Ct. 1304, 1308, 1 L.Ed.2d 1498, 1506:

"[I]t is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. Beauharnais v. Ill., 343 U.S. 250, 266, 72 S.Ct. 725, 735, 96 L.Ed. 919. At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press."

[7] Threats and bribes are not protected simply because they are written or spoken; extortion is a crime although it is verbal. The Supreme Court has also upheld the Labor Board's attempt to protect employees from spoken coercion by employers. NLRB v. Gissel Packing Co., 395 U.S. 575, 616–619, 89 S.Ct. 1918, 23 L.Ed.2d 547. The "government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." Near v. Minnesota, 283 U.S. 697, 716, 51 S.Ct. 625, 631, 75 L.Ed. 1357, 1367. Cf. Pennsylvania v. Nelson, 350 U.S. 497, 76 S. Ct. 477, 100 L.Ed. 640. This flexible approach toward the executive and judicial branch is warranted not only because they are omitted from the express language of the First Amendment, but also because they lack legislative capacity to establish a pervasive system of censorship. This case itself illustrates the point that the executive and judicial branches proceed on a case by case basis, the executive branch being dependent on the judiciary to restrict unwarranted disclosures.

An earlier case upholding a government request to enjoin publication involved the Valachi papers, written while Valachi was in prison. The United States brought an action to obtain a permanent injunction requiring Maas, the editor of Valachi's manuscript, to comply with a "Memorandum of Understanding" which required the approval

4. "Because freedom of public expression alone assures the unfolding of truth, it is indispensable to the democratic process. But even that freedom is not an absolute and is not predetermined. By a doctrinaire overstatement of its scope and by giving it an illusory absolute appearance, there is danger of thwarting the free choice and the responsibility of exercising it which are basic to a democratic society." Bridges v. California, 314 U.S. 252, 293, 62 S.Ct. 190, 268, 86 L.Ed. 192, 219 (Frankfurter, J., dissenting). *See also* Near v. Minnesota, 283 U.S. 697, 708, 51 S.Ct. 625, 628, 75 L.Ed. 1357, 1363, "Liberty of speech, and of the press, is * * * not an absolute right, and the state may punish its abuse."

of the manuscript by the Department of Justice prior to publication or dissemination. The parties entered this agreement because the Attorney General had promulgated, pursuant to 18 U.S.C. §§ 4001, 4042, a regulation that no manuscript prepared by a federal prisoner should be approved for publication "if it deals with the life history or the criminal career of the writer." Valachi and his attorney had signed the Memorandum, but Maas had not, signing instead another agreement to which the Department of Justice was not a party. The District Court granted the United States a preliminary injunction which was upheld by the Court of Appeals based on the broad discretion of the District Court in considering preliminary injunctions. Maas v. United States, 125 U.S. App.D.C. 251, 371 F.2d 348.

This Court recently granted the government declaratory relief against a newspaper publisher who had published a racially discriminatory advertisement for the rental of a room in a private house, in violation of the 1968 Civil Rights Act. The Court denied the defendant's claim that freedom of the press was being abridged, concluding that the act affected the press only in a commercial context and not in the dissemination of ideas. United States v. Hunter, 4 Cir., 459 F.2d 205, 211–213.

III

The Government has a Right to Secrecy

[8, 9] Gathering intelligence information and the other activities of the Agency, including clandestine affairs against other nations, are all within the President's constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed forces. Const., art. II, § 2. Citizens have the right to criticize the conduct of our foreign affairs, but the Government also has the right and the duty to strive for internal secrecy about the conduct of governmental affairs in areas in which disclosure may reasonably be thought to be inconsistent with the national interest.

The Supreme Court recognized the need for secrecy in government in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320, 57 S.Ct. 216, 221, 81 L.Ed. 255, 263 where it said that the President

> "has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results."

A similar view was expressed in Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111, 68 S.Ct. 431, 436, 92 L.Ed. 568, 576:

> "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world."

In another case the government was granted an injunction to enforce an agreement with a private contractor who claimed the right to divulge the details of a torpedo to other potential customers. In E. W. Bliss Co. v. United States, 248 U.S. 37, 46, 39 S.Ct. 42, 45, 63 L.Ed. 112, 118, the Supreme Court quoted with approval from the opinion of the Second Circuit in that case:

> " 'The nature of the services rendered was such that secrecy might almost be implied. It is difficult to imagine a nation giving to one of its citizens contracts to manufacture implements necessary to the national defense and permitting that citizen to disclose the construction of such implement or sell it to another nation. The very nature of the service makes the construction urged by the defendant untenable.' "

[10] Although the First Amendment protects criticism of the government,

nothing in the Constitution requires the government to divulge information:

> "From our national beginnings, the Government of the United States has asserted the right to conceal and, therefore, in practical effect not to let the people know. Secrecy governed the deliberations in Philadelphia in 1787. Some need for secrecy was expressly recognized in the Constitution: in providing for publication of a journal of each House of Congress, it excepted 'such parts as may in their judgment require secrecy.' The occasional need for secrecy underlay some of the dispositions of the Constitution: the power to conduct foreign relations was given to the Executive rather than to Congress, and a part in making treaties to the less numerous Senate rather than to the House. Presidents from Washington to Nixon have asserted 'executive privilege' to withhold information from Congress. And Congresses and congressional committees have recognized the 'right,' the propriety, the need for some executive nondisclosure, even to them: since 1791 Congress, in requesting reports from Executive Departments, has asked the State Department to report only what in the President's judgment was 'not incompatible with the public interest.' Modern Congresses have recognized the Executive's classification system and provided for its enforcement, to some extent by criminal penalties. The Supreme Court, too, has repeatedly recognized the need for some secrecy in executive activities. For its own part, Congress has often claimed the need to conceal: the Senate in particular (especially in executive session), and committees and subcommittees of both Houses, have often maintained secrecy. The courts, too, often insist on the confidentiality of deliberations in the jury room or in judicial chambers. The most confidential proceeding in all of government is probably the conference of the Justices of the Supreme Court." Henkin, The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers, 120 U.Pa.L.Rev. 271, 273–74 (1971).[5]

IV

Secrecy Agreements with Employees Provide a Reasonable Means for Government Agencies to Protect Internal Secrets

[11] Congress has imposed on the Director of Central Intelligence the responsibility for protecting intelligence sources and methods. 50 U.S.C. § 403(d)(3). In attempting to comply with this duty, the Agency requires its employees as a condition of employment to sign a secrecy agreement, and such agreements are entirely appropriate to a program in implementation of the congressional direction of secrecy. Marchetti, of course, could have refused to sign, but then he would not have been employed, and he would not have been given access to the classified information he may now want to broadcast.

Confidentiality inheres in the situation and the relationship of the parties. Since information highly sensitive to the conduct of foreign affairs and the national defense was involved, the law would probably imply a secrecy agreement had there been no formally expressed agreement, but it certainly lends a high degree of reasonableness to the contract in its protection of classified information from unauthorized disclosure.

[12] Moreover, the Government's need for secrecy in this area lends justi-

5. *Cf.* 5 U.S.C. § 552(b)(1) exempting from mandatory disclosure under the Freedom of Information Act "matters * * * specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy * * *." Executive Order 10501 has established a system of classifying documents as "Top Secret", "Secret" or "Classified" depending on the effect of disclosure on the national defense and the conduct of the nation's affairs.

fication to a system of prior restraint against disclosure by employees and former employees of classified information obtained during the course of employment. One may speculate that ordinary criminal sanctions might suffice to prevent unauthorized disclosure of such information, but the risk of harm from disclosure is so great and maintenance of the confidentiality of the information so necessary that greater and more positive assurance is warranted. Some prior restraints in some circumstances are approvable of course. See Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649.

V

Marchetti's Rights

[13–15] As we have said, however, Marchetti by accepting employment with the CIA and by signing a secrecy agreement did not surrender his First Amendment right of free speech. The agreement is enforceable only because it is not a violation of those rights. We would decline enforcement of the secrecy oath signed when he left the employment of the CIA to the extent that it purports to prevent disclosure of unclassified information, for, to that extent, the oath would be in contravention of his First Amendment rights.[6]

[16] Thus Marchetti retains the right to speak and write about the CIA and its operations, and to criticize it as any other citizen may, but he may not disclose classified information obtained by him during the course of his employment which is not already in the public domain.

[17] Because we are dealing with a prior restraint upon speech, we think that the CIA must act promptly to approve or disapprove any material which may be submitted to it by Marchetti. Undue delay would impair the reasonableness of the restraint, and that reasonableness is to be maintained if the restraint is to be enforced. We should think that, in all events, the maximum period for responding after the submission of material for approval should not exceed thirty days.

[18] Furthermore, since First Amendment rights are involved, we think Marchetti would be entitled to judicial review of any action by the CIA disapproving publication of the material. Some such review would seem essential to the enforcement of the prior restraint imposed upon Marchetti and other former employees. See Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed. 2d 649. Because of the sensitivity of the area and confidentiality of the relationship in which the information was obtained, however, we find no reason to impose the burden of obtaining judicial review upon the CIA. It ought to be on Marchetti.

Indeed, in most instances, there ought to be no practical reason for judicial review since, because of its limited nature, there would be only narrow areas for possible disagreement.

[19, 20] The Constitution in Article II § 2 confers broad powers upon the President in the conduct of relations with foreign states and in the conduct of the national defense. The CIA is one of the executive agencies whose activities are closely related to the conduct of foreign affairs and to the national defense. Its operations, generally, are an executive function beyond the control of the judicial power. If in the conduct of its operations the need for secrecy requires a system of classification of documents and information, the process of classification is part of the executive function beyond the scope of judicial review. See Oetjen v. Central Leather Co., 246 U.S. 297, 38 S.Ct. 309, 62 L.Ed. 726; United States v. Belmont, 301 U.S. 324, 57 S.Ct. 758, 81 L.Ed. 1134; Zemel

6. There was no apparent consideration for the secrecy oath, so that it would be, generally, unenforceable on that ground. The oath has the support of the moral force underlying solemn oaths, but it added nothing to the Government's arsenal of legal rights in the context of this proceeding.

v. Rusk, 381 U.S. 1, 85 S.Ct. 1271, 14 L. Ed.2d 179.

There is a practical reason for avoidance of judicial review of secrecy classifications. The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.

[21] Information, though classified, may have been publicly disclosed. If it has been, Marchetti should have as much right as anyone else to republish it. Rumor and speculation are not the equivalent of prior disclosure, however, and the presence of that kind of surmise should be no reason for avoidance of restraints upon confirmation from one in a position to know officially.

[22] The issues upon judicial review would seem to be simply whether or not the information was classified and, if so, whether or not, by prior disclosure, it had come into the public domain.

VI

Conclusion

For the stated reasons, our conclusion is that the secrecy agreement executed by Marchetti at the commencement of his employment was not in derogation of Marchetti's constitutional rights. Its provision for submission of material to the CIA for approval prior to publication is enforceable, provided the CIA acts promptly upon such submissions and withholds approval of publication only of information which is classified and which has not been placed in the public domain by prior disclosure.

Generally, therefore, we approve the injunctive order issued by the District Court. The case will be remanded, however, for the purpose of revising the order to limit its reach to classified information and for the conduct of such further proceedings as may be necessary if Marchetti contends that the CIA wrongfully withheld approval of the publication of any information under the standards we have laid down.

Affirmed and remanded.

CRAVEN, Circuit Judge (concurring):

I agree that "[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." Oetjen v. Central Leather Co., 246 U.S. 297, 302, 38 S.Ct. 309, 311, 62 L.Ed. 726, 732 (1917).

I concur in the opinion of the court except for the statement that the classification of documents and information by the executive is not subject to judicial review. Because the national security may be involved and because of the expertise of the executive, I would resolve any doubt about the reasonableness of a classification in favor of the government. If the burden were put upon one who assails the classification, and surely it ought to be, much of the difficulty envisioned in the court's opinion would presumably disappear. Indeed, I would not object to a presumption of reasonableness, and a requirement that the assailant demonstrate by clear and convincing evidence that a classification is arbitrary and capricious before it may be invalidated.

But however difficult the adjudication of the reasonableness of a secrecy classification, I cannot subscribe to a flat rule that it may never be attempted. The "right to know" is in a period of gestation. I think that the people will increasingly insist upon knowing what their government is doing and that, because this knowledge is vital to govern-

ment by the people, the "right to know" will grow. I am not yet ready to foreclose any inquiry into whether or not secrecy classifications are reasonable. To protect those that are does not require that we also protect the frivolous and the absurd.

Other than my doubt about the insulation of a classification system from judicial review, I fully concur in the opinion of the court.



Harold HARRIS, Plaintiff-Appellee,
v.
John TURNER, Warden of the Utah State Prison, Defendant-Appellant.
No. 72-1300.

United States Court of Appeals, Tenth Circuit.
Sept. 21, 1972.

Petition for federal habeas corpus by state prisoner. The United States District Court for the District of Utah, Central Division, Willis W. Ritter, Chief Judge, granted petition, and warden of state prison appealed. The Court of Appeals, Orie L. Phillips, Circuit Judge, held that fact that state prisoner did not have counsel present at time lineup was conducted by state authorities was not violative of any constitutional right for which he could obtain relief by way of federal habeas corpus, where, at time of lineup, prisoner had not been charged by information, complaint, or any other formal accusation, and was required only to exhibit his physical characteristics, and was not required to disclose any knowledge that he might have or provide state with evidence of a testimonial or communicative character.

Remanded with instructions.

1. Criminal Law ⇐339

Where evidence clearly established that clothes state prisoner wore in lineup, held very shortly after he was arrested, were same clothes he was wearing when he was with person who testified for state as to events earlier in evening, and that he wore such clothes continuously thereafter until he retired at a late hour at a motel, which, if true, meant that prisoner was wearing such clothes when alleged offense was committed at motel, and victim gave testimony in nature of comparisons that jacket and shirt worn by prisoner at lineup was same as jacket and shirt she saw on man who allegedly committed offense, it was not error to require prisoner to wear same clothes in lineup that he was wearing when alleged offense was committed.

2. Habeas Corpus ⇐45.2(4)

Fact that state prisoner did not have counsel present at time lineup was conducted by state authorities was not violative of any constitutional right for which he could obtain relief by way of federal habeas corpus, where, at time of lineup, prisoner had not been charged by information, complaint, or any other formal accusation, and was required only to exhibit his physical characteristics, and was not required to disclose any knowledge that he might have or provide state with evidence of a testimonial or communicative character. U.S.C.A. Const. Amends. 6, 14.

H. Don Sharp, Ogden, Utah, for plaintiff-appellee.

David R. Irvine, Asst. Atty. Gen., State of Utah (Vernon B. Romney, Atty. Gen., and David S. Young, Chief Asst. Atty. Gen., State of Utah, on the brief), for defendant-appellant.

Before PHILLIPS, SETH and McWILLIAMS, Circuit Judges.

ORIE L. PHILLIPS, Circuit Judge.

Harris was charged with and tried and found guilty of the offenses of rape, robbery, and second degree kidnapping

Annex 7: *Mann v. Carnell* (1999) 201 CLR 1.

REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

MANN ..... APPELLANT;
APPLICANT,

AND

CARNELL ..... RESPONDENT.
RESPONDENT,

[1999] HCA 66

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

H C OF A
1999
Aug 31;
Dec 21
1999

Gleeson CJ, Gaudron, McHugh, Gummow, Kirby and Callinan JJ

Practice — Discovery — Preliminary discovery — Production of documents — Privilege — Legal professional privilege — Waiver — Communication of terms of legal advice to third party — Purpose of communication — Whether inconsistent with privilege — Relevance of statute regulating adducing of evidence — Evidence Act 1995 *(Cth), ss* 118, 122.

Section 118 of the *Evidence Act* 1995 (Cth) provided that evidence was not to be adduced if, on objection by a client, a court found that adducing the evidence would result in disclosure of certain confidential communications or the contents of certain confidential documents made or prepared for the dominant purpose of a lawyer providing legal advice to the client. Section 122 stipulated circumstances in which s 118 did not apply to prevent the adducing of evidence.

In 1997, the Australian Capital Territory government compromised an action brought by a member of the public by making a payment to him without admitting liability. The litigant complained to a member of the Legislative Assembly of the Territory about the conduct of the government in the litigation. The member passed the complaint on to the Chief Minister for the Territory. The Chief Minister sent to the member in confidence copies of documents containing legal advice about the litigation that the government had received, which were the subject of legal professional privilege, to enable him to consider the reasons for the conduct. The member returned the copies to the Chief Minister but retained the covering letter, a copy of which he sent to the litigant. The litigant sought production of those copies of the documents in the Supreme Court of the Australian Capital Territory by way of preliminary discovery to ascertain whether they were defamatory. He contended that privilege had been lost by their having been shown to the member.

Waiver of privilege at common law

28 At common law, a person who would otherwise be entitled to the benefit of legal professional privilege may waive the privilege. It has been observed that ''waiver'' is a vague term, used in many senses, and that it often requires further definition according to the context (33). Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege (34). Examples include disclosure by a client of the client's version of a communication with a lawyer, which entitles the lawyer to give his or her account of the communication (35), or the institution of proceedings for professional negligence against a lawyer, in which the lawyer's evidence as to advice given to the client will be received (36).

29 Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is ''imputed by operation of law'' (37). This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege. Thus, in *Benecke v National Australia Bank* (38), the client was held to have waived privilege by giving evidence, in legal proceedings, concerning her instructions to a barrister in related proceedings, even though she apparently believed she could prevent the barrister from giving the barrister's version of those instructions. She did not subjectively intend to abandon the privilege. She may not even have turned her mind to the question. However, her intentional act was inconsistent with the maintenance of the confidentiality of the communication. What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.

(33) *Ross T Smyth & Co Ltd v T D Bailey, Son & Co* [1940] 3 All ER 60 at 70; *Larratt v Bankers & Traders Insurance Co Ltd* (1941) 41 SR (NSW) 215 at 226; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 406, 422, 467, 472.

(34) *Cross on Evidence*, 5th Aust ed (1996), par 25005; *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 497-498.

(35) *Benecke v National Australia Bank* (1993) 35 NSWLR 110.

(36) *Lillicrap v Nalder & Son (a firm)* [1993] 1 WLR 94; [1993] 1 All ER 724.

(37) eg, *Goldberg v Ng* (1995) 185 CLR 83 at 95.

(38) (1993) 35 NSWLR 110.

30 In *Goldberg v Ng* (39) this Court considered a case in which there was disclosure of a privileged communication to a third party, for a limited and specific purpose, and upon terms that the third party would treat the information disclosed as confidential. The Court was divided upon whether, in the circumstances of the case, privilege was waived. However, the reasoning of all members of the Court was inconsistent with the proposition that any voluntary disclosure to a third party necessarily waives privilege. No application was made on the present appeal to re-open *Goldberg* or any of the earlier authorities on the subject. In *Goldberg*, reference was made (40) to the statement of Jordan CJ in *Thomason v Campbelltown Municipal Council* (41):

> "The mere fact that a person on some one occasion chooses to impart to another or others advice which he has received from his solicitor indicates no intention on his part to waive his right to refuse on other occasions to disclose in evidence what that advice was, and supplies no sufficient reason for depriving him of a form of protection which the law has deemed it specially necessary to throw around communications between solicitor and client."

31 His Honour's reference to intention must be read subject to what has been said above.

32 Reference was also made (42) to *British Coal Corporation v Dennis Rye Ltd [No 2]* (43) and *Goldman v Hesper* (44), in which the English Court of Appeal held that, in the circumstances of those cases, disclosure to a third party for a limited and specific purpose did not lead to a loss of the privilege as against a person opposed in litigation. To like effect is the recent decision in *Gotha City v Sotheby's [No 1]* (45).

33 It does less than justice to the respondent's position to describe what occurred in the present case as disclosure to a third party. The privilege was that of the body politic, the Australian Capital Territory. The head of the Territory's Executive, the Chief Minister (46), in response to a question raised by a member of the Territory's Legislative Assembly as to the reasonableness of the conduct of the Territory in relation to certain litigation, gave the member, confidentially, access to legal advice that had been given to the Territory, and on the basis of which it had acted. Although "disclosure to a third party" may be a convenient rubric under which to discuss many

(39) (1995) 185 CLR 83.
(40) *Goldberg v Ng* (1995) 185 CLR 83 at 120.
(41) (1939) 39 SR (NSW) 347 at 355.
(42) *Goldberg v Ng* (1995) 185 CLR 83 at 107-108.
(43) [1988] 1 WLR 1113; [1988] 3 All ER 816.
(44) [1988] 1 WLR 1238; [1988] 3 All ER 97.
(45) [1998] 1 WLR 114.
(46) *Australian Capital Territory (Self-Government) Act*, s 40.

problems of this nature, it represents, at the least, an over-simplification of the circumstances of the present case.

34 The purpose of the privilege was to enable the Australian Capital Territory to seek and obtain legal advice, in relation to the litigation which Dr Mann had instituted, without the apprehension of being prejudiced by subsequent disclosure of that advice. That included, and perhaps included above all, subsequent disclosure to Dr Mann. If Mr Moore had been given copies of the legal report and advice given to the Territory in relation to the proceedings brought by the appellant upon the basis that he was at liberty to show them to the appellant (even if to nobody else), that would have waived the privilege, because it would have been inconsistent with the confidentiality protected by the privilege. It is not difficult to imagine other circumstances in which the basis on which the communications were made available to Mr Moore, even though limited, would have been inconsistent with the purpose of the privilege and thus would have resulted in waiver. Disclosure by a client of confidential legal advice received by the client, which may be for the purpose of explaining or justifying the client's actions, or for some other purpose, will waive privilege if such disclosure is inconsistent with the confidentiality which the privilege serves to protect. Depending upon the circumstances of the case, considerations of fairness may be relevant to a determination of whether there is such inconsistency. The reasoning of the majority in *Goldberg* (47) illustrates this.

35 The purpose of the privilege being to protect the Territory from subsequent disclosure of the legal advice it received concerning the litigation instituted by the appellant, there was nothing inconsistent with that purpose in the Chief Minister conveying the terms of that advice, on a confidential basis, to a member of the Legislative Assembly who wished to consider the reasonableness of the conduct of the Territory in relation to the litigation.

36 The conclusion of the Full Court of the Federal Court, that privilege was not lost, was correct.

37 The appeal should be dismissed with costs.

38 McHUGH J. The question in this appeal is whether the Chief Minister of the Australian Capital Territory (ACT) is able to resist an order for pre-trial discovery of documents which contain legal advice to the ACT Government. The question arises in circumstances where copies of the originals of those documents have been provided by the Chief Minister to Mr Michael Moore, a member of the ACT Legislative Assembly. The resolution of the question raises issues relating to the circumstances in which legal professional privilege may be claimed and waived and the application of concepts of waiver to transactions occurring within a single "body politic". In my opinion,

(47) (1995) 185 CLR 83 at 101-102.

APPENDIX—Continued

rator and a director, Short was the President, and O'Brien's brothers Paul and Eugene were officers and directors. The corporation was dissolved, and the dealership sold, about one month ago. Short informed me that some of the records called for by the subpoena might be in the custody of DEA, in connection with the internal affairs investigation referred to above.

On March 2, 1989 I interviewed DEA agents Brian Noon and Gerald Chapman, who are participating in the internal affairs investigation, for the sole purpose of determining whether they had any of the records called for by the defense subpoena. They told me that the investigation does pertain to the business relationship between Short and O'Brien. They also told me they have copies of a financial statement and certain cancelled checks related to the business, but no original records.

On Friday, March 3, 1989, I reviewed with Special Agent Allen (who is the case agent in the Perkins case and the government's principal witness at trial) his knowledge of the status of the internal affairs investigation against O'Brien. Allen confirmed that, to his knowledge, the allegations against O'Brien include O'Brien's business relationship with Short. Allen told me that this business relationship began in the spring of 1988, after all of the events which are the subject of this trial had occurred, and after the date of this indictment (December 28, 1987).

Short told me on March 3 that there is a dispute between Short and O'Brien regarding settlement of the dissolution of the corporation. Short believes he is owed about $25,000.

The internal affairs investigation against O'Brien also include a possible attempt by O'Brien to extort money from a defendant under state indictment (in an unrelated case), in return for O'Brien's promise to assist that defendant to avoid incarceration. Both Short and another informant have reported this allegation to DEA.

The DEA internal affairs investigation is being conducted by Agent Art Carter, of DEA Internal Affairs in Washington, D.C.

REQUEST

The information set forth above is not relevant to the events of July 16 to 18, 1987 which are the subject of this indictment. The business relationship between James Short and Agent O'Brien was not formed until after the defendants were indicted. The existence of this relationship between O'Brien and Short does not imply misconduct by Short. Nothing contained herein is exculpatory, nor does it tend to impeach Agent Allen or Short.

Moreover, disclosure of this information would compromise the internal affairs investigation against O'Brien. For these reasons, therefore, the government requests that the Court seal and impound this document and refrain from disclosing this information to the defense in this case.

Respectfully submitted,
JEREMIAH T. O'SULLIVAN
United States Attorney
By: R.J. Cinquegrana
R.J. CINQUEGRANA
Assistant U.S. Attorney

Dated: March 6, 1989



UNITED STATES of America, Appellee,

v.

Paul A. BILZERIAN, Defendant–Appellant.

No. 787, Docket 89–1502.

United States Court of Appeals, Second Circuit.

Argued Feb. 13, 1990.

Decided Jan. 3, 1991.

Investor was convicted in the United States District Court for the Southern District of New York, Robert J. Ward, J., of securities fraud, false statements to Securities and Exchange Commission (SEC), and

the attorney-client privilege would not be waived by his testimony and, therefore, the trial court committed reversible error when it denied his motion *in limine* seeking to protect the privilege. He alleges that this ruling, together with similar rulings made during the course of the trial, prevented him from refuting the charge that he acted with criminal intent—a central element of the government's case—and that his constitutional right to "the fullest opportunity to meet the accusation against him.... [and] to deny all the elements of the case against him," *Walder v. United States*, 347 U.S. 62, 65, 74 S.Ct. 354, 356, 98 L.Ed. 503 (1954), was thereby encroached upon.

Professor Wigmore tells us that the attorney-client privilege, dating back to the 1600s, is the most ancient of the confidential communication privileges. Originally, it was the attorney's privilege; today, it is recognized as the client's. *See* 8 J. Wigmore, *Evidence* § 2290, at 542–44 (McNaughton rev.1961). It may have arisen—with the advent of testimonial compulsion in Elizabethan England—as a judicial extension of the right of individuals to avoid self-incrimination. *Id.* at 543–44; Note, *Developments in the Law: Privileged Communications*, 98 Harv.L.Rev. 1450, 1502 (1985).

The purposes for the privilege are twofold: first, it assures that a person seeking legal advice may do so safely. Its existence therefore encourages the full and truthful revelation by the client of all the facts in his possession. Second, no attorney can represent a client effectively unless the client discloses fully all the facts in his possession. Thus, the privilege "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981). The fundamental purpose of the privilege is to " 'encourage full and frank communication between attorneys and their clients.' " *United States v. Zolin*, 491 U.S. 554, 109 S.Ct. 2619, 2626, 105 L.Ed.2d 469 (1989) (quoting *Upjohn*, 449 U.S. at 389, 101 S.Ct. at 682).

Although the underlying rationale for the privilege has changed over time, it has retained its importance in the common law tradition. *Id.* 109 S.Ct. at 2625–26; *see United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir.1989). The potential societal benefit may be great in cases like the one at bar, where defendant seeks legal advice in order to act within the confines of highly complex federal securities laws. Often the importance of the interests promoted by the privilege justify the exclusion of otherwise relevant evidence. *See McCormick on Evidence* § 72 at 152 (E. Cleary 2d ed. 1972).

[2] However, the attorney-client privilege cannot at once be used as a shield and a sword. *See In re von Bulow*, 828 F.2d 94, 103 (2d Cir.1987); *see also Clark v. United States*, 289 U.S. 1, 15, 53 S.Ct. 465, 469, 77 L.Ed. 993 (1933) ("The privilege takes flight if the relation is abused."). A defendant may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes. *See von Bulow*, 828 F.2d at 101–02. Thus, the privilege may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications. *See United States v. Exxon Corp.*, 94 F.R.D. 246, 249 (D.D.C.1981) (claim of good faith reliance on governmental representations waived attorney-client privilege); *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash.1975) (assertion of qualified immunity defense waived attorney-client privilege). This waiver principle is applicable here for Bilzerian's testimony that he thought his actions were legal would have put his knowledge of the law and the basis for his understanding of what the law required in issue. His conversations with counsel regarding the legality of his schemes would have been directly relevant in determining the extent of his knowledge and, as a result, his intent.

In support of his argument that asserting a good faith defense does not waive the attorney-client privilege, Bilzerian points to *United States v. White*, 887 F.2d 267 (D.C.

Annex 9: *Esso Australia Resources Ltd v. Commission of Taxation* (1999) 201 CLR 49.

ESSO AUSTRALIA RESOURCES LIMITED..... APPELLANT;
APPLICANT,

AND

COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA ..... RESPONDENT.
RESPONDENT,

[1999] HCA 67

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

HC OF A 1999

Sept 28, 29; *Dec* 21 1999

Gleeson CJ, Gaudron, McHugh, Gummow, Kirby and Callinan JJ

Practice — Discovery — Production of documents — Privilege — Legal professional privilege — Purpose of document or communication — Whether common law test sole or dominant purpose of obtaining legal advice — Relevance of statute regulating adducing of evidence — Evidence Act 1995 *(Cth), ss* 118, 119.

Federal Court of Australia — Discovery — Production of documents — Claim of privilege — Legal professional privilege — Rule conferring discretionary power — Principles for exercise — Federal Court Rules, O 15, *r* 15.

Sections 118 and 119 of the *Evidence Act* 1995 (Cth) provided that evidence was not to be adduced if, on objection by a client, a court found that adducing the evidence would result in disclosure of certain confidential communications or the contents of certain confidential documents made or prepared for the dominant purpose of a lawyer providing to a client legal advice or professional legal services relating to certain proceedings or anticipated or pending proceedings.

Order 15, r 15 of the Federal Court Rules provided that the Federal Court of Australia should not make an order for the filing or service of any list of documents or affidavit or other document or for the production of any document unless satisfied that the order was necessary at the time it was made.

Held, (1) that ss 118 and 119 of the *Evidence Act* concerned the adducing of evidence and did not apply to a request for the making available of documents for inspection.

(2) That, as the tests in those sections did not apply throughout Australia, they did not provide a consistent pattern of legislative policy to which the common law could adapt. Accordingly, the common law could not be modified, by analogy or derivation, to accord with them.

Adelaide Steamship Co Ltd v Spalvins (1998) 81 FCR 360 at 373; *Telstra Corporation Ltd v Australis Media Holdings Ltd [No 1]* (1997) 41 NSWLR 277 at 279; and *Akins v Abigroup Ltd* (1998) 43 NSWLR 539, disapproved.

(3) That the discretionary power conferred by O 15, r 15 of the Federal

proportion of their internal communications in writing. If the circumstance that a document primarily directed to lawyers is incidentally directed to someone else as well means that privilege does not attach, the result seems to alter the balance too far the other way. This may be the kind of result Deane J was intending to avoid in his reformulation of the privilege, but it seems to follow unless one puts a gloss upon the sole purpose test.

60 A dominant purpose test was sufficient to defeat the claims for privilege in *Grant v Downs* and *Waugh*. The reason why Barwick CJ, the House of Lords, and the New Zealand Court of Appeal preferred that test was that they were unable to accept, as either necessary or desirable, the apparent absoluteness and rigidity of a sole purpose test. If the only way to avoid that absoluteness and rigidity is to water down the sole purpose test so that, in its practical application, it becomes more like the dominant purpose test, then it should be abandoned. Either the test is too strict, or it lacks the clarity which the respondent claims for it.

61 It would be possible to seek to formulate a new test, such as that adopted by Jacobs J in *Grant v Downs*, or Deane J in *Waterford*, in a further attempt to adjust the necessary balance of competing policies. To do so, however, would produce only confusion. As a practical matter, the choice presently confronting this Court is between sole purpose and dominant purpose. The dominant purpose test should be preferred. It strikes a just balance, it suffices to rule out claims of the kind considered in *Grant v Downs* and *Waugh*, and it brings the common law of Australia into conformity with other common law jurisdictions.

Conclusion

62 The appeal should be allowed with costs. The orders of the Full Court of the Federal Court of Australia should be set aside. In their place, the appeal to that court from Foster J should be allowed. The questions of law raised for decision by Foster J should be answered:
(a) The correct test is the dominant purpose test, which is the common law test for claiming legal professional privilege.
(b) Does not arise.

63 The respondent should pay the appellant's costs of the proceedings before Foster J and of the appeal to the Full Court of the Federal Court.

64 McHUGH J. In my opinion this appeal should be dismissed. The facts and issues are set out in the joint judgment of Gleeson CJ, Gaudron and Gummow JJ. I agree with their Honours that the Full Court of the Federal Court was correct in holding that the *Evidence Act* 1995 (Cth) does not apply to the discovery of confidential written communications made between lawyer and client, either directly or by a derivative modification of the common law. I also agree with their Honours that the discretionary power in O 15, r 15 of the Federal

Annex 10: *Lac Lanoux Arbitration (France v. Spain)* Award of 16 November 1957, XII RIAA 281.

iv.—Utilization of the Flow of Non-National and International Rivers

State Territory—Parts of—Rivers—Utilization of Flow of—Adverse Affection of Rights and Interests of Neighbouring State—Interests Going Beyond Specific Legal Rights—Whether Prior Agreement Necessary for Exercising Rights under Treaty—State Whose Interests May be Affected as Sole Judge Thereof—Right to Information on Proposed Works—Necessity for Genuineness of Prior Negotiations—Obligation of Good Faith—Recognition of Legality of Enjoyment of Use of Water—Adverse Effect of Diversion for Works of Public Utility—Whether Payment of Compensation Sufficient—Sufficiency of Guaranteed Restitution of Water—Necessity for Reconciling Interests by Mutual Concessions—Respective Rights of Upstream and Downstream States with Regard to Schemes.

LAKE LANOUX ARBITRATION (FRANCE *v.* SPAIN).

Arbitral Tribunal.[1] *November* 16, 1957.

(Petrén, President; Bolla, De Luna, Reuter, De Visscher).

THE FACTS.—This arbitration concerned the use of the waters of Lake Lanoux, in the Pyrenees. Briefly, the French Government proposed to carry out certain works for the utilization of the waters of the lake and the Spanish Government feared that these works would adversely affect Spanish rights and interests, contrary to the Treaty of Bayonne of May 26, 1866, between France and Spain and the Additional Act of the same date. In any event, it was claimed that, under the Treaty, such works could not be undertaken without the previous agreement of both parties.

Lake Lanoux lies on the southern slopes of the Pyrenees, on French territory.[2] It is fed by streams which have their source in French territory and which run entirely through French territory

[1] Set up under a *Compromis* dated November 19, 1956, pursuant to an Arbitration Treaty of July 10, 1929, between France and Spain.

[2] According to the French Memorial, Lake Lanoux, one of the largest Pyrenean lakes, lies at an altitude of approximately 2,174 metres, is about three kilometres in length and 500 metres in width, and has a surface of 86 hectares. Its depth is at some points as great as 53 metres. The volume of water it collects naturally is about 17 million cubic metres. The planned construction of barrage of the height of 45 metres would turn Lake Lanoux into a reservoir capable of storing approximately 70 million cubic metres of water. The water would be channeled through a tunnel toward the Altantic watershed and directed to a power station where it would be run through a turbine after dropping straight from a height of 780 metres. This project would enable France to produce enough electricity, even during the peak hours, to serve a city of 326,000 inhabitants throughout the year. To return to the Carol River the waters diverted from it, the French project contemplates the construction of a tunnel, 5 kilometres in length, which would take water from the Ariège to the Carol at a rate of approximately 5 cubic metres per second and at a point higher than where the headworks of a canal which serves Spanish users are located. The headworks would lie in French territory. The planned diversion amounts to 25% of the entire flow of the Carol, the waters of which are used in Spain by 18,000 farmers. (Affaire du Lac Lanoux, Mémoire du Gouvernement de la République Française 3–13 [Paris, 1957].)

the works in question have as their object, apart from satisfying French interests, the creation of a means of injuring, at least contingently, Spanish interests; that would be all the more improbable since France could only partially dry up the resources that constitute the flow of the Carol, since she would affect also all the French lands that are irrigated by the Carol and since she would expose herself along the entire boundary to formidable reprisals.

" On the other hand, the proposals of the French Government which form an integral part of its project carry ' the assurance that in no case will it impair the régime thus established ' (Annex 12 of the French Memorial). The Tribunal must therefore reply on the basis of this assurance to the question posed by the *Compromis*. It cannot be alleged that, despite this pledge, Spain would not have a sufficient guarantee, for there is a general and well-established principle of law according to which bad faith is not presumed. Furthermore, it has not been contended that at any time one of the two States has knowingly violated, at the expense of the other, a rule relating to the control of the water. At any rate, while inspired by a just spirit of reciprocity, the Treaties of Bayonne have only established a legal equality and not an equality in fact. If it were otherwise, they would have had to forbid on both sides of the boundary all installations and works of a military nature which might have given one of the States a *de facto* preponderance which it might use to violate its international pledges. But we must go still further; the growing ascendancy of man over the forces and the secrets of nature has put into his hands instruments which he can use to violate his pledges just as much as for the common good of all; the risk of an evil use has so far not led to subjecting the possession of these means of action to the authorization of the States which may possibly be threatened. Even if we took our stand solely on the ground of neighbourly relations, the political risk alleged by the Spanish Government would not present a more abnormal character than the technical risk which was discussed above. In any case, we do not find either in the Treaty and the Additional Act of May 26, 1866, or in international common law, any rule that forbids one State, acting to safeguard its legitimate interests, to put itself in a situation which would in fact permit it, in violation of its international pledges, seriously to injure a neighbouring State.

" It remains to enquire whether the French scheme conflicts with the basic rules laid down by Article 11. That question will be examined below within the general framework of that Article (see para. 24).

" Subject to this last-mentioned question, the Tribunal replies in the negative to the first question, at para. 3 (A) *supra*.[1]

[1 See *supra*, p. 121.]

Privy Council Appeal Nos. 45 *and* 46 *of* 1953

Juan Ysmael & Company Incorporated - - - - *Appellants*

v.

The Government of the Republic of Indonesia - - - *Respondents*

and between

Juan Ysmael and Company Incorporated - - - - *Appellants*

v.

The Government of the Republic of Indonesia and another *Respondents*

(Consolidated Appeals)

FROM

THE APPEAL COURT OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH OCTOBER, 1954

Present at the Hearing:
EARL JOWITT
LORD PORTER
LORD OAKSEY
SIR JOHN BEAUMONT
MR. L. M. D. DE SILVA
[*Delivered by* EARL JOWITT]

These are consolidated appeals from a judgment dated the 13th December, 1952, of the Appeal Court of Hong Kong reversing a judgment of Mr. Justice Reece in the Supreme Court of Hong Kong (Admiralty Jurisdiction) dated the 15th September, 1952, and setting aside the writs and all subsequent proceedings in two actions, namely Action No. 6 and Action No. 8 in the Supreme Court of Hong Kong (Admiralty Jurisdiction). Action No. 6 was an action brought against the steamship "Tasikmalaja" by the respondent Anthony Loh for ship's necessaries. It was conceded in argument that that action can be ignored, and their Lordships have therefore confined their judgment to Action No. 8.

It will be convenient to summarise in the first place the relevant steps in the action leading up to the judgment under appeal. The appellants, who are a company incorporated under the laws of the Philippine Islands, issued the writ in the action on the 27th June, 1952. It was a writ *in rem* against the steamship "Tasikmalaja" addressed to all parties interested in the said steamship, and by the statement of claim endorsed thereon the plaintiffs as the owner of the said steamship claimed to have legal possession of the vessel decreed to them.

On the 27th June, 1952, the said vessel was arrested by process of the Court in the action and at all material times thereafter remained in the legal custody of the Head Bailiff of the Supreme Court. On the 30th June, 1952, an appearance under protest was entered by the Government of Indonesia without prejudice to an application to dismiss the action. On the 9th July, 1952, the Government of Indonesia gave notice of motion for an order that the writ and all subsequent proceedings be set aside on the grounds that the writ impleaded a Foreign Sovereign State and that the Government of Indonesia was the owner or was in possession or control or entitled to possession of the vessel. Affidavits were sworn

in support of the motion by various persons, including in particular Kwee Djie Hoo, described as Consul General for the Government of Indonesia at Hong Kong, and Pamoe Rahardjo, described as a Major in the Army of the Republic of Indonesia. On the 25th July, 1952, the appellants gave notice of their intention to cross-examine these deponents, and applied for leave to do so, and on the 25th August Mr. Justice Reece granted such leave. Thereupon the Government of Indonesia claimed diplomatic privilege for the deponents, but on the 27th August Mr. Justice Reece ruled that the deponents were not entitled to diplomatic privilege. Summonses were accordingly issued to the deponents to attend for cross-examination, which they failed to do, and on the 15th September, 1952, Mr. Justice Reece ordered the affidavits of the two deponents to be removed from the file. There is no appeal before their Lordships' Board against the Orders of the learned judge overruling the claim to diplomatic privilege, and directing the two affidavits to be removed from the file, and their Lordships express no opinion on the propriety of such Orders.

On the 15th September, 1952, Mr. Justice Reece gave judgment dismissing the motion of the Government of Indonesia claiming immunity from being sued, and on the same day the said Government gave notice of appeal from the said Order to the Appeal Court. On the 24th October, 1952, the action came to trial before Mr. Justice Reece who decreed possession of the vessel to the appellants subject to the claim of the Hong Kong & Whampoa Dock Company Ltd. for the cost of work done upon the said vessel. On the 8th December, the appeal of the Government of Indonesia against the Order of Mr. Justice Reece of the 15th September, 1952, refusing immunity, came before the Appeal Court. The three following submissions were made to the Appeal Court by counsel on behalf of the Indonesian Government:

(i) That the trial judge erred in making the orders for the cross-examination of Mr. Kwee Djie Hoo and Major Pamoe Rahardjo;

(ii) That the trial judge erred in refusing to grant to these persons the diplomatic immunity claimed for them;

(iii) That even if the trial judge was correct in his decisions on points (i) and (ii), there was left upon the record ample material upon which the impleading motions should have been allowed.

The Appeal Court decided to hear the third point first, as a decision on that point would render it unnecessary to determine points (i) and (ii). The Court came to the conclusion that on the material before them the impleading motions should have been allowed. They pronounced no decision on points (i) and (ii). Accordingly the judgment of the Court rescinded the judgment of Mr. Justice Reece of the 15th September, 1952, ordered that the writ and all subsequent proceedings and orders in the said action be set aside on the ground that the said action impleaded the Government of Indonesia, a Foreign Sovereign State, declared that the judgment of Mr. Justice Reece dated the 24th October, 1952, was null and void for want of jurisdiction and ordered the appellants to pay the costs of the Government of Indonesia of the said appeal and the said notice of motion. The question before the Board is whether that judgment is right.

The rule according to a Foreign Sovereign Government immunity against being sued has been considered and applied in many cases. The basis of the rule is that it is beneath the dignity of a Foreign Sovereign Government to submit to the jurisdiction of an alien court, and that no Government should be faced with the alternative of either submitting to such indignity or losing its property. The rule was stated by Lord Atkin in the case of *The Cristina* [1938] A.C. 485 as involving two propositions. The first that the courts of a country cannot implead a Foreign Sovereign; and the second that they would not by their process, whether the Sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. Dicey, 6th Edition 131.

in a passage in his "Conflict of Laws" approved by Lord Radcliffe in the case of *Dollfus Mieg* [1952] A.C. 616, stated the rule in these terms:—

> "The court has no jurisdiction to entertain an action or proceeding against any foreign sovereign. . . . An action or proceeding against the property of a foreign sovereign is an action or proceeding against such person."

In whichever way the rule is stated it is apparent that difficulty may arise in the application of the second branch of it. Where the Foreign Sovereign State is directly impleaded the writ will be set aside, but where the Foreign Sovereign State is not a party to the proceedings, but claims that it is interested in the property to which the action relates and is therefore indirectly impleaded, a difficult question arises as to how far the Foreign Sovereign Government must go in establishing its right to the interest claimed. Plainly if the Foreign Government is required as a condition of obtaining immunity to prove its title to the property in question the immunity ceases to be of any practical effect. The difficulty was cogently expressed by Lord Radcliffe in the case of the *Dollfus Mieg* (*ubi supra*) where he said at page 616:—

> "A stay of proceedings on the ground of immunity has normally to be granted or refused at a stage in the action when interests are claimed but not established, and indeed to require him (i.e. the Foreign Sovereign) to establish his interest before the court (which may involve the court's denial of his claim) is to do the very thing which the general principle requires that our courts should not do."

In the case of *The Jupiter* [1924] P. 236 where the writ was *in rem* against the ship, Lord Justice Scrutton based his judgment on the view that an assertion by a Foreign Sovereign that he claimed a right in property must be accepted by the court as conclusive without investigating whether the claim be good or bad. The learned Lord Justice concluded his judgment by saying:—

> "I am content to rest my decision in this case on the fact that this writ requires a foreign sovereign to appear in these Courts to defend what he alleges to be his property and by the principles of international comity the Courts of this kingdom do not allow such steps to be taken against foreign sovereigns."

The view that a bare assertion by a Foreign Government of its claim is sufficient has the advantage of being logical, and simple in application, but it may lead to a very grave injustice if the claim asserted by the Foreign Government is in fact not maintainable, and the view of Lord Justice Scrutton has not found favour in subsequent cases.

In the case of *The Cristina* (*ubi supra*) the action was commenced by a writ *in rem* against the ship and the Foreign Government which sought to have the writ set aside claimed to be in possession of the ship. Lord Wright, in his speech at page 506, noted that the fact of possession was proved, and he added:—

> "It is unnecessary here to consider whether the Court would act conclusively on a bare assertion by the Government that the vessel is in its possession. I should hesitate as at present advised so to hold, but the respondent here has established the necessary facts by evidence."

Lord Maugham in his speech dealt with the matter at more length and expressed the view that "there is neither principle nor any authority binding this House to support the view that the mere claim by a Government or an ambassador or by one of his servants would be sufficient to bar the jurisdiction of the Court, except in such cases as ships of war or other notoriously public vessels or other public property belonging to the State".

In the case of *Haile Selassie* v. *Cable and Wireless Limited* [1938] 1 Ch. 839 the plaintiff sued for a debt and a Foreign Government claimed that it was entitled to the debt, and claimed to have the action stayed, but the Foreign Government took no part in the proceedings and the

Court of Appeal in those circumstances refused to stay the action, accepting the view expressed by Lord Maugham in *The Cristina* case that a mere claim by the Foreign Government is not enough. In the case of *The Arantzazu Mendi* [1939] P. 37 and [1939] A.C. 256 the writ was *in rem* claiming possession of the vessel. A Foreign Government entered appearance under protest and claimed to set aside the writ on the ground that the action impleaded a Foreign Sovereign State. In the Court of Appeal it was held that the Foreign Government was entitled neither to the ownership nor possession of the ship, but that it had proved that it had requisitioned the ship, and that the master and owners had recognised such requisition. The Court held that this showed a sufficient interest in the Foreign Government to involve that it was impleaded by the writ, and accordingly the writ was set aside. Lord Justice Goddard, as he then was, expressed the view on the authority of *The Cristina* and *Haile Selassie* cases that where a claim for immunity is made by a Foreign Sovereign it is not enough that his claim should be a bare assertion of right or a mere claim and the Lord Justice continued:—

> "But if the Court can see that the question that arises is a question of competing rights, as in this case here, where we have got the fact that the owners of the ship admittedly have purported to give to the foreign sovereign who is claiming immunity rights over the ship it may be that those rights are good or it may be they are bad, that is just what we cannot try, but if they purport to give rights over their ship and therefore there is more than a mere claim, and there is evidence before the Court on which it can be shown that the question which is to be decided in the case is competing rights, then it appears to me the principle of immunity applies."

In the House of Lords the view was taken that the Foreign Government had proved that it was in possession of the vessel and the case therefore was similar to that of *The Cristina*.

In the *Dollfus Mieg* case (*ubi supra*) the plaintiffs claimed from the Bank of England 64 gold bars which the Bank held as bailee. Certain Foreign Governments sought to stay the action on the ground that they were the owners of the bars. The action was stayed as to 51 bars it having been discovered after the hearing in the Court of First Instance that the Bank had inadvertently parted with 13 of the bars. Their Lordships think it clear that the House of Lords considered the evidence relating to the claim of the Foreign Governments since most of the learned Lords expressed the view that there should have been more adequate discovery which would only have been important to enable the Court to ascertain all the relevant facts.

In their Lordships' opinion the view of Lord Justice Scrutton that a mere assertion of a claim by a Foreign Government to property the subject of an action compels the Court to stay the action and decline jurisdiction is against the weight of authority, and cannot be supported in principle. In their Lordships' opinion a Foreign Government claiming that its interest in property will be affected by the judgment in an action to which it is not a party, is not bound as a condition of obtaining immunity to prove its title to the interest claimed but it must produce evidence to satisfy the Court that its claim is not merely illusory, nor founded on a title manifestly defective. The Court must be satisfied that conflicting rights have to be decided in relation to the Foreign Government's claim. When the Court reaches that point it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached. It remains to apply this principle to the facts of the present case.

The steamship "Tasikmalaja" was registered on the Panamanian registry. It was acquired by the appellants in the year 1950 and from 1951 onwards was chartered by the appellants to the Government of Indonesia under successive charter parties, the last of which was due to expire on the 30th June, 1952, three days after the issue of the writ.

The vessel was used by the Government of Indonesia for carrying troops, so that the question raised in some of the cases whether a right of immunity can be claimed for a ship used by the Foreign Government solely for commercial purposes does not arise. The only charter party produced in evidence is that of the 1st January, 1951, which was made by Frank Starr as lawful attorney for the appellants and under it, possession of the vessel did not pass to the Government. The last charter party due to expire on the 30th June, 1952, has not been produced, and there is no evidence that under it the Government of Indonesia acquired possession of the vessel, nor indeed has it been so claimed in argument. The power of attorney in favour of Starr which is in evidence is exhibit AR-1. It is dated the 8th November, 1950, and constitutes Starr the attorney of the appellants to sell the steamship "Tasikmalaja" for any sum of money or other consideration as to him may seem most advantageous and beneficial to the appellants. The power of attorney was signed on behalf of the appellant by K. H. Hemady as President and General Manager. There is some evidence that the power was void under the law of the Philippine Islands, but this matter has not been fully investigated and their Lordships will assume that the power was valid. On the 10th January, 1952, Hemady wrote to Major Pamoe saying that if the Government bought the "Tasikmalaja" there should be no deduction from $450,000 in respect of money paid to Starr on account. In his reply of the 17th January, 1952, Major Pamoe agreed to act as requested. At the end of January, 1952, Major Pamoe wrote to Hemady a letter in which he said:

> "We have chartered the Tasik for 6 months more until June this year with option to buy the vessel. The purchase price of the vessel will be applied to the charter price of the 6 months of last year. This contract is settled down already and we agreed. We can and dared to do this because Mr. Starr has the full power of attorney from your Company to charter or to purchase the vessel."

After receipt of this letter, on the 6th February, 1952, Hemady cabled to Major Pamoe:

> "We do not agree to deduct any charter money from purchase price Tasikmalaja. Starr inquired and we answered negatively."

This cable was confirmed by letter to Major Pamoe the next day, and on the same day, the 7th February, Hemady wrote to Starr setting out a copy of the cable sent to Major Pamoe. In spite of these instructions and in complete disregard of them, Major Pamoe and Starr entered into an agreement to sell the ship, and it has not been denied that moneys due under the charter party were deducted from the purchase money. It appears from the Printed Case of the Government of Indonesia that the contract for sale was entered into on the 13th February, 1952, the contract price being U.S. $70,000 and that the sale was completed by Bill of Sale dated the 17th March, 1952. The Bill of Sale is not in evidence, but presumably further particulars of the transaction were contained in the evidence of the respondents which has been struck out. As from the date of the alleged sale the Government of Indonesia have claimed to be owners of the vessel, and have taken various steps to implement their title, including registering the vessel on the Indonesian register, and changing the flag from Panamanian to Indonesian. On the 13th March, 1952, the vessel was brought by the Government of Indonesia to Hong Kong and was delivered for repair to the Hong Kong & Whampoa Dock Company Ltd. in whose dock the ship was at the time of the issue of the writ. The said Government claims to have paid large sums to the Dock Company for work done on the vessel. The ship, however, has always remained in the legal possession of the appellants through the acting Captain, Jose Silos. On the 30th June, 1952, the Consul General for the Government of Indonesia at Hong Kong by letter purported to dismiss Silos, but Silos in his answer of the same day refused to accept such dismissal. Their Lordships are satisfied that Silos, as acting Captain of the "Tasikmalaja", has always remained, as he claims in his Affidavit, the servant of the

appellants, and that legal possession of the vessel never passed to the Government of Indonesia. This indeed was not disputed in the argument before their Lordships' Board.

The result appears to be this. The charter party under which the Government of Indonesia had control of the vessel, expired on the 30th June, 1952, at the latest, even if it had not been previously repudiated. At the date when immunity was claimed by the Government of Indonesia, namely the 9th July, 1952, which is the date on which the validity of the claim first fell to be considered, the Government of Indonesia had no interest whatever in the vessel except such as arose under the alleged purchase of the 13th February, 1952. The negotiations for the sale and purchase of the ship were conducted between Starr and Major Pamoe. Starr was purporting to act as agent of the appellants as sellers and Major Pamoe as agent for the Government of Indonesia as purchasers. In fact, Starr had no authority to sell the ship on the terms specified in the agreement of sale, and Major Pamoe was fully aware that he had no such authority. However wide the powers originally given to Starr may have been, it is clear that they could be withdrawn or modified by the appellants. The cable and letters of the 6th and 7th February, 1952, from Hemady to Starr and Major Pamoe make it clear that the vessel could only be sold on certain conditions and Starr and Major Pamoe subsequently purported to agree to a sale of the ship in complete disregard of these conditions. The evidence in the record of their title to the ship set up by the Government of Indonesia appears therefore to their Lordships to be manifestly defective, since even if Major Pamoe did not disclose the position to his employers, the Government of Indonesia, yet he was the agent of that Government in carrying out the purchase, and his knowledge must be attributed to the Government. For these reasons their Lordships think that the Government of Indonesia have not established that they possess such an interest in the steamship "Tasikmalaja" as would show that they were impleaded. Accordingly there is no ground for setting the writ aside.

Their Lordships will therefore humbly advise Her Majesty that this appeal be allowed, that the judgment of the Appeal Court in Hong Kong dated the 13th December, 1952, be set aside including the declaration that the judgment of Mr. Justice Reece dated the 24th October, 1952, was null and void for want of jurisdiction, and that the matter be remitted to the Appeal Court to consider the other questions raised in the appeal. All costs incurred in the courts in Hong Kong shall be dealt with by the Appeal Court. The respondents must pay the costs of the appeal to their Lordships' Board.

(39111) Wt. 8082—47 150 10/54 D.L.

In the Privy Council

JUAN YSMAEL & COMPANY INCORPORATED

v.

THE GOVERNMENT OF THE REPUBLIC OF INDONESIA

AND BETWEEN

JUAN YSMAEL & COMPANY INCORPORATED

v.

THE GOVERNMENT OF THE REPUBLIC OF INDONESIA AND ANOTHER

(CONSOLIDATED APPEALS)

DELIVERED BY EARL JOWITT

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DRURY LANE, W.C.2.

1954

Annex 12: *Wentworth v. De Montfort* (1988) 15 NSWLR 348.

A

WENTWORTH v DE MONTFORT AND OTHERS

Court of Appeal: Hope, Samuels and Mahoney JJA

17 November, 16 December 1988

Legal Practitioners — Solicitor and client — Ownership of documents in possession of solicitor.

B

Held: (1) Where a solicitor is acting only as an agent for a client who is his principal in the doing of some act, the ordinary rules of agency apply to him and a document brought into existence or received by him when so acting belongs to the client. (353G)

Chantrey Martin (A Firm) v Martin [1953] 2 QB 286, followed.

(2) Where a solicitor is acting for a client other than as agent for the client, property in documents brought into existence or received by him when not so acting depend on principles referable to the relationship of a professional person and his client (353G), as to which relevant considerations include whether or not the client was charged for the creation of the document and whether the solicitor created the document for his client's benefit and protection, or did so for his own benefit and protection. (355G)

C

(3) A solicitor's trust account records of his dealings with a client's money is the property of the solicitor but the client is entitled to inspect them and to have information about them and to be provided with copies if asked for. (356D-G)

D

Re Londerry's Settlement; Peat v Walsh [1964] Ch 594, referred to.

(4) A solicitor's cheque requisition form is an internal record made for his own purposes and benefits and cannot be said to be a document made by him on behalf of his client. Therefore, it is the property of the solicitor. (357A)

(5) Financial records, whether kept pursuant to statutory duty or otherwise, and whether computerised or otherwise, which a solicitor keeps in relation to transactions concerning the moneys of a client held by him in his trust account and the disbursement of these moneys, are the property of the solicitor and not the client. However, the client is entitled to information concerning his financial affairs as appear on the records and, where appropriate, to copies of them. (358A-B)

E

(6) Notes made by a solicitor of telephone attendances on other persons, records of personal attendances on persons other than the client or at court and correspondence with persons other than the client may be the property of the solicitor or the client depending on the nature and content and whether they were made for the primary benefit or purposes of the solicitor or the client. (359F-360F)

F

(7) The internal records and memoranda of a solicitor as to work done or work to be done are documents which are created by the solicitor for his own benefit and not for the benefit of his client and are, therefore, the property of the solicitor. (359G)

(8) Generally, documents involving counsel are documents created or received for the benefit of the client, even though they may also be for the benefit of the solicitor. The client is entitled to the original or a copy of them. Counsel's brief belongs to the client. (360G)

G

(9) Generally, any correspondence between a solicitor and officers of the court, and any notes of conversations by someone on the part of the solicitor and an officer of the court belongs to the client, although the solicitor would be able to keep copies of them. (361B)

(10) Requisitions made for internal photocopying of documents by an employee of the solicitor belong to the solicitor. (361C)

(11) Internal attempted financial reconciliation documents prepared by the solicitor in respect of a client are the property of the solicitor. (361D)

(12) Apart from exceptional cases, such as receipts for money paid for the client to third parties, a solicitor's financial records concerning a client, all of which relevantly concern litigation, are the property of the solicitor. However, the client is entitled to inspect the records and have information about them. (361E)

(13) A solicitor's trust account bank statements or any other bank account statement relating to an amount of money held for a client are the property of the solicitor but the client is entitled to inspect them and to be given information about them. (361G)

Discussion of ownership of various other classes of documents held by a solicitor in his capacity as solicitor or as trustee.

Note:
A Digest — LEGAL PRACTITIONERS [130]

CASES CITED

The following cases are cited in the judgments:
Chantrey Martin (A Firm) v Martin [1953] 2 QB 286.
Cowin, Re (1886) 33 Ch D 179.
Ebdy v McGowan (The Times, 17 November 1870).
Ellis & Ellis, Re [1908] WN (Eng) 215.
Gibbon v Pease [1905] 1 KB 810.
Horsfall, Ex parte (1827) 7 B & C 528; 108 ER 820.
Howard v Gunn (1863) 32 Beav 462; 55 ER 181.
Leicestershire County Council v Michael Faraday and Partners Ltd [1941] 2 KB 205.
London School Board v Northcroft (1889) Hudson's BC, 4th ed, vol 2, 147.
Londonderry's Settlement, Re; Peat v Walsh [1964] Ch 594.
Thomson, Re (1855) 20 Beav 545; 52 ER 714; 24 LJ Ch 599.
Wentworth v Rogers (No 10) (1987) 8 NSWLR 398.

The following additional cases were cited in argument:
Browne v Dunn (1893) 6 R 67.
Wheatcroft, Re (1877) 6 Ch D 97.

APPEAL AND NOTICE OF MOTION

This was an appeal against a decision of Hodgson J in respect of an order concerning the ownership of documents in the possession of the appellant's solicitors, and in which the appellant sought leave to adduce and to rely on new evidence and by motion on notice sought declarations in relation to the ownership of the documents. During the course of the hearing the Court ordered that the question of ownership of twelve categories of documents should be determined separately.

The claimant in person.

M G Skinner, for the opponent.

Cur adv vult

16 December 1988

HOPE JA. The proceedings presently before the Court are part of a long history of litigation which had its origins, so far as civil litigation is concerned, in a common law action and cross-action between

Ms Wentworth and Mr Rogers. In those proceedings a jury returned a verdict in favour of Mr Rogers in Ms Wentworth's claim, and against Ms Wentworth in Mr Rogers' claim, damages being assessed at $571,000. An appeal was brought by Ms Wentworth in those proceedings being CA 8 of 1986 which has long since been heard and disposed of: see *Wentworth v Rogers (No 10)* (1987) 8 NSWLR 398. The appeal was allowed, the judgment set aside and a new trial ordered. Whilst the appeal was still pending, Ms Wentworth made an application in that proceeding on 14 May 1986 by notice of motion returnable before this Court, the opponents in the application being De Montfort and Others, the partners of the firm of Ms Wentworth's former solicitors, then known as Sly & Russell. This Court dealt partially with the relief sought in the notice of motion by ordering the return of certain documents to Ms Wentworth, but remitted the balance of the claim sought by Ms Wentworth to be dealt with in the Equity Division. These proceedings came before Hodgson J, the relief sought by Ms Wentworth falling into three categories:

(1) Order for the return of her documents;

(2) Order for the payment to her of money received by the opponents; and

(3) Order for the provision of bills of costs in taxable form in respect of various matters.

On 13 February 1987, Hodgson J declined to make any order in respect of the return of Ms Wentworth's documents, ordered that, upon Ms Wentworth providing certain documents, the opponents should provide her with bills of costs in taxable form, and ordered that the opponents should pay Ms Wentworth $57,000 together with $12,000 interest. An appeal and cross-appeal followed this decision. After the hearing by this Court, and while judgment was reserved, Ms Wentworth filed an application for leave to adduce and to rely upon new evidence in the appeal. This application, which necessarily delayed the giving of judgment, has been before the Court on a number of occasions, Ms Wentworth claiming that the opponents failed to produce before Hodgson J a very large number of documents, many of which she claims are her property. The application has unfortunately run a very checkered course, one of the reasons being the immense amount of material that is involved and the number of issues which it is submitted it will be necessary to decide.

In the proceedings before Hodgson J the opponents submitted that they did not have any documents belonging to Ms Wentworth. They claimed that the only documents which they still had relating to her litigation fell within four categories:

(i) Originals and copies of correspondence between them and the applicant;

(ii) Original notes and telephone and personal attendances on the applicant;

(iii) Accounting records; and

(iv) Photocopies of documents in the litigation.

Hodgson J concluded that documents falling within these categories were the property of the opponents. This decision is one of the matters the subject of Ms Wentworth's appeal.

On 7 November 1988, Ms Wentworth filed in court a notice of motion in which she sought declarations:

A "1. That the Court declares that the categories of documents which are not the property of the claimant, are:

(i) originals and copies of correspondence between Sly and Russell and K Wentworth;

(ii) original notes and personal telephone attendances by Sly and Russell on K Wentworth;

(iii) photocopies of documents made in the litigation at the expense of Sly and Russell.

B 2. That the Court declares that all other documents, with the exception of some accounting records, whose ownership is to be determined, are the property of the claimant."

Because of the great bulk of the documents involved in this part of the dispute and the need to try to contain the length of its hearing, the Court ordered that the question of the ownership of twelve categories of documents should, so far as possible, be determined by the Court before the C hearing of the balance of the application to adduce fresh evidence. Those categories were:

"1. Cheque requisitions forms.

2. Computer printouts.

3. Notes of Sly and Russell relating to telephone attendances on persons other than Miss Wentworth.

4. Internal Sly and Russell records and memoranda as to work done or D work to be done.

5. Records of personal attendances by Sly and Russell on any person other than Miss Wentworth or at court.

6. Correspondence by Sly and Russell with any person other than Miss Wentworth.

7. Any document held by Sly and Russell involving counsel.

8. Communications between Sly and Russell and any officer of the E court.

9. Photocopy requisitions of any matter in relation to litigation.

10. Internal Sly and Russell attempted financial reconciliation documents.

11. Any financial records that do not fall within the definition of cash book, ledger or journal.

12. All trust account bank statements or any other bank account F statements relating to an amount of money held for Miss Wentworth."

Ms Wentworth's primary submission is that any documents brought into existence or received by Sly & Russell in relation to her litigation were documents created or received by Sly & Russell in their capacity as agents for their principal Ms Wentworth, and that, applying ordinary agency principles, any documents so created or received are accordingly hers. As I understand their case, the opponents do not deny that any document created G or received by them only as agents for Ms Wentworth would belong to her. However they deny that any documents falling within the twelve categories were so created or received and submit that upon a number of principles applying to solicitors and other professional people, the documents falling within those categories are theirs.

Although solicitors may in particular circumstances receive or create a document as an agent for their client, this is commonly not the case. The

distinction between principal and agent and professional person and client is well established. In *Leicestershire County Council v Michael Faraday and Partners Ltd* [1941] 2 KB 205, a company carrying on business as rating valuers was employed by a county council for five years to give advice and assistance in connection with the valuation of land within its area and for related purposes. At the expiration of the engagement the council brought proceedings for the recovery of all documents, books, maps and plans which had been prepared by, or had come into the possession of, the valuers in the course of or for the purpose of the performance of their duties. Macnaghten J at first instance and the Court of Appeal rejected their claim. MacKinnon LJ said (at 215-216):

> "If there is nothing in the contract on which the plaintiffs can rely to establish that they are right in saying that these pieces of paper are their property, by what rule of law otherwise can they assert that that is so? I know of none. Some reference has been made to, and reliance placed on, one or two cases which were cited by Mr Macaskie, such as *Lady Beresford v Driver* 20 LJ (Ch) 476; 22 LJ (Ch) 407 and *Gibbon v Pease* [1905] 1 KB 810, but I think that those cases are radically different from the present case, as being concerned with the relative rights and duties of principal and agent. If an agent brings into existence certain documents while in the employment of his principal, they are the principal's documents and the principal can claim that the agent should hand them over, but the present case is emphatically not one of principal and agent. It is a case of the relations between a client and a professional man to whom the client resorts for advice. I think it would be entirely wrong to extend to such a relation what may be the legal result of the quite different relation of principal and agent. These pieces of paper, as it seems to me, cannot be shown to be in any sense the property of the plaintiffs, any more, as I suggested to Mr Macaskie during the argument, than his solicitor client or his lay client could assert that his notes of the argument he addressed to us could be claimed to be delivered up by him when the case is over either to the solicitor or to the lay client. They are documents which he has prepared for his own assistance in carrying out his expert work, not documents brought into existence by an agent on behalf of his principal, and, therefore, they cannot be said to be the property of the principal."

Goddard and Du Parcq LLJ agreed. In the course of his short reasons Goddard LJ referred to the decision of A L Smith J in *London School Board v Northcroft* which apparently was reported in (1889) Hudson's BC, 4th ed, vol 2, at 147. It was a case where it was held that detinue would not lie for memoranda which were in the possession of quantity surveyors who had been employed by the London School Board and which the quantity surveyors had prepared for their own use in measuring up certain buildings. A L Smith J (at 149), quoted in [1941] 2 KB 217 said:

> "Now I should like to know how it can be said that what I call the private memoranda, which were made by Messrs Northcroft for the purpose of framing that which ultimately became the property of the plaintiffs, namely, the bill of quantities, ever became the property of the plaintiffs. The paper belonged to Messrs Northcroft, the ink belonged to Messrs Northcroft, and the brains that put the calculations on paper

A belonged to Messrs Northcroft, and I want to know how that document which came into existence ever became the property of the plaintiffs. In my judgment it never did, and therefore the demand which was made … for the return of this manuscript was illfounded in law."

This approach was affirmed by the Court of Appeal in *Chantrey Martin (A Firm) v Martin* [1953] 2 QB 286. Martin had been an employee of Chantrey Martin and had been dismissed for alleged breach of contract. B Chantrey Martin sued their former employee to recover salary which had been paid in advance and otherwise and Martin counter-claimed for wrongful dismissal. In his particulars Martin made certain allegations about irregularities he claimed to have found in the books of a company client of Chantrey Martin. He made an application for the production of certain documents relating to the auditing of the client company's accounts, but for which Chantrey Martin claimed privilege on the ground that they were the property of the company client. The judgment of the Court of Appeal was C given by Jenkins LJ who, having discussed *Leicestershire County Council* and *London School Board*, concluded that apart from correspondence with the Inland Revenue and the client company's own ledgers the documents were the property of Chantrey Martin. His Lordship distinguished *Ex parte Horsfall* (1827) 7 B & C 528; 108 ER 820, as turning on the nature of the services rendered by an attorney or solicitor and the system upon which he is remunerated for those services. His Lordship went on to say (at 293):

D "… Even in the case of a solicitor there must, we should have thought, be instances of memoranda, notes, etc, made by him for his own information in the course of his business which remain his property, although brought into existence in connexion with work done for clients."

As regards the Inland Revenue documents, which comprised letters received from the Inland Revenue and copies of letters written to the Inland E Revenue, his Lordship held that in conducting this correspondence the plaintiffs must have been acting as agents for the client company for the purpose of settling with the Inland Revenue the client company's tax liability. It was held that these letters were the property of the client company.

It thus appears that if a solicitor is acting only as agent for a client who is his principal in the doing of some act, the ordinary rules of agency apply to F him, and documents brought into existence or received by him when so acting belong to the client. However in other cases, different principles apply, those principles being referable to the relationship between a professional person and his client.

The principles which are to be applied do not form a coherent whole, and some of them have been formulated in a context which no longer exists. However it is clear that documents including financial records which a solicitor holds relating to the affairs (including litigation) of a client do not G necessarily belong to the client. The passages which I have quoted from judgments of the English Court of Appeal clearly establish this position.

There are a number of reports of decisions on particular matters which throw some light on the question. I have already referred to *Ex parte Horsfall* where Lord Tenterden held that drafts and copies of certain deeds in the custody of an attorney were the property of his client on the ground

that: "He who pays for the drafts, &c by law has a right to the possession of them." I have also described the way in which Jenkins LJ distinguished this decision in *Chantrey Martin*, and referred to his statement about a solicitor's ownership of documents made by him for his own information in the course of his business, although brought into existence in connection with work done for clients.

In *Re Thomson* (1855) 20 Beav 545; 52 ER 714; 24 LJ Ch 599, Sir John Romilly MR held that a client is not entitled to copies of letters written by the client's solicitor which have been entered in his letter books. The client is entitled to copies of those copies, but must pay for them. He also appears to have held (the reports vary) that the solicitor is entitled to retain letters written to him from the client. The reports agree that his Lordship held that letters written by the solicitor to third parties, relating exclusively to the client's business, are held by the solicitor as the agent for the client and the client is entitled to them, the solicitor being entitled to make and keep copies.

In *Howard v Gunn* (1863) 32 Beav 462; 55 ER 181, Sir John Romilly MR again held that a letter written by a solicitor for a client to a third party belonged to the client. Somewhat later, in *Gibbon v Pease* [1905] 1 KB 810, an architect had been employed by a building owner to carry out alterations to some houses. He prepared plans and superintended the execution of the work and was duly paid. The building owner demanded that the architect hand over the plans which he refused to do. The Court of Appeal held that the building owner was entitled to the plans. Collins MR (at 813) concluded that the contract made with the architect resulted in the making of plans the property in which passed to the building owner on payment of the remuneration provided under the contract and that he found a difficulty in distinguishing the case from that of a contract to paint a picture or design a coat of arms as to which no question of ownership could arise. Cozens-Hardy LJ (at 814) applied *Ex parte Horsfall* and also relied upon practical considerations saying:

> "… What would be his (that is the building owner's) position after the building was completed? Unless he has the plans, how is he to know where the drains, the flues, and many other things are? Is he bound to go to the architect and make a fresh contract with him with respect to every matter that arises relating to the structure?"

He concluded that a decision of the Court of Exchequer in *Ebdy v McGowan*, reported only in *The Times*, 17 November 1870, where a building owner had been held entitled to the plans drawn by the architect, was correct, and ought to be followed.

Some light is thrown on financial records by the decision in *Re Ellis & Ellis* [1908] WN (Eng) 215. There Ellis & Ellis, a firm of solicitors, acted for a client in the management of his affairs and over a period of two years received large sums on his behalf. Out of the money so received they paid many of the client's debts and also retained the amount of their costs charges and expenses as his solicitors. They then ceased to act for him. Later the client became bankrupt and the trustee in bankruptcy sought an account from Ellis & Ellis of the moneys they had received in the two year period. Ellis & Ellis delivered the accounts which the trustee did not dispute, but the

trustee required that the vouchers for the payments should be handed over to him which Ellis & Ellis declined to do. Neville J said:

> "I think the respondents have misconceived their position. They are not trustees, but agents who have been paid. The vouchers represent payments made on behalf of the bankrupt with his money and are his property, and must be handed over to the trustees; …."

This decision must be regarded as one based on the finding of fact that the solicitor was acting as an agent, and not as authority for the proposition that the actions of solicitors are always or even usually to be treated as the actions of agents for their clients.

Cordery on Solicitors, 8th ed, (1988) propounds a number of principles. The learned author says (at 89) that documents in existence before the retainer commences and sent to the solicitor by the client or by a third party during the currency of the retainer present no difficulty and that the solicitor holds them as agent for the client or third party. He goes on to say that documents which only come into existence during the currency of the retainer and for the purposes of business transacted by the solicitor pursuant to the retainer fall into four broad categories:

> "(i) Documents prepared by the solicitor for the benefit of the client and which may be said to have been paid for by the client, belong to the client.
>
> (ii) Documents prepared by the solicitor for his own benefit or protection the preparation of which is not regarded as an item chargeable against the client, belong to the solicitor.
>
> (iii) Documents sent by the client to the solicitor during the course of the retainer, the property in which was intended at the date of despatch to pass from the client to the solicitor, belong to the solicitor.
>
> (iv) Documents prepared by a third party during the course of the retainer and sent to the solicitor (other than at the solicitor's expense), belong to the client."

He also says (at 90) that where the basis of charging a client enables a conclusion to be reached that the client has paid for all draft and copy documents and letters and things such as instructions and briefs in contentious matters, the client is entitled to the documents. On the other hand copies of letters written to the client, entries of attendances, tape recordings of conversations and proofs of evidence, inter-office memoranda, entries in diaries, time sheets, computerised records, office journals and books of account belong to the solicitor.

A number of considerations can be discerned in these decisions and statements as being relevant in the determination of ownership. These include whether or not the client was charged for the creation of the document, and whether the solicitor created the document for his client's benefit and protection, or did so for his own benefit and protection. It is apparent that in many if not most cases a solicitor would have mixed reasons for creating a document. Thus if on his client's instructions he writes a letter of demand to a third party, it would be his duty to keep a copy of the letter, for the client may have to prove the sending of the letter and its contents, and the copy kept by the solicitor may be essential for this purpose. On the other hand the solicitor would want a copy for his own

protection in order, for example, to be able to prove to his client that he had sent the letter of demand, and also for the purposes of making up a bill of costs. In such a case, the clients would be entitled to a copy of the letter and the solicitor would be entitled to charge him for it. On the other hand the solicitor would be entitled to keep a copy for his own records and absent some special agreement would not be entitled to charge the client for making that copy. Again if on his client's instructions the solicitor pays money to a third party and obtains a receipt, the receipt is obviously of benefit for the client for it is evidence that the third party has been paid. It is also evidence for the solicitor that he has carried out his client's instructions and would be needed by him if any questions as to payments out of his trust account were raised. Again in this case I should have thought that the client was entitled to the original receipt, but that the solicitor was entitled to retain a copy.

Before going to the particular categories of documents which have to be considered, I should refer to documents relating to a trust account. It was Ms Wentworth's submission that any records held by the solicitors of their dealings with her money in their trust account other apparently than documents falling within the definitions of cash book, ledger or journal, belong to her. Sly & Russell, in keeping any relevant record, were acting as trustees, she was the beneficiary, she was accordingly entitled to any such document. This submission runs counter to principles applicable to a solicitor who receives and holds money in trust for his clients. A trustee must keep proper financial records and in a real sense, as well as keeping them for his own benefit, he keeps them for the benefit of the beneficiary, to whom he must be ready to render accounts when required. However, while he is trustee, they are his records and he has the legal title to them. The beneficiary is entitled to inspect them, and to have information about them, but they are not the beneficiary's property: *Re Londonderry's Settlement; Peat v Walsh* [1964] Ch 594. Normally, when a trustee ceases to hold office, either on appointment of a new trustee or the determination of the trust, he would be required to hand over all trust property, including documents and financial records, to the new trustee, or to the sole beneficiary or all the beneficiaries if more than one, if required to do so. In *Re Cowin* (1886) 33 Ch D 179 at 185, North J quoted with approval the following passage in *Lewin on Trusts*, 8th ed (1885) at 975: "All documents held by the trustee in that character must be produced by him to the *cestuis que trust*, who in equity are the true owners." This position would generally apply to a trustee who is a solicitor, but there are important qualifications in some cases. If he is solicitor for the client as well as trustee, he is required by law (as I shall describe later) to maintain and to retain proper financial records. He is entitled to retain these records, some of which may refer to other clients as well as the trust, but the beneficiary should be provided with copies if asked for. Other records which he makes as solicitor and not as trustee are subject to the same principles as would apply if he were not a trustee.

I shall now deal with the ownership of the various classes of documents.

1. Cheque requisition forms:

When Sly & Russell wish to pay an amount of money for a client or in respect of the client's matters by cheque, a printed form of cheque requisition is completed. This requisition form includes the date, an identification of the matter, the member or employee of the firm making the

A requisition, the name of the client, the nature of the relevant business of the client, the name of the payee, and the purpose of the payment and the amount. The requisition then goes to the relevant employee of the firm who makes out the cheque and enters on the cheque requisition form the date and number of the cheque. In my opinion this form is the property of the solicitors. It is an internal record made for their own purposes and benefit and cannot be said to be a document made by them as agent for Ms Wentworth. The decision in *Re Ellis & Ellis* does not apply, for that was a
B case where the solicitor was acting only as an agent. I can see no basis on which Ms Wentworth can claim to be the owner of any such form.

2. Computer printouts:

The financial records of Sly & Russell are computerised and the firm holds copies of the printouts of the information stored in the computer, and presumably can make as many copies of them as it wishes. I do not know
C the details of the way in which the computer records information but examples of printouts produced by Sly & Russell show that they can relate solely to Ms Wentworth's affairs. It may be that other computer printouts relate to the affairs of other clients as well as those of Ms Wentworth. I do not understand how any distinction in principle can be made between these records and records in documents such as cash books, ledgers and journals. Whatever may be the position in relation to ordinary trustees, solicitors who hold money in trust for their clients have two roles and are subject to special
D duties, and they are entitled to and indeed must retain their financial records.

Until the *Legal Profession (Trust Accounts and Controlled Money) Regulation* 1988 came into force, the trust account regulations made under the *Legal Practitioners Act* 1898 required solicitors to keep or cause to be kept at their registered office the following documents:

(a) a receipt book;
E (b) a bank deposit book;
(c) a cash book, or receipts cash book and payments cash book;
(d) trust ledger;
(e) a trust cheque book;
(f) trust ledger trial balance statements;
(g) a trust journal.

These records were required to be retained for a period of five years after
F the last entry had been made in them. Although it may not be relevant for present purposes, I would have thought that this last provision did not mean that trust account records could be disposed of even though trust money was still held by the solicitor, simply because nothing had happened requiring any entry to be made during the last five years. The last entry must refer to the last entry clearing the account.

Those regulations did not make provision in respect of computerised
G accounts. The 1988 regulations enlarge to some extent the nature of the trust records to be kept, require records to be retained for a period of six years, and make special provision in relation to computerised accounts.

As it seems to me the records, whether computerised or otherwise, which a solicitor keeps in relation to transactions concerning the moneys of a client held in his trust account and the disbursement of those moneys are his property and not the property of his client. This result can be arrived at

whether the principles which relate to trustees and beneficiaries are applied or those relating to solicitor and client are applied. In so far as the records are those of a continuing trustee, they belong to the trustee, the beneficiary is entitled to information concerning their contents and where appropriate to copies of them but the beneficiary does not own them. In so far as the solicitor has ceased to be a trustee, he is still required by law to maintain and to retain proper financial records. Looked at as a solicitor's records, no doubt they are kept in part for the benefit of the client but they are also kept for the benefit of the solicitor who must know and be able to establish not only to the client but to persons exercising the relevant powers under the *Legal Practitioners Act* precisely what he has done with moneys in his trust account. His liability to account to inspectors and others pursuant to the *Legal Practitioners Act* is not a liability which has been created solely for the benefit of the solicitor's client. It is for the client's benefit, but it is also for the benefit of the public generally, which has a considerable interest in ensuring the integrity of solicitors and their observance of their professional and other obligations.

Accordingly, whilst Ms Wentworth is entitled to information concerning her financial affairs as appearing on the records kept by Sly & Russell, whether computerised or otherwise, she does not own those records. Having regard to technological advances and the ease with which copies can now be made, I should have thought that the solicitor who keeps computerised accounts should supply his client with a copy of the relevant printout, but at the client's expense. That however is not the issue in the present case; the issue is simply whether any printout of the computerised records concerning Ms Wentworth's affairs belongs to the solicitors. In my opinion it does, unless it is a copy which has been made for and at the expense of Ms Wentworth.

3. Notes of Sly & Russell relating to telephone attendances on persons other than Ms Wentworth:

The notes made by a solicitor of telephone conversations with persons other than his client, but relating to the client's affairs, may obviously fall into an almost indefinite number of classes. On the one hand, a solicitor could have a telephone conversation with a person whom the client alleges owes him money. The alleged debtor may give the solicitor his version of the matter, make admissions, deny his obligation or make a counter-claim. As it seems to me the solicitor's record of conversations of these kinds, although made in part for his benefit or purposes, are of primary benefit to the client. If the client determined the solicitor's retainer and went to another solicitor, it could be critical to that other solicitor to have the record which the solicitor has made of the conversation. Again a solicitor may interview a witness and take a statement from him. I would have thought that such a statement was taken for the benefit of the client as well as by the solicitor for his own purposes and undoubtedly the client would be charged for the taking of the statement. If a new solicitor took over a client's business, the former solicitor having been paid his fees, I would have thought that the former solicitor would be bound to hand over the statement to the new solicitor, although he could keep a copy for which he had not charged.

As I have indicated *Cordery* suggests that both that “entries of attendance” and “proofs of evidence” are the property of the solicitor. No

A authority is cited for these suggestions, and I would have thought that they both fell squarely within the first of the four categories described by *Cordery* and that they each belonged to the client. The "*Guide to the Professional Conduct of Solicitors*" issued by the (English) Council of the Law Society (1974) states (at 39) that a memorandum of a telephone conversation with a third party made by a solicitor is the property of the client, and is accordingly to be handed over on a change of solicitors. On the other hand, B a solicitor may well make a note of a telephone conversation which he has with a person relating to the work he is doing for a client, but the conversation may be solely for the benefit of the solicitor and not be chargeable to the client.

Between this class of case and the former there are no doubt cases where questions of degree are involved, and where predominant purpose may resolve the issue. Thus one of the examples provided by Sly & Russell falling C within this category was a note of a conversation with senior counsel in respect of the payment of his fees. Counsel look primarily to solicitors for the payment of their fees and solicitors have a professional responsibility for their payment. Clients of course have an interest, and a very real interest, in counsel's fees, but I should think that a record of a conversation by a solicitor with senior counsel concerning the non-payment of his fees would be a record belonging to the solicitor. On the other hand a record of a conversation between the solicitor and the director of a legal aid D organisation discussing a costs position seems to me to be the property of the client. If the solicitor had written a letter rather than had a telephone conversation and received a letter in reply, I would have thought that both belong to the client although the solicitor would be entitled to retain a copy of each.

It appears from this discussion that it is not possible to give a single answer to the question whether a document falling within this category is E the property of Ms Wentworth or of the solicitors unless its nature and the relevant facts are known. Some guidance however may be obtained from the particular examples which I have discussed.

4. Internal Sly & Russell records and memoranda as to work done or work to be done:

These records in my opinion fall within the category of documents which F are created by solicitors for their own benefit and not for the benefit of their client, and there is no principle upon which Ms Wentworth could base her claim to ownership. If there were no special arrangement as to fees, I do not think that the solicitor would be entitled to charge for making these records. If there is an arrangement that fees are to be charged upon a time basis which would include the time for making these records, I do not think that on that account alone, the records would become the property of the client. Thus a barrister may make written notes of arguments he proposes to G submit to a court and if he charges upon a time basis for out of court work, the client has in a sense been charged for that work. However I do not think that that makes those notes the property of the client; they would be made by the barrister entirely for his own professional purposes even though they are made in the course of carrying out work for the client. The position is the same in the case of the internal records as in relation to the analogous

internal records of a solicitor. Records falling within this category belong to Sly & Russell.

5. Records of personal attendances by Sly & Russell on any person other than Ms Wentworth or at court:

The ownership of the records of personal attendances on persons other than Ms Wentworth is to be determined on the same principles as those applying to records of telephone attendances. As in the case of those records, it is not possible to give a single answer in relation to the records falling within this category, but the examples I have discussed in relation to category 3 are equally applicable to records falling within category 5.

Similarly the question of the ownership of records of attendances at court do not admit of a single general answer. A record of such a proceeding may be made for the benefit of both client and solicitor; for the client because it is important for a client to know and to have a record of what has happened in court, and his solicitor is a person on whom he must be entitled to rely for information about what has happened. No doubt also such a record would be valuable for any new solicitor. On the other hand the solicitor would want a record for his own purposes in order to be able to establish what has taken place and as a basis for future action on behalf of the client. In these cases in my opinion the client is entitled to the original record and the solicitor is entitled to retain a copy. No doubt there may be some records of court attendances which are made primarily for the benefit or protection of the solicitor. Thus notes made by a solicitor when at court to remind him of what matters he should attend to seem to me to be a record wholly or substantially for his benefit or purposes and not for the benefit of the client. Such a record would in my opinion belong to the solicitor.

6. Correspondence by Sly & Russell with any person other than Ms Wentworth:

These communications are subject to the same principles as those in category 3, that is, notes of telephone conversations by Sly & Russell with persons other than Ms Wentworth. No single answer can be given; as appears from the authorities to which I earlier referred, this correspondence is often sent or received by a solicitor as agent for his client. In such a case the correspondence belongs to the client. No doubt there are cases where it would be the solicitor who would be entitled to the property.

7. Any document held by Sly & Russell involving counsel:

Generally speaking documents involving counsel would be documents created or received for the benefit of the client, even though they may also be for the benefit of the solicitor, and the client would be entitled to the originals or a copy of them. Thus counsel's brief must belong to the client. If in the middle of litigation the client changed its solicitor, the new solicitor would be entitled to a copy of the brief and upon its return the original brief of counsel. Notes of conferences held by solicitors with counsel, either in counsel's chambers or by telephone, would likewise generally belong to the client, as would correspondence between counsel and solicitor. As I have previously indicated in relation to a record of a conversation about non-payment of counsel's fees, records and notes of some conversations and

A some correspondence may in particular circumstances belong to the solicitor but this would not generally be the position.

8. Communications between Sly & Russell and any officer of the court:

Any correspondence between Sly & Russell and officers of the court, and any note of the conversation by someone on the part of Sly & Russell and an officer of the court, would be subject to the same principles which I have discussed in relation to other correspondence or records of conversations
B with third parties. Generally they would belong to the client although the solicitor would be entitled to keep a copy of them. Here again there may be some particular letters or records which are solely for the solicitor's benefit in which event the solicitor would be entitled to them.

9. Photocopy requisitions of any matter in relation to litigation:

In my opinion requisitions made for the photocopying of documents, by
C an employee of Sly & Russell are the records of Sly & Russell. They relate essentially to its own internal conduct of its business, and no relevant principle entitles the client to them. Requisitions to copiers outside the firm are to be dealt with in accordance with the principles applying to communications with third parties.

10. Internal Sly & Russell attempted financial reconciliation documents:

These documents belong to Sly & Russell and not to Ms Wentworth.
D They are in effect the working papers of Sly & Russell in relation to their accounting obligations and are either wholly or predominantly for their benefit.

11. Any financial records that do not fall within the definition of cash book, ledger or journal:

I have earlier discussed the principles that apply to these records. In my
E opinion, apart from exceptional cases such as receipts for money paid for the client to third parties, Sly & Russell's financial records concerning Ms Wentworth's affairs, all of which relevantly concern litigation, are their property. In so far as Sly & Russell have records concerning money held in their trust account for Ms Wentworth, the principles I have referred to earlier apply. Ms Wentworth is entitled to inspect the records and to have information about them, and to have Sly & Russell render accounts in respect of the moneys but the records themselves belong to Sly & Russell.

F

12. All trust account bank statements or any other bank account statement relating to an amount of money held for Ms Wentworth:

Applying the principles which I have described, these bank statements (which would normally relate to moneys of other clients, as well as Ms Wentworth) belong to Sly & Russell, but Ms Wentworth is entitled to inspect them and to be given information about them.

G The parties told the Court that the resolution of the issues as to property in the documents would go a long way to resolving most of the issues in the application by Ms Wentworth to adduce fresh evidence. Hopefully this will prove to be correct. However I do not think that it is possible for the Court to make any orders in that application at this stage, save to stand the application over to a date to be fixed by the Registrar, and to reserve the costs.

SAMUELS JA I agree with the reasons of Hope JA and with his proposal for the future conduct of the matter. A

MAHONEY JA I agree with what has been said by Hope JA and with what he proposes.

Summons for leave to adduce fresh evidence adjourned to date to be fixed

Solicitors for the opponent: *Sly & Russell*.

B

M L BARR,
Barrister.

C

D

E

F

G

BREEN ..... APPELLANT;
PLAINTIFF,

AND

WILLIAMS ..... RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

Medical Practitioners — Medical records — Patient's right of access — Contract — Whether implied term — Doctor's duty in relation to information and medical records concerning patient — Whether proprietary right of access — Copyright — Whether fiduciary duty to grant access — Whether right to know.

H C OF A
1995-1996
Nov 21
1995
Sept 6
1996
Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ

Held, (1) that in the absence of a formal contract between doctor and patient there is no implied term in the contractual relationship which entitles the patient to inspect or obtain his or her medical records.

Hawkins v Clayton (1988) 164 CLR 539 at 573, 582-586, referred to.

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266 at 283-284; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 605-606; and *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 346, 347, 404, applied.

(2) That the duty of a doctor to advise and treat a patient with reasonable care and skill does not impose a general duty to grant access to medical records relating to the patient.

(3) That a patient has no proprietary interest in the documents comprising his or her medical records or in the information contained in those documents.

Leicestershire County Council v Michael Faraday & Partners Ltd [1941] 2 KB 205 at 216 and *Chantrey Martin v Martin* [1953] 2 QB 286 at 293, applied.

(4) That there is no common law principle in Australia of a patient's "right to know" the contents of his or her medical records.

Rogers v Whitaker (1992) 175 CLR 479, considered.

Hence a patient has no general right to access his or her medical records in the possession of a doctor.

R v Mid Glamorgan Family Health Services; Ex parte Martin [1995] 1 WLR 110; [1995] 1 All ER 356, considered.

A woman consulted a plastic surgeon in 1978 about complications which occurred after surgery in 1977 (which he had not performed) for the insertion of silicone implants in her breasts. He performed remedial surgery but the complications continued. Some years later she became interested in litigation by class action in the United States against the

access to records containing that information. Fifth, the law imposed on Dr Williams a fiduciary duty, enforceable in a court of equity, to give her access to her medical records.

Did Ms Breen have a proprietary right or interest in the medical records?

Dr Cashman did not submit that Ms Breen owned the actual documents which comprised the medical file. She did not, he said, "seek to divest the doctor of the pieces of paper" comprising the records. The concession that Ms Breen did not own the documents was plainly correct. Professional persons are not ordinarily agents of their clients even though they often have express, implied or ostensible authority to enter into contracts on their clients' behalf. Documents prepared by an agent are ordinarily the property of the principal. But documents prepared by a professional person to assist him or her to do work for a client are the property of the professional person, not the lay client. Speaking of documents which a firm of valuers had prepared in the course of its professional employment, MacKinnon LJ said (98):

> "If an agent brings into existence certain documents while in the employment of his principal, they are the principal's documents and the principal can claim that the agent should hand them over, but the present case is emphatically not one of principal and agent. It is a case of the relations between a client and a professional man to whom the client resorts for advice. I think it would be entirely wrong to extend to such a relation what may be the legal result of the quite different relation of principal and agent ... [The documents in question] are documents which he has prepared for his own assistance in carrying out his expert work, not documents brought into existence by an agent on behalf of his principal, and, therefore, they cannot be said to be the property of the principal."

The doctor-patient relationship, like that of valuer and client, is not one of agent and principal. Dr Williams' notes were prepared to assist him to fulfil his professional duties. The property in the medical records relating to Ms Breen which he prepared belongs to him; Ms Breen has no proprietary right in respect of those records. The right of ownership of Dr Williams is, statute or contract apart, good against the world and entitles Dr Williams to prevent any person from having access to those records.

Although Dr Cashman conceded that Ms Breen did not own the records, he contended that she had a proprietary right or interest in the documents that entitled her to access to them. The premise of this

(98) *Leicestershire County Council v Michael Faraday & Partners Ltd* [1941] 2 KB 205 at 216, followed in *Chantrey Martin v Martin* [1953] 2 QB 286 at 292-293; *Wentworth v De Montfort* (1988) 15 NSWLR 348 at 352.

H C OF A 1995-1996

BREEN v WILLIAMS

Gaudron J McHugh J

argument was that the records were not owned by anybody. However the idea that an item of personal property that has not been abandoned has no owner is ill-founded. Ownership may be divisible in the sense that one or more of the collection of rights constituting ownership may be detached and vested in a number of persons. Ownership may also be divorced from possession in numerous circumstances (99). But the notion that personal property that has not been abandoned may have no owner is one that is foreign to the common law. Statute or contract apart, medical records, prepared by a doctor, are the property of the doctor. That property right entitles the doctor to refuse other persons access to the records. Dr Cashman's argument based on Ms Breen having a proprietary right or interest in the records must fail.

Was a right of access an implied contractual term?

The doctor-patient relationship is contractual in origin (100). In general terms, "[a] doctor offers a patient diagnosis, advice and treatment", the objectives of which are "the prolongation of life, the restoration of the patient to full physical and mental health and the alleviation of pain" (101). Given the informal nature of the relationship, however, a contract between a doctor and a patient rarely contains many express terms. Because that is so, the courts are obliged to formulate the rights and obligations of the parties to the contract. As Lord Wilberforce has put it, in cases where the parties to a contract have not attempted to spell out all the terms of their contract, the function of the court is "simply ... to establish what the contract is, the parties not having themselves fully stated the terms" (102). The court does so by implying terms in the contract in accordance with established legal principles.

The common law draws a distinction between terms which are implied in fact and terms which are implied by law. Leaving aside terms that are presumed to apply because of the custom of a trade or business, the courts will only imply a term in fact when it is necessary to give efficacy to the contract (103). A term implied in fact purports to give effect to the presumed intention of the parties to the contract in respect of a matter that they have not mentioned but on which presumably they would have agreed should be part of the con-

(99) *Halsbury's Laws of England*, 4th ed (1981), vol 35, par 1128.

(100) *Sidaway v Board of Governors of Bethlem Royal Hospital & Maudsley Hospital* [1985] AC 871 at 904.

(101) *Sidaway* [1985] AC 871 at 903. See also *Rogers v Whitaker* (1992) 175 CLR 479 at 483.

(102) *Liverpool City Council v Irwin* [1977] AC 239 at 254, cited in *Hawkins v Clayton* (1988) 164 CLR 539 at 571.

(103) *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 139, per Dawson J. See generally, Carter and Harland, *Contract Law in Australia*, 3rd ed (1996), pp 205-209.

LEICESTERSHIRE COUNTY COUNCIL *v.* MICHAEL FARADAY AND PARTNERS, LIMITED.

C. A.
K. B. D.
1941
March 3.
C. A.
May 22.

Rates—Rating valuers—Employment by rating authority to give advice and assistance in connection with valuation of hereditaments—Documents, books, maps and plans relating to valuation—Ownership—Rating and Valuation Act, 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 38.

A company carrying on business as rating valuers was employed by a county council, under the powers conferred by s. 38 of the Rating and Valuation Act, 1925, for five years to give advice and assistance in connection with the valuation of hereditaments in their area and to take steps to secure uniformity of valuation throughout it at a remuneration which was to be inclusive of all out of pocket expenses, office accommodation, staff, notebooks, plans, etc. The valuers, on receiving instructions, were to inspect and value any hereditament within the county area and report thereon. At the termination of the five years' agreement the rating authority claimed that they were entitled to all documents, books, maps, and plans which had been prepared by, or had come into the possession of, the valuers in the course of, or for the purpose of, the performance of their duties. The agreement under which the valuers were employed contained no provision for the delivery up of the documents. In an action by the county council for the delivery up of the documents:—

Held, by the Court of Appeal, affirming Macnaghten J., that the relationship between the county council and the valuers was that of client and professional man and not that of principal and agent; that the documents which the valuers had prepared in carrying out their expert work were their own property; and that, as the agreement did not contain any provision requiring the valuers to hand over the documents to the plaintiffs, they were not bound to hand them over.

London School Board v. *Northcroft* (1889) Hudson's Building Contracts, 4th ed., vol. ii., p. 147, approved and followed.

APPEAL from Macnaghten J. in an action tried without a jury at Leicester Assizes.

The plaintiffs, the Leicestershire County Council, claimed from the defendants, Michael Faraday and Partners, Ld., the delivery up of certain documents which the plaintiffs alleged were their property.

Sect. 18 of the Rating and Valuation Act, 1925, provides for the establishment in every county of a valuation committee charged with the duty of taking such steps as they may think fit for promoting uniformity in the principles and practice of

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the architect had been paid. In *Ex parte Horsfall* (1) a solicitor, on receiving the amount of his bill, was held to be bound to deliver up to his client, not only original deeds belonging to him, but also the drafts and copies. Here the plaintiffs paid, not merely for the final result of the defendants' work, but also for all the information collected and collated by the defendants to produce the final result. It is stated in Halsbury's Laws of England, 2nd ed., vol. xxxi., p. 102, that "documents coming into existence in the course of business "transacted under a retainer, and either prepared for the "benefit of the client, or received by the solicitor as agent for "the client, belong to the client." In the present case the documents were prepared by the defendants for the benefit of the plaintiffs who will be seriously handicapped if they do not have the calculations for a period of five years. *London School Board* v. *Northcroft* (2) is distinguishable.

Comyns Carr K.C. and *A. H. Bidder* for the defendants. The duty to hand over these documents is not expressed in the contract, and, therefore, the plaintiffs must show that it was an implied term, but the plaintiffs have failed to point to anything in the contract from which such a term could be implied. Under s. 38 of the Act of 1925 a rating authority does not delegate to an agent what they could do themselves, and, therefore, this case has no analogy to the case of *Lady Beresford* v. *Driver* (3). A rating authority has no power to enter on premises compulsorily, but, if they appoint a professional valuer to assist them, the valuer has a right under the section to enter compulsorily on premises to value them. Much of the information that is given to a professional valuer by an occupier of premises is in confidence, and he must not disclose it to the rating authority. [He was stopped.]

Gardiner replied.

MACKINNON L.J. [after stating the facts :] The difficulty that the learned judge below felt (which I share to the full)

(1) (1827) 7 B. & C. 528.
(2) (1889) Hudson's Building Contracts, 4th ed., vol. ii., p. 147.
(3) 20 L. J. (Ch.) 476; 22 L. J. (Ch.) 407.

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was to understand to what precise sort of documents the statement of claim refers. One must assume that during the five years of the defendants' employment all the documents which it was the duty of the defendants, pursuant to the terms of the contract, to prepare and forward to the plaintiffs, have been duly prepared and furnished, because there is no complaint of any failure by the defendants to do that. These other documents are apparently the memoranda, notes on scraps of paper, and various other things that may have come into existence, jotted down perhaps in a note book by the man who carried out the duty of inspecting a hereditament and making up his mind about its valuation. It is suggested that all pieces of paper of that description used by the defendants in the course of their visits and of making their estimates of values became the property of the plaintiffs directly they came into existence. There is nothing in the contract itself which supports any such proposition. The only passage in the contract which is relied on is the reference to plans which provides that the salary of 2500*l.* a year "shall be inclusive of all out-of-pocket "expenses, including cost of transport, office accommodation, "staff, note books, plans, etc., that may be necessary to "carry out this work." It is fairly obvious that the reference to note books and plans is a quite unnecessary addition to the provision that the salary is an inclusive salary, and that the defendants are to pay their own out-of-pocket expenses in the nature of office accommodation, wages, stationery and the other things which they have to provide to carry on their work.

If there is nothing in the contract on which the plaintiffs can rely to establish that they are right in saying that these pieces of paper are their property, by what rule of law otherwise can they assert that that is so? I know of none. Some reference has been made to, and reliance placed on, one or two cases which were cited by Mr. Macaskie, such as *Lady Beresford* v. *Driver* (1) and *Gibbon* v. *Pease* (2), but I think that those

(1) 20 L. J. (Ch.) 476; 22 L. J. (Ch.) 407.
(2) [1905] 1 K. B. 810.

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cases are radically different from the present case, as being concerned with the relative rights and duties of principal and agent. If an agent brings into existence certain documents while in the employment of his principal, they are the principal's documents and the principal can claim that the agent should hand them over, but the present case is emphatically not one of principal and agent. It is a case of the relations between a client and a professional man to whom the client resorts for advice. I think it would be entirely wrong to extend to such a relation what may be the legal result of the quite different relation of principal and agent. These pieces of paper, as it seems to me, cannot be shown to be in any sense the property of the plaintiffs, any more, as I suggested to Mr. Macaskie during the argument, than his solicitor client or his lay client could assert that his notes of the argument he addressed to us could be claimed to be delivered up by him when the case is over either to the solicitor or to the lay client. They are documents which he has prepared for his own assistance in carrying out his expert work, not documents brought into existence by an agent on behalf of his principal, and, therefore, they cannot be said to be the property of the principal.

I have, perhaps, said too much in regard to this case, because it would have been sufficient, I think, if I had said that I entirely agreed with the very careful judgment of Macnaghten J., and with the reasons that he gave for rejecting the plaintiffs' claim. I think that he was quite right, and that as a result this appeal fails.

GODDARD L.J. I agree. *London School Board* v. *Northcroft* (1), which was referred to in the course of the argument, was a case exactly like this, and in it A. L. Smith J. emphatically asserted that detinue would not lie for documents of exactly the same class as these; memoranda which were in the possession of quantity surveyors who had been employed by the London School Board, and which the quantity surveyors had prepared for their own use in measuring up certain

(1) Hudson's Building Contracts, 4th ed., vol. ii., p. 147.

[545] *In re* THOMSON. *May* 23, 24, 30, 1855.

[S. C. 24 L. J. Ch. 599; 1 Jur. (N. S.) 718; 3 W. R. 474.]

On payment of a solicitor's bill, the client is entitled to the possession of letters written to the solicitor by third parties, but not to copies of letters written by the solicitor to third parties, unless they are paid for by the client.

Semble, that a solicitor is entitled to retain the original letters written to him by his client.

The Petitioner, Mrs. Lowe, employed Mr. Thomson as her solicitor, from July 1853 to February 1855, when she discharged him and retained other solicitors. Mr. Thomson's bill of costs being paid, he handed over to the new solicitors the deeds, books, papers and writings belonging to the Petitioner, except the original letters addressed to and received by him as the Petitioner's solicitor, and relating exclusively to her business, and except copies of letters written by him as the Petitioner's solicitor, and exclusively relating to her business, which copies had been made by him and had not charged for in his bill of costs. These he declined to deliver up, but he offered to furnish copies of both classes of letters at the expense of the Petitioner. This proposal being unsatisfactory to Mrs. Lowe, she presented a petition for the delivery up of these letters and copies, and which she alleged were important to her interests.

Mr. Waller, in support of the petition. First, the letters written to the solicitor on his client's affairs were received by him and are now in his possession, as the solicitor and agent of his client. They belong therefore to the client, and, the pecuniary claims of the solicitor being fully satisfied, the Petitioner is entitled to their possession. Secondly, the copies of the letters written by the solicitor were made in the usual and proper discharge of his duty, and they are as important to the client as the original letters to which they are answers. They belong to the Petitioner and their possession is es-**[546]**-sential in order to understand and to explain the correspondence which has taken place relative to her affairs. They form part of her documents, and it would be a great hardship to compel her to pay for copies of documents already made.

Mr. Morgan, *contrà*. The solicitor has the property or at least a qualified property in the letters sent to him, and he is entitled to retain possession of them; *Pope* v. *Curl* (2 Atk. 342); *Gee* v. *Pritchard* (2 Swanst. 415). They do not belong to the client and would not come within the terms of the common order for delivery "upon oath of all deeds, &c., belonging to the Petitioner." As to the copies of the letters written by the solicitor, they were made in his letter-book, for his own protection and justification, and at his own expense, for they were neither charged for in the bill of costs nor paid for by the client. Charges for copies of such letters are never allowed upon taxation. If the client requires copies, she must bear the expense of making them. He referred to an unreported case of *Ex parte Bosville*, before Baron Parke.

Mr. Waller, in reply. As to the copies of the letters in question, the petition does not allege, in words, that they are charged for, but it does so inferentially, for the copies are, in fact, taken and retained solely for the benefit of the client, and they are considered and paid for in the charge for the letters themselves. If the solicitor desires copies of any of the letters for his own purposes, he may take them at his own expense.

THE MASTER OF THE ROLLS. I am at present of opinion that the copies of letters written by the solicitor and copied in his own letter-book cannot be ordered to be given up, and that if the **[547]** client wants copies of them, she must pay for them, but as to the original letters, I shall reserve my judgment.

May 30. THE MASTER OF THE ROLLS [Sir John Romilly] in substance said:—The copies made by the solicitor of letters written by him to third parties, on his client's business, were made for his own benefit and protection, and were neither charged for by him, nor paid for by his client. If therefore the client requires copies, she can only have them on the terms of paying for them.

No question arises as to the letters from the client to her solicitor, but my impression is that the solicitor would be entitled to retain them.

As to the letters written to the solicitor by third parties, relating exclusively to the client's business, I think that they having been received by the solicitor as the agent of the client she is entitled to have them delivered up to her. My decision is in no way founded on any questions of copyright or qualified ownership.

[548] *In re* BAKER. BAKER *v.* BAKER. *June* 9, 1855.

[S. C. on appeal, 7 De G. M. & G. 681 ; 44 E. R. 265 ; 6 H. L. C. 616 ; 10 E. R. 1436. See cases cited in note, 10 E. R. 1436 ; and, also, *Brayne* v. *Rees*, 1866, 15 L. T. 349 ; *Michell* v. *Wilton*, 1875, L. R. 20 Eq. 271.]

The testator gave his real and personal estate, on trust to raise such a sum of money, as when invested, the dividends would realize the clear annual sum of £200 a year, and to pay such dividends to his widow for life, and afterwards to stand possessed of the principal or trust monies in trust for his brothers and sister. There was a gift to the same person of the residue, "after raising thereout the money sufficient to realize the annuity to his wife." On a deficiency of assets, held, that the *corpus* was liable to make good the widow's annuity.

The testator gave all his real and personal estate to his brother, Alfred Baker, upon trust, to convert the same into money, and stand possessed of the proceeds, "upon trust to raise thereout and invest in the Parliamentary stocks or funds of Great Britain, or upon mortgage or other good security, *such a sum of money as*, when so placed out or invested, the dividends or interest thereof *shall realize the clear annual income of* £200 ; and do and shall pay to, or permit and suffer my said wife, Elizabeth, to take and receive such dividends, interest or annual income, by two half-yearly payments, for and during the term of her natural life, provided she shall so long continue my widow, but not otherwise. And from and after her decease or second marriage, whichever shall first happen, it is my will and I further declare that in case I shall die without issue, the said trustee shall stand possessed of the said principal or trust monies, and the stocks, funds and securities in or upon which the same shall be invested, upon trust for himself and my other brothers, Walter Baker and James Baker, and my sister, Louisa, the wife of Thomas Grant, in equal shares and proportions."

There was a residuary clause giving the residue of the trust monies arising from his real and personal estate and effects (*after raising thereout the money sufficient to realize the annuity for his said wife*), to the testator's brothers and his sister.

[549] There was also a proviso that in case the testator died leaving issue, the bequests to his brothers and sister should be void, and that instead thereof his children should take the trust monies.

In this suit, the accounts, &c., were taken and the only available residue, when invested in consols, would only produce £100 a year. There were some outstanding assets apparently irrecoverable. The question therefore arose, on further consideration of the cause, whether the deficiency of the £200 a year ought, or ought not, to be made up out of the *corpus* of the residue.

Mr. Shebbeare, for the Plaintiff, the widow, insisted that deficiency of the income to meet her annuity of £200 a year ought to be made good out of the *corpus* of the residue. He relied on *Wright* v. *Callender*.(1)

Mr. J. H. Palmer, for the Defendant, argued that the income of the fund was alone liable to pay the annuity.

THE MASTER OF THE ROLLS was of opinion that this case was governed by *Wright* v. *Callender*, and that he was bound to follow that decision ; he declared, therefore,

(1) 2 De G. Mac. & G. 652 ; and see *Hodge* v. *Lewin*, 1 Beav. 431 ; *Swallow* v. *Swallow*, 1 Beav. 432, n. ; *May* v. *Bennett*, 1 Russ. 370 ; *Mills* v. *Drewitt*, *post*, 632, and *Ingleman* v. *Worthington*, V.-C. Kindersley, 20th Nov. 1855.

A. AND OTHERS . . . . . PLAINTIFFS;

AND

HAYDEN AND OTHERS . . . . DEFENDANTS.

F. . . . . PLAINTIFF;

AND

HAYDEN AND OTHERS . . . . DEFENDANTS.

G. . . . . PLAINTIFF;

AND

HAYDEN AND OTHERS . . . . DEFENDANTS.

H. AND OTHERS . . . . . PLAINTIFFS;

AND

HAYDEN AND OTHERS . . . . DEFENDANTS.

K. AND ANOTHER . . . . . PLAINTIFFS;

AND

HAYDEN AND OTHERS . . . . DEFENDANTS.

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MASON J. There is an air of unreality about this stated case. It has the appearance of a law school moot based on an episode taken from the adventures of Maxwell Smart. It features the Commonwealth in a new and somewhat unattractive role — recruiting officers to the service of ASIS, its counter-espionage organization, on the footing that their names will be kept secret for reasons of national and personal security, instructing them through superior officers to participate in a bizarre training exercise carried out at the Melbourne Sheraton Hotel which involved risks of disturbing the peace and of the commission of criminal offences, yet arguing that it is entitled to disclose their names to the Chief Commissioner of Police for Victoria so that he may conduct investigations with a view to enforcing the criminal law against them, the Commonwealth itself being immune from enforcement of the law notwithstanding that through senior officers it initiated the training exercise.

The Commonwealth has a legitimate concern with the administration of the criminal law in its application to the events recorded in the stated case. However, the emphasis which the Commonwealth seeks to give to this responsibility should not be allowed to obscure its responsibility for what occurred. It is possible that the promise was given, and the arrangements for the training exercise made, in the belief that executive orders would provide sufficient legal authority or justification for what was done. It is very difficult to believe that this was the Commonwealth's view — superior orders are not and never have been a defence in our law — though it is conceivable that the plaintiffs may have had some such belief. I mention these aspects of the case lest concentration on the legal questions presented by the stated case should divert attention away from the primary role played by the Commonwealth in this enterprise, a primary role which should be kept steadily in mind if the criminal law ever comes to be set in motion against the plaintiffs. For the future, the point needs to be made loudly and clearly, that if counter-espionage activities involve breaches of the law they are liable to attract the consequences that ordinarily flow from breaches of the law.

It is fortunate that the enterprise resulted only in very minor damage to property and that no one sustained personal injuries. The publicity given to the incident will no doubt almost certainly ensure that exercises of this kind will not be repeated. Fortunately the Commonwealth has the capacity through its control of its own organization to ensure that there will be no repetition. In a unitary

system the executive government would in all probability rely on its capacity to control its organization as a sufficient means of ensuring that there would be no recurrence, without enforcing the criminal law. The tensions produced by the division of powers and responsibilities in our federal system tend sometimes, as in this case, to generate legal issues which would not usually arise in a non-federal system.

The evidence recited in the stated case and the questions which it presents are sufficiently set out in the reasons for judgment which have been prepared by Wilson and Dawson JJ. The form of the stated case, which is by no means a model precedent, presents some difficulties, certainly to the Commonwealth in relation to the first argument which it seeks to advance. The argument is that the relevant term of each of the contracts of employment between the plaintiffs A., B., C., D., E. and G. and the Commonwealth requiring that his name should be kept confidential should be read down so as to permit a disclosure of identity by the Commonwealth for purposes associated with the administration of justice, i.e., to the Chief Commissioner of Police to enable him to investigate whether the plaintiffs or any of them have committed a criminal offence. The Commissioner's anxiety to investigate these comparatively minor offences is a tribute to his zeal.

No doubt in an appropriate case it would be proper to construe the general words of a contract requiring a party to keep confidential the name of another party as permitting the disclosure of the name for the purpose of enforcing the criminal law. Where the general words of a contract are susceptible of such a narrow construction it would be proper to read them strictly so as to impose no obstacle or obstruction to the administration of justice. The well recognized public policy or public interest in the administration of justice, a matter to be discussed when I come to consider the Commonwealth's alternative submission that the relevant term in the contracts is void or unenforceable, would favour such a construction. Here, however, the form of the stated case precludes any consideration by the Court of the first question which the Commonwealth seeks to raise. It is significant that the stated case does not set out the evidence, documentary and oral, constituting the contracts. Instead the stated case itself recites in terms the effect of the relevant promise. In the absence of the evidence to which I have referred, the Court cannot determine the meaning or content of the promise. What is of special importance is that the Court cannot determine whether the limitation which the Commonwealth seeks to place on the contractual obligation not to disclose is consistent with the promises in the actual contracts considered in

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their entirety. The fact that the parties had it in mind that ASIS would engage in clandestine counter-espionage activities might tend to suggest that the obligation not to disclose was related not only to national security but also to protection from the enforcement from the law. For this reason alone it would be material to inquire whether the discussions between the parties relating to the obligation not to disclose were associated with liability for criminal offences committed in the course of ASIS activites.

I turn to the question of enforceability. From the early days of the common law it was the duty of the citizen to disclose any treason or felony of which he had knowledge: *Reg. v. Crimmins* (80). Failure to perform the duty constituted the offence of misprision of felony which was a common law misdemeanour punishable by imprisonment. In *Crimmins* the Full Court of the Supreme Court of Victoria rejected the dictum of Lord Westbury in *Williams v. Bayley* (81), that an essential element in the crime was the offender's making his concealment of the crime a source of profit to himself. And despite suggestions to the contrary it was accepted as late as 1962 that misprision of felony was not obsolete: *Sykes v. Director of Public Prosecutions* (82). The compounding of a felony was also a common law misdemeanour. An agreement not to prosecute a felon or to stifle the prosecution of a felony for consideration amounted to compounding a felony. There was, however, no common law offence of misprision of misdemeanour and the existence of the offence of compounding a misdemeanour was doubtful.

The Criminal Law Revision Committee in its Seventh Report on Felonies and Misdemeanours (Cmnd. 2659) recommended the abolition of the distinction between felonies and misdemeanours and considered it to be objectionable: (a) that a person should be criminally liable for not reporting to the police any minor offence of which he might happen to know; (b) that dishonesty was not an element in the omission to give information; and (c) that the offence of misprision of felony contained no clear limitations in relation to offences committed by near relatives. The Committee recommended that the only case which needed to be provided for was one in which a person accepts or agrees to accept a bribe not to disclose information to the prosecution. The *Criminal Law Act* 1967 (U.K.) gave effect to these recommendations. It abolished the distinction between felonies and misdemeanours: s. 1(1); and provided that in all matters in which a distinction was formerly drawn between them

(80) [1959] V.R. 270, at p. 272.
(81) (1866) L.R. 1 H.L. 200, at pp. 220-221.
(82) [1962] A.C. 528.

the law and practice were to be assimilated to that formerly applicable to misdemeanours: s. 1(2). Misprision of felony thereby ceased to exist as an offence in English law.

Much the same course was followed in Victoria with the enactment of the *Crimes (Classification of Offences) Act* 1981 (Vict.) which introduced s. 322B into the *Crimes Act* 1958 (Vict.). That section abolished the distinction between felonies and misdemeanours, making the law and practice relating to misdemeanours applicable, thereby abolishing the offence of misprision of felony. The 1981 Act also introduced a new s. 326 which created the new offence of concealing an offence for a benefit, the gist of which is accepting a benefit for not disclosing information which might be of material assistance in securing a prosecution or conviction of a serious indictable offence, the offender knowing or believing that such an offence or some other serious indictable offence has been committed. Section 326(5) provides that the compounding of an offence other than treason shall not be an offence otherwise than under the section.

The consequence of the amendments is that it is no longer the duty of a citizen in Victoria, as it once was, to disclose a felony of which he has knowledge. And, as we have seen, it never was the duty of a citizen in Victoria to disclose a misdemeanour of which he had knowledge. It follows that had the promise made by the Commonwealth not to disclose the identity of some of the plaintiffs been made by an ordinary citizen it would not have involved him in any breach of a duty imposed by the law of Victoria in 1983. And it has not been suggested that the Commonwealth was under some overriding duty to disclose its knowledge of a felony or misdemeanour which transcended the obligation of the ordinary citizen.

Accordingly, if the promise is void or unenforceable, it is not because it is inconsistent with the duty imposed on the Commonwealth by law but because the promise seeks to impose an obligation which is at variance with a fundamental head of public policy — the public interest in the enforcement of the criminal law and in the administration of justice. That there is a powerful public interest in the enforcement of the criminal law as an important element in the administration of justice does not admit of debate. Indeed, its importance has been such that the common law has regarded as illegal "any contract or engagement having a tendency, however slight, to affect the administration of justice" to use the words of Lord Lyndhurst in *Egerton v. Brownlow (Earl)* (83). In *Howard v.*

(83) (1853) 4 H.L.C. 1, at p. 163 [10 E.R. 359, at p. 424].

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Odhams Press Ltd. (84), Slesser L.J. pointed out that the perversion of justice may take place in many ways. One example was concealment or procuring the concealment of a felony amounting to the offence of misprision. Another example is an agreement not to prosecute or to stifle a prosecution which at common law is void or unenforceable: *Williams v. Bayley* (85), per Lord Westbury.

Yet another example is an agreement between a prosecutor and persons indicted that a witness should not give evidence at a trial for reward. In *Collins v. Blantern* (86) Wilmot C.J., referring to such an agreement, observed (87):

> "This is a contract to tempt a man to transgress the law, to do that which is injurious to the community: it is void by the common law; and the reason why the common law says such contracts are void, is for the public good. You shall not stipulate for iniquity. All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a Court to fetch it back again, you shall not have a right of action when you come into a Court of Justice in this unclean manner to recover it back. Procul O! procul este profani."

This and other statements of the principle were made at a time when the law did not: (a) differentiate between void and unenforceable contracts; and (b) draw a distinction between a contract which was unenforceable in the sense that it could not be sued on and a provision in a contract which the courts would not enforce in particular circumstances. I shall discuss this question later.

The final example is an agreement to compromise legal proceedings for an offence of a public nature which is illegal: *Keir v. Leeman* (88); *Windhill Local Board of Health v. Vint* (89). In *Windhill*, Cotton L.J. said (90):

> ". . . the Court will not allow as legal any agreement which has the effect of withdrawing from the ordinary course of justice a prosecution when it is for an act which is an injury to the public. It would be the case of persons taking into their own hands the determining what ought to be done; and that ought not to be taken into the hands of any individuals, . . . but ought to be left to the due administration of the law . . . ."

These remarks are of special significance because they show that the

(84) [1938] 1 K.B. 1, at p. 29.
(85) (1866) L.R. 1 H.L., at p. 220.
(86) (1765) 2 Wils. K.B. 341 [95 E.R. 847].
(87) (1765) 2 Wils. K.B., at p. 350 [95 E.R., at p. 852].
(88) (1844) 6 Q.B. 308 [115 E.R. 118]; (1846) 9 Q.B. 371 [115 E.R. 1315].
(89) (1890) 45 Ch. D. 351.
(90) (1890) 45 Ch. D., at p. 363.

underlying thrust of the common law principle was directed as much against the detriment which would be caused to the administration of justice if agreements of the kind in question were to be enforced as against the evil of making knowledge of the commission of the crime a source of profit to the individual.

So much at least was recognized by Slesser L.J. in *Howard v. Odhams Press Ltd.* (91) when, in relation to the agreement under consideration in that case, he observed that it would have the effect of restricting the opportunity which the defendants and others might otherwise possess to assist the authorities in the investigation and prosecution of the alleged crime and went on to refer to the judgment of Stirling J. in *Lound v. Grimwade* (92), where his Lordship, after quoting the observations of Lord Lyndhurst in *Egerton* (93) said:

> "Upon this principle it has been repeatedly held that agreements tending to affect the course of legal proceedings are illegal, even although those proceedings may not be strictly criminal in their nature."

The assumption, unstated but unquestionably well founded, which lies behind the observations of Cotton L.J. in *Windhill* as applied and expounded by Slesser L.J. is that the effective enforcement of the criminal law and the administration of justice, which are central elements in a well ordered democratic society, depend for their efficacy on the unrestricted freedom of each and every citizen to assist and co-operate with the authorities in the investigation and prosecution of criminal offences. There is therefore a powerful public interest in promoting and preserving the citizen's freedom to assist and co-operate with the authorities in the investigation and prosecution of crime. The force of this public interest was formerly buttressed by the existence of the old common law offences of misprision and compounding a felony. However, as we have seen, the basic common law principle reaches beyond the circumstances which give rise to the old offences. Because the principle rests on the wider foundation of public interest already mentioned, its continued existence remains unaffected by the abolition of the old offences and the creation of the new offence of concealment enshrined in s. 326 of the *Crimes Act*. The public interest in the enforcement of the criminal law is not diminished because it now depends, not on any duty or obligation on the part of the citizen to give information concerning the commission of an offence, but on his freedom to

(91) [1938] 1 K.B., at p. 31.
(92) (1888) 39 Ch. D. 605, at p. 612.
(93) (1853) 4 H.L.C. 1 [10 E.R. 359].

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decide what action he will take. The elimination of the duty to give information in relation to felonies, a consequence of the abolition of misprision of felony, is no more than an acknowledgment that the duty is no longer suited to the conditions and circumstances of society, in which liberty of action on the part of the individual is to be preferred to coercive obligation. Indeed, the enactment of the relevant provisions of the *Crimes (Classification of Offences) Act* makes it all the more important that the citizen's unrestricted freedom to assist the authorities should be maintained against influences and pressures which are designed or calculated to induce him not to exercise that freedom by way of co-operating with the authorities.

At first glance it might be thought that the making of a contract not to disclose information which may prove to be relevant to the investigation of a crime is no more than an exercise of the citizen's freedom of action to which I have referred, but this is to ignore the element of public policy. Generally speaking, the making of a contract is no more than an exercise of the citizen's freedom to take such action as he thinks is appropriate, at least in those areas in which he enjoys liberty of action. Undertaking to act in a particular way in the future is not ordinarily regarded as an illegitimate impairment of the individual's freedom to decide for himself what action he will take, even though his undertaking commits him contractually to a course of action in advance of the projected event. This is because no element of public policy is involved which would require that the exercise of the freedom should not be qualified or impaired by entry into some antecedent commitment or some antecedent commitment of a particular kind.

It is obvious that the public interest in the enforcement of the criminal law as an element in the administration of justice would be seriously impaired if the citizen were at liberty to assume in return for a benefit an obligation not to disclose information concerning the commission of a criminal offence. The enforcement of the criminal law cannot be allowed to hinge on the willingness of the citizen to make a profit out of his silence, whether the contract be made before or after the commission of the offence. The existence of s. 326 of the *Crimes Act* does not supply a reason for confining the public interest in the enforcement of the criminal law to the extent to disclosure of serious indictable offences. There is no fundamental inconsistency in recognizing the wide public interest in the administration of justice generally and in making it a criminal offence to conceal for a benefit serious indictable offences only.

The foregoing discussion indicates that, subject to minor qualification only, Lord Lyndhurst was correct in *Egerton v.*

Brownlow (94) when he said that any contract having a tendency, however slight, to affect the administration of justice is illegal. He was of course speaking of a contract or engagement which has a tendency to affect the administration of justice adversely. It has been said that it is the effect of the contract rather than its purpose or the motives of the parties to it that is important: *Howard v. Odhams Press Ltd.* (95). In truth, it is the effect of the enforcement of the contract that is all important. In some cases it may not be easy to assess what impact the contract, if enforced, will have on the administration of justice, as, for example, where in one respect the impact is adverse, but in other respects, beneficial: see, e.g., the discussion in *Weld-Blundell v. Stephens* (96) and *Howard v. Odhams Press Ltd.*

Sometimes it is said that a contract to which the principle applies is void; at other times it is said that the contract is unenforceable or, as Lord Tenterden C.J. expressed it in *Wetherell v. Jones* (97), that the court will not lend its aid to the enforcement of the contract. The true position, as I see it, is that some contracts are void whereas others are valid, though the court will decline to enforce the particular provision in a valid contract in particular circumstances when enforcement of that provision would have an adverse effect on the administration of justice. Thus, a simple agreement not to disclose the existence of a serious criminal offence, which has been, or is about to be, committed in consideration of the payment of a sum of money may well be void because it is illegal. However, it will be otherwise with a contract which is in all respects lawful but nevertheless contains a provision which, if enforced according to its terms, will result in an interference with the administration of justice. Take a contract which contains a minor or subsidiary provision which, though not directed to non-disclosure of criminal offences, imposes an obligation of confidentiality in sweeping terms. If those terms are not susceptible of being read down, the court will refuse to lend its aid to the enforcement of the provision if enforcement would result in the non-disclosure of a criminal offence adversely affecting the administration of justice. In such a case the contract is not void; nor is it unenforceable in the sense in which that term is customarily used in the law of contracts. The case is one in which the court refuses a remedy on the ground of public policy. *Beresford v. Royal Insurance Co.* (98) is an illustration of such a case.

(94) (1853) 4 H.L.C., at p. 163 [10 E.R., at p. 424].
(95) [1938] 1 K.B., at p. 40.
(96) [1919] 1 K.B. 520.
(97) (1832) 3 B. & Ad. 221, at pp. 225-226 [110 E.R. 82, at p. 84].
(98) [1938] A.C. 586.

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It was acknowledged in *Egerton v. Brownlow* (99) that the common law principle which I have been discussing was based on public policy. It has at times been fashionable to criticize public policy: see *Janson v. Driefontein Consolidated Mines Ltd.* (1); *Fender v. St. John-Mildmay* (2). Indeed in *Egerton v. Brownlow* itself Crompton J. thought that varying notions of public expediency would make it impossible to determine its scope and would introduce uncertainty into the ascertainment of legal rights (3). Other judges, anxious to distance themselves from questions of policy because they are thought to fall within the province of the legislature have asserted that public policy is a species of judicial legislation. However, the place of public policy in the formulation of the common law has been recognized by the greatest judges from early times: see, for example, the opinion of Lord Mansfield in *Jones v. Randall* (4). In *In re Morris (dec'd)* (5), a decision which was affirmed by this Court in *Lieberman v. Morris* (6), Jordan C.J. said:

> "... the phrase 'public policy' appears to mean the ideas which for the time being prevail in a community as to the conditions necessary to ensure its welfare; so that anything is treated as against public policy if it is generally regarded as injurious to the public interest. 'The "public policy" which a court is entitled to apply as a test of validity to a contract is in relation to some definite and governing principle which the community as a whole has already adopted either formally by law or tacitly by its general course of corporate life, and which the courts of the country can therefore recognise and enforce. The court is not a legislator: it cannot initiate the principle; it can only state or formulate it if it already exists': *Wilkinson v. Osborne* (7). It is well settled that a contract is not enforceable if its enforcement would be opposed to public policy: *Mogul Steamship Co. v. McGregor, Gow & Co.* (8). Public policy is not, however, fixed and stable. From generation to generation ideas change as to what is necessary or injurious, so that 'public policy is a variable thing. It must fluctuate with the circumstances of the time': *Naylor, Benzon & Co. v. Krainische Industrie Gesellschaft* (9). New heads of public policy come into being, and old heads undergo modification."

In *Egerton v. Brownlow* Pollock L.C.B. pointed out that he would be abdicating the functions of his office if he were to discard public welfare from consideration and thought that he ought not to shrink

(99) (1853) 4 H.L.C. 1 [10 E.R. 359].
(1) [1902] A.C. 484.
(2) [1938] A.C. 1, at pp. 10-11, 38-41.
(3) (1853) 4 H.L.C., at pp. 70-71 [10 E.R., at p. 388].
(4) (1774) 1 Cowp. 37, at p. 39 [98 E.R. 954, at pp. 955-956].
(5) (1943) 43 S.R.(N.S.W.) 352, at pp. 355-356.
(6) (1944) 69 C.L.R. 69.
(7) (1915) 21 C.L.R. 89, at p. 97.
(8) [1892] A.C. 25, at pp. 39, 51.
(9) [1918] 1 K.B. 331, at p. 342.

from applying its principles to "any new and extraordinary case that may arise" (10). He conceded that (11) "it may be that Judges are no better able to discern what is for the public good than other experienced and enlightened members of the community; but that is no reason for their refusing to entertain the question, and declining to decide upon it". Notwithstanding the criticism of these remarks by Lord Wright in *Fender v. St. John-Mildmay* (12), I find them compelling.

The refusal of the courts to enforce contracts on grounds of public policy is a striking illustration of the subordination of private right to public interest. The problem is one of formulating with any degree of precision the criteria or the circumstances which will justify a court in refusing to enforce a contract on the ground that there is a countervailing public interest amounting to public policy. The difficulties in ascertaining the existence and strength of an identifiable public interest to which the courts should give effect by refusing to enforce a contract are so formidable as to require that they "should use extreme reserve in holding such a contract to be void as against public policy, and only do so when the contract is incontestably and on any view inimical to the public interest", to use the words of Asquith L.J. in *Monkland v. Jack Barclay Ltd.* (13). Here, however, the head of public policy invoked is well recognized and it relates to the enforcement of the criminal law — a field in which the courts have a special interest and experience.

In the past that principle has been applied to contracts between private citizens. But I can see no reason why it should not apply with at least equal force to a contract to which the Commonwealth is a party when the contract is sought to be enforced so as to prevent the Commonwealth from assisting the executive government of a State in the investigation of possible breaches of criminal laws of the State.

The question which then arises is whether a refusal to disclose the information requested to the Chief Commissioner will have a tendency to interfere with the enforcement of the criminal law. Before I turn to this question I should consider the argument urged that there is a countervailing public interest, national and international security, which must be taken into account as a counterweight to the public policy in the administration of justice. Because a principle based on public policy is necessarily a reflection of judicial assessment of public interest, it generally follows that any

(10) (1853) 4 H.L.C., at p. 149 [10 E.R., at p. 419].
(11) (1853) 4 H.L.C., at p. 151 [10 E.R., at p. 419].
(12) [1938] 1 A.C., at pp. 40-41.
(13) [1951] 2 K.B. 252, at p. 265.

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opposing public interest must be identified and weighed in the balance so that the common law principle can be appropriately limited and applied. It may be that the public interest in the administration of justice and the enforcement of the criminal law is so strong that it cannot be outweighed by any countervailing public interest, though I am by no means presently persuaded that this is the case. Be this as it may, security presents a particular problem. That there is a public interest in national and international security is beyond question. But in many situations it may be difficult or impossible for a court to satisfy itself that there is a threat or prejudice to security. This is one such case. Paragraph 31 of the first stated case recites that advice has been given by ASIS to the Commonwealth that the disclosure of the participants' names would be prejudicial to the national and international security of Australia. We are not told that the advice is accurate or that the Commonwealth accepted it. Paragraph 33 recites that the Chief Commissioner has agreed to take any measures necessary to preserve confidentiality of the identity of the participants "so far as practicable to do so in the conduct of his investigation". Paragraph 40 then recites that the first defendant, the fourth defendant and the Commonwealth do not rely on national and international security as inhibiting the disclosure of the names to the Chief Commissioner and allege disclosure would not prejudice national security.

The contents of this paragraph are related to recently enacted legislation which is designed to preserve a measure of confidentiality in relation to the names of the participants should criminal proceedings be taken against them. The *Criminal Proceedings Act* 1984 (Vict.) empowers the courts of that State to make orders for confidentiality in relation to criminal proceedings arising out of the events at the Sheraton Hotel. The *Judiciary Amendment Act* 1984 (Cth) provides for effect to be given throughout Australia to any orders made pursuant to the Victorian Act with a view to ensuring confidentiality.

The qualification attaching to the Chief Commissioner's claim as recorded in par. 33 excites some misgiving as to the effectiveness of the arrangement made for maintaining confidentiality if disclosure is made to him for the purpose of the proposed investigation. However, the materials in the stated case are quite inadequate to enable this Court to make any assessment of the threat to national and international security and for that matter to the personal safety of the participants which may be involved in the proposed disclosure of their names to the Chief Commissioner. For this reason I am unable to hold that there is a countervailing public interest which

overcomes or neutralizes the traditional public policy supporting the common law principle.

I return finally to the question of whether non-disclosure of the names of the participants to the Chief Commissioner will have a tendency to adversely affect the enforcement of the criminal law. The question must be answered in the affirmative if on the facts recited in the stated case there are reasonable grounds for apprehending that the plaintiffs or any of them participated in the commission of the offences which the Deputy Commissioner (Operations) of the Victoria Police believes were committed in the course of the training exercise. The list of possible offences recited in the stated case seems to be exaggerated. However, it has not been contested that there are reasonable grounds for apprehending that the plaintiffs participated in the commission of one or more of the offences, though I do not understand how K. was involved in them. In the circumstances the question must be answered in the affirmative.

What I have said applies with equal force to any implied or equitable obligation of confidentiality which may have arisen on the part of the Commonwealth in relation to the plaintiffs, though I have difficulty in understanding how such an obligation could arise in those cases in which the Commonwealth gave an express promise not to disclose.

In actions Nos. M.101, M.102 and M.103 of 1983 — 1. Yes. 2. (a) Yes; (b) No. 3. There is no such enforceable duty. 4. No. 5. No.

In action No. M.104 of 1983 — 1. Yes. 2. (a) Yes; (b) No. 3. There is no such enforceable duty. 4. Unnecessary to answer in light of the answer to question 3. 5. Unnecessary to answer. 6. No. 7. No.

In action No. M.105 of 1983 — 1. Not applicable. 2. Not applicable. 3. There is no such enforceable duty. 4. No. 5. No.

MURPHY J. The plaintiffs claim an injuntion to restrain the defendants from revealing to the Victorian Chief Commissioner of Police their identities as persons who engaged in conduct which has been investigated by the Victorian police with a view to charging persons with various offences against the laws of Victoria. This Court is not concerned with whether the plaintiffs have actually committed offences. That is for investigation or trial, beyond the ambit of these proceedings. The plaintiffs claim that the Commonwealth has contracted not to reveal their identities.

[HIGH COURT OF AUSTRALIA.]

NORTH AND OTHERS . . . . . APPELLANTS;
PLAINTIFFS,

AND

MARRA DEVELOPMENTS LIMITED . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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1981.
Sept. 2, 3:
Dec. 9.

Stephen, Mason, Murphy, Aickin and Wilson JJ.

Contract—Defence of illegality—Company securities—Prohibition of acts calculated to create false or misleading appearance with respect to market for or price of securities—Purchases of shares on stock exchange for purpose of setting and maintaining market price—Action for fees for advice and services rendered by stockbroker—Whether conduct illegal—Whether conspiracy to deceive—Securities Industry Act 1970 (*N.S.W.*), *s.* 70.

Section 70 of the *Securities Industry Act* 1970 (N.S.W.) provided: "A person shall not create or cause to be created or do anything which is calculated to create, a false and misleading appearance of active trading in any securities on any stock market in the State, or a false or misleading appearance with respect to the market for, or the price of, any securities."

The directors of Marra, a public company whose shares were listed on the stock exchange, considered that the company was vulnerable to takeover because the net assets backing of its shares was much more than their market price. On the advice of a stockbroker the directors proposed that Marra should make a bonus issue of shares and offer to merge its business with that of another public company by means of Marra's taking over the other company. It was essential to the success of the takeover proposal that the market price of Marra shares should rise. After the bonus issue was announced but before the announcement of the takeover offer, the stockbroker's firm bought quantities of Marra shares on the stock exchange for a higher price than that of previous sales and it continued to pay prices of that order after the takeover offer was announced. Those shares were bought for a company associated with the stockbrokers and for directors of Marra. The stockbrokers sued Marra for fees for advice and negotiations for the reconstruction of Marra's capital to reflect more appropriately the company's assets backing and earnings and as a basis for a takeover offer for the other company. Neither the statement of account nor the statement of claim in the action mentioned an arrangement to support the market price

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agreement to carry out the scheme, and the carrying out of the scheme itself, involved illegality in that the conduct in question was contrary to s. 70 of the *Securities Industry Act* 1970 (N.S.W.) and constituted an offence under that section. The consequence is that the amounts now claimed cannot be recovered.

We are with respect unable to agree that the conduct of the parties constituted a conspiracy to deceive. There was, however, a common law conspiracy involved in the agreement to engage in conduct constituting an offence contrary to s. 70 of the *Securities Industry Act*.

In the result therefore we are of opinion that the appeal should be dismissed.

MASON J. The appellants are members of a stockbroking firm, a member of the Sydney Stock Exchange Ltd., which formerly carried on business under the firm name of "J. & J. North" but which now trades as "Norths". They sued the respondent Marra Developments Ltd. ("Marra") for the balance of remuneration due to them in connexion with services rendered as advisers in relation to a reorganization of the capital of Marra and its takeover of another company Scottish Australia Holdings Ltd. ("Scottish"), together with interest. The action was dismissed in the Supreme Court of New South Wales, Meares J. upholding a defence of illegality based on a breach of the provisions of s. 70 of the *Securities Industry Act* 1970 (N.S.W.) ("the Act") (since repealed and replaced by the *Securities Industry Act* 1975 (N.S.W.)) (21). An appeal from this decision was dismissed by the Court of Appeal (22). From that dismissal an appeal is now brought to this Court.

Marra was incorporated in 1954 as a public company. In the early months of 1974 it owned a number of pastoral properties in New South Wales and up to that time approximately ninety-three per cent of its issued and paid up capital was held by some five families. Its shares were listed on the Sydney Stock Exchange.

For some years prior to 1974 neither the balance sheets of Marra nor the market price reflected the true value of the assets of the company. From December 1972 until the end of February 1974 various members of the appellants, who were Marra's stockbrokers, discussed with certain of the directors the need to bring market capitalization into line with the real value of Marra's assets.

The late Mr. Geoffrey Killen, Marra's chairman of directors, informed Mr. David North, one of the appellants, at a discussion early in July 1973 that he and his fellow directors were very

(21) [1978] 2 N.S.W.L.R. 338. (22) [1979] 2 N.S.W.L.R. 887.

concerned that the company was extremely vulnerable to a takeover, that he expected earnings to improve and that the net asset backing of Marra's shares was several times more than the market price. Why it was felt that the company was vulnerable to a takeover does not appear. The capital was closely held and this in itself suggested that a successful takeover would not be easily achieved. However, the parties appear to have proceeded on the footing that the company was vulnerable. Mr. North advised that it was important that the market should be informed of the company's position and that steps should be taken promptly to correct the existing anomaly.

No further action was taken until January 1974 when Mr. North, having reiterated his earlier advice, proposed that three steps should be taken to correct the anomaly: (1) the shareholders should be informed of Marra's current position with respect to assets and income; (2) Marra's capital should be reconstructed; and (3) it should take over or merge with Scottish. The directors accepted these suggestions.

On the advice of the company's auditors the directors concluded that each Marra $2.00 share was covered by net tangible assets of $22.50 and that the profits for the year ending 30 June 1974 were likely to be more than double the profits for the previous year. On this footing the directors accepted the appellants' recommendation that Marra should make a bonus issue of thirteen new $2.00 shares for every two shares held and that the $2.00 shares should then be divided into shares of $0.50 par value. The market price of Marra shares was then about $4.40.

On or about 18 February 1974, Mr. Geoffrey Killen advised Mr. David North that a company was contemplating making a takeover offer for Marra at $15.00 a share. The directors decided that the offer should not be recommended and shareholders were informed accordingly.

An important discussion took place between Mr. Geoffrey Killen and Mr. David North on the same day, or possibly on the following day. The only evidence of the discussion consists of a note made by Mr. North:

> "... I advised him that I thought the shares would well be worth in excess of $15.00, which would be equivalent to par value for the new 50 cent shares, and that we believed the shares would be a sound investment at that level and the directors should be prepared to buy some shares in order to establish the market. Mr. Killen asked me would we be prepared to buy at about that level. I said to Mr. Killen: 'Well let's look at the position'. The board had advised us that the asset backing for the shares was $22.50, that

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earnings were expected to rise to $800,000, that a takeover approach had been indicated at $15.00 and that if it was intended to recommend a dividend of 7 per cent on the new 50 cent shares, we would be prepared to buy at $16.50 which we would consider to be a sound level for the shares. I advised Mr. Killen that we must not take any market action whatsoever until after the announcement of the proposed reconstruction was relayed to the Stock Exchange and was made public in the press. He informed me that he would buy also at that level and also that he would recommend other directors to do likewise. He asked that we buy in the market on our own account initially until such time as he had completed arrangements with his fellow directors."

The announcement of the proposed reconstruction was made to the Stock Exchange on 28 February 1974. The announcement pointed out that the reconstruction, together with the bonus issue, would result in an increase in the issued capital from 587,307 $2 shares to 17,619,208 fully paid $0.50 shares. $7,634,990 would thus be added to issued ordinary capital, which would total $8,809,604 after the reconstruction.

In February 1974 negotiations proceeded between Marra and Scottish in relation to the proposed merger. The negotiations were complicated by the making on or about 12 February of a cash offer by another company Tiera Pty. Ltd. for Scottish shares. In the negotiations Marra and Scottish each sought to have the highest value established for its shares. Initial negotiations were based on a valuation of $15.00 for each Marra $2.00 share and $1.35 for each Scottish $0.50 share. Later Mr. Gleeson-White, a merchant banker advising Scottish, stipulated that the Scottish shares should be valued at $1.50. Had this valuation been adopted without an increase in the valuation of Marra shares, the takeover would have resulted in an increase in Marra capital and a diminished percentage holding of that capital by existing Marra shareholders. As a result of further negotiations, it was agreed that each Scottish share would be valued at $1.51 if Scottish shareholders applied for Marra ordinary shares or $1.45 if shareholders applied for Marra convertible redeemable preference shares. There was to be a compensating increase in the value of Marra shares to $16.50 for the $2.00 shares, the equivalent of $0.55 for the $0.50 shares after the reconstruction of capital. The final terms negotiated for the Scottish shares were alternatively: (a) two Marra 7 per cent $0.50 convertible redeemable preference shares plus $0.35 cash; or (b) eleven Marra $0.50 ordinary shares for every four Scottish $0.50 ordinary shares. Consequently the Stock Exchange price of Marra shares came to be material to the success of the proposed takeover.

The announcement of the proposed offer was made to the Stock Exchange on 1 March 1974. The directors of Scottish stated that they proposed to recommend acceptance of the offer by all Scottish shareholders.

Under the heading "Value of Offer" there appeared the following statement:

> "Based on the last sale price of $16.50 for Marra shares on the Sydney Stock Exchange today, the new 50 cents ordinary shares in Marra would be valued at 55 cents, and the new convertible preference shares in Marra should be valued in the market at or above the conversion value of 55 cents.
>
> On this basis, the offer values Scottish Australian shares at:—
>
> at least $1.45 for the convertible preference share alternative,
>
> or
>
> $1.51 for the ordinary share alternative.
>
> These values are, respectively, 45% and 51% higher than the original takeover price proposed by Tiera Pty. Ltd., whose offer has now lapsed.
>
> Based on the dividend rates indicated above for the new Marra ordinary and convertible preference shares, income to Scottish Australian shareholders will be more than doubled as a result of the merger."

Reference should now be made to details of transactions in Marra shares. For the thirteen months from January 1973 to January 1974 the total turnover was only 7,600 shares, with prices ranging from $2.60 to $4.40. In February 1974 there was a turnover of 3,600 shares, none of which were purchased by the appellants, with prices ranging from $4.40 to $7.80. On 28 February Marra shares were quoted at seller $20.00, buyer $15.00, but there were no sales in February after 25 February.

On 1 March, the day following the announcement of the reconstruction of capital, but before the announcement of the merger offer later in the day, the appellants purchased 1,100 Marra $2.00 shares, 720 of these at $16.50 and 380 at $16.00, on behalf of their "House" company J. & J. North Securities Pty. Ltd. On 4 March, the next day on which the Exchange was open, the appellants purchased a total of 1,500 shares, also on behalf of their "House" company, 1,480 of which were purchased at $15.00 and 20 at $16.50. With the exception of the purchase of an odd lot of two shares, the appellants were the only purchasers on that day. It should be noted that on both 1 and 4 March the first purchase of the day of Marra shares was a purchase of twenty shares only at $16.50 by the appellants. From 5 March to 16 April the appellants purchased on behalf of various directors (or their associates) and

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shareholders of Marra 15,240 shares, as opposed to 3,044 shares purchased by other brokers, at $15.00 for the first five purchases on 5 March and thereafter at prices varying between $15.50 and $16.50 for the $2.00 shares (or the equivalent price of $0.53 to $0.55 for the $0.50 shares after the reconstruction, these being listed and purchased from 1 April 1974).

The appellants sued for $140,000, Marra having paid $35,000 only of the original claim for $175,000. The statement of fees and disbursements rendered by the appellants to Marra claimed:

> "Corporate fees in relation to advice and negotiation in the reconstruction of the issued capital of Marra Developments Limited (Marra) to reflect more appropriately the asset backing and earnings of the Company and as a basis of a takeover offer for Scottish Australian Holdings Limited (Scottish).
> Fees in relation to initiating and introducing the proposal to merge the two companies to the Chairman of Marra, Mr. G. L. Killen and to Mr. John Darling, Chairman of Scottish.
> . . ."

The statement went on to specify many other services claimed to have been performed in connexion with the reorganization of capital and the takeover. The statement made no mention of any arrangement to support the price of Marra shares on the market, nor did it claim fees for buying shares on the market. Presumably the appellants were paid commission by the purchasers (other than the house company) for the purchase of Marra shares on the market.

In their amended statement of claim the appellants pleaded their case in three ways. First, they pleaded an agreement that Marra would pay the appellants' reasonable fees for the work done. Secondly, the appellants sued on an account stated for $140,000. The third alternative claim was an agreement made at or about the end of 1974 that in consideration that the appellants did not press Marra for prompt payment of the sum of $175,000 the respondent would pay five instalments of $35,000 at three-monthly intervals, the first instalment payable on 1 February 1975, plus interest at "standard overdraft rates", only one instalment of $35,000 being paid, together with interest of $6,309.59. The account stated and the subsequent agreement were based on correspondence between the parties, in particular a letter dated 18 December 1974 from Marra to the appellants which set out the terms of the subsequent agreement as I have related them.

Marra's defence to the first agreement and the account stated was that it was illegal and unenforceable because it contravened ss. 70 and 71 of the Act and the common law. Marra's defence to the second agreement was that it was not supported by consideration because the forbearance to sue for the sum of $175,000 under the

original contract was illusory, the appellants being unable to sue on the original contract by reason of its illegality and unenforceability.

In the Court of Appeal Samuels and Hope JJ.A., like Meares J. at first instance, held that the appellants' claim to relief arose out of an illegal agreement because that agreement contravened s. 70. Their Honours also agreed with Mahoney J.A. that the appellants could not recover because their claim arose out of an agreement which was illegal at common law. Mahoney J.A. found it unnecessary to decide whether there was a contravention of s. 70 or s. 71.

An essential preliminary to an examination of the statutory provisions and common law illegality is a review of the findings of fact made at first instance and in the Court of Appeal. The difference in the approach taken by Meares J. and Mahoney J.A. is partly to be explained by the different inferences of fact which they drew. In this case the inferences to be drawn are decisive. Neither the appellants nor the directors of Marra gave oral evidence. The evidence is mainly documentary, much of it consisting of the appellants' answers to interrogatories.

In answers to interrogatory no. 60, the appellants admitted that Mr. David North was aware that directors of Marra had formed an association to raise and maintain the price of the shares. It was further admitted that Mr. David North believed that the association was formed:

> "To purchase Marra shares at $16.50 or thereabouts, as the market had until very recently been completely uninformed as to the true worth of Marra, and its shares had been traded at an unrealistic value; the release of information and the making of a takeover approach had substantially increased the market value of the shares; it was considered that the proper market value should be approximately $16.50, and that that figure would be attained or surpassed once the market had had the opportunity of evaluating the information; and in order to assist the market to evaluate the information as to the current net assets and earnings estimates, shares should be purchased at up to about $16.50, thereby assisting the establishment of a realistic market price and precluding a predatory takeover offer at below the true asset value figures."

In answer to interrogatory no. 65 the appellants admitted that to the extent set out in 60 and 61 it was the intention of Mr. David North in effecting or participating in transactions involving the purchase of Marra shares "directly or indirectly to raise the current price" on the Stock Exchange of Marra shares or "to maintain such price at or about a particular level".

It was further admitted in answer to interrogatories that, prior to 1 March 1974, the appellants or one or more of them considered

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that the level of the market price of Marra shares immediately prior to the announcement of the merger offer would be a factor in determining the success of the offer. Hope and Samuels JJ.A. thought that the admission was that it would be an "important" or "critical" factor. It is common ground that the answer was not in these terms. But the answer that "it would be a factor" indicates that it was material to the success of the takeover to persuade Scottish shareholders that Marra shares had a real market value of, not $15.00, but $16.50. The admission apart, I should have thought it was an important or critical factor and that the appellants so regarded it. It appears from a draft document prepared by the appellants and dated 26 February 1974, only three days before they embarked on a course of buying Marra shares at around $16.50, that the "Estimated Market Price" of Marra shares was only $15.00. This document was at the time of its preparation proposed to be issued as an announcement regarding the proposed merger.

At the close of trading on the Stock Exchange on 28 February 1974 the ordinary shares in Scottish were quoted at $1.85 buyer, $1.90 seller. There was an overnight sale at $1.40 and special sales on 1 March 1974 at $1.55 and $1.80. Other sales on 1 March 1974 ranged between $1.85 and $2.00. Thereafter the market rose, reaching a plateau of $2.50 to $2.52 between 20 March and 10 April.

It is apparent that the market price of Scottish shares between 28 February and 10 April was so high as to present a threat to the success of the takeover. On the face of it, the Scottish shareholder would fare better by selling on the market than by accepting the Marra offer, particularly the ordinary share alternative. The evidence offers no explanation for the high price which Scottish shares commanded in the market. One possibility is that the price was due to activity on the part of Tiera Pty. Ltd. and persons associated with it. However this may be, the point is made that the market for old Marra shares would need to stand at $25.00 approximately in order to make the Marra ordinary share takeover alternative a viable competitor with the market price for Scottish shares. So much may be acknowledged whilst asserting that it was important for the success of the takeover to maintain the price of Marra shares at $16.50 or thereabouts. Although old Marra shares never climbed above $16.50, their projected level, the takeover was successful. The result might well have been different had Marra shares fallen below their projected level. There were strong reasons why the directors of Marra and the appellants would have wished to see a market established at $16.50 or thereabouts.

That the appellants relied heavily on the establishment of a market at $16.50 for Marra shares as a necessary or attractive element in the proposed takeover is evidenced by their subsequent conduct. During the afternoon of 1 March 1974 Marra and Scottish issued a press release. The release was prepared and issued by the appellants. It was an item for which they claimed payment in their statement of fees and disbursements. The press release, which was designed to place the takeover offer in its most attractive light, made the point that the value of the offer, based on the last sale price of Marra shares at $16.50, was much greater than the takeover price offered by Tiera Pty. Ltd. for Scottish shares.

Again, the appellants participated in the preparation of a statement complying with s. 180c and Part A of the Tenth Schedule of the *Companies Act* 1961 (N.S.W.). The claim for payment of fees for services rendered in connexion with this statement was also made by the appellants. In par. 13 of the statement it was said of the Marra shares that "the latest available market sale price before the date of this Statement was $16.50". Further the statement specified as the highest sale price during the preceding three months "$16.50 on 1st March 1974". It went on to say "The latest available market sale price immediately prior to public announcement of the takeover scheme on the 1st March, 1974, was $16.50."

Later, the appellants prepared Marra's formal merger offer to Scottish shareholders, once more claiming fees for the services which they provided in connexion with the preparation of this document. The formal merger offer set much store on the fact that the market value of the shares was $16.50.

Mahoney J.A. found, rightly in my view, that: "... there had been devised by the plaintiffs [appellants] and agreed to by the defendant, a scheme which involved, inter alia, that there would be a reconstruction of the defendant's share capital; that ... the plaintiffs and directors of the defendant would, by transactions on the Sydney Stock Exchange, 'establish a market' for Marra shares at $16.50 or thereabouts;" that a takeover offer by Marra for Scottish shares would be made involving an exchange of shares in the two companies; "and that the Stock Exchange price so 'established' for Marra shares would be ... utilised in relation to that takeover offer."

This finding was supported by Mr. David North's record of his discussion with Mr. Geoffrey Killen which plainly acknowledges the arrangements made by the parties "in order to establish the market" and that the appellants "must not take any market action" until after the Stock Exchange and the public were informed of the proposed reconstruction, the appellants agreeing to buy in the

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market initially on their own account until Mr. Killen completed arrangements with his fellow directors. The finding was also supported by the appellants' answers to interrogatories nos. 60 and 65 to which I have already referred. The euphemistic language in which these answers are expressed does not deny and in my opinion confirms the existence of the agreement found by his Honour, as do the subsequent actions of the appellants which I have recited in some detail.

Mr. North's record of the discussion noted that Mr. Killen had inquired whether the appellants would buy at about $15.00, to which Mr. North responded by saying that they would buy at $16.50 and that they considered this to be a sound level for the shares. Mahoney J.A. was therefore correct in finding that the buying was "carried out in a manner directed to achieving the result that the purchases would be made at $16.50 per share or at a price of that general order". No doubt the subsequent negotiation with Mr. Gleeson-White which resulted in the placing of a valuation of $16.50 on Marra shares gave added importance to Mr. David North's agreement to buy at that figure or thereabouts — see answer to interrogatory no. 60.

Mahoney J.A.'s finding is criticized because it fails to give effect to the uncontradicted expert evidence of Mr. Tilley, that an agreement to buy "at" a nominated price is an agreement to buy "at best" up to that price. Mr. Tilley's evidence would be of value if we were concerned to ascertain the effect of a simple agreement between broker and client without a constraining context. Here the substance of the agreement was very different — it was an agreement to buy specifically at $16.50 or thereabouts in order to attain a particular goal. Consequently, I agree with Mahoney J.A.: "... that it was not the purpose of the plaintiffs to buy the shares that they did at the lowest price reasonably obtainable; that the reason why they bought shares as they did was so that the Stock Exchange price of Marra shares would appear publicly to be $16.50 per share or of that general order; and that they did this so that that price could be used to advantage in connection with, at least, the takeover" of Scottish shares.

His Honour went on to find that the references in the three documents prepared by the appellants to the Stock Exchange price of the shares were misleading. In these documents $16.50 was referred to variously as the "sale price", the "market sale price", "market price" and "market value". These references, unaccompanied by any disclosure of the nature and extent of the appellants' operations in the market, were, he thought, apt to mislead the reader of the documents as to the significance which should be attached to

the price. I agree. His Honour also found that the appellants must have realized this, their purpose being to influence those who had occasion to consider Marra's offer to take over Scottish shares.

Another criticism made of his Honour's findings is that he failed to take account of the conclusion of the primary judge that he was "not reasonably satisfied that the plaintiffs' activities had the effect of raising the price of the shares above their market value". Meares J. thought that the prices paid over the relevant period reflected prices which one would have expected the market to pay. With respect to the primary judge, this view seems to give no weight to the importance which the appellants attached to their action in "establishing" a market, to the marked preponderance of their activity in the market for Marra shares and to the dramatic fall in the price of the shares once the appellants' support and that of Marra directors was withdrawn. The final purchasing transaction effected by the appellants was at 2.39 p.m. on 16 April — a purchase of 1,000 new Marra shares at $0.55. There were two later transactions that day on the Exchange at $0.55 and $0.54. There was a further transaction at $0.55 on the following day. There were no further transactions until 29 April when there were sales at $0.50 and $0.46, followed by one on 30 April at $0.51. In May the highest price was $0.48, the lowest $0.40; in June the range was between $0.35 and $0.30; in July $0.38 and $0.28; in August $0.30 and $0.25; and in September $0.25 and $0.18.

It is of importance to appreciate that Mahoney J.A. accepted that when the scheme was originally formulated the use of Stock Exchange prices in a misleading way was not seen as an inevitable element in the scheme. His Honour had this to say:

> "I accept that the plaintiffs hoped (and perhaps believed) that, after some purchases had been made of Marra shares at $16.50 or thereabouts, purchasers on the Exchange would (to put the matter in the plaintiffs' favour) come to recognise the true value of the shares and that the price at which the shares would thereafter be traded would be approximately $16.50. But I am satisfied that from the outset the plaintiffs realised that it was quite possible that this would not occur and that the Stock Exchange price would in reality be the result of purchases made by them at the level they desired. In that event, if the resulting Stock Exchange price was to be referred to, without disclosure of how it had been established and maintained, then the reference to it was (depending of course upon the precise verbiage employed) apt to be misleading. Therefore, at the least, a person considering the plaintiffs' scheme and considering the possibility to which I have referred, would see that use of the Stock Exchange price pursuant to it without such

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disclosure would lead to misleading statements being made. In the event that is what happened."

His Honour then found that, if it was not recognized before, a reasonable person in the appellants' position would have realized by the time that the Part A statement was being prepared that the use made of the Stock Exchange prices in that statement was misleading, that the use made of those prices in the announcement of 1 March was also misleading and that continued reference to that announcement would be misleading. His Honour inferred that the appellants, aware of their own special operations in the market, were conscious of the significance of their reference to Stock Exchange prices without any disclosure of these operations and of the misleading quality of these references.

Quite apart from the argument examined earlier, that the references were not misleading because Meares J. found that the appellants' transactions had no effect on the market price, it is submitted that there was no misleading conduct by the appellants because the market is not concerned with the identity of purchasers or with their motivation so long as the purchases are genuine in the sense that they satisfy a legitimate market activity of the purchaser. This submission is important both in its application to common law illegality and to s. 70 of the Act.

Section 70 provides:

> "A person shall not create or cause to be created or do anything which is calculated to create, a false or misleading appearance of active trading in any securities on any stock market in the State, or a false or misleading appearance with respect to the market for, or the price of, any securities."

The relevant prohibition in the section is against creating, or causing to create, or doing anything which is calculated to create, "a false or misleading appearance with respect to the market for, or the price of, any securities".

In terms the statutory prohibition is directed against activity which is designed to give the market for securities or the price of securities a false or misleading appearance. In this setting, "calculated" means "designed" or "intended" rather than "adapted" or "suited". It is not altogether easy to translate the generality of this language into a specific prohibition against injurious activity, whilst at the same time leaving people free to engage in legitimate commercial activity which will have an effect on the market and on the price of securities. Purchases or sales are often made for indirect or collateral motives, in circumstances where the transactions will, to the knowledge of the participants, have an effect on the

market for, or the price of, shares. Plainly enough it is not the object of the section to outlaw all such transactions.

It seems to me that the object of the section is to protect the market for securities against activities which will result in artificial or managed manipulation. The section seeks to ensure that the market reflects the forces of genuine supply and demand. By "genuine supply and demand" I exclude buyers and sellers whose transactions are undertaken for the sole or primary purpose of setting or maintaining the market price. It is in the interests of the community that the market for securities should be real and genuine, free from manipulation. The section is a legislative measure designed to ensure such a market and it should be interpreted accordingly.

I agree with Hope and Samuels JJ.A. in rejecting the suggestion that the section strikes only at fictitious or colourable transactions. Transactions which are real and genuine but only in the sense that they are intended to operate according to their terms, like fictitious or colourable transactions, are capable of creating quite a false or misleading impression as to the market or the price. This is because they would not have been entered into but for the object on the part of the buyer or of the seller of setting and maintaining the price, yet in the absence of revelation of their true character they are seen as transactions reflecting genuine supply and demand and having as such an impact on the market.

When purchases have been made of shares in a company at or about a particular level for the purpose of setting and maintaining a market price for those shares there is a breach of the statutory prohibition. At the very least purchases have then been made which are calculated to create "a false or misleading appearance with respect to the market for, or the price of" the shares. In reality the purchases are calculated to create a false market or false price. The false or misleading appearance is that the market, in the absence of any disclosure that a market support operation is on foot, appears to be real or genuine, there being no overt sign of market support or manipulation.

In passing I note that it is enough to breach the section that the activities are calculated to create a false or misleading appearance. It is not necessary that they do in fact create that appearance. Had I been disposed to agree with the finding of Meares J. as to the effect on the market of the transactions in which the appellants engaged, that finding would not have saved the appellants from a contravention of s. 70.

The question then is whether the contravention of the section results in an illegality so as to prevent the appellants from recovering

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their remuneration. On the inferences drawn by the Court of Appeal the original agreement between the parties was one which from its inception contemplated the possibility of a breach of s. 70 as a means of executing the scheme which the parties agreed should be carried into execution. As events fell out what was a contemplated possibility became an actuality — the appellants carried out their part of the contract by contravening s. 70. It makes no difference that Marra acquiesced in what was done. The appellants' performance of the agreement involved an illegality and the agreement itself envisaged this as a possibility. The appellants fail, not because the agreement on which they sue is avoided by s. 70, but because the performance on which they rely involved illegal conduct. The consequence is that the claims based upon the account stated and the second agreement must also fail.

Quite apart from contravention of s. 70, the inferences drawn establish that the appellants' claim was affected by common law illegality. The appellants' claim for remuneration was based on the commission of fraudulent conduct, the making of statements which were and were known to be misleading with a view to deceiving the Scottish shareholders. A claim for remuneration for fraudulent conduct is defeated by the illegality principle (*E. T. Fisher & Co. Pty. Ltd. v. English Scottish and Australian Bank Ltd.* (23)). The general principle was expressed by Lindley L.J. in *Scott v. Brown, Doering, McNab & Co.* (24) in these terms:

> "In this case the correspondence put in evidence by the plaintiff in support of the claim he made at the trial shews conclusively that the sole object of the plaintiff in ordering shares to be bought for him at a premium was to impose upon and to deceive the public by leading the public to suppose that there were buyers of such shares at a premium on the Stock Exchange, when in fact there were none but himself. The plaintiff's purchase was an actual purchase, not a sham purchase; that is true, but it is also true that the sole object of the purchase was to cheat and mislead the public. Under these circumstances, the plaintiff must look elsewhere than to a court of justice for such assistance as he may require against the persons he employed to assist him in his fraud, if the claim to such assistance is based on his illegal contract."

As the fraud and illegality (common law and statutory) was a contemplated means of performing the contract and became an integral element in the appellants' performance of the contract there is no basis for treating the fraud and the illegality as collateral only

(23) (1940) 64 C.L.R. 84, at pp. 91, 103.

(24) [1892] 2 Q.B. 724, at pp. 728-729.

or fraud as severable from the remainder of the work undertaken by the appellants.

In the result the appeal should be dismissed.

MURPHY J. I agree with Mason J. The appeal should be dismissed.

WILSON J. I would dismiss the appeal, for the reasons given by Mason J.

Appeal dismissed with costs.

Solicitors for the appellants, *William Patterson, Houen & Partners.*

Solicitors for the respondent, *Dawson Waldron.*

J.D.M.

Annex 18: *Shearson Lehman Brothers Inc. v. Maclaine, Watson & Co. Ltd., International Tin Council Intervening (No. 2)* [1988] 1 WLR 16.

LORD GRIFFITHS. My Lords, for the reasons given in the speech of my noble and learned friend Lord Havers, which I have had the opportunity of reading in draft, I too would dismiss the appeal and answer the certified question, as amended, in the affirmative.

Appeal dismissed.
Certified question, as amended, answered in affirmative.

Solicitors: Crown Prosecution Service, Headquarters; Victor Lissack & Roscoe.

M. G.

[HOUSE OF LORDS]

*SHEARSON LEHMAN BROTHERS INC. AND ANOTHER . . . . . PLAINTIFFS

v.

MACLAINE, WATSON & CO. LTD. AND OTHERS . . . . . RESPONDENTS AND CROSS-APPELLANTS

AND

INTERNATIONAL TIN COUNCIL (INTERVENER) (No. 2) . . . . APPELLANT AND CROSS-RESPONDENTS

[CONSOLIDATED CROSS-APPEALS]

1987 Nov. 2, 3, 4, 5; Dec. 3 — Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Griffiths, Lord Oliver of Aylmerton and Lord Goff of Chieveley

International Law—Treaty—International organisation—Immunity from suit—Inviolability of official archives—Documents communicated to constituent members of organisation—Documents communicated by officers or employees of organisation with actual or ostensible authority—Whether protected—Burden of proof—Foreign sovereign immunity—International Tin Council (Immunities and Privileges) Order 1972 (S.I. 1972 No. 120), arts. 7(1), 14(1)[1]—Diplomatic Privileges Act 1964 (c. 81), Sch. 1, art. 24[2]

The International Tin Council (Immunities and Privileges) Order 1972 provides by article. 7:

[1] International Tin Council (Immunities and Privileges) Order 1972, art. 14(1): see post, p. 26A–B.
[2] Diplomatic Privileges Act 1964, Sch. 1, art. 24: see post, p. 24A.

"(1) The council shall have the like inviolability of official archives as ... is accorded in respect of the official archives of a diplomatic mission. . . ."

In 1985, the International Tin Council ("I.T.C."), an international organisation presently constituted under the Sixth International Tin Agreement, a treaty concluded in 1981, ran out of funds in an unsuccessful attempt to support the price of tin and collapsed. In an action arising out of the collapse, the plaintiffs claimed against the first and second defendants damages for breach of contract and declarations as to the alleged invalidity of rule M of the rules of the London Metal Exchange and against the third to tenth defendants damages for alleged inducement of breach of contract, negligence or breach of duty and breaches of articles 85 and 86 of the E.E.C. Treaty. On the fourth day of the trial of the action, the I.T.C. obtained the leave of the court to intervene, claiming that numerous documents that the parties proposed to adduce in evidence were inadmissible by virtue of article 7(1) of the International Tin Council (Immunities and Privileges) Order 1972 as being documents, or copies of documents, in respect of which the I.T.C. had a statutory inviolability akin to diplomatic privilege. The questions arising were argued as a preliminary issue, and Webster J. gave rulings of principle on whether the documents would be admissible. The I.T.C. appealed from his rulings, and the plaintiffs and defendants cross-appealed. The Court of Appeal, having delivered their judgments on those rulings, remitted the matter to Webster J.

On appeal by the I.T.C. and cross-appeal by the defendants:—

Held, dismissing the appeal and allowing the cross-appeal, (1) that article 7(1) of the International Tin Council (Immunities and Privileges) Order 1972 was to be construed as conferring inviolability on the archives and documents of the I.T.C. to the same extent as article 24 of the Vienna Convention on Diplomatic Relations set out in Schedule 1 to the Diplomatic Privileges Act 1964 conferred inviolability on the archives and documents of a diplomatic mission, "archives and documents of the mission" in article 24 being construed as those belonging to or held by the mission; and that the protection conferred by article 24 and article 7(1) of the Order of 1972 was not confined to executive or judicial action by the host state (post, pp. 24B–C, F, 27E–G, 31F—32A).

(2) That, having regard to article 14(1) of the Order of 1972, the I.T.C. was an entity distinct from its constituent members in the conduct of its internal affairs; and that, accordingly, once a document had been communicated by the I.T.C. to a member or a member's representative, the protection afforded to it by article 7(1) of the Order of 1972 ceased to apply (post, pp. 25H—26A, E, 31F—32A).

(3) That a document communicated to a third party by an officer or employee of the I.T.C. with actual authority, express or implied, or with ostensible authority no longer belonged to the I.T.C. and accordingly no longer enjoyed inviolability as part of the official archives; that if an officer or employee acted and was known to be acting in the course of his employment in communicating documents to a third party that would be strong prima facie evidence of ostensible authority and rebuttal of the inference to be drawn therefrom would necessitate evidence of absence of actual authority and some circumstance such as to put the third party on inquiry (post, pp. 28A–B, E–F, 29E–G, 31F—32A).

(4) That the rule of foreign sovereign immunity, which the I.T.C. sought to rely on by analogy, that the foreign sovereign claiming immunity was not bound to prove his title but was only obliged to produce prima facie evidence of it should not be extended further than was strictly necessary; that there was a distinction to be drawn between a foreign sovereign resisting a claim made against him and his asserting a claim against another, whether to recover property or to assert a right of property in a document so as to prevent it being received in evidence; and that production by the I.T.C. of prima facie evidence that a document had been communicated by an officer or employee to a third party in circumstances putting the third party on inquiry as to the absence of authority of the officer or employee would not prevent the parties to the action challenging that evidence or preclude the court from adjudicating on any such issue, the legal burden resting on the I.T.C. to prove its case (post, pp. 30G—31C, 31F—32A).

Juan Ysmael & Co. Inc. v. Government of the Republic of Indonesia [1955] A.C. 72, P.C. distinguished.

Order of the Court of Appeal set aside.

The following cases are referred to in the opinion of Lord Bridge of Harwich:

International Tin Council, In re [1987] 2 W.L.R. 1229; [1987] 1 All E.R. 890

Juan Ysmael & Co. Inc. v. Government of the Republic of Indonesia [1955] A.C. 72; [1954] 3 W.L.R. 531; [1954] 3 All E.R. 236, P.C.

The following additional cases were cited in argument:

Buttes Gas and Oil Co. v. Hammer (No. 3) [1982] A.C. 888; [1981] 3 W.L.R. 787; [1981] 3 All E.R. 616, H.L.(E.)

Congreso del Partido, I [1978] Q.B. 500; [1977] 3 W.L.R. 778; [1978] 1 All E.R. 1169, C.A.

Empson v. Smith [1966] 1 Q.B. 426; [1965] 3 W.L.R. 380; [1965] 2 All E.R. 881, C.A.

Fayed v. Al-Tajir [1987] 3 W.L.R. 102; [1987] 2 All E.R. 396, C.A.

Goddard v. Nationwide Building Society [1987] Q.B. 670; [1986] 3 W.L.R. 734; [1986] 3 All E.R. 264, C.A.

Intpro Properties (U.K.) Ltd. v. Sauvel [1983] Q.B. 1019; [1983] 2 W.L.R. 908; [1983] 2 All E.R. 495, C.A.

Kavanagh v. Hiscock [1974] Q.B. 600; [1974] 2 W.L.R. 421; [1974] 2 All E.R. 177, D.C.

Rayner (J. H.) (Mincing Lane) Ltd. v. Department of Trade and Industry (unreported), 24 June 1987, Staughton J.

Rose v. The King [1947] 3 D.L.R. 618

Standard Chartered Bank v. International Tin Council [1987] 1 W.L.R. 641; [1986] 3 All E.R. 257

Triquet v. Bath (1764) 3 Burr. 1478

APPEAL and CROSS-APPEAL from the Court of Appeal.

These were an appeal by the interveners, the International Tin Council, and cross-appeals by the first defendants, Maclaine, Watson & Co. Ltd., the second defendants, J. H. Rayner (Mincing Lane) Ltd., the tenth defendants, the Metal Marketing & Exchange Co. Ltd., and seven other named defendants from the decision of the Court of Appeal (Dillon and Mustill L.JJ. and Sir Roualeyn Cumming-Bruce) on 31 July 1987.

The Court of Appeal, on an appeal by the interveners from a ruling of Webster J. given on 29 June 1987 on a preliminary issue and cross-appeals by the plaintiffs and by the first, second and third to tenth defendants from that ruling, made no order save that the matter be remitted to Webster J.

The preliminary issue had arisen in proceedings by the plaintiffs, Shearson Lehman Brothers Inc. and Shearson Lehman Metals Ltd., against the defendants claiming against the first and second defendants damages for breach of contract and declarations as to the alleged invalidity of rule M of the London Metal Exchange and against the third to tenth defendants damages for alleged inducement of breach of contract, negligence or breach of duty and breaches of articles 85 and 86 of the E.E.C. Treaty.

The Court of Appeal refused applications by the interveners and the defendants for leave to appeal to the House of Lords, but on 19 October 1987 the Appeal Committee of the House of Lords (Lord Keith of Kinkel, Lord Bridge of Harwich and Lord Brandon of Oakbrook) allowed petitions by them for leave to appeal and cross-appeal respectively. The cross-appeals were consolidated.

The facts are set out in the opinion of Lord Bridge of Harwich.

Nicholas Chambers Q.C., *Rosalyn Higgins Q.C.* and *Peter Irvin* for the interveners.

Sydney Kentridge Q.C., *John Higham* and *Adrian Hughes* for the defendants.

Their Lordships took time for consideration.

3 December. LORD BRIDGE OF HARWICH. My Lords, the action which gives rise to the present appeal and cross-appeal is one of many proceedings arising out of the financial collapse of the International Tin Council ("the I.T.C."). The hearing of the action commenced before Webster J. on 8 June 1987. On 11 June the I.T.C. obtained leave to intervene to claim that a large number of documents proposed to be adduced in evidence by the parties were rendered inadmissible by article 7(1) of the International Tin Council (Immunities and Privileges) Order 1972 which provides:

> "The council shall have the like inviolability of official archives as in accordance with the 1961 Convention Articles is accorded in respect of the official archives of a diplomatic mission."

The objection to the production of the documents, which must all be taken to be relevant to issues arising in the action, was opposed by all parties to the litigation. Between 11 and 28 June a number of affidavits were filed going to the issue of admissibility, but even now the evidence is not closed. On 29 June Webster J. delivered a judgment in which he records that at an early stage all the parties

> "agreed with my suggestion that all questions relating to the admissibility of evidence should be deferred until I have given a decision on the questions of principle that arise."

The judge proceeded to give a number of "rulings" on a series of abstract and hypothetical questions of law which had been argued before him. I well understand the considerations which prompted the judge to think that the course he took would be the most convenient and expeditious way of disposing of the issues raised by the intervention of the I.T.C. But with hindsight one cannot escape from the conclusion that great difficulties have arisen from the attempt to resolve questions of law without, first, either finding the facts to which the law falls to be applied or requiring the parties, by way of pleading or otherwise, to set out the facts they allege with sufficient particularity to raise specific questions of law for decision.

Neither side was content with the judge's rulings and both appealed to the Court of Appeal. The matter came before Dillon and Mustill L.JJ. and Sir Roualeyn Cumming-Bruce. On 31 July Dillon and Mustill L.JJ. delivered separate reserved judgments. Sir Roualeyn Cumming-Bruce expressed agreement with both. The views of Dillon and Mustill L.JJ. differed significantly from those expressed by Webster J. and, at least in some respects, with each other. The difficulties arising from the hypothetical and academic nature of the exercise become fully apparent when one looks at the formal order which was drawn up to give effect to the decision of the Court of Appeal. The order sets out what is described as the "ruling" of Webster J. in a series of 11 propositions, some of them qualified by such adverbial phrases as "prima facie" or "as I presently think," but proceeds to make no order on the appeal or cross-appeal. No doubt the intention was that the matter should go back to Webster J., leaving him to extract and apply as best he could the propositions of law to be found in the two main judgments of the Court of Appeal. The discussion as to whether leave to appeal to your Lordship's House should be granted, which followed the handing down of the judgments, shows that the members of the Court of Appeal were fully aware of the acute difficulty of dealing with the case in the absence of any findings or assumptions of relevant fact. Dillon L.J. observed at one point:

> "It is a problem which really needs to be, I would have thought, in a much more final shape before their Lordships could properly be invited to give any guidance on it."

The Court of Appeal refused leave to appeal.

When the petitions for leave to appeal, presented by the I.T.C., on the one side, and all the defendants in the action, on the other, came before my noble and learned friends Lord Keith of Kinkel, Lord Brandon of Oakbrook and myself, sitting as the Appeal Committee, we fully shared the view expressed by Dillon L.J. in the remark quoted. But our great reluctance to grant leave to appeal was overcome by the fear convincingly expressed on both sides that the alternative course of sending the matter back to Webster J. to find the facts, with the probability of fresh appeals to the Court of Appeal and to this House ensuing, would be likely to increase the already considerable and regrettable delay in the disposal of the action occasioned by the intervention of the I.T.C. Leave to appeal was accordingly granted, but the Appeal Committee stipulated that the parties should attempt to

agree assumptions of fact which it was hoped would be sufficient to narrow and define the issues to be determined. A first draft of the agreed assumptions was put before the Appeal Committee before leave was granted and a more elaborate version was presented as the basis for argument of the appeal. Even now I am not satisfied, on the one hand, that the agreed assumptions are, in all cases, sufficiently precise and specific to provide a wholly satisfactory foundation for authoritative preliminary rulings of law nor, on the other hand, that they do not, in some cases, raise questions that probably will turn out to be quite academic. However, in the way the case has developed, we can only do our best with the material before us to provide an authoritative basis for the resolution of the issues.

The "Agreed Assumptions of Fact" are set out in a document so entitled which I must quote in full:

> "The parties to the appeal agree to the assumptions of fact set out below for the purposes of this appeal. In each case the term 'I.T.C. document' refers to: (a) an original, or (b) one of a printed run, or (c) a photocopy of: (i) a document of record, or (ii) a document drafted by the I.T.C., or (iii) a document circulated within the council of the I.T.C., or (iv) a document received by the I.T.C.
>
> "1. An I.T.C. document was supplied to a third party (i) with the consent of the I.T.C. or (ii) without the consent of the I.T.C. being asked for or given, by: (a) a member of the I.T.C. to whom it was distributed in the ordinary course of the I.T.C.'s business; (b) a member of a delegation to the I.T.C. without the authority of the relevant member [of the I.T.C.]; (c) an adviser to a member of the I.T.C. which obtained the document as in (a); (d) an institution having observer status at the I.T.C. to whom it was distributed in the ordinary course of the I.T.C.'s business; (e) the executive secretary of the Association of Tin Producing Countries, whose membership includes producer members of the I.T.C.
>
> "2. An I.T.C. document was supplied to a third party by an officer or by another member of staff of the I.T.C: (a) with actual authority; (b) with ostensible authority; (c) without any authority.
>
> "3. Facts as in (2), but the document was supplied to a third party with whom the I.T.C. dealt in order to reassure that third party of the financial position of the I.T.C.
>
> "4. Facts as in (2), but the document was supplied to a third party to assist in connection with settlement negotiations after the I.T.C. became unable to meet its commitments.
>
> 5. Facts as in (1), (2), (3) or (4) but the third party recipient made a copy of the document and sent the copy to another third party.
>
> "6. An I.T.C. document which had been discussed or referred to in the settlement negotiations between the I.T.C. and third parties without objection on the part of the I.T.C. subsequently came into the hands of: (a) a third party with whom it had been discussed or referred to, or (b) another third party.
>
> "7. The House of Commons Select Committee published an I.T.C. document in the minutes of evidence of the select committee inquiry. Those minutes of evidence were ordered to be published

by the House of Commons, and are publicly available from H.M.S.O.

"8. A copy of an I.T.C. document which had been before the House of Commons Select Committee was placed in the House of Lords Library. It is there available for inspection by members of the public.

"9. An I.T.C. document was released by the U.S. authorities under the United States Freedom of Information Act.

"10. An I.T.C. document whose provenance was unknown became widely available in the market and was referred to or quoted from in press reports. [5 U.S.C. para. 552, as amended by the Freedom of Information Reform Act 1986 (Public Law No. 99–570, paras. 1801–1804).]

"11. A copy of an I.T.C. document was received from a private individual. The party who received it does not know where or how the private individual obtained it.

"12. A document was prepared by a third party which contained information derived from an I.T.C. document and was sent to the I.T.C. A copy of this document was subsequently sent out by the I.T.C. to member states under cover of an I.T.C. frontsheet marked 'Confidential.'

"13. Information was derived by third parties from I.T.C. documents in each of the categories referred to above. Some or all of this information was included in documents prepared by third parties and those documents were neither sent to nor seen by the I.T.C."

Before addressing the issues which must be resolved in order to determine whether documents in the several categories contemplated by the assumed facts are rendered inadmissible by article 7(1) of the Order of 1972 it is appropriate to sketch the background and to refer to some preliminary considerations.

The I.T.C. is an international organisation presently constituted under the Sixth International Tin Agreement, a treaty concluded in 1981. There are 22 members including the United Kingdom and the European Economic Community. The headquarters of the organisation, as constituted under an earlier treaty, were established in London under the Headquarters Agreement, a treaty between the United Kingdom and the I.T.C. concluded in 1972. The Order of 1972 was made under the International Organisations Act 1968 to come into operation when the Headquarters Agreement came into force.

The functions and unfortunate collapse of the I.T.C. are concisely described and recounted in the judgment of Millett J. in *In re International Tin Council* [1987] 2 W.L.R. 1229, 1233, where he said:

"Its main functions were to provide for adjustment between world production and consumption of tin and to alleviate serious difficulties arising from surplus or shortage of tin, whether anticipated or real, and to prevent excessive fluctuations in the price of tin and in export earnings from tin. To these ends, it maintained and operated a buffer stock of tin and engaged in the buying and selling of tin by entering into sale and purchase contracts, both for immediate and forward delivery, on recognised markets including the London

Metal Exchange. In 1985, in a vain attempt to support the world price of tin, the I.T.C. ran out of money and collapsed. In October 1985 the I.T.C. announced that it was unable to meet its commitments. Dealings in tin on the London Metal Exchange were suspended and the I.T.C. ceased to trade in tin."

For the sequel to this story I turn to the judgment in the instant case of Dillon L.J. in a passage which reads:

"The collapse of the I.T.C. achieved considerable notoriety at the time, both in financial circles and among those concerned with tin. There was some attempt to negotiate a financial rescue package, but it was unsuccessful. The I.T.C. was left with vast liabilities. The effect of the collapse, and of the suspension of dealings in tin on the London Metal Exchange, was a drastic fall in the price of tin and financial chaos among dealers and brokers in tin who were parties to uncompleted contracts entered into before the collapse. It also, it is said, led the tenth defendant in this action, the Metal Market & Exchange Co. Ltd., which operates the London Metal Exchange, to add a new rule M to the rules of the exchange, whereby all outstanding bargains in tin between members of the exchange were deemed to have been reversed by reverse bargains at a lower close-out price prescribed by the exchange. The nature of the present action is that the plaintiffs are seeking to enforce against the first and second defendants contracts for tin which had before the collapse of the I.T.C. been entered into between the plaintiffs as sellers and those defendants as buyers at prices well above present market prices, and the plaintiffs are also seeking to establish that the new rule M is not valid or binding on them."

A question which troubled me and, I believe, others of your Lordships in the course of the argument was why this insolvent organisation should have undertaken the expense of intervening in the present litigation and what detriment to any subsisting interest of the I.T.C. was apprehended by the use in evidence before Webster J. of the disputed documents, especially having regard to the inclusion of such categories as those referred to in paragraphs 7, 8 and 9 of the assumed facts. The answer, so far as counsel for the I.T.C. were able to proffer one, seems to be that no detriment is apprehended from the use of any of the documents in the *present* litigation, but that the I.T.C. felt obliged to intervene lest failure to do so should preclude it from objecting to the admission of similar documents in other litigation in which it may be directly affected and also to establish that the protection of article 7(1) of the Order of 1972 may be invoked to prevent the use in evidence for probative purposes of documentary material notwithstanding that it is fully available to the public. That said, I bear in mind, of course, that, if the claim to exclude the documents is well founded in law, the I.T.C. are entitled to assert it without having to satisfy your Lordships that it will serve any useful purpose.

The reference in article 7(1) of the Order of 1972 to the "1961 Convention Articles" is a reference to the articles of the Vienna

Convention on Diplomatic Relations which are set out in Schedule 1 to the Diplomatic Privileges Act 1964. Article 24 of the Vienna Convention provides: "The archives and documents of the mission shall be inviolable at any time and wherever they may be."

In the argument before your Lordships nothing turned on the use of the word "official" in article 7(1) of the Order of 1972 and Mr. Kentridge Q.C., appearing for all the defendants in the action as respondents to the I.T.C.'s appeal and as cross-appellants (to whom I will simply refer as "the defendants"), was content to accept that article 7(1) of the Order of 1972 should be construed as conferring inviolability on the archives and documents of the I.T.C. to the like extent that article 24 confers inviolability on the archives and documents of a diplomatic mission. Professor Higgins Q.C., for the I.T.C., relied, as an aid to construction, on article 4 of the Headquarters Agreement which provides:

> "The archives of the council shall be inviolable. The term 'archives' includes all records, correspondence, documents, manuscripts, photographs, films and recordings belonging to or held by the council."

The Court of Appeal, for reasons which I need not examine, did not accept that the definition in the Headquarters Agreement could be relied on in construing the Order of 1972. But Professor Higgins helpfully drew your Lordships' attention to a consistent practice in domestic legislation, enacted to give effect to treaties concluded by the United Kingdom with international organisations, of referring in the domestic enactment to "archives" or "official archives" simpliciter, when the corresponding treaty embodied a definition similar to that in article 4 of the Headquarters Agreement. Nothing turns on the terms used in the definition except the phrase "belonging to or held by the council" which, Professor Higgins submitted, was available in the light of the legislative practice to indicate the meaning intended by the domestic enactment. Mr. Kentridge presented no argument to the contrary and I am the readier to accede to the submission since it would seem to me perfectly natural to interpret the phrase "the archives and documents *of* the mission" in article 24 of the Vienna Convention as referring to the archives and documents belonging to or held by the mission and thus I am inclined to the view that resort to the definition in the Headquarters Agreement only makes explicit what is already implicit in article 7(1) of the Order of 1972 interpreted by reference to article 24 of the Vienna Convention.

We are not in this appeal in any way concerned with documents held by the I.T.C. Ex hypothesi the categories of documents in the assumed facts are held by third parties. No claim is made against the I.T.C. requiring them to produce documents which they hold. Thus the central question at the heart of the dispute which has to be asked in relation to each category is whether the documents in that category "belong to" the I.T.C. In relation to the categories embraced in paragraphs 2 to 13 of the assumed facts I shall shortly need to examine a number of factors bearing upon that central question and to consider whether light is thrown upon the ambit of the documents which can be regarded as belonging to the I.T.C. by the concept of inviolability which attaches to the documents if they do.

But the first and perhaps most important categories of documents in dispute, judging by the central place accorded to them in argument, are the several categories of documents embraced in paragraph 1 of the assumed facts. They raise a special question said to turn on the peculiar juristic qualities of international organisations in general and of the I.T.C. in particular and upon the relationship between the I.T.C. and its constituent members, whether sovereign states or intergovernmental organisations. The submission for the I.T.C. was that all documents relating in any way to the business of the I.T.C. which originate within the I.T.C. and therefore commence life as documents which belong to the I.T.C. retain that character unimpaired when they are communicated to constituent members or their representatives. Thus it was said, for example, that, when the official representative of the Malaysian Government leaves a meeting of the I.T.C. carrying away in his briefcase a sheaf of minutes and reports about the business of the I.T.C., all those documents remain part of the official archives of the I.T.C. and still belong to the I.T.C. not only when they are in the Malaysian representative's hotel bedroom in London, but also when he returns to Kuala Lumpur and hands them over to his own government. This led to an interesting argument as to the extent to which United Kingdom domestic legislation can be construed as conferring diplomatic inviolability of the kind in question extraterritorially. But I find it unnecessary to discuss this issue separately since it seems to me that the case advanced by the I.T.C. in relation to documents communicated by the I.T.C. to constituent members or their representatives fails at an earlier stage.

Article 16 of the Sixth International Tin Agreement is headed "Privileges and immunities" and provides as follows:

> "1. The council shall have legal personality. It shall in particular have the capacity to contract, to acquire and dispose of movable and immovable property and to institute legal proceedings. 2. The council shall have in the territory of each member, to the extent consistent with its law, such exemption from taxation on the assets, income and other property of the council as may be necessary for the discharge of its functions under this agreement. 3. The council shall be accorded in the territory of each member such currency exchange facilities as may be necessary for the discharge of its functions under this agreement. 4. The status, privileges and immunities of the council in the territory of the host government shall be governed by a Headquarters Agreement between the host government and the council."

The Headquarters Agreement between the United Kingdom and the I.T.C. was made in pursuance of paragraph 4 of this article.

I need not cite in extenso other provisions of the treaty. The I.T.C. has its own distinct powers and functions under article 7 of the treaty, exercisable in accordance with the procedure laid down by the treaty, in particular the voting procedure prescribed by articles 14 and 15.

In the light of these provisions determining the constitution of the I.T.C. I found it difficult to follow Professor Higgins' argument that in the conduct of its internal affairs the I.T.C. could not be treated as distinct from its constituent members. But whatever validity that argument might have in any other context, it seems to me to be

conclusively refuted for present purposes by article 14(1) of the Order of 1972. This provides, so far as relevant:

> "Except in so far as in any particular case any privilege or immunity is waived by the government of the member country or by the intergovernmental organisation whom they represent, representatives of member countries of the council and of intergovernmental organisations participating in the International Tin Agreement in accordance with article 50 of the Fourth International Tin Agreement or a corresponding article in any succeeding agreement shall enjoy:— . . . (*b*) while exercising their functions and during their journeys to and from the place of meetings convened by the council . . . the like inviolability for all their official papers and documents as is accorded to the head of a diplomatic mission; . . ."

The Order of 1972 was made under section 1 of the Act of 1968. The effect of section 1(2) is to empower Her Majesty by Order in Council to "specify an organisation" to which section 1 applies (here the I.T.C.) and to confer relevant diplomatic immunities and privileges "in respect of the organisation so specified." It is perfectly clear, therefore, that in article 14(1)(*b*) of the Order of 1972 the phrase "all *their* official papers and documents" relates to documents concerning I.T.C. business and includes documents emanating from the I.T.C. which are now no longer documents *of* the I.T.C. but documents *of* the member country or intergovernmental organisation. It is the member who both needs and, by virtue of this provision, enjoys an inviolability in respect of the documents which is distinct from that attaching to the "official archives" of the I.T.C. and, still more significantly, article 14 expressly recognises that it is the member, not the I.T.C., by whom this inviolability may be waived. It follows that once a document has been communicated by the I.T.C. to a member or the representative of a member the protection of article 7(1) of the Order of 1972 ceases to apply to it. The documents of the categories referred to in paragraph 1(a), (b) and (c) of the assumed facts are not, therefore, rendered inadmissible as claimed. It was, I think, conceded but must in any event follow logically that the same conclusion applies to the categories in paragraph 1(d) and (e).

The issues arising for consideration in determining whether the remaining categories of documents contemplated by the assumed facts are rendered inadmissible by article 7(1) of the Order of 1972 have been very considerably narrowed by concessions which have been made at different stages in the proceedings up to the conclusion of the arguments addressed to your Lordships. As Dillon L.J. recorded in his judgment:

> "it has not been suggested that any of the copies of I.T.C. archival documents which have come into the possession of any of the parties to the action have been stolen from the premises of the I.T.C. or have been illicitly copied within those premises or have been obtained by bribing or deceiving members of the staff of the I.T.C."

It was conceded before your Lordships that in these circumstances it was unnecessary to consider the possibility that any I.T.C. document now in the hands of a third party, or any original I.T.C. document referred to as the basis of any derivative document, was originally obtained by any dishonesty either on the part of the third party who first obtained it or

A on the part of any member of the staff of the I.T.C. who first communicated it to that third party. It was further conceded before your Lordships that no question now arises with respect to any documents held by third parties on loan from the I.T.C. or otherwise as bailees or agents for the I.T.C.

There is a danger of some confusion of thought clouding the issues for decision from the use of the term "confidentiality" to describe that B which article 7(1) of the Order of 1972 protects. Of course in one sense it is no doubt true that the purpose of conferring inviolability on the archives and documents of a diplomatic mission and on the official archives of the I.T.C. is to preserve the confidentiality of the information which the documents contain. But on the other hand it is now clear, and was rightly accepted by counsel for the I.T.C., whatever doubt C there may have been at any earlier stage in these proceedings, that if a document was communicated to a third party by or on behalf of the I.T.C. in circumstances such as to impose a duty of confidentiality on the third party not to disclose the information which the document contained, any breach of that duty of confidentiality would be quite irrelevant to the claim which the I.T.C. is now seeking to establish. If D A writes to B in confidence, A may be able to restrain a breach of that confidence in appropriate proceedings, but the imposition of a duty of confidence does not prevent the property in the letter which conveys the confidential information passing in the ordinary course from A to B. When A writes the confidential letter, it belongs to A. When B receives it, it belongs to B. I prefer therefore to speak not of the confidentiality, but of the privacy, of documents which article 24 of the Vienna E Convention and article 7(1) of the Order of 1972 are designed to protect.

Mr. Kentridge presented a forceful argument for the defendants based on the proposition that the only protection which the status of inviolability conferred by article 24 of the Vienna Convention and article 7(1) of the Order of 1972 affords is against executive or judicial action F by the host state. Hence, it was submitted, even if a document was stolen, or otherwise obtained by improper means, from a diplomatic mission, inviolability could not be relied on to prevent the thief or other violator from putting it in evidence, but the mission would be driven to invoke some other ground of objection to its admissibility. I need not examine this argument at length. I reject it substantially for the reasons given by the Court of Appeal. The underlying purpose of G the inviolability conferred is to protect the privacy of diplomatic communications. If that privacy is violated by a citizen, it would be wholly inimical to the underlying purpose that the judicial authorities of the host state should countenance the violation by permitting the violator, or any one who receives the document from the violator, to make use of the document in judicial proceedings.

H At the heart of the issue on which the validity of the I.T.C.'s claim to inviolability for the categories of document referred to in paragraphs 2 to 13 of the assumed facts depends lies the question of authority. As I have pointed out in connection with the question of confidentiality, if A, an individual, communicates a document to B in the absence of any relationship of lender and borrower, bailor and bailee or principal and agent, the ordinary inference must be that the property in the document communicated passes to B when he receives it. If A is a body such as

the I.T.C. which can only act through an agent, I see no reason why the same inference should not be drawn in respect of any communication to B which A's agent had authority to make. Accordingly I have no difficulty, in the light of the concessions to which I have referred, in concluding that a document in categories 2(a) or (b) of the assumed facts, sc. a document communicated to a third party by an officer or employee of the I.T.C. with actual authority, express or implied, or with ostensible authority, no longer belongs to the I.T.C. and hence no longer enjoys inviolability as part of the official archives. But what is here involved in the concept of ostensible authority? The issue of ostensible authority normally falls for decision where one party as agent has purported to undertake some obligation on behalf of another party as principal. In those circumstances the party seeking to enforce the obligation in reliance on the agent's ostensible authority will need to show that the principal held the agent out as having the necessary authority so as to create an estoppel. But here there is no question of any obligation to be enforced. The question is simply whether a limitation upon the actual authority of an officer or employee of the I.T.C. who, acting honestly and in the course of his employment by the I.T.C., communicates a document to a third party prevents the document communicated becoming the property of the recipient, notwithstanding that the recipient is unaware of any lack of authority. In the real world it seems to me that business would come to a standstill if persons who receive documents from clerks or secretaries, acting in the course of their employment, were not entitled to assume that those documents were sent with the authority of the employer, and if this is true of the ostensible authority of staff in such humble grades, it must equally be true of staff at higher levels. Thus, in my opinion, the very fact that an officer or employee of the I.T.C. was acting and known to be acting in the course of his employment in communicating documents to a third party would be strong prima facie evidence that he had at least ostensible authority to do so. To rebut the inference from that prima facie evidence it would be necessary, as I think, not only to prove absence of actual authority but also to show something in the circumstances in which the transaction took place sufficient to put the recipient of the document on inquiry that the I.T.C.'s officer or employee might be acting without authority.

In the light of these considerations I strongly suspect that the issue raised as to documents in category 2(c) of the assumed facts is purely academic. This suspicion is reinforced, first, by the fact that no evidence has yet been adduced to suggest any want of authority on the part of any officer or employee of the I.T.C. who communicated any of the disputed documents to any third party, although the I.T.C. have reserved the right to adduce such evidence; secondly, by the particular circumstances in which documents in categories 3 and 4 of the assumed facts are taken to have been communicated. These categories have presumably been singled out for special consideration as typical cases where authority might be in dispute. But to my mind it is beyond argument that an officer or employee of the I.T.C. authorised to approach a third party to reassure him of the financial stability of the I.T.C. or, when that assurance was falsified, authorised to conduct negotiations for a settlement must thereby have been clothed with

ostensible authority to supply any documents to the third party which might assist in promoting the authorised purpose.

I think it is possible to reach the same conclusion as that which I have sought to express in considering the question of ostensible authority by approaching the issue from another point of view. The protection which article 7(1) of the Order of 1972 provides is expressed by the word "inviolability." An infringement of the protection must amount to a violation of the protected documents. It would surely be a misuse of language to say that a protected document had been violated because an officer of the I.T.C. supplied it to a third party without authority, unless the recipient was or ought to have been aware of the absence of authority. Putting the same point in other language, which I gratefully adopt from Mr. Kentridge, the inviolability conferred on the archives and documents of a diplomatic mission cannot have been intended to protect the mission from the consequences of errors on the part of the staff whom the mission chose to employ.

Turning to the remaining categories of documents which fall to be considered in accordance with the assumed facts, the concessions excluding dishonesty, loan, bailment or agency as the basis of the original transmission from the I.T.C. to any third party of I.T.C. documents embraced within the categories, or referred to, as for example in paragraphs 5, 12 and 13, as the source from which other documents were derived, entitle and indeed oblige your Lordships to assume that the original transmission whereby all these documents initially passed out of the possession and control of the I.T.C. into the possession and control of third parties was effected by officers or employees of the I.T.C. acting in the course of their employment. This leads back to the conclusion that in every case the determinative question whether the original communication of any documents was authorised or unauthorised depends upon the considerations already examined under paragraph 2.

The conclusions I have expressed may seem to go a long way, as I think they do, towards shutting the door on the I.T.C.'s claim to exclude the admission in evidence of any of the disputed documents in reliance on article 7(1) of the Order of 1972. But they must, of course, since the agreed assumptions do not admit of a final ruling, at least leave the door ajar. The only live issue, however, which, as it seems to me, will remain for decision by Webster J. is whether any particular document proposed to be put in evidence, or in the case of a derivative document, the original I.T.C. document communicated by an officer or employee of the I.T.C. to a third party on which the derivative document is founded, was so communicated without authority, actual or ostensible.

It was argued for the I.T.C. that the principle expressed in *Juan Ysmael & Co. Inc. v. Government of the Republic of Indonesia* [1955] A.C. 72 would operate to preclude the court from adjudicating upon any such issue. The question which arose in that case appears from the following passage in the judgment of the Judicial Committee of the Privy Council delivered by Earl Jowitt, at pp. 86-87:

> "The rule according to a foreign sovereign government immunity against being sued has been considered and applied in many cases. The basis of the rule is that it is beneath the dignity of a foreign

sovereign government to submit to the jurisdiction of an alien court, and that no government should be faced with the alternative of either submitting to such indignity or losing its property. The rule was stated by Lord Atkin in *The Cristina* [1938] A.C. 485, 490 as involving two propositions. The first, that the courts of a country cannot implead a foreign sovereign; and the second, that they would not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. . . . In whichever way the rule is stated it is apparent that difficulty may arise in the application of the second branch of it. Where the foreign sovereign state is directly impleaded the writ will be set aside, but where the foreign state is not a party to the proceedings, but claims that it is interested in the property to which the action relates and is therefore indirectly impleaded, a difficult question arises as to how far the foreign sovereign government must go in establishing its right to the interest claimed."

The Board's answer to the difficult question posed appears at pp. 89-90 where Earl Jowitt said:

"In their Lordships' opinion a foreign government claiming that its interest in property will be affected by the judgment in an action to which it is not a party is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. The court must be satisfied that conflicting rights have to be decided in relation to the foreign government's claim. When the court reaches that point it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached."

If the *Juan Ysmael* principle falls to be applied, I am of opinion, for the reasons I have already explained, that even the limited evidential burden imposed upon a sovereign claiming immunity, on the ground that he is indirectly impleaded by a claim to property to which he asserts title, could only be discharged here by the I.T.C. if they could adduce some evidence to show that the original communication of a disputed document to a third party was effected in circumstances putting the recipient on inquiry as to the absence of authority on the part of the officer or employee of the I.T.C. to make such a communication. But, for my part, while I recognise the propriety of safeguarding the dignity of foreign sovereigns by securing that they are neither directly nor indirectly impleaded, I should be extremely reluctant to see the rule in *Juan Ysmael* extended any further than is strictly necessary for that purpose. It is one thing for the courts to decline jurisdiction to adjudicate upon a claim by a plaintiff to recover from a defendant property to which a foreign sovereign asserts a title which he is able to support by prima facie evidence. It would be an entirely different thing for the court to decline jurisdiction to adjudicate on a claim by a foreign sovereign or any other organisation entitled to invoke the inviolability of diplomatic documents to prevent the court from receiving otherwise relevant and available evidence in proceedings to which the sovereign is not a party. All other distinctions apart, in the first case the sovereign is

A resisting a claim made against him, in the second he is asserting a claim against another. If a sovereign wishes to recover his property from a third party in possession of it, he must choose between saving his dignity or invoking and thereby submitting to the jurisdiction of the court. I cannot see why it should make any difference that the sovereign, instead of seeking to recover his property, is, in effect, asserting a right of property in a document in the possession of a third party as a ground for B preventing the court from receiving that document in evidence. Accordingly, in my opinion, if the I.T.C. do produce prima facie evidence to the effect I have indicated, that will not be the end of the matter, but the parties to the action will be entitled to challenge and, if they can, to controvert that evidence and the legal burden will rest on the I.T.C. to establish that the relevant document was communicated to C the third party without authority, actual or ostensible, with the consequence that it did not cease to be part of the official archives of the I.T.C.

Having regard to the way in which this matter reached your Lordships, it is not perhaps surprising that one cannot identify with precision the issues raised by the appeal and the cross-appeal respectively. But the effect of the conclusions I have expressed is that the I.T.C. have D failed and the defendants have succeeded on all the issues save that raised by the separate argument advanced by Mr. Kentridge with respect to inviolability which I have rejected. In the event the rejection of that argument turns out to be of minimal significance in the context of the overall dispute. It seems to me, therefore, that the appropriate order would be that the appeal be dismissed and the cross-appeal allowed, that E the order of the Court of Appeal be set aside, that there be substituted therefor an order that the matter be remitted to Webster J. to determine the admissibility of the disputed documents in accordance with the opinions expressed in your Lordships' House and that the costs of the proceedings before the House be paid by the I.T.C. I would not think it appropriate to make any order with respect to the costs in the Court of Appeal, where many of the defendants were separately represented, F and the costs of the proceedings on the I.T.C.'s intervention before Webster J. will, of course, remain in his discretion.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Bridge of Harwich. I agree with it, and for the reasons which he G gives I would make the orders in respect of both the appeal and the cross-appeal proposed by him.

LORD GRIFFITHS. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Bridge of Harwich, and for the reasons that he gives I too would dismiss the appeal and allow the cross-appeal.

H

LORD OLIVER OF AYLMERTON. My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend, Lord Bridge of Harwich. I agree with it and concur in the order which he has proposed.

LORD GOFF OF CHIEVELEY. My Lords, for the reasons given in the speech of my noble and learned friend Lord Bridge of Harwich, which I

have had the opportunity of reading in draft, I too would dismiss the appeal and allow the cross-appeal.

Appeal dismissed and cross-appeal allowed.

Order of Court of Appeal of 31 July 1987, as amended on 11 August 1987, set aside save as to costs. Cause remitted to Webster J. to determine admissibility of disputed documents in accordance with speeches delivered; original appeal dismissed.

Interveners to pay defendants' costs in House of Lords. Costs of proceedings on intervention before Webster J. to remain at his discretion.

Solicitors: Cameron Markby; Allen & Overy; Clyde & Co.; Linklaters & Paines.

M. G.

Annex 19: *Westminster City Council v. Government of the Islamic Republic of Iran* [1986] 1 WLR 979.

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[CHANCERY DIVISION]

WESTMINSTER CITY COUNCIL v. GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN
[1985 W. No. 5113]

1986 Jan. 20, 21 Peter Gibson J.

Conflict of Laws - Sovereign immunity - Diplomatic immunity - Building used as embassy of foreign state - Foreign state breaking off diplomatic relations - Local authority seeking to register local land charges against property - Reference by Chief Land Registrar brought before court by originating summons - Foreign state refusing to accept service of summons - Whether court jurisdiction to entertain reference - Whether diplomatic immunity afforded to premises not currently in use as embassy

The city council in the exercise of its statutory powers shored up and made secure premises that were in a dangerous state which were owned by the Iranian government and had previously been used as its embassy. The city council, having unsuccessfully sought to recover its building costs from the Iranian government, registered its expenses as five local land charges and applied to the Land Registry to have the charges registered under the Land Registration Act 1925. The Iranian government, by solicitors, objected to the registration on the ground that the premises formed part of their diplomatic mission and therefore enjoyed diplomatic immunity. The Chief Land Registrar referred the matter to the court, requiring the city council to take out an originating summons or other appropriate originating process to bring the matter before the court. The city council took out an originating summons for which personal service was required but the Iranian government through their solicitors refused to accept service. Furthermore, the method prescribed by section 12(1) of the State Immunity Act 1978[1] for serving originating documents against a state was rendered impossible by the discontinuance of diplomatic relations between Iran and the United Kingdom.

On the question whether the court had jurisdiction to entertain the summons:-

Held, that once a dispute had arisen on the registration of a charge under the Land Registration Act 1925 it was not possible to treat the matter as ex parte whether at a hearing before the registrar or on a reference to the court; that an originating summons was the appropriate originating process for bringing the matter before the court and had to be served in accordance with section 12(1) of the State Immunity Act 1978; that there was nothing in either the Rules of the Supreme Court or the circumstances which made it proper to dispense with the requirement for personal service; and that, accordingly, since it had not been possible to effect service on the Iranian government the court could not rule on the question whether the charges should be registered (post pp. 982G-H, 983B-C, G, 984A).

Per curiam. The diplomatic immunity accorded to the

1 State Immunity Act 1978, s. 12(1): see post, p. 982E.

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premises of a mission by article 22 of the Vienna Convention 1961 applies only to premises currently so used; the fact that premises have been so used in the past cannot be relevant to the state immunity afforded by the convention (post p. 984G-H).

No cases are referred to in the judgment or were cited in argument.

ORIGINATING SUMMONS

By an originating summons dated 4 October 1985 the plaintiffs, Westminster City Council, sought the determination of the following matter referred to the court by H.M. Chief Land Registrar by an order dated 1 July 1985 made under rule 298(2) of the Land Registration Rules 1925, namely, whether the five

local land charges registered against premises owned by the defendant, the Government of the Islamic Republic of Iran, pursuant to section 6(1) of the London County Council (General Powers) Act 1955 on the local land charges register should be registered pursuant to the provisions of section 59(2) of the Land Registration Act 1925.

The facts are stated in the judgment.

P. B. Mauleverer Q.C. and *J. Acton Davis* for the plaintiffs.

The defendants did not appear and were not represented.

PETER GIBSON J. On 30 January 1979 the Provisional Revolutionary and Islamic Government of Iran, the name then adopted by the defendant, the Iranian government, was registered as the proprietor of 16, Princes Gate, London, S.W.1., and the premises were used as the Iranian embassy until May 1980. That property is within the area of the plaintiff, Westminster City Council. As many of us will have seen on our television screens, those premises were stormed by the Special Air Service in May 1980 to free some hostages held there, but unfortunately in consequence the property was gutted by fire. The building was left in a dangerous state. Pursuant to section 62 of the London Building Acts (Amendment) Act 1939, the district surveyor on 6 May 1980 certified the dangerous state of the premises and the city council proceeded in accordance with its statutory powers to shore up and secure the structure.

Thereby it incurred expenses, and by section 66 of the Act of 1939 such expenses are required to be paid by the owner of the building. Demands were made by the city council on the Iranian government, but such demands were not met. The city council then sought, in December 1981, to recover expenses which had been incurred by commencing proceedings in the Queen's Bench Division against the Iranian government, but such proceedings have, by reason of the State Immunity Act 1978, to be served on the Iranian Ministry of Foreign Affairs. There is no British embassy in Iran, and the Swedish embassy, which looked after British interests in Iran, was, perhaps understandably, not prepared to effect such service. Accordingly those proceedings were frustrated. By section 6(1) of the London County Council (General Powers) Act 1955 and section 1(1)(*a*) of the Local Land Charges Act 1975 the city council had the right to register the expenses as local land charges, and five local land charges were registered on dates between 5 August 1980 and 5 November 1982. Such charges by section 7 of the Act of 1975 take effect as if they had been created by a deed of charge by way of legal

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mortgage within the meaning of the Law of Property Act 1925. By the proviso to section 59(2) of the Land Registration Act 1925, such charges cannot be realised unless registered under the Land Registration Act 1925.

The city council sought registration of its charges under the Land Registration Act 1925 on 11 April 1983, supporting its application by the certificate of the city council's solicitor. Such an application has potentially serious consequences for the Iranian government, because of the possibility that the property might be sold by the city council if the registration is allowed. But the city council's solicitor has deposed to the fact that the purpose of the city council in seeking registration was to protect the interests of the city council in the event, in particular, of a sale by the Iranian government. Indeed, the city council has offered an undertaking that without the leave of the court it would not itself initiate action to effect a sale of the property.

The Land Registry invited the comments of the Iranian government on the application. The Iranian government, by its solicitors, Messrs. Cathcart & Co. ("Cathcarts"), objected to the registration on the ground that the property formed part of the diplomatic mission of the Iranian government and that state immunity applied. The Land Registry confirmed to the city council that apart from that objection its application was in order.

On 1 July 1985 the Chief Land Registrar made an order referring to this court the question whether the charges should be registered pursuant to the proviso to section 59(2) of the Land Registration Act 1925. The order of the Chief Land Registrar required the city council to "take out an originating summons or such other originating process as may be appropriate for the purpose of bringing the matter before the court." The city council took out an ordinary originating summons, using form 8 and naming the Iranian government as defendant. Under R.SC, Ord. 10, r. 5, personal service is required. No doubt the city council had the reasonable expectation that the Iranian government would want to support its objection by accepting service and appearing in these proceedings; but Cathcarts have refused to accept service on

behalf of the Iranian government. They say they have no instructions to do so. Although Cathcarts have been supplied with the relevant documents and have been notified of the preliminary hearing before the master and of this hearing, the Iranian government still does not appear, and it still has not been served. Mr. Mauleverer, appearing for the city council, has therefore had the invidious task of not only presenting the city council's case but also performing his duty of drawing the attention of the court to those matters which might have been relied on by the Iranian government had it chosen to appear. I am very grateful to him for his very fair presentation of the possible difficulties in the way of the city council, and I have been much assisted by his argument.

Two questions arise, one procedural and the other the substantive question raised in the reference. The procedural question is whether the court is able to rule on the substantive question in the circumstances that it has not been possible to serve the only defendant, the Iranian government. Mr. Mauleverer submitted that the court can so rule. He first submitted that the hearing in this court is in effect an extension of the ex parte application before the Chief Land Registrar. It is true that

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the registrar, on receiving an application for registration, can, if satisfied with that application and by the evidence in support, make an order without serving the evidence on the party affected thereby. But if a dispute arises as to the registration of a charge, then the registrar comes under a mandatory obligation. Under rule 298(1) of the Land Registration Rules 1925, in that event the registrar shall hear and determine the matter, and by rule 300 he must serve notice that he will hear and determine the matter at the registry on all persons appearing to be interested, stating the time of such hearing and that such persons may attend before him at that time in person or by solicitors or counsel. It is therefore to my mind clear that once a dispute has arisen the matter cannot properly be described as being ex parte, but that a party known to be interested must be given the opportunity of appearing.

The registrar, however, under rule 298(2) may, if he thinks fit, instead of determining the question himself, refer the matter at any stage or any question thereon for the decision of the court, and "the court" for that purpose means the Chancery Division, and the matter falls to be determined by a single judge of this division: see section 138(2) of the Land Registration Act 1925, as amended by the Administration of Justice Act 1982 and R.SC, Ord. 93, r. 10. Rule 298(2) of the Rules of 1925, therefore, allows a dispute to be resolved, if the registrar chooses, by the court instead of by himself. One would therefore expect that the same obligation to serve notice of the hearing on interested parties would arise in the case of court proceedings.

Mr. Mauleverer then drew my attention to section 12(1) of the State Immunity Act 1978. By that subsection

> "Any writ or other document required to be served for instituting proceedings against a state shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the state and service shall be deemed to have been effected when the writ or document is received at the ministry."

That is subject to subsection (6), which allows the service of a writ or other document in any manner to which the state has agreed. He submitted that despite the mandatory nature of section 12(1) it had no application because the originating summons was not a document required to be served for instituting proceedings against a state, but was merely a document chosen as a convenient method of bringing the matter before the court in compliance with the Chief Land Registrar's order. I regret that I cannot accept this. It is true that the Chief Land Registrar by his order was not insisting on an originating summons and that any other appropriate originating process could have been used, although in my judgment the originating summons was the correct form: see R.SC, Ord. 5, r. 3. But whatever originating process was chosen, it must have been envisaged that the city council would be instituting proceedings as plaintiff and the only other known interested party, the Iranian government, would be defendant, and that by analogy with rule 300 of the Land Registration Rules 1925 the Iranian government would be served with the proceedings, so that it could participate in the hearing before the court. It seems to me, therefore, that the wording of the opening words of section 12(1) of the State Immunity Act 1978 is satisfied in the present case.

There are some ex parte originating proceedings provided for under the Rules of the Supreme Court, for example an ex parte originating summons, and Mr. Mauleverer submitted that I should treat the form 8 originating summons as though it were an ex parte originating summons. If such an ex parte application were an appropriate originating process, the fact that another form of originating summons had been used would not have deterred me from exercising the power in R.SC, Ord. 2 and from treating the application as one made by the appropriate mode; but I find it impossible to say that on a dispute arising under the Land Registration Act 1925 it would be appropriate for an ex parte originating process to be used. It is known that there is a dispute between the city council as applicant for registration and the Iranian government as objector. It seems to me, therefore, to be contrary to principle in those circumstances to treat the matter as though it were an ex parte originating process. Mr. Mauleverer accepts that if section 12 of the Act of 1978 does apply there can be no question of ordinary substituted service, section 12 providing the only mode of service in mandatory terms.

Mr. Mauleverer then argued that R.S.C., Ord. 32, r. 5(1) and (2) (made applicable to originating summonses by Ord. 28, r. 1) gave the court power to dispense with service. R.S.C., Ord. 32, r. 5 provides:

> "(1) Where any party to a summons fails to attend on the first or any resumed hearing thereof, the court may proceed in his absence if, having regard to the nature of the application, it thinks it expedient so to do. (2) Before proceeding in the absence of any party the court may require to be satisfied that the summons or, as the case may be, notice of the time appointed for the resumed hearing was duly served on that party."

It was submitted that Ord. 32, r. 5(1) applied because the Iranian government had failed to attend; but the failure to attend which is referred to in rule 5(1) to my mind connotes that someone who has been duly served with a summons has failed to attend. Ord. 32, r. 5(2), Mr. Mauleverer submitted, gave the court a discretion to dispense with service because of the terms of that rule "The court may require to be satisfied that the summons was duly served." But I do not read this rule as a power to dispense with service. To my mind it is concerned with proof of service, and it puts a party on notice that proof of service on a person not attending may be insisted upon by the court. In my judgment the rule would be in a different form if it were directed at allowing dispensation with service. There are, of course, special and express provisions in the Rules of the Supreme Court allowing dispensation with service in particular cases, and the contrast with the present rule is to my mind marked.

Mr. Mauleverer also reminded me of the wide discretion conferred on the court by R.SC, Ord. 2, r. 1 to dispense with requirements of the rules. But I do not regard it as proper in the circumstances of the present case to treat an application, which to my mind was rightly framed as an inter partes proceeding, as an ex parte application. Of course, the rules do provide for some ex parte applications (see for example R.SC, Ord. 50, r. 1(2)), but again the contrast between such a provision and the present case is marked. One would expect an express provision dealing with the matter.

In the result I find myself forced to the conclusion that I cannot rule on the question referred to the court without prior service on the Iranian government. I reach this conclusion with no satisfaction whatsoever. I find it disquieting that the Iranian government, having raised an objection, can frustrate the resolution by the court of the question thereby raised by not being willing to accept service through the solicitors who raised the objection on their behalf. But, as Mr. Mauleverer accepts, by taking a state immunity objection the Iranian government has not submitted in any way to the jurisdiction (section 2 of the State Immunity Act 1978), and further I recognise that the particular problem in the present case arises only because of the exceptional circumstance that the method of service provided for by section 12 of the Act of 1978 is or may be for the time being impractical.

In case I am wrong on the procedural question, I shall express my view briefly on the substantive

question. Cathcarts, in their objection on behalf of the Iranian government, relied on article 22 of the Vienna Convention 1961, which is one of the articles having, by reason of the Diplomatic Privileges Act 1964, the force of law in the United Kingdom. Cathcarts claimed that the premises at 16, Princes Gate still form part of the diplomatic mission of Iran in this country. Paragraphs 1 and 2 of article 22, to which Cathcarts referred, read:

> "1. The premises of the mission shall be inviolable. The agents of the receiving state may not enter them, except with the consent of the head of the mission. 2. The receiving state is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity."

For the sake of completeness I should read paragraph 3:

> "The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution."

The references to the premises of the mission must however, be read with the definition provided in article 1(*i*).

> "The 'premises of the mission' are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission."

The key word, as Mr. Mauleverer submitted, is "used." That must connote the present tense "which are used." The fact that premises have been used in the past cannot be relevant to the state immunity afforded by the Vienna Convention 1961. The evidence is clear that since May 1980 the premises have not been used. The premises are in such a state now that they could not be used without extensive rebuilding.

The Foreign and Commonwealth Office, in a letter dated 2 November 1984, expressed to the city council the view that the building no longer constituted the premises of the Iran mission within the meaning of article 1(*i*). I agree. It seems to me clear beyond argument that the premises have ceased to be used for the purposes of the mission, and in

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those circumstances the provisions of article 22 have no application to the premises. But, for the reasons which I have endeavoured to give, I find myself unable to give a ruling for the purposes of the reference to this court.

Order accordingly.
No order as to costs.

Solicitors: City Solicitor, Westminster City Council.

[Reported by SARAH WADHAM, Barrister-at-Law.]

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Annex 20: *Controller and Auditor-General v. Sir Ronald Davison* [1996] 2 NZLR 278.

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Controller and Auditor-General v Sir Ronald Davison (CA 226/95)
KPMG Peat Marwick and Others v Sir Ronald Davison (CA 223/95)
Brannigan and Others v Sir Ronald Davison (CA 231/95)

Court of Appeal Wellington
30, 31 October; 1 November 1995 (CA 226/95)
1, 2 November 1995 (CA 223/95)
8 December 1995 (CA 231/95)
16 February 1996 (all cases)
Cooke P, Richardson, McKay, Henry and Thomas JJ

International law – Sovereign immunity – Circumstances in which foreign government may forfeit its right to sovereign immunity – Relevance of desirability of comity of nations – Commission of inquiry – Whether Commissioner of Inquiry could require production of documents and giving of oral evidence in respect of matters outside the territorial jurisdiction of New Zealand – Whether foreign government engaged in commercial activities or governmental activities – Whether issues of public policy were dominant element in the deliberations of a commission of inquiry – Applicability of doctrine of iniquity – Crimes Act 1961, s 352(1) – Evidence Amendment Act (No 2) 1980, s 35 – Public Revenues Act 1953, s 12 – Commissions of Inquiry Act 1908, ss 4C, 4D, 13A, 13B and 13C.

Evidence – Commission of inquiry – Commissioner requiring production of documents and giving of oral evidence in respect of matters outside the territorial jurisdiction of New Zealand – Whether commissioner could make such requirement – Whether issues of public policy were dominant element in the deliberations of a commission of inquiry – Crimes Act 1961, s 352(1) – Evidence Amendment Act (No 2) 1980, s 35 – Public Revenues Act 1953, s 12 – Commissions of Inquiry Act 1908, ss 4C, 4D, 13A, 13B and 13C.

Application for review – Judicature Act 1908 – Commission of inquiry – Whether Commissioner of Inquiry could require production of documents and giving of oral evidence in respect of matters outside the territorial jurisdiction of New Zealand – Whether witnesses had defences of sovereign immunity or protection from self-incrimination – Whether issues of public policy were the dominant element in the deliberations of a commission of inquiry – Extent of limitation on commissioner's powers – Crimes Act 1961, s 352(1) – Evidence Amendment Act (No 2) 1980, s 35 – Public Revenues Act 1953, s 12 – Commissions of Inquiry Act 1908, ss 4C, 4D, 13A, 13B and 13C.

Certain documents belonging to the European Pacific group of companies were allegedly stolen by an employee. They passed in due course to the Honourable Winston Peters MP who, with the leave of the House of Representatives, was eventually able to table them in the House. On the basis of the papers Mr Peters and others alleged that various companies associated with European Pacific were implicated in the evasion of New Zealand income tax by the use of the Cook Islands tax haven. The documents given to Mr Peters were contained within a winebox, and that gave rise to the popular image associated with the allegations. These allegations included assertions by Mr Peters that at the very least the New Zealand Inland Revenue Department and the Serious Fraud Office had been derelict

Having had the advantage of reading in draft the judgment of Richardson J, with much of which (particularly the concluding part) I am in sympathy, I add some brief comments on what my brother calls the iniquity factor. In the present era of civilisation and international law I should think that a Court would be going too far if it were to allow a general exception of iniquity to the doctrine of sovereign immunity. The invasion of Kuwait was treated as iniquitous by the United Nations and no doubt was so regarded by many countries, yet in the *Kuwait Airways* case the House of Lords held unanimously that the seizure of Kuwait civil aircraft was protected by sovereign immunity. On the other hand, as noted in the American Law Institute's *Restatement of The Law The Foreign Relations Law of the United States* (1987), vol 1, s 461c, "In principle, a foreign state is responsible for violations of domestic law by terrorist acts committed by its agents". The assassination case of *Letelier v Republic of Chile* 488 F Supp 665 (DDC, 1980) is one of the supporting authorities cited.

One can speculate that the law may gradually but steadily develop, perhaps first excepting from sovereign immunity atrocities or the use of weapons of mass destruction, perhaps ultimately going on to except acts of war not authorised by the United Nations. But this is peer optimistically into the future far beyond the bounds of anything falling to be decided in the present judicial review proceedings. The maxim festina lente is in point, and while founding on public interest I prefer to confine the reasoning in this judgment to issues of tax avoidance or evasion under investigation by a national commission of inquiry.

The question of incrimination of witnesses

The plaintiffs in the second judicial review proceeding now before the Court are the New Zealand chartered accountancy partnership Peats and three members of the firm who practise in New Zealand but from time to time work elsewhere, as in the Cook Islands. The plaintiffs in the third judicial review proceeding are four former employees of the European Pacific group of companies. The group was or is based in the Cook Islands. The plaintiff Barry has continued to do contract work for the group, taking him to the Cook Islands from time to time. The plaintiffs Brannigan and McCullagh practise as chartered accountants in a New Zealand partnership. The practice of their partnership includes considerable Cook Islands work, necessitating frequent visits there. They have now become auditors to the Cook Islands Government. The plaintiff Lilly is currently employed by another group of companies and does not have a continuing business connection with the Cook Islands. All the plaintiffs are citizens and residents of New Zealand. They object to answering questions or supplying documents as required by the Commissioner of Inquiry, on the ground that this would tend to expose them to criminal proceedings in the Cook Islands.

In one respect, while not at all doubting his ultimate conclusion, I very much doubt an opinion expressed by the Commissioner of Inquiry in the course of a comprehensive ruling by him on 27 September 1995. Contrary to his view, the relevant Cook Islands legislation designed to ensure the secrecy of the tax haven appears to me to be almost certainly intended to have extraterritorial operation. Under s 227(3) of the International Companies Act 1981-1982, any person or entity who, with respect to an international company or a foreign company registered under the Act and whether in the Cook Islands or elsewhere, divulges information etc is guilty of an offence. There are enacted exceptions, including one relating to transactions in prohibited narcotic substances, but, despite some inelegance in the wording of s 227(8), the tenor and terminology of the section as a whole point to an intention to exclude the presumption against extraterritoriality. I will assume that the true interpretation of the section is that it does have extraterritorial effect.

Similarly, certain injunctions obtained by European Pacific in the High Court of the Cook Islands may be assumed to have been intended to have extraterritorial

function in a modern state as is recognised internationally in the "Lima Declaration on Guidelines on Auditing Precepts" resolved on by the 9th Congress of the International Organisation of Supreme Audit Instutitions meeting in Lima in 1977. The Deputy Controller and Auditor-General saw the art 71 functions as being the same in the Cook Islands as those required of the Audit Office in New Zealand in respect of the operations of the New Zealand Government. The report of the Audit Office for the year ended 30 June 1995 states the purpose of the office as being a constitutional safeguard to maintain the financial integrity of the country's parliamentary system of government; its role being to assist Parliament to strengthen the effectiveness, efficiency and accountability of the instruments of government; and the role being discharged by providing reports on whether governmental activities are carried out, and accounted for, in a manner consistent with Parliament's intentions.

In that role of constitutional auditor of the Cook Islands under art 71, the Audit Office came into possession of documents created by the Government of the Cook Islands, by third parties and by the Audit Office itself. Those documents were then held by the Audit Office on behalf of the Cook Islands Government. Some of those documents will no doubt relate to the spending of public money for the acquisition of goods and services for the state. However, that cannot affect the legal answer which is that on the material before the Court the Audit Office came into possession of the documents and information and created documents for its own audit purposes in the course of carrying out a sovereign governmental function. That being so, the requisition by the commission for the production of these documents by the Audit Office affects the property rights and interests of the Cook Islands so as to implead the state. While s 4C of the Commissions of Inquiry Act 1908 and RR 310 and 311 of the High Court Code, on which the commission relied in issuing the notices and making the order for production, are broadly phrased, they are not expressed to apply extraterritorially or to override sovereign immunity. They cannot be construed as barring a claim to sovereign immunity (*Governor of Pitcairn and Associated Islands v Sutton* at pp 430 and 438).

It follows that, subject to consideration of the iniquity factor, all the arguments raised by the commission in support of the notices and the order for production fail.

Iniquity and public policy

In *Rahimtoola v Nizam of Hyderabad* [1958] AC 379, 404 Lord Reid emphasised that the principle of sovereign immunity is not founded on any technical rules of law: it is founded on broad considerations of public policy, international law and comity.

In assessing the weight which may legitimately be given at common law to New Zealand public policy considerations in the present case it is as well to have three other factors in mind. The first is that, as the distinguished international law scholar Sompong Sucharitkul has emphasised (Bedjaoui, *International Law: Achievements and Prospects* (1991) ch 16: "Immunity of States", at p 328), the doctrine of state immunity is the result of an interplay of two fundamental principles of international law: the principle of territoriality and the principle of state personality, both being two aspects of state sovereignty. Under that first fundamental principle sovereign states have jurisdiction to prescribe rules of law and processes applying within their territory.

The second and related consideration is that the state activity in question in this case is New Zealand based in three respects. First, Magnum and like transactions contemplated that the tax payment certificates issued by the Cook Islands Government would be utilised to secure a tax credit for the full amount in New Zealand and for New Zealand income tax purposes. Second, all the documents sought by the commission for production for inspection are presently in New

Zealand. Third, they are in the possession of the Audit Office of New Zealand. While the Audit Office carried out the audit activity in question as constitutional auditor of the Cook Islands and holds documents in that capacity, it remains a New Zealand agency constituted under New Zealand law and amenable in the ordinary way to the jurisdiction of New Zealand Courts and commissions of inquiry. Neither the Cook Islands Constitution Act 1964 nor any other New Zealand enactment has taken the further step of immunising the Audit Office in that capacity as such from the jurisdiction of New Zealand Courts and tribunals. The Audit Office may interplead in respect of the property interests of the Cook Islands in the documents, as it has done. It is not immune ratione personae from the jurisdiction of the commission.

The third background factor is the particular expression of the recognised international law principle of good faith in the special relationship between the two states. Cook Islanders are New Zealand citizens and in the 1973 exchange of letters the Prime Minister of New Zealand stated and the Premier of the Cook Islands agreed that the bond of citizenship "also creates an expectation that the Cook Islands will uphold, in their laws and policies, a standard of values generally acceptable to New Zealanders".

Against that background the public policy argument for requiring production by the Audit Office of the specified documents can be put very shortly. It is not a matter of the forum state simply preferring public policies underlying its domestic laws to those of the foreign state. Fundamental values must be at stake. Where the conduct of the foreign state is in question, refusal of a claim to sovereign immunity could be justified only where the impugned activity, if established, breaches a fundamental principle of justice or some deep-rooted tradition of the forum state.

It is well established that the forum state may assert jurisdiction over certain governmental torts committed within or having an effect within the jurisdiction. The European Convention on State Immunity of 1972, the articles on jurisdictional immunities of states and their property adopted by the International Law Commission in 1991 and many state immunity statutes (including those of Australia, Canada, the United Kingdom and the United States of America) withhold immunity. The basis for the assumption and exercise of jurisdiction is territoriality. The current provisions are confined to physical damage and do not extend to defamation or interference with contractual rights.

Thus s 1605(a)(5) of the United States Code as enacted by the Foreign Sovereign Immunities Act of 1976 provides:"

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case:
>
> (5) . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to:
>
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
>
> (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

One extreme case is *Letelier v Republic of Chile* 488 F Supp 665 (1980). That was a tort claim by the families of dissident Chilean leaders assassinated in Washington, against the Republic of Chile alleging it had directed the assassination. The United States District Court held that the Foreign Sovereign Immunities Act

of 1976 would not protect a foreign government from civil liability in those circumstances. While the decision turned on the construction and application of the particular statutory provision, there are two important points for present purposes. The first is that the assertion of jurisdiction in civil claims against a foreign state does not distinguish between governmental and non-governmental acts. Its basis is the entitlement of the forum state to exercise local control over particular forms of harm or danger. See also *Olsen v Mexico* 729 F 2d 641 (1984), a claim against Mexico arising from the crash within United States territory of an aeroplane carrying prisoners on behalf of Mexico.

As Professor Crawford explains ("International Law and Foreign Sovereigns: Distinguishing Immune Transactions", 54 BYIL (1983) 75, 111):

> "Deliberately to cause such harm or damage on the territory of another State by an act of 'public power' is, in the absence of some special exception, a plain violation of international law, whether the harm is caused by assassination or invasion. The exercise of local jurisdiction in such cases is an assertion of the forum's right, acknowledged by international law, to deal with the consequences of unlawful acts on its territory."

The second point is the observation of Green DJ (p 673): "Whatever policy options may exist for a foreign country, it has no 'discretion' to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law." That reference to international law simply emphasises that a gross violation of international law on foreign territory is an additional ground for refusing sovereign immunity (Schreuer, p 54).

Letelier was an extreme case. There must be other cases where the alleged conduct of the foreign state is directed in a real sense against the forum state or so directly affects it and is so outrageous that the protection international law would otherwise give to the foreign state in matters properly within the jurisdiction of the forum state should not be allowed. The due imposition and collection of taxes is fundamental to the functioning of government. The state has a prime interest in tax enforcement and in the investigation of abuses of its tax system. Defrauding the public revenue strikes at the heart of government. It would be indefensible for a friendly state to be party to an attempt to evade or abuse our tax laws. It would also undermine those values generally acceptable to New Zealanders which the Cook Islands has committed itself to uphold.

The Council of Europe – OECD Convention on Mutual Administrative Assistance in Tax Matters of 1988 which came into force on 1 April 1995 recognises that states have information obligations to each other in international tax matters. The purpose in this regard of the convention is reflected in the opening paragraphs of the preamble:

> "Considering that the development of international movement of persons, capital, goods and services – although highly beneficial in itself – has increased the possibilities of tax avoidance and evasion and therefore requires increasing co-operation among tax authorities;
>
> Welcoming the various efforts made in recent years to combat tax avoidance and tax evasion on an international level, whether bilaterally or multilaterally;
>
> Considering that a co-ordinated effort between States is necessary in order to foster all forms of administrative assistance in matters concerning taxes of any kind whilst at the same time ensuring adequate protection of the rights of taxpayers."

Article 4(1) requires state parties to exchange any information:

". . . that is foreseeably relevant to:

a the assessment and collection of tax, and the recovery and enforcement of tax claims, ..."

Article 5 goes on to provide:

"1. At the request of the applicant State, the requested State shall provide the applicant State with any information referred to in Article 4 which concerns particular persons or transactions.

2. If the information available in the tax files of the requested State is not sufficient to enable it to comply with the request for information, that State shall take all relevant measures to provide the applicant State with the information requested."

And art 7 requires a party, without prior request, to forward to another party information of which it has knowledge in certain circumstances including where:

"*a* the first-mentioned Party has grounds for supposing that there may be a loss of tax in the other Party;

. . .

d a Party has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises."

The convention has not been incorporated by legislation into New Zealand law. It has not yet been ratified by New Zealand. Nevertheless it is a contemporary recognition by the Council of Europe and the OECD that states have responsibilities to each other for the provision of information in their possession relating to international tax transactions. It also reflects the good faith obligation which states owe each other under international law.

Conclusion

The documents in question are held within New Zealand by an agency of New Zealand. They are believed to contain evidence of a conspiracy to which the Cook Islands Government was party to make an abusive claim to foreign tax credits in which reliance on tax certificates issued by the Cook Islands Government was a key feature. In my view to insist on production of those documents for the purpose of copying them would be a proportionate response by New Zealand and should be justified under international law.

The remaining question is whether the Court should take the view that such issues are more appropriately dealt with through diplomatic channels or at least by Executive decision rather than under the exercise of the Court's judgment in assessing underlying policy considerations. That may often be the proper course. But the constituting of the commission recognises that the government made the policy decision to inform itself about the Winebox transactions through a commission of inquiry. The Executive has ruled where New Zealand interests lie in that regard and that the commission is the appropriate mechanism for gathering relevant facts and recommending action within the terms of reference.

I would refuse the declaration and orders sought in the amended statement of claim.

McKAY J. I have had the advantage of reading in draft the judgment of Richardson J in respect of this appeal. I am in agreement with his reasoning and conclusions and concur in the result proposed by the President.

HENRY J. This was the first of three closely related proceedings for review argued in this Court, all having been removed to it by orders of the High Court. All relate to decisions of the defendant acting in his capacity as a commission of inquiry duly appointed by Order in Council. It has become known as the Winebox Inquiry.

In each proceeding challenges were made to the right of the commissioner to require the giving of evidence or the production of documents. Judgments are being delivered contemporaneously in all three proceedings.

The issue in this case is whether the claim of sovereign immunity made by the plaintiff as auditor of the accounts of the Cook Islands Government and on behalf of that government, is to be upheld. The composite judgment of the President and that of Richardson J in this proceeding set out the relevant factual matrix which I need not repeat. I am prepared to approach the issue on the basis that all documents in question are or may be the property of the Cook Islands Government and that the information sought to be disclosed relates to the exercise of the functions of the plaintiff as constitutional auditor of the Cook Islands Government accounts. Whether the auditor is an organ of state needs no separate determination, because in my view the issue can be decided by the application of the recognised exception in respect of commercial transactions. This doctrine, which it is common ground forms part of the law of New Zealand and is referred to as the restrictive theory, is discussed in *Playa Larga (Owners of cargo lately laden on board) v I Congreso del Partido (Owners) I Congreso del Partido* [1983] 1 AC 244 and *Kuwait Airways Corp v Iraqi Airways Co* [1995] 3 All ER 694. In the former Lord Wilberforce said at p 267:

> "The conclusion which emerges is that in considering, under the 'restrictive' theory whether state immunity should be granted or not, the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity."

and at p 269:

> ". . . it is not just that the purpose or motive of the act is to serve the purposes of the state, but that the act is of its own character a governmental act, as opposed to an act which any private citizen can perform."

Although the imposition and collection of a tax is undoubtedly a function of government and not a commercial activity, as is the issuing of a tax credit certificate, in my opinion to allow those factors to be determinative is to ignore the reality of the transactions being investigated. An example of those is what is known as the Magnum transaction, described in some detail by Richardson J in his judgment. It would appear that withholding tax paid to the Cook Islands Government and evidenced by a tax credit certificate for $881,582 was in reality repaid (except for the sum of $50,000) through the medium of a contemporaneous dealing in a promissory note carried out by the Cook Islands Government Property Corporation. The corporation, a statutory body, comprises all members of the Cabinet of Ministers of the Cook Islands. As a result of the dealing the corporation, which has wide commercial powers, retained the sum of $50,000 by way of profit.

One day later a similar procedure was adopted, the amount of tax involved being $1,169,909, the whole of which was effectively repaid. The net result is said to be that the New Zealand taxpayer obtained a reduction of tax otherwise payable in this country of $2,051,191 and the Cook Islands Government received $50,000. As Richardson J observed, in those circumstances put bluntly what occurred was a sale of tax certificates.

The commissioner is inquiring into the propriety of the tax credit consequently claimed under the New Zealand tax legislation. The context in which the act of the Cook Islands Government in issuing the tax credit is to be considered must include

the directly associated promissory note dealing involving the state corporation. That dealing cannot be divorced from the associated collection of "revenue", and in my opinion lends the transaction as a whole a commercial character, with the element of tax collection becoming largely illusory. To use the words of Lord Wilberforce, when put in context the acts in question can properly be considered as falling within a commercial area of activity of a private law character.

The use of a revenue-gathering power, although necessary to the implementation of the whole transaction, is but part of it. There is a strong commercial flavour, with the government and its instrument the corporation being directly and significantly involved. It is difficult to see how it can be said that the acts of the corporation were other than commercial and of a private law character. They cannot be the subject of immunity. The issuing of the tax credit gave rise to and formed an integral part of that commercial activity, and must also have the same character.

In his submissions Mr Barton also argued that the functions of the Audit Office are functions of government (performed by an organ of government) and therefore immune. It is not however the acts of the auditor which are in question. The commissioner is investigating transactions which presumably have come under the audit inspection. If the doctrine of immunity is unavailable to the sovereign state itself because its acts are outside the sphere of governmental activity then I do not think the immunity can be claimed on behalf of government in respect of the audit relating to those acts. The documents held by the auditor are in its possession as a result of the commercial activities of the state.

In his judgment Richardson J gives his reasons for concluding that public policy here requires rejection of the claim to sovereign immunity by reason of the inequity factor. There is in my respectful view merit in the line of reasoning adopted in that judgment. Whether or not this Court should now accept a broad principle of iniquity as affecting and possibly overriding the traditional concept of sovereign immunity – which would be a development beyond that now accepted under the "restricted" theory – is debatable. However in my opinion there are compelling reasons for excluding the doctrine of sovereign immunity, even if the restrictive theory did not apply, without offending current concepts of international law. This case is concerned with the functions of a commission of inquiry whose terms of reference require investigation into the Winebox transactions and the need for change to criminal or tax law to protect New Zealand's tax base from fraud and evasion. There is evidence presently before the commissioner to support a contention that some of the transactions may have defrauded the New Zealand revenue or provided a means for evading tax. The foreign state is said to have been instrumental in a significant way in assisting New Zealand taxpayers to that end. The persons sought to be examined, and the documents sought to be inspected are all in New Zealand. In those circumstances, public policy requires disclosure, not frustration of the objects of the Commission of Inquiry. Principles of international comity do not in my opinion require otherwise.

I would dismiss the application.

THOMAS J. I am spared, and will spare the reader, a review of the background facts and circumstances leading up to this appeal. Those matters have been fully traversed in the draft judgments of Cooke P, Richardson J and Henry J, which I have had the advantage of reading.

I am in agreement with the decision which is reached in each of those judgments. The claim to sovereign immunity cannot be allowed. In the circumstances of this case it would be a denial of the sovereign right of this country to exert jurisdiction within its own territory to excuse the Auditor-General from producing documents held by the Audit Office in New Zealand which are directly relevant to a task of the Commission of Inquiry. The commission was established

by the government to examine the competence of two of its most senior public servants in dealing with certain transactions and, having regard to those transactions, to report on what changes, if any, are required to the criminal or tax law for the purpose of protecting New Zealand's tax base from the effects of fraud, evasion and avoidance. To a greater or lesser extent, the Cook Islands Government is involved in, at least, certain of those transactions, but the inquiry is not directed at either that government or its conduct. The documents are simply required to enable the Commission of Inquiry to discharge its duly authorised function of reporting in accordance with its terms of reference.

Whatever argument may precede or accompany the issue, ultimately no Court of law would be prepared to extend sovereign immunity to the Cook Islands Government in respect of the documents held by the Auditor-General. Different Courts, or different Judges, may adopt different routes in arriving at that conclusion, as evidenced in the judgments of Cooke P and Richardson J, but in the end the same conclusion is inevitable. The Court's decision will be founded expressly or tacitly on perceptions of public policy and expectations of international law which accord with that policy. Neither the content nor application of the doctrine of sovereign immunity is so inflexible as to exclude the influence of those perceptions or expectations.

In this judgment, therefore, I first seek to affirm that the restricted theory of sovereign immunity can be applied without strain or injury so as to disentitle the Cook Islands to immunity from the jurisdiction of this country. In the second place I suggest an alternative, and preferred, approach which would enable the Court to have regard to all relevant factors and criteria in determining whether the doctrine of sovereign immunity should apply or not. In the course of advancing that proposal, I warmly endorse the opinion of Richardson J under the heading of "Iniquity and public policy" to the effect that, as a matter of public policy, the Cook Islands should be refused sovereign immunity.

For the purpose of this judgment, I accept that the Cook Islands is a sovereign independent state, that the Commission of Inquiry is an instrument of the Executive, having been appointed by the Governor-General by Order in Council pursuant to s 2 of the Commissions of Inquiry Act 1908, and that the Audit Office is, or was at the material time, an organ of the Cook Islands Government.

The restricted theory of sovereign immunity

At times during argument counsel on both sides of the case managed to convey the impression that they were addressing the topic in the early part of this century. The doctrine of absolute sovereign immunity, perhaps eroded only by an exception in respect of commercial activity, strictly defined, of the foreign state, was confidently extolled. Such a view is, of course, patently incorrect. Indeed, a number of commentators doubt that the absolute theory of sovereign immunity has ever prevailed. Even English law, which has in the past tended to the monolithic on the subject, is not absolute (see D P O'Connell, *International Law* (2nd ed, 1970) vol 2 at p 843). Exceptions abound, as is to be expected when it is recognised that the principles of state immunity are grounded less in theories of sovereignty than in the needs of international relations. (See *Restatement of The Law The Foreign Relations Law of the United States* (1987) vol 1 as adopted and promulgated by the American Law Institute, 14 May 1986, at p 438). The enumeration of non-immunity situations is so long that it is beyond me to provide an exhaustive list, and I shall not attempt to do so. Reference to any textbook on international law readily reveals the wide-ranging exceptions required by most countries (see Ian Brownlie, *Principles of Public International Law* (4th ed, 1990), at pp 334 to 338). As Professor Sucharitkul reports, absolute immunity, even in common law jurisdictions, has been in decline since *Compania Naviera Vascongado v Steamship "Cristina" The Cristina* [1938] AC 485 (Sompong Sucharitkul, *State Immunities and Trading Activities in International Law* (1959) ch 16).

PRECISION DATA HOLDINGS LIMITED AND OTHERS . . . . . PLAINTIFFS;

AND

WILLS AND OTHERS . . . . . DEFENDANTS.

H. C. OF A. 1991.

CANBERRA, *Sept.* 25, 26; *Oct.* 24.

PERTH, *Dec.* 19.

Mason C.J., Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

Constitutional Law (Cth) — Judicial power of Commonwealth — Corporations and Securities Panel — Acquisition of shares and conduct in relation to shares — Power to declare unacceptable — Power to make orders, after declaration, to protect rights or interests of persons affected by acquisition or conduct or to ensure that takeover proceeds as if acquisition or conduct had not occurred — Whether Panel invested with judicial power — The Constitution (63 & 64 *Vict. c.* 12), *ss.* 71, 72 — *Australian Securities Commission Act* 1989 (*Cth*), *s.* 171 — *Corporations Law of Victoria, ss.* 731, 732, 733, 734.

Section 733(1) of the *Corporations Law of Victoria* provided: "Where it appears to the [Australian Securities] Commission that unacceptable circumstances have, or may have, occurred: (a) in relation to an acquisition of shares in a company; or (b) as a result of conduct engaged in by a person in relation to shares in, or the affairs of, a company; the Commission may apply to the Corporations and Securities Panel for a declaration under subsection (3) in relation to the acquisition or conduct." Sub-section (3) empowered the Panel, where it was satisfied that such unacceptable circumstances had occurred and that, having regard to the matters referred to in s. 731 and any other matters it considered relevant, it was in the public interest to do so, to declare the acquisition to have been an unacceptable acquisition or the conduct to have been unacceptable conduct. Sub-section (5) provided that the Panel might only make a declaration under sub-s. (3) if it had given each person to whom the declaration related an opportunity to appear at a hearing and to make submissions and to give evidence. Where the Panel declared an acquisition or conduct to have been unacceptable, s. 734(2)(a) empowered it, on the application of the Commission, to make "any order that it thinks necessary or desirable to protect the rights or interests of any person affected by the acquisition or conduct or to ensure, as far as possible, that a takeover scheme or takeover announcement, or a proposed takeover scheme or proposed takeover announcement, in relation to shares in the company proceeds in the manner in which it would have proceeded if that acquisition had not taken place or that conduct had not been engaged in". Paragraph (b) specified orders the Panel could make, "without limiting the generality of paragraph (a)". Section 732 provided that "unacceptable circumstances shall be taken to have occurred if, and only if: (a) the shareholders and directors of a company did not know the identity of a

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remedial order; and (b) an order directing a person to do, or refrain from doing, a specified act (6).

Does the Panel exercise judicial power?

It is convenient to consider the plaintiffs' submission that ss. 733 and 734 vest the exercise of judicial power in the Panel. Only in the event that this submission is accepted will it be necessary to consider the plaintiffs' second submission, namely, that the Panel, though it is not a federal court constituted as Ch. III of the Constitution prescribes, is exercising the judicial power "of the Commonwealth". It was submitted that the Panel is empowered to hear and determine a dispute between parties, on the application of the A.S.C., by making a declaration as to past conduct, involving the making of findings of fact, and by making orders affecting the existing rights of parties. Thus, once the Panel declares under s. 733(3) an acquisition of shares to have been an unacceptable acquisition, or conduct engaged in by a person in relation to shares in, or the affairs of, a company to have been unacceptable conduct, the Panel is authorized to make orders affecting such rights. By way of example, the Panel may make an order prohibiting the exercise of voting rights or the acquisition or disposal of specified shares, or an interest in those shares, or an order that the exercise of the voting or other rights attached to specified shares be disregarded. In this setting, so the argument runs, the making of a declaration and the consequential orders amount to an authoritative and binding determination which is characteristic of the exercise of judicial power.

True it is that the making of binding declarations of right by way of adjudication of disputes about rights and obligations arising from the operation of the law upon past events or conduct is a classical instance of the exercise of judicial power (7). But the declarations for which s. 733 provides are not binding declarations of right in the sense in which that term is used, more particularly in the context of the exercise of judicial power. That is because the adjudication which the Panel under s. 733 is called upon to make is not an adjudication of a dispute about rights and obligations arising solely from the operation of the law on past events or conduct.

The acknowledged difficulty, if not impossibility, of framing a definition of judicial power that is at once exclusive and exhaustive arises from the circumstance that many positive features which are

(6) s. 736.
(7) *Re Cram; Ex parte Newcastle Wallsend Coal Co. Pty. Ltd.* (1987), 163 C.L.R. 140, at pp. 148-149.

essential to the exercise of the power are not by themselves conclusive of it. Thus, although the finding of facts and the making of value judgments, even the formation of an opinion as to the legal rights and obligations of parties, are common ingredients in the exercise of judicial power, they may also be elements in the exercise of administrative and legislative power (8). Again, functions which are ordinary ingredients in the exercise of administrative or legislative power can, in some circumstances, be elements in the exercise of what is truly judicial power.

It follows that functions may be classified as either judicial or administrative according to the way in which they are to be exercised (9). So, if the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by considerations of policy also, then the determination does not proceed from an exercise of judicial power (10). That is not to suggest that considerations of policy do not play a role, sometimes a decisive role, in the shaping of legal principles.

Furthermore, if the object of the adjudication is not to resolve a dispute about the existing rights and obligations of the parties by determining what those rights and obligations are but to determine what legal rights and obligations should be created, then the function stands outside the realm of judicial power. In *Re Ranger Uranium Mines* (11) the Court said:

> "The power of inquiry and determination is a power which properly takes its legal character from the purpose for which it is undertaken. Thus inquiry into and determination of matters in issue is a judicial function if its object is the ascertainment of legal rights and obligations. But if its object is to ascertain what rights and obligations should exist, it is properly characterized as an arbitral function when performed by a body charged with the resolution of disputes by arbitration."

The Court was then speaking with reference to an arbitral function of the Conciliation and Arbitration Commission but, as the judgment shows (12), the remarks apply with equal force to

(8) *Re Ranger Uranium Mines Pty. Ltd.; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987), 163 C.L.R. 656, at pp. 665-667; *Re Cram* (1987), 163 C.L.R., at p. 149.

(9) *Reg. v. Hegarty; Ex parte City of Salisbury* (1981), 147 C.L.R. 617, at p. 628; *Re Ranger Uranium Mines* (1987), 163 C.L.R., at p. 665.

(10) *Reg. v. Davison* (1954), 90 C.L.R. 353, at pp. 366-367, per Dixon C.J. and McTiernan J., citing the comments of Lord Simonds L.C. in *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*, [1949] A.C. 134, at p. 149.

(11) (1987) 163 C.L.R., at p. 666.

(12) (1987) 163 C.L.R., at pp. 665-666; see also *Re Cram* (1987), 163 C.L.R., at p. 149.

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determinations made for administrative, executive or legislative purposes.

When the function to be performed by the Panel under s. 733 is examined in the light of the principles stated above, it becomes apparent that the decision to be made by the Panel is not an adjudication of a dispute about *existing* rights and obligations. The Commission alone can institute proceedings before the Panel and invoke an exercise of its authority. In applying for a declaration under s. 733, the Commission is not seeking the vindication of any right or obligation; a declaration, when made, does not resolve an actual or potential controversy as to existing rights. Nor does the Panel, in granting or refusing a declaration, make its decision solely by reference to the application of the law to past events or conduct. Although the function entrusted to the Panel is that of making a declaration about past events or conduct, the function is one in which the Panel is bound to take account of the considerations of commercial policy mentioned in s. 731 (13) and "any other matters the Panel considers relevant" in arriving at the conclusion that it is in the public interest to make a declaration, as well as to apply the provisions of ss. 732 and 733 to the facts which it finds. Furthermore, the object of the inquiry undertaken by the Panel and of the declaration which it makes under s. 733 is to enable the Panel to make one or more of the orders set out in s. 734. In other words, the object of the Panel's inquiry and determination is to create a new set of rights and obligations, that is, rights and obligations arising from such orders as the Panel may make in a particular case, being rights and obligations which did not exist antecedently and independently of the making of the orders. It follows from what has already been said that, in creating that new set of rights and obligations, considerations of policy, including commercial policy, as well as factors not specified by the legislature yet deemed relevant by the Panel, on which it may form a subjective judgment, must inevitably play a prominent part. The materiality of these considerations is reflected in the prescription in s. 172 of the A.S.C. Act of the qualifications for appointment as a Panel member, namely, that he or she have knowledge or experience in one or more of the fields of business, the administration of companies, the financial markets, law, economics and accounting. There is no necessity that any member has a legal qualification.

In some situations, the fact that the object of the determination is

(13) "[T]he desirability of ensuring that the acquisition of shares in companies takes place in an efficient, competitive and informed market."

to bring into existence by that determination a new set of rights and obligations is not an answer to the claim that the function is one which entails the exercise of judicial power. The Parliament can, if it chooses, legislate with respect to rights and obligations by vesting jurisdiction in courts to make orders creating those rights or imposing those liabilities. It is an expedient which is sometimes adopted when Parliament decides to confer upon a court or tribunal a discretionary authority to make orders which create rights or impose liabilities. This legislative technique and its consequences in terms of federal jurisdiction were discussed by Dixon J. in *R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (14). Leaving aside problems that might arise because of the subject-matter involved or because of some prescribed procedure not in keeping with the judicial process, where a discretionary authority is conferred upon a court and the discretionary authority is to be exercised according to legal principle or by reference to an objective standard or test prescribed by the legislature and not by reference to policy considerations or other matters not specified by the legislature, it will be possible to conclude that the determination by the court gives effect to rights and obligations for which the statute provides and that the determination constitutes an exercise of judicial power (15). However, where, as here, the function of making orders creating new rights and obligations is reposed in a tribunal which is not a court and considerations of policy have an important part to play in the determination to be made by the tribunal, there is no acceptable foundation for the contention that the tribunal, in this case the Panel, is entrusted with the exercise of judicial power.

The fact that the Panel is given a power to make orders conditionally upon its having declared the acquisition to have been an unacceptable acquisition or the conduct to have been unacceptable conduct does not indicate that the Panel is exercising judicial power in making the declaration or subsequently in making orders. As the making of a declaration necessarily proceeds in part, at least, from an assessment of considerations of commercial policy, not solely from an application of the law to the facts as found, neither the making of a declaration nor the making of orders is binding in the same sense that a judicial determination would be binding. Both are subject to judicial review. The consequence is that, for much the same reasons as the Trade Practices Tribunal was held not to exercise judicial power in discharging its functions

(14) (1945) 70 C.L.R. 141, at p. 165 et seq.

(15) *Reg v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty. Ltd.* (1970), 123 C.L.R. 361, at p. 377, per Kitto J.

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under ss. 49, 50 and 52 of the *Trade Practices Act* 1965 (Cth) (16), the Panel does not exercise judicial power in making or refusing a declaration under s. 733 or in making or refusing orders under s. 734.

The plaintiffs sought to extract some support for their case from *Mikasa (N.S.W.) Pty. Ltd. v. Festival Stores* (17) where this Court held that s. 90AA of the *Trade Practices Act* 1965 (Cth) vested judicial power in the Commonwealth Industrial Court, although the jurisdiction conferred by that section to grant an injunction was not conditioned by what a court of equity would, in ordinary cases, require before granting such relief. However, in that case, the legislation required the Commonwealth Industrial Court to make findings of fact in relation to events which occurred before the date of the application and to apply to the facts so found the provisions of the Act, in accordance with the construction which the Court put upon those provisions. As Walsh J. noted (18):

> "[I]t is by those processes that the Court determines whether or not a person, who is a party to proceedings before it, has acted in breach of the Act and has thereby rendered himself liable to have an injunction granted against him."

Conclusion

For the foregoing reasons, the plaintiffs' first contention that the functions and powers conferred upon the Panel by ss. 733 and 734 of the *Corporations Law of Victoria* are judicial in nature must be rejected. The rejection of that contention means that it is unnecessary to consider the consequential arguments advanced by the plaintiffs. It is in accordance with this conclusion that the question reserved was answered in the negative, with the consequence that the plaintiffs were ordered to pay the defendants' costs of the question reserved.

Answer the question reserved as follows:

Question: *By reason of the plaintiffs' contentions in paragraphs* 12 *and* 13, *is the Corporations and Securities Panel precluded from validly exercising the functions and powers referred to in sections* 733 *and* 734 *of the Corporations Law of Victoria?*

Answer: *No.*

(16) (1970) 123 C.L.R., at pp. 373-378, esp., per Kitto J.
(17) (1972) 127 C.L.R. 617.
(18) ibid., at p. 649.

The plaintiffs to pay the defendants' costs of the question reserved.

Solicitors for the plaintiffs, *Ebsworth & Ebsworth.*

Solicitor for the fourth defendant, *Australian Government Solicitor.*

Solicitor for the fifth defendant, *Regional General Counsel (Victoria) for the Australian Securities Commission.*

Solicitor for the sixth defendant, *R. C. Beazley*, Victorian Government Solicitor.

Solicitors for the interveners, *P. A. Panegyres*, Crown Solicitor for the State of Western Australia; *B. M. Selway*, Crown Solicitor for the State of South Australia; *W. C. R. Bale*, Crown Solicitor for the State of Tasmania; and *K. M. O'Shea*, Crown Solicitor for the State of Queensland.

R.A.S.

Annex 22: *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656.

RE RANGER URANIUM MINES PROPRIETARY LIMITED AND OTHERS; EX PARTE FEDERATED MISCELLANEOUS WORKERS' UNION OF AUSTRALIA.

H. C. OF A. 1987.

Nov. 12; *Dec.* 16.

Mason C.J., Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

Industrial Law (Cth) — Conciliation and arbitration — Industrial arbitration — Industrial dispute — Conciliation and Arbitration Commission — Jurisdiction — Claim for reinstatement of dismissed employees — Application to vary award to provide for reinstatement — Determination of existence of industrial dispute — Judicial power of the Commonwealth — Conciliation and Arbitration Act 1904 (*Cth*), *ss.* 4(1) *"Industrial matters"* (k), 18, 24(1), 25, 119.

Section 18 of the *Conciliation and Arbitration Act* 1904 (Cth) empowered the Conciliation and Arbitration Commission to prevent or settle industrial disputes by conciliation or arbitration. Section 25 provided for the notification of disputes to the Commission. Section 24(1) required the Commission, subject to power to vary or revoke any finding, in proceedings relating to an industrial dispute or alleged industrial dispute to determine whether there was an industrial dispute and, if so, who were the parties and what were the matters in dispute, and to record its findings. "Industrial dispute" was defined in terms of a dispute as to "industrial matters". "Industrial matters" was defined by s. 4(1) to mean "all matters pertaining to the relations of employers and employees and, without limiting the generality of the foregoing" to include "the right to dismiss or to refuse to employ, or the duty to reinstate in employment, a particular person or class of persons" and "all questions of what is right and fair in relation to an industrial matter having regard to the interests of the persons immediately concerned and of society as a whole".

A union notified the Commission of a dispute between it and a company which was alleged to have arisen from the company's action "of purporting to summarily dismiss seven of its employees". The award under which the employees had been employed did not oblige the employer to reinstate dismissed employees in any circumstances. In the course of a hearing under s. 24(1), the union stated that it sought a variation of the award or a new award providing for the reinstatement of the dismissed employees. The Commission refused to proceed with the matter on the ground that it had no jurisdiction.

Held that a dispute had been notified which was capable of being resolved by the exercise of the Commission's arbitral power.

Per curiam. The resolution of the dispute did not involve the assumption of judicial power notwithstanding that in the course of the resolution of the dispute the Commission might undertake similar inquiries and determine similar questions of fact as would be made and determined in proceedings brought in a court for the enforcement of the award under s. 119 of the Act, and notwithstanding that in the course thereof it might form an opinion about the legal rights and obligations of the parties.

> Without limiting the above, except where a distinction, exclusion or preference is based on the inherent requirements of a particular position, termination on the ground of race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction and social origin shall constitute a harsh, unjust or unreasonable termination of employment."

Ordinarily, in industrial tribunals empowered to order reinstatement, the criterion for the making of an order for reinstatement is that the dismissal was harsh, unjust or unreasonable, although more recently the tendency has been to express the test in terms of unfairness: see *In re Loty and Holloway and Australian Workers' Union* (45). In the present case the Union and the Society each claimed that the dismissals which gave rise to their claim were harsh, unjust and unreasonable. Accordingly it was said that the resolution of the dispute necessarily involved the determination of whether the dismissals were harsh, unjust or unreasonable — a determination which, it was argued, required the Commission, in the context of the Award, to determine whether the employer was in breach of the obligation contained in cl. 7(d)(vi). This, it was contended, necessarily involved an assumption of the judicial power of the Commonwealth, for it involved the Commission in precisely the same task as would be undertaken by a court in the event that proceedings were taken pursuant to s. 119 of the Act alleging breach of cl. 7(d)(vi) of the Award.

It is well settled that functions "may be classified as either judicial or administrative according to the way in which they are to be exercised": *Reg. v. Hegarty; Ex parte City of Salisbury* (46), per Mason J.; see also *Federal Commissioner of Taxation v. Munro* (47), per Isaacs J.; *Reg. v. Spicer; Ex parte Australian Builders' Labourers' Federation* (48), per McTiernan J. and Kitto J. (49); *Re Cram; Ex parte Newcastle Wallsend Coal Co. Pty. Ltd.* (50). A finding that a dismissal is harsh, unjust or unreasonable involves the finding of relevant facts and the formation and expression of a value judgment in the context of the facts so found. Although findings of fact are a common ingredient in the exercise of judicial power, such findings may also be an element in the exercise of administrative, executive and arbitral powers: see *Reg. v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty. Ltd.* (51), per McTiernan J., and

(45) [1971] A.R. (N.S.W.) 95.
(46) (1981) 147 C.L.R. 617, at p. 628.
(47) (1926) 38 C.L.R. 153, at p. 177.
(48) (1957) 100 C.L.R. 277, at p. 293.
(49) (1957) 100 C.L.R., at p. 305.
(50) (1987) 163 C.L.R., at p. 158.
(51) (1970) 123 C.L.R. 361, at p. 371.

H. C. OF A. 1987.

RE RANGER URANIUM MINES PTY. LTD.; EX PARTE FEDERATED MISCELLANEOUS WORKERS' UNION OF AUSTRALIA.

Mason C.J. Wilson J. Brennan J. Deane J. Dawson J. Toohey Gaudron J.

Reg. v. Hegarty; Ex parte City of Salisbury (52), per Murphy J. So too with the formation and expression of value judgments.

In our view the fact that the Commission is involved in making a determination of matters that could have been made by a court in the course of proceedings instituted under s. 119 of the Act does not ipso facto mean that the Commission has usurped judicial power, for the purpose of inquiry and determination is necessarily different depending on whether the task is undertaken by the Commission or by a court. The purpose of the Commission's inquiry is to determine whether rights and obligations should be created. The purpose of a court's inquiry and determination is to decide whether a pre-existing legal obligation has been breached, and if so, what penalty should attach to the breach.

The power of inquiry and determination is a power which properly takes its legal character from the purpose for which it is undertaken. Thus inquiry into and determination of matters in issue is a judicial function if its object is the ascertainment of legal rights and obligations. But if its object is to ascertain what rights and obligations should exist, it is properly characterized as an arbitral function when performed by a body charged with the resolution of disputes by arbitration.

Inquiry into and determination of facts for the purpose of ascertaining what rights and obligations should be brought into existence in settlement of an industrial dispute does not cease to be an exercise of arbitral power merely because, in the course thereof, the Commission may form an opinion as to the existing legal rights and obligations of the parties. As was pointed out in *Re Cram; Ex parte Newcastle Wallsend Coal Co. Pty. Ltd.* (53), the formation of an opinion as to legal rights and obligations does not involve the exercise of judicial power, at least if it is "a step in arriving at the ultimate conclusions on which [is based] the making of an award intended to regulate the future rights of the parties". For, as was there made clear, "the formation of such an opinion does not bind the parties and cannot operate as a binding declaration of rights".

It follows in our opinion that the dispute notified to the Commission is a dispute capable of resolution by the exercise of arbitral power. The resolution of the dispute does not involve the assumption of judicial power not possessed by the Commission, notwithstanding that in the course of the resolution of the dispute the Commission may undertake similar inquiries and determine similar questions of fact as would be made and determined in proceedings brought for the enforcement of the Award pursuant to

(52) (1981) 147 C.L.R., at p. 631. (53) (1987) 163 C.L.R., at p. 149.

s. 119 of the Act, and notwithstanding that in the course thereof it may form an opinion as to the legal rights and obligations of the parties.

It must be acknowledged that where an award seeks to impose limits upon the right of an employer to terminate employment, there exists a potential for inconvenience and embarrassment if proceedings are brought under s. 119 of the Act and are concurrently brought in the Commission to create new rights and obligations by reference to the same issues which fall for determination in s. 119 proceedings. To some extent that potential will be minimized by reason that considerations other than unfairness will be relevant in determining whether an award should be made creating an obligation upon an employer to reinstate an employee. In some cases the nature of the relationship necessary for the proper performance of the work will render the making of an award for reinstatement undesirable. However, in other cases where enforcement or other legal proceedings are available or current, this will be a matter to be taken into account by the Commission in deciding pursuant to s. 41(1)(d)(iii) of the Act whether it should refrain from further hearing or determining the dispute on the ground that further proceedings are not desirable in the public interest.

The order nisi for mandamus should be made absolute in respect of matter No. C3670 of 1986. It is unnecessary for certiorari to issue to the members who constituted the Full Bench of the Commission, and the order nisi for certiorari should thus be discharged.

Order nisi for a writ of mandamus in relation to matter No. C3670 made absolute.
Order nisi for a writ of certiorari discharged.

Solicitors for the prosecutor, *Steve Masselos & Co.*

Solicitors for the respondent company, *Corrs Pavey Whiting & Byrne.*

Solicitor for the Attorney-General for the Commonwealth, *Australian Government Solicitor.*

J.D.M.

ATTORNEY-GENERAL FOR THE COMMONWEALTH OF AUSTRALIA..... APPELLANT;
INTERVENER,

AND

ALINTA LIMITED AND OTHERS..... RESPONDENTS.
APPLICANTS,

[2008] HCA 2

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

HC of A 2007-2008

Oct 2, 3; *Dec* 13 2007

Jan 31 2008

Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ

Constitutional Law (Cth) — Judicial power of Commonwealth — Takeovers Panel — Declaration that circumstances unacceptable — Whether functions of Takeovers Panel involve exercise of judicial power — Commonwealth Constitution, Ch III — Corporations Act 2001 (Cth), s 657A.

High Court — Practice — Parties — Interveners and amici curiae — Appeal — Special leave granted to intervener — Whether intervener as of right a party after resolution of controversy between original parties — Whether appropriate for amici curiae to contradict intervener's submissions on appeal.

A Ltd and AGL Co agreed to merge certain assets. Those assets included 30 per cent of the issued units in a pipeline trust held by AGL Co. A wholly-owned subsidiary of A Ltd later acquired on the market a further 10¼ per cent of the issued units in the trust. The responsible entity of the trust (APL) applied to the Takeovers Panel under s 657A of the *Corporations Act 2001* (Cth) for a declaration of "unacceptable circumstances". Section 657A(2) provided that the Panel could declare circumstances to be unacceptable circumstances only if it appeared to the Panel that they "(a) are unacceptable having regard to the effect of the circumstances on: (i) the control, or potential control, of the company or another company; or (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in the company or another company; or (b) are unacceptable because they constitute, or give rise to, a contravention of a provision of [Chapter 6] or of Chapter 6A, 6B or 6C." It further provided that the Panel could only make or decline to make a declaration under sub-s (2) if it considered that doing so was not against the public interest after taking into account any policy considerations that the Panel considered relevant. The Panel made a declaration under s 657A in relation to the proposed merger and an order under s 657D vesting in the Australian Securities and Investment Commission the units acquired by the subsidiary.

A Ltd applied unsuccessfully to the Federal Court for judicial review of the Panel's declaration and order on the ground that the Panel's decisions

were invalid as an exercise of the judicial power of the Commonwealth by a body other than a court under Ch III of the *Commonwealth Constitution*. A Ltd and its subsidiary appealed to a Full Court of the Federal Court. Pursuant to s 78A of the *Judiciary Act 1903* (Cth), the Attorney-General for the Commonwealth intervened. The Full Court allowed the appeal and declared that s 657A(2)(b) was invalid.

APL and the Attorney-General were granted special leave to appeal to the High Court of Australia. The underlying commercial controversy was subsequently resolved. APL did not file a notice of appeal. A Ltd and its subsidiary applied for orders revoking in full or in part the special leave granted to the Attorney-General. The Attorney-General applied for and was granted leave to amend the notice of appeal to confine the issues raised in his appeal to the validity of s 657A(2)(b). He also caused counsel not previously engaged in the proceedings to be retained to apply for leave to appear in the High Court as amici curiae and submit arguments supporting the declaration of invalidity.

Held, that s 657A(2)(b) did not confer judicial power on the Panel and therefore was valid.

Per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ. No single combination of necessary or sufficient factors identifies judicial power. That policy considerations are taken into account is not necessarily conclusive. A decision of the Panel creates new rights and obligations and provision is made for their enforcement by a court in the independent exercise of judicial power. Hence the Panel does not exercise the judicial power of the Commonwealth.

Per Gleeson CJ. In deciding whether to make a declaration of unacceptable circumstances, and remedial orders, the Panel is required to take account of considerations and interests to which the judicial process is ill-adapted. The constitution of the Panel, the nature of the legislative purposes it pursues, the way in which it is intended to go about its supervisory and regulatory function, the way in which it informs itself about matters that arise for its consideration and the nature of the considerations according to which it acts or declines to act all point against a conclusion that it exercises judicial power.

Per Gummow J. Whether s 657A(2)(b) is invalid depends on whether the authority it confers on the Panel is essentially and exclusively judicial in nature. The "historical approach" cannot support an argument of invalidity in this case. The partial displacement of contractual rights and obligations by the takeovers regime does not stamp the functions of the Panel with the character of judicial power. Matters of policy can enter permissibly into the exercise of judicial power.

Per Hayne J (Gleeson CJ and Gummow J agreeing). That an order of the Panel is open to challenge by proceedings under s 75(v) of the *Constitution*, by proceedings for relief under s 39B of the *Judiciary Act 1903* (Cth), and in other judicial proceedings, further points away from the conclusion that the Panel exercises judicial power.

Per Crennan and Kiefel JJ (Gleeson CJ and Gummow J agreeing). The consideration which the Panel can give by operation of s 657A(2)(b) to

the fact that a contravention of the provisions of Chs 6, 6A, 6B and 6C has occurred does not render its function judicial.

R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd (1970) 123 CLR 361 and *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, applied.

Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245, distinguished.

Held, further, that the lack of a contradictor to the arguments of the Attorney-General for the Commonwealth was a sufficient and, in the circumstances, a compelling reason to grant the amici curiae leave to appear.

Decision of the Federal Court of Australia (Full Court): *Australian Pipeline Ltd v Alinta Ltd* (2007) 159 FCR 301, reversed.

APPEAL from the Federal Court of Australia.

Alinta Ltd and The Australian Gas Light Co (AGL) agreed to merge their infrastructure assets. Those assets included 30 per cent of the issued units in the Australian Pipeline Trust held by AGL. A wholly-owned subsidiary of Alinta, Trewas Pty Ltd, later acquired on the market a further 10¼ per cent of the issued units in the Trust. Australian Pipeline Ltd, the responsible entity of the Trust, applied to the Takeovers Panel for a declaration of "unacceptable circumstances" under s 657A of the *Corporations Act 2001* (Cth). The consequence of such a declaration was that the Takeovers Panel could make one or more "remedial orders". The Takeovers Panel made a declaration of "unacceptable circumstances" and orders under s 657D vesting in the Australian Securities and Investment Commission the units in the Trust that Alinta, through Trewas, had acquired.

Alinta applied to the Federal Court of Australia for judicial review of the Panel's decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). It contended that the Panel's decisions were invalid because they involved the exercise of the judicial power of the Commonwealth by a body other than a court under Ch III of the *Constitution*. Australian Pipeline also brought proceedings claiming declarations that Alinta's acquisitions of units contravened s 606 of the *Corporations Act*, which prohibited the acquisition of relevant interests in shares or securities of a body corporate except in accordance with that Act. Both proceedings were dismissed by Emmett J (1). Alinta, Trewas and Australian Pipeline each appealed to a Full Court of the Federal Court. Pursuant to s 78A of the *Judiciary Act 1903* (Cth), the Attorney-General for the Commonwealth intervened in the appeals. The Full Court (Gyles and Lander JJ, Finkelstein J dissenting) ordered that Alinta's appeal be allowed and declared that s 657A(2)(b) of the *Corporations Act* was invalid, because it purported to confer on the Panel the judicial power of the Commonwealth, that the Panel's

(1) *Australian Pipeline Ltd v Alinta Ltd* (2006) 237 ALR 158.

declaration of "unacceptable circumstances" be quashed and that the vesting orders be set aside. It also ordered that the appeal of Australian Pipeline Ltd be allowed and declared that Alinta's acquisition of units contravened s 606 (2). The Attorney-General for the Commonwealth was granted special leave to appeal to the High Court by Gleeson CJ, Gummow and Callinan JJ. Australian Pipeline was granted special leave to appeal and sought an order that s 657A(2)(b) was valid. A separate application for special leave brought by Alinta and Trewas against the orders of the Full Court allowing the appeal by Australian Pipeline and declaring the on-market acquisitions to be in contravention of s 606 was referred for argument before the Full Court of the High Court.

The underlying commercial controversy was later resolved. Australian Pipeline did not file a notice of appeal. Alinta and Trewas discontinued their application for special leave and applied for orders revoking the special leave granted to the Attorney-General for the Commonwealth or revoking it in part so that the scope of the appeal was limited to whether the declaration of invalidity of s 657A(2)(b) should be set aside. The Attorney-General then applied for leave to amend the notice of appeal to confine the issues raised in his appeal to the validity of s 657A(2)(b). The Attorney-General also caused counsel not previously engaged in the proceedings to be retained to apply for leave to appear in the High Court as amici curiae and submit arguments supporting the declaration of invalidity made by the Full Court of the Federal Court.

J R L Lockhart, for the first and second respondents, submitted, in support of an application that special leave be revoked in part, that the orders granting special leave should be limited to the issue contained in the Attorney-General's amended notice of appeal, the validity of s 657A(2)(b) of the *Corporations Act 2001* (Cth), and that leave should be granted to the Attorney-General to amend his notice of appeal accordingly.

D M J Bennett QC, Solicitor-General for the Commonwealth, *M A Perry* QC and *E A Collins*, for the appellant and the third respondent, did not oppose the application because, as it was submitted, the application was immaterial, since it sought to reduce the special leave to the issue contained in the Attorney-General's amended notice of appeal.

The Court heard argument on the application for leave for *P J Hanks* QC, *S P Donaghue* and *F I Gordon* to be appointed as amici curiae.

D M J Bennett QC, Solicitor-General for the Commonwealth, (with him *M A Perry* QC and *E A Collins*). The Attorney-General is affected

(2) *Australian Pipeline Ltd v Alinta Ltd* (2007) 159 FCR 301.

The Panel's task

88 Delaying the institution or prosecution of proceedings in which a private party affected by an actual or proposed takeover bid alleges that there has been a contravention of a provision of one of the specified Chapters of the *Corporations Act* is at least consistent with the Panel's task under s 657A being the task of creating new rights and obligations as between those affected by the bid. And as explained earlier, the requirement that the Panel take into account any policy considerations that it considers relevant (s 657A(2)), in deciding whether to make or not make a declaration, coupled with the obligation to have regard to the matters identified in s 657A(3)(a) and the power to have regard to any other matters it considers relevant (s 657A(3)(b)) reinforce the view that the Panel's task is better described as the creating of new rights and obligations rather than the quelling of a controversy about contravention of the *Corporations Act*.

89 Further, the question before the Panel is not confined to any question of contravention. The Panel may make a declaration under s 657A, a final order under s 657D, or an interim order under s 657E, only on an application under s 657C (s 657C(1)). The persons who may apply for a declaration or an order are limited (s 657C(2)) to the bidder, the target, ASIC or "any other person whose interests are affected by the relevant circumstances". Leaving aside ASIC (which is not affected by the limitations on bringing court proceedings relating to a takeover bid before the end of the bid period), those who may make application to the Panel all have commercial interests underpinning their application. Those of the bidder and the target are self-evident; the interests of a person "whose interests are affected by the relevant circumstances" are necessarily larger than and different from a bare interest in enforcement of compliance with the relevant provisions of the *Corporations Act*. And the Panel may *not* make an order directing a person to comply with the requirement of the provision that has been contravened (s 657D(2)).

90 In these circumstances, it is not right to describe the proceedings before the Panel as encompassing only a controversy about contravention. The issues which arise in an application to the Panel by a party other than ASIC are necessarily wider and extend to the commercial questions that emerge from that party's interests in the bid in question. It follows that to describe the Panel as quelling a controversy about contravention is inaccurate. Even if it were right to describe the Panel's task as quelling a controversy, the controversy or dispute with which the Panel deals, when s 657A(2)(b) is engaged, is wider than a controversy or dispute about contravention of the *Corporations Act*.

Enforcement of the Panel's orders

91 It was not disputed, whether in this Court or in the courts below, that the Panel's orders under s 657D are not enforceable by the Panel. Rather, contravention of an order of the Panel is made an offence under

s 657F. And "the Court", which is to say one of the several courts identified in s 58AA of the *Corporations Act* (119), may make orders to secure compliance with an order made by the Panel (s 657G).

92 Whether, as the majority in the Full Court held (120), these provisions provide "stronger methods of enforcement than were present in *Brandy*" depends upon what is meant by "stronger". If, as seems most likely, the "strength" of the enforcement methods is no more than a reference to the nature of the consequences that may follow disobedience, the observation is not to the point in deciding whether the Panel exercises the judicial power of the Commonwealth.

Judicial power?

93 As *Brandy* demonstrated, and has been recognised since the very earliest decisions of this Court about Ch III (121), no single combination of necessary or sufficient factors identifies what is judicial power. So much is made plain by the so-called chameleon doctrine (122) and the cases in which that doctrine has been engaged.

94 In *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (123), in a passage often since applied in this Court (124), Kitto J said:

> "[A] judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist."

(119) The Federal Court, the Supreme Court of a State or Territory, the Family Court of Australia and "a court to which section 41 of the *Family Law Act 1975* (Cth) applies because of a Proclamation made under sub-section 41(2) of that Act".

(120) (2007) 159 FCR 301 at 388-389 [408].

(121) *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357; *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434; *R v Davison* (1954) 90 CLR 353 at 368-369; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189.

(122) *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1 at 8.

(123) (1970) 123 CLR 361 at 374.

(124) See, eg, *R v Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 636 at 655; *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at 12; *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 320; *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 532, 685; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 109-110 [41].

95 In *Tasmanian Breweries*, the legislation in issue (the *Trade Practices Act 1965* (Cth)) did not require the relevant tribunal to adjudicate upon any claim of right (125) but did render unenforceable the restriction or practice found to be contrary to the public interest. But as Kitto J went on to say (126):

> "The determination [by the tribunal] itself has no operative effect: it constitutes the factum by reference to which the Act operates to alter the law in relation to the particular case. And an order under s 52 (or an interim restraining order under s 54) is in like case. It presents a direct contrast with an injunction granted by a court as a means of enforcing obligations that have been established by adjudication. The order restrains future conduct, not as being in breach of ascertained obligations, but as being in conformity with ascertained obligations or practices – not in order to ensure observance of them but to prevent observance of them, because it is considered that their observance would be against the public interest. The Act, particularly s 52(7), operates upon the order to give its provisions the force of law, and thus to alter the law for the future in relation to the particular case."

96 The features of the legislation in issue in *Tasmanian Breweries* which were identified in that case are also to be observed in the relevant provisions of the *Corporations Act*. The Panel is required to conclude whether a declaration of unacceptable circumstances should be made. If s 657A(2)(b) is engaged, the Panel must decide, along the way, whether there has been a contravention of a relevant provision of the *Corporations Act*. But if it does decide that there has been a contravention, the conclusion to which the Panel must ultimately come is whether identified circumstances should be declared unacceptable. In making a declaration, or orders consequent upon a declaration, the Panel does not create a charter for the observance of the rights and obligations that attach *to the contravention*. The Panel's powers to make orders expressly exclude (s 657D(2)) the power to make "an order directing a person to comply with a requirement of Chapter 6, 6A, 6B or 6C". The charter that is established by the Panel's order is for the observance of the rights and obligations that are created *in consequence of a declaration* being made. For, if a declaration is made, an order is framed to prevent the consequences of what have been found to be unacceptable circumstances. The order is framed to prevent those consequences by "protect[ing] the rights or interests of any person affected by the circumstances" (s 657D(2)(a)) or by "ensur[ing] that a takeover bid or proposed takeover bid ... proceeds (as far as possible) in a way that it would have proceeded if the circumstances had not occurred" (s 657D(2)(b)). The order constitutes the new charter of rights and obligations of the parties. And the *Corporations Act*

(125) (1970) 123 CLR 361 at 377.
(126) (1970) 123 CLR 361 at 378

"operates upon the order to give its provisions the force of law, and thus to alter the law for the future in relation to the particular case" (127).

97 It is then for the courts in the exercise of judicial power to enforce the law as it has been framed by the Panel's orders. There is what was identified in *Brandy* (128) as "an independent exercise of judicial power" to give effect to the Panel's orders.

98 The orders of the Panel stand in sharp contrast with the determinations of the Human Rights and Equal Opportunity Commission considered in *Brandy*. By the provisions of the *Racial Discrimination Act 1975* (Cth) in issue in *Brandy*, the Commission's determination, when registered as it had to be, was binding upon the parties and enforceable as an order of the Federal Court. But the determination remained the determination of the Commission and in no sense became the determination of the Federal Court (129). Under the relevant provisions of the *Corporations Act*, the binding effect of the orders of the Panel is determined by the Court which is called upon to decide whether orders should be made under s 657G to secure compliance with them or to decide whether there has been an offence committed under s 657F by a person contravening a valid order of the Panel.

99 This analysis of the effect of the relevant provisions requires the conclusion that the Panel does not exercise the judicial power of the Commonwealth.

100 It is important, however, to notice one further consideration which strengthens the case for validity of the impugned provisions. Although the *Corporations Act* gives an order of the Panel the force of law and makes contravention of the Panel's order an offence, an order of the Panel is open to challenge. It is open to direct challenge by proceedings under s 75(v) of the *Constitution* or proceedings seeking relief under s 39B of the *Judiciary Act*. No less importantly, an order of the Panel is open to collateral challenge (130) in other judicial proceedings in which its valid making is an element in issue. That an order of the Panel may be challenged in these ways points away from a conclusion that the Panel exercises judicial power.

Conclusions and orders

101 For these reasons, the Full Court erred in holding that s 657A(2)(b) was invalid as purporting to confer the judicial power of the Commonwealth on the Panel.

102 The appeal to this Court should be allowed. So much of para 2 of the orders of the Full Court of the Federal Court of Australia as ordered

(127) *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 378.
(128) (1995) 183 CLR 245 at 261.
(129) (1995) 183 CLR 245 at 270.
(130) *Breckler* (1999) 197 CLR 83 at 111-112 [46].

contradictor to the arguments to be raised, the Attorney-General made arrangements for counsel, having no prior connection to the proceedings, to appear as amici curiae, in the event that the Court granted leave. That leave was granted at the commencement of the hearing.

150 The declaration sought by the Attorney-General was in wide terms: that s 657A of the Act is valid. The declaration of invalidity made by the Full Court is limited to s 657A(2)(b). And the invalidity in question is confined to contravention of Ch III of the *Constitution*, by investing judicial power in the Panel. This was accepted as the correct position on the hearing of the appeal. The question on the appeal is to be understood as so confined.

The appeal

151 No issue is taken with the approach taken by the Court in *Precision Data* to the question whether an exercise of judicial power is involved in a function such as the Panel's. The starting point is the identification of those features of the judicial function that are essential to it. Their presence characterises the power exercised as judicial. In *Precision Data* the Court referred to the difficulty, if not the impossibility, of framing an exclusive and exhaustive definition of judicial power. It arose from the many positive features essential to the exercise of the power but which were not conclusive of it (177).

152 The purpose of the judicial function identified by their Honours is not controversial. An adjudication is undertaken in order to resolve a dispute about the existing rights and obligations of the parties by determining what they are, not in order to determine what rights and obligations should be created (178). Holmes J, delivering the opinion of the Court in *Prentis v Atlantic Coast Line Co* (179) said that a judicial inquiry "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end."

153 It is both logical and necessary that the right or obligation in question exist independent of, and prior to, the exercise of judicial power (180). The controversy about its existence is the hallmark of a matter before the courts (181). The ascertainment of its existence is exclusively a judicial function (182). In doing so the courts apply the

(177) (1991) 173 CLR 167 at 188-189; and see *Labour Relations Board (Saskatchewan) v John East Iron Works Ltd* [1949] AC 134 (PC).

(178) *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 463 per Isaacs and Rich JJ; *Tasmanian Breweries* (1970) 123 CLR 361 at 396 per Windeyer J; *Re Ranger Uranium Mines* (1987) 163 CLR 656 at 665.

(179) (1908) 211 US 210 at 226.

(180) *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 442-443 per Griffith CJ.

(181) *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 per Griffith CJ.

(182) *R v Davison* (1954) 90 CLR 353 at 369 per Dixon CJ and McTiernan J.

law, not considerations foreign to it, such as policy (183), which is to say policy which is not of the law. The conclusion of the judicial process was described by Kitto J in *Tasmanian Breweries* (184):

> "[T]he end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist."

154 In his Honour's view a power that does not involve a process which applies the law to the facts as determined and lead to such an end needs special qualities to make it judicial (185).

155 Neither a legislative, an executive nor an arbitral function has as its purposes the ascertainment and recognition of existing rights or obligations. It follows that the result reached cannot be the same as that of the judicial function. Holmes J described the legislative function as looking to the future and having as its purpose the creation of a new rule to be applied (186). In *Prentis* the legislative act was the fixing of railway passenger rates.

156 In *Precision Data* the Court gave as an example of a non-judicial function, the arbitration of an industrial dispute (187). Viewed in general terms, arbitration is a claim by one party that relations should be altered, with the other party not conceding that claim (188). In the case to which the Court there referred, *Re Ranger Uranium Mines*, it was pointed out that an industrial dispute concerning the dismissal of an employee is properly to be viewed as a claim for the creation of an obligation, on the part of the employer, to reinstate (189). In that example the employee does not have a legal entitlement to reinstatement arising from the contract of employment. If the employee did have such a right the courts, but not an arbitral body, could recognise and give effect to it. The local coal authority in *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* (190) could settle claims as a matter of what was right and fair as between the parties, but not a claim for the payment of wages, which was a matter of legal entitlement.

157 The majority in the Full Court placed some weight upon the acknowledgment in *Precision Data* (191), that the Parliament

(183) *Labour Relations Board (Saskatchewan) v John East Iron Works Ltd* [1949] AC 134 at 149 per Lord Simonds, delivering the opinion of the Privy Council; approved *R v Davison* (1954) 90 CLR 353 at 366-367 per Dixon CJ and McTiernan J.

(184) (1970) 123 CLR 361 at 374 per Kitto J.

(185) (1970) 123 CLR 361 at 374-375.

(186) *Prentis* (1908) 211 US 210 at 226.

(187) (1991) 173 CLR 167 at 189.

(188) *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 463 per Isaacs and Rich JJ.

(189) (1987) 163 CLR 656 at 664.

(190) (1987) 163 CLR 140.

(191) (1991) 173 CLR 167 at 191.

sometimes confers upon courts authority to make orders which create rights and liabilities. However, the Court made plain that what is exercised is nevertheless judicial power, which requires the application of legal principle and objective standards, not reference to policy considerations and other matters not specified by the legislature. Considerations of that kind had an important part to play in the determination to be made by the Panel. That did not provide a proper foundation for the contention that it was entrusted with judicial power, the Court held.

158 The result of the exercise of judicial power, of which Kitto J spoke in *Tasmanian Breweries*, assumes some importance in connection with the declaration and the orders made by the Panel in this case. Palles CB in *R (Wexford County Council) v Local Government Board for Ireland* (192) and Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead* (193) identified as an essential element in the judicial process that it resulted in a binding and authoritative determination (194). It is the judicial determination which pronounces the existence of the right or duty and obliges the parties to that recognition. It is not an exercise of judicial power if effect is not given to a controversial matter of legal right (195).

159 A non-judicial determination does not itself have force and effect. It is the statute which stamps an arbitrator's opinion with legal rights or obligations, so that when it is declared those are the mutual rights and obligations (196). In *Tasmanian Breweries* the statute operated upon the determination to render the agreement or practice unenforceable. As Kitto J pointed out (197), the findings made by the Tribunal did not bind the parties in the sense referred to by Palles CB. The Tribunal did not conclude any question between them and its determination had no operative effect.

160 The provision in s 657A(2)(b), which permits the Panel to consider whether a contravention has occurred in connection with the making of a declaration, is a point of departure from the legislation considered in *Precision Data*. It may be inferred that in *Tasmanian Breweries* the absence of any inquiry into the validity or legality of the practice or agreement in question was taken to indicate that a judicial function was not involved (198). The finding of, and conviction for, an offence together with the imposition of penalties are matters regarded as

(192) [1902] 2 IR 349 at 373-374.
(193) (1909) 8 CLR 330 at 357.
(194) And see *Brandy* (1995) 183 CLR 245 at 258 per Mason CJ, Brennan and Toohey JJ.
(195) *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 443 per Griffith CJ; at 451 per Barton J.
(196) *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 463 per Isaacs and Rich JJ.
(197) (1970) 123 CLR 361 at 376-378.
(198) (1970) 123 CLR 361 at 375 per Kitto J.

exclusively pertaining to judicial power (199). So too is the grant of an injunction on the finding of a contravention of a statute (200). On the other hand, it is not uncommon for a tribunal to find it necessary to form an opinion as to the existence of the legal rights of the parties as a step in arriving at its ultimate decision (201).

161 Another feature of the current legislation, pointed to by the majority in the Full Court, is that the applicant for a declaration is no longer limited to ASIC. The bringing of an application by persons whose interests might be affected, by the circumstances arising in connection with a takeover, may suggest a dispute about rights as more likely. The majority thought so, and that the Panel's function involved adjudication between the parties (202). The adjudication of a dispute is itself, however, neither conclusive, nor even a strong indicator, of a judicial function. It is commonplace in administrative law (203). A non-judicial function, such as arbitration, does not cease to be so because the decision-maker forms an opinion as to existing legal rights and obligations (204). A controversy of the kind dealt with by the courts requires more than an adjudication of some dispute. A controversy has as its subject matter the existence of a legal right or obligation. The majority clearly considered that the contravention referred to in s 657A(2)(b) provided that subject matter (205). It may be inferred that their Honours considered that the Panel's determination under the sub-section was declaratory of it.

162 Sub-section (1) of s 657A provides a power, expressed in non-obligatory terms (may declare), to make a declaration that the affairs of a company are unacceptable. The purpose of sub-s (2) is to provide for the occurrences which may constitute unacceptable circumstances. Paragraph (a) requires an opinion, on the part of the Panel, about the effect of the circumstances on the company. Paragraph (b) requires only that the Panel be satisfied that there has been a contravention. The paragraph treats a contravention as synonymous with unacceptable circumstances. The circumstances are unacceptable "because" they constitute or give rise to a contravention of the Chapters.

163 The Panel may make something in the nature of a finding in relation to the contravention. There may be a dispute about whether it has occurred, for example if the acquisition in question is denied, where a

(199) *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 444 per Griffith CJ.
(200) *Mikasa (NSW) Pty Ltd v Festival Stores* (1972) 127 CLR 617.
(201) *Re Cram* (1987) 163 CLR 140 at 149 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ.
(202) (2007) 159 FCR 301 at 386 [400].
(203) *Tasmanian Breweries* (1970) 123 CLR 361 at 371 per McTiernan J; *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 463 per Isaacs and Rich JJ.
(204) *Re Ranger Uranium Mines* (1987) 163 CLR 656 at 665.
(205) (2007) 159 FCR 301 at 389-390 [412].

subsidiary company or third party has purchased the shares. Some such question arose in the present proceedings. The Panel's finding may have some evidentiary effect in later proceedings (s 658B), but it is not suggested that it is itself binding upon the parties or that it is determinative of any legal question.

164 If a declaration was made at this point it may more readily be inferred that the contravention was its sole subject matter. The making of a declaration upon the basis of a finding of contravention is not, however, possible at this point. Sub-section (3) and the concluding words of sub-s (2) direct attention to other considerations. It is necessary to have regard to those considerations to determine whether the finding of "unacceptable circumstances", of which sub-s (2) speaks, is a conclusion reached by the Panel by reference to matters other than the contravention.

165 Section 657A(3) requires that, in exercising any power under the section, the Panel must have regard to the purposes of Ch 6 and in particular those referred to in s 602. It will be recalled that the section states the principles of maintaining a well-informed, efficient and competitive market, that shareholders and directors be well-informed and have an opportunity to properly consider any offer of acquisition and that shareholders be able to participate in any benefits the takeover proposal offers. The other matters which the Panel is permitted to take into account would be consistent with these purposes. These considerations could not inform a discretion to make or refuse a declaration in a situation where there has been a contravention of a provision of the Chapters. The matters to which sub-s (3) refers concern the principles upon which those provisions are based. A reference to them could add nothing to the conclusion that the circumstances are unacceptable.

166 The concluding words of sub-s (2), however, import considerations of the public interest, and policy considerations relevant to it, in connection with the Panel's decision to make or to decline to make a declaration. The question which arises, when a contravention has occurred, is whether those considerations have a part to play in a decision whether to make or refuse to make a declaration.

167 Where a contravention is found to have occurred it may be thought that the making of a declaration is the only course consistent with the public interest. The public interest ordinarily requires the maintenance of standards set by statutes. It was pointed out in argument, however, that some contraventions may have less serious consequences than others. Even when that is not the case, considerations of interests other than those directly affected by the share acquisitions may lead the Panel to conclude that no action should be taken and that the takeover proposal should be permitted to proceed. In either case the point is that the public interest is to be taken into account in making the decision. This implies a process where the Panel weighs the contravention and its effects with other considerations in order to determine what is required.

168 Policy considerations are more often regarded as applying to a non-judicial process of decision-making. This is not to say that statutes do not sometimes require the courts to have regard to the public interest. Whether it is possible for a court to do so, consistent with its function, may depend upon what guide is given by the statutory context and stated criteria. Where policy considerations relevant to the public interest are ill-defined and subjective, their application may be regarded as inappropriate to the judicial method (206) and more consonant with a non-judicial process of decision-making. The policy considerations here reserved to the Panel are potentially of wide range, even with statements of statutory purpose. They may involve matters relevant to the market, corporate behaviour and the interests of stakeholders beyond those directly affected by the proposal. In this regard Panel members may be taken to be qualified to make an assessment by their knowledge and experience.

169 The considerations relevant to the Panel's decision point to a non-judicial function being undertaken. But such a conclusion is not reached by reference to the nature of the considerations alone. When identifying whether administrative power is being exercised, considerations of policy will not necessarily be decisive (207). The taking into account of policy considerations is part of a statutory scheme in which the declaration is preliminary to action taken by the Panel. The declaration is a statement of the Panel's conclusion that, having regard to the circumstances created by the contravention and to the public interest, it considers something needs to be done about those circumstances. They are "unacceptable" in the sense that they cannot remain as they are and that they require consideration to be given to the orders that may be made under s 657D. It follows that a declaration of unacceptable circumstances made under s 657A(2)(b) is not operative and determinative of any question of legal obligation.

170 In *Tasmanian Breweries* the determination by the Tribunal, that the agreement or practice was contrary to the public interest, was held to have no binding or operative effect. It was described as the factum upon which the section rendering it unenforceable depended (208). This approach was relied upon by the Attorney-General in argument on this appeal. There is a difference, however, in the operation of the *Corporations Act 2001*. The provisions of Ch 6 do not work upon a declaration made under s 657A(2)(b). The making of a declaration enables the Panel to exercise the powers given by s 657D to make orders of the kind there referred to.

(206) *Tasmanian Breweries* (1970) 123 CLR 361 at 399-400 per Windeyer J.

(207) *Thomas v Mowbray* (2007) 233 CLR 307 at 348-351 [80]-[91] per Gummow and Crennan JJ.

(208) (1970) 123 CLR 361 at 371 per McTiernan J; at 378 per Kitto J; and see *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 464 per Isaacs and Rich JJ; *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 176 per Isaacs J; *Luton v Lessels* (2002) 210 CLR 333 at 357-358 [67] per Gaudron and Hayne JJ.

171 Where a body is given power, conditionally upon being satisfied as to a state of facts, a determination that it is satisfied rarely has the binding effect spoken of. The determination may be described as one as to jurisdictional facts (209). In the present case the Panel's opinion, expressed in the declaration of unacceptable circumstances, provides the basis for the exercise of its powers to make orders. Windeyer J, in *Tasmanian Breweries*, observed that deciding whether or not facts exist, upon which jurisdiction depends, is not an exercise of judicial power unless the jurisdiction dependent upon the decision is itself part of the judicial power (210). The focus of the inquiry then shifts to the orders made under s 657D. The nature of the final act may be determinative of the nature of the inquiry leading to it (211).

172 The orders which can be made by the Panel are in substantially the same terms as those which could be made by the Panel under the 1989 legislation. The orders that that Panel could make were, in most respects, the same as those which could be made by the Court, although the Court's orders were called remedial orders. The *Corporations Act 2001* refers the power to make those orders to both the Panel and the Court. No issue arises on the appeal concerning the ability of the Panel to make particular orders listed in the definition of remedial orders in s 9. It is not suggested that the further express power in the Panel to order costs is a distinctly judicial one. The fact that both the Court and the Panel can make orders in the same terms does not mean that they involve the exercise of judicial power.

173 The orders which the Panel may make include those which may direct a person to do or not to do an act. Many non-judicial bodies make orders of this kind, in order to regulate the future rights of the parties. In *Tasmanian Breweries* the Tribunal was given power to make restraining orders. They were regarded as laying down rules for the future (212), consistent with the exercise of a non-judicial power. A similar power may be seen to be exercised by the Panel. Its orders address the circumstances as have occurred in connection with the takeover. Its role is to protect the interests of persons affected by the share acquisition and to realign the takeover process. In doing so it is to take account of the extent of burden or prejudice to a party in what it seeks to do. This suggests a power akin to one to do what is right and fair as between the respective interests (213). Its orders, whilst remedial in effect, do not require a party to make good a legal

(209) *Rola Co (Aust) Pty Ltd v The Commonwealth* (1944) 69 CLR 185 at 197 per Latham CJ.

(210) (1970) 123 CLR 361 at 399.

(211) *Prentis* (1908) 211 US 210 at 227, applied *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 382 per Isaacs J; and see *Tasmanian Breweries* (1970) 123 CLR 361 at 376-377 per Kitto J.

(212) (1970) 123 CLR 361 at 408 per Owen J.

(213) *Re Cram* (1987) 163 CLR 140 at 154 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ.

obligation or correct a contravention of the Chapters. The Panel is expressly denied the power to do so.

174 By contrast, and in addition to the remedial orders it may make in the circumstances arising from a contravention, the Court may make any order, by way of injunction or otherwise, that it considers appropriate where a contravention has occurred (s 1325A). The specified orders it may make include one requiring a bidder to make an offer (s 1325B) and orders declaring unconscionable agreements to be void (s 1325C). It may make orders securing compliance with any of its orders so made (s 1325E). It may excuse a contravention and declare that an act is not invalid because of a contravention and has at all times had legal effect (s 1325D).

175 The absence of a power in the Panel to compel compliance with its orders says much about the nature and effect of its orders. In *Brandy* it was held by four justices that it is not essential to the exercise of judicial power that a body have the ability to enforce its own decision (214). The other members of the Court accepted that, whilst not an exclusive test, the fact that the Human Rights and Equal Opportunity Commission could not enforce its own determinations was a strong factor weighing against the characterisation of its powers as judicial (215). In the present case an order of the Court is necessary for enforcement of compliance with the Panel's orders. This aspect of the legislative scheme has not altered. That an offence of strict liability is now created, on non-compliance with the statute, does not render the Panel's orders enforceable in their own right.

Conclusion

176 The consideration which the Takeovers Panel may now give to the fact that a contravention of the provisions of Chs 6, 6A, 6B and 6C has occurred does not render its function a judicial one. The making of a declaration of unacceptable circumstances does not involve the resolution of a controversy about an existing legal obligation. It represents a conclusion reached by the Panel that the circumstances are such as to require orders and directions to be made by it. It reaches that conclusion by reference to the circumstances arising from the contravention and wider considerations, referable to the public interest. The orders it makes reflect the Panel's view about the process which should be undertaken with respect to the takeover and what the rights of the parties should be. So understood, the function of the Panel under s 657A(2)(b) does not involve the exercise of judicial power.

177 The majority in the Full Court were clearly concerned about the restriction placed upon the use of the courts in the bid period. Although there was no question raised in the proceedings concerning that aspect of Ch 6, their Honours were alert to the prospect that the courts' functions might be undertaken by the Panel. It is apparent from the

(214) (1995) 183 CLR 245 at 269 per Deane, Dawson, Gaudron and McHugh JJ.
(215) (1995) 183 CLR 245 at 257 per Mason CJ, Brennan and Toohey JJ.

provisions of that and following Chapters, that some care has been taken to ensure that the Panel's functions do not impermissibly involve the exercise of judicial power.

178 The appeal should be allowed. The only orders necessary to be made are that the declaration made by the Full Court as to the invalidity of s 657A(2)(b) be set aside; and in lieu it be declared that s 657A(2)(b) is not invalid as involving an exercise of the judicial power of the Commonwealth.

1. *Appeal allowed.*
2. *Set aside so much of para 2 of the orders of the Full Court of the Federal Court of Australia made on 30 April 2007 as ordered that there be a declaration that s 657A(2)(b) of the Corporations Act 2001 (Cth) is invalid and, in its place, order that there be a declaration that s 657A(2)(b) of the Corporations Act 2001 (Cth) is not invalid on the ground that it purports to confer the judicial power of the Commonwealth on the Takeovers Panel.*

Solicitor for the appellant and the third respondent, *Australian Government Solicitor.*

Solicitors for the first and second respondents, *Blake Dawson Waldron.*

PTV

Annex 24: *R v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361.

[HIGH COURT OF AUSTRALIA.]

THE QUEEN

AGAINST

THE TRADE PRACTICES TRIBUNAL AND OTHERS; EX PARTE TASMANIAN BREWERIES PROPRIETARY LIMITED.

H. C. OF A. 1969-1970.

SYDNEY, 1969, *Nov.* 4-7; 1970, *March* 24.

McTiernan, Kitto, Menzies, Windeyer, Owen and Walsh JJ.

Constitutional Law (Cth)—Powers of Commonwealth Parliament—Judicial power of Commonwealth—Trade Practices Tribunal—Power to determine that agreement or practice examinable and whether contrary to public interest—Agreement or practice rendered unenforceable by determination—Power to make restraining order—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 51 (i.), 71, 72—*Trade Practices Act* 1965-1968 (*Cth*), *ss.* 47, 49, 50, 52.

Restraint of Trade—Restrictive practices—Trade Practices Tribunal—Whether vested with judicial power of the Commonwealth—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 51 (i.), 71, 72—*Trade Practices Act* 1965-1968 (*Cth*), *ss.* 47, 49, 50, 52.

The Trade Practices Tribunal established under the *Trade Practices Act* 1965-1968 (Cth) is not constituted in accordance with s. 72 of the Constitution of the Commonwealth. Section 49 of the Act provides that if the Tribunal is satisfied that an examinable agreement or practice exists it shall make a determination whether the agreement or practice is contrary to the public interest. Section 50 provides that the basis for such a determination is the principle that the preservation and encouragement of competition are desirable, and it sets out a number of matters to be taken into account by the Tribunal. The effect of a determination that an agreement or practice is contrary to the public interest is that it becomes unenforceable. Section 52 provides for the making of restraining orders to enforce the determination of the Tribunal. Disobedience of an order is made punishable by the Commonwealth Industrial Court as if it were a contempt of that Court. By s. 102 the validity of a determination or order of the Tribunal is made unexaminable in any proceedings except by prerogative writ or injunction in the High Court.

Held: (1) By Kitto, Windeyer, Owen and Walsh JJ., Menzies J. dissenting, that the determination of the existence of the conditions of the Tribunal's jurisdiction under s. 49 does not involve the exercise of judicial power of the Commonwealth.

(2) By Kitto, Windeyer, Owen and Walsh JJ., Menzies J. expressing no opinion, that the determination whether a practice or restriction is contrary

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to the public interest does not involve the exercise of judicial power of the Commonwealth.

(3) By Kitto, Menzies, Windeyer, Owen and Walsh JJ., that the making of a restraining order under s. 52 does not involve the exercise of judicial power of the Commonwealth.

McTiernan J. was of the opinion that ss. 49, 50 and 52 are valid on the ground that none of the provisions of the *Trade Practices Act* 1965-1968 (Cth) assign jurisdiction to the Tribunal in any "matter" arising under the Act within the meaning of Ch. III of the Constitution of the Commonwealth.

In re Judiciary and Navigation Acts (1921), 29 C.L.R. 257; *Reg.* v. *Davison* (1954), 90 C.L.R. 353; *Reg.* v. *Kirby*; *Ex parte Boilermakers' Society of Australia* (1956), 94 C.L.R. 254; *Reg.* v. *Spicer*; *Ex parte Waterside Workers' Federation of Australia* (1957), 100 C.L.R. 312; *Reg.* v. *Spicer*; *Ex parte Australian Builders' Labourers' Federation* (1957), 100 C.L.R. 277, considered.

PROHIBITION.

An order for a writ of prohibition directed to the Trade Practices Tribunal and the Honourable Richard Moulton Eggleston, the President of the Tribunal, the Honourable John Angus Nimmo, the Honourable Charles Augustine Sweeney, the Honourable John Robert Kerr, the presidential members of the Tribunal, and John David Bates Esq., Lloyd Howard Heaslip Esq., Julius Albert Francis Shipton Esq., and John Noble Walker Esq., the non-presidential members of the Tribunal, and Ronald Moore Bannerman, the Commissioner of Trade Practices, was granted by Menzies J. in the High Court of Australia on 6th May 1969 on the application of Tasmanian Breweries Pty. Ltd. The order called on the respondents to show cause why a writ of prohibition should not issue prohibiting them and each of them from proceeding further with the proceedings which the Commissioner instituted in the Tribunal against the prosecutor by document dated 28th January 1969, upon the ground that the provisions of ss. 9-22, 49-84 and 102 of the *Trade Practices Act* 1965-1968 (Cth) were ultra vires the Parliament of the Commonwealth of Australia and invalid in that:— (a) ss. 49-84 and s. 102 of the Act purported to invest the Tribunal with powers and functions of a judicial character and with part of the judicial power of the Commonwealth of Australia; (b) the Tribunal as constituted by ss. 9-22 of the Act was not a court properly created by the Parliament of the Commonwealth in accordance with Ch. III of the Constitution; (c) the Tribunal is by reason of Ch. III not validly constituted and the said sections were therefore invalid as being contrary to and repugnant to the Constitution and in particular Ch. III; (d) the provisions of the *Commonwealth Powers (Trade Practices)*

The proceedings to which the order nisi for prohibition relates were instituted under s. 47. The validity of this section is not impugned. The institution of proceedings under s. 47 is a ministerial act. The provisions of the Act which are called in question on the ground that they are repugnant to Ch. III begin with s. 49. In my view, the nature of the function assigned by this section cannot be properly understood without reading with it ss. 47 and 51. These sections are in Pt VI of the Act, the heading of which is: "Examination of Agreements and Practices by the Tribunal." Section 47 limits the Tribunal's function of "examination" to (1) agreements which the Commissioner has reason to believe are examinable agreements and which he is of opinion contain restrictions contrary to the public interest; and (2) to practices which he has reason to believe are examinable and are contrary to the public interest. The proceedings now in question were instituted in respect of monopolization, a term defined by s. 37 and an examinable practice referred to in s. 36. The institution of the proceedings is within s. 7A of the Act. The effect of s. 49 is to interpose a quasi-judicial inquiry by the Tribunal between the Commissioner's consideration under s. 47 and the operation of s. 51 (which depends upon the determination under s. 49). The execution of the mandate given by the section to the Tribunal involves adjudication. But it is commonplace in the field of administrative law that adjudication is not distinctive of judicial power exclusively: and it is not necessarily inconsistent with true executive or administrative action.

> "The power and function of finally determining matters of fact and even of discretion are not solely indicative of judicial action. That is an attribute common to administrative bodies, to subordinate bodies that are adjuncts to legislation, and to judicial bodies": *Federal Commissioner of Taxation* v. *Munro*, per Isaacs J. (1).

A determination under s. 49 is not in my opinion a judicial act. It is the factum on which the operation of s. 51 depends. Proceedings under s. 47 are not, in my view, a civil or criminal suit; the document which the Commissioner files to commence proceedings is not a pleading seeking the protection or enforcement of a right nor claiming judicial relief. I think that s. 49 is not an attempt by the Parliament to exert the power conferred by s. 77 (i.) of the Constitution to define the jurisdiction of the Trade Practices Tribunal (as if it were a "federal court"), in a "matter" arising under the *Trade Practices Act*. In the joint judgment

(1) (1926) 38 C.L.R. 153, at p. 176.

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McTiernan J.

in the case *In re The Judiciary Act 1903-1920 and In re The Navigation Act 1912-1920* (1), the following statement is made:

> ". . . we do not think that the word 'matter' in s. 76 means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court."

The judgment continues: "The word 'matter' is used several times in Ch. III of the Constitution (ss. 73, 74, 75, 76, 77), and always, we think, with the same meaning." After referring to opinions expressed in *South Australia* v. *Victoria* (2), their Honours said, in the joint judgment mentioned above (3):

> "All these opinions indicate that a matter under the judicature provisions of the Constitution must involve some right or privilege or protection given by law, or the prevention, redress or punishment of some act inhibited by law."

None of the provisions of the *Trade Practices Act* 1965-1968 assigns jurisdiction to the Tribunal in any "matter" within the meaning of Ch. III arising under the Act. The dominant statutory functions of the Tribunal are appropriate exclusively to administrative action. They pertain to trade and commerce. "Courts do not execute or maintain laws relating to trade and commerce": *New South Wales* v. *The Commonwealth*, per Isaacs J. (4).

In my opinion the order nisi should be discharged.

KITTO J. Part II of the *Trade Practices Act* 1965-1968 (Cth) establishes a tribunal which it designates the Trade Practices Tribunal. The Tribunal is constituted in a manner which does not comply with the requirements of s. 72 of the Constitution for the creation of a federal court. By s. 71 of the Constitution the judicial power of the Commonwealth is vested exclusively in the High Court, such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. Since the Tribunal answers none of these descriptions it is not a competent repository of any part of the judicial power of the Commonwealth.

Part VI of the *Trade Practices Act* contains provisions purporting to confer upon the Tribunal authority to entertain certain proceedings instituted by an official styled the Commissioner of Trade Practices. Section 54 provides that the Tribunal in such proceedings may make interim orders where there is a likelihood of

(1) (1921) 29 C.L.R. 257, at p. 265.
(2) (1911) 12 C.L.R. 667.
(3) (1921) 29 C.L.R., at p. 266.
(4) (1915) 20 C.L.R. 54, at p. 93.

grave hardship to a person or irremediable injury to the public interest, and s. 49 provides for its making such inquiry as it considers appropriate having regard to the matters alleged by the Commissioner. The latter section then provides that if the Tribunal is satisfied that an agreement of a certain description, called in the Act an examinable agreement, exists or has existed, or that a practice of a certain description, called in the Act an examinable practice, has been, or is being, or is proposed to be, engaged in, it shall make a determination by which it (a) records its findings as to those matters, including its findings as to the parties to, and terms of, the agreement, or the particulars of the examinable practice, and (b) determines, in accordance with its opinion, whether the relevant restrictions to which the proceedings relate (i.e. under the examinable agreement) are contrary to the public interest or, as the case may require, the examinable practice is contrary to the public interest.

The question is whether the powers which Pt VI thus purports to confer are within the concept of the judicial power of the Commonwealth. Questions of this general description are often difficult to decide, for it has not been found possible to frame an exhaustive definition of judicial power. But this is not to say that the expression is meaningless. The uncertainties that are met with arise, generally if not always, from the fact that there is a "borderland in which judicial and administrative functions overlap" (*Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* (1)), so that for reasons depending upon general reasoning, analogy or history, some powers which may appropriately be treated as administrative when conferred on an administrative functionary may just as appropriately be seen in a judicial aspect and be validly conferred upon a federal court. The judgments in *Reg.* v. *Davison* (2) provide illustrations of this.

But I do not think that any such difficulty confronts us here. There are no traditional concepts to be applied as there were in *Reg.* v. *Davison*, and two considerations, one negative and the other positive, appear to me when taken together to require the conclusion that the powers entrusted to the Tribunal are essentially non-judicial. The powers must, of course, be performed in a judicial manner, that is to say with judicial fairness and detachment, but the same is true of many administrative powers. Close examination of the relevant provisions of the Act shows, I think, that on the one hand no exercise of any of the Tribunal's powers is an adjudication (in the proper sense of the word), and that on

(1) [1949] A.C. 134, at p. 148. (2) (1954) 90 C.L.R. 353.

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the other hand the result achieved by an exercise of any of the powers is a result foreign to the nature of judicial power.

In *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* (1), Lord Simonds for the Privy Council said:

> "It is a truism that the conception of the judicial function is inseparably bound up with the idea of a suit between parties, whether between Crown and subject or between subject and subject."

This is not to say that some powers may not be held to be judicial though no adjudication in a lis inter partes is involved, for there may be sufficient justification for such a conclusion in an analogy with an admittedly judicial function, or in the fact that the power is ancillary to a judicial function, or in some such consideration: see *Reg.* v. *Davison* (2). But in general the notion is there, even if in the background, of arbitrament upon a question as to whether a right or obligation in law exists. Griffith C.J. fastened upon it in the passage in his judgment in *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (3) which the Privy Council has repeatedly approved, not as a comprehensive definition but as a statement of the broad features of judicial power: see *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* (1). It will be remembered that to him the central idea was "the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property". See also the statements of Palles C.B. and Holmes J. cited in *Reg.* v. *Davison* (4). Thus a judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist. It is right, I think, to conclude from the cases on the subject that a power which does not involve such a process

(1) [1949] A.C., at p. 149.
(2) (1954) 90 C.L.R., at p. 368.
(3) (1908) 8 C.L.R. 330, at p. 357.
(4) (1954) 90 C.L.R., at pp. 367, 370.

and lead to such an end needs to possess some special compelling feature if its inclusion in the category of judicial power is to be justified.

The powers of the Tribunal do not present any such feature, and they are not directed to any determination or order which resolves an actual or potential controversy as to existing rights or obligations. The Commissioner alone is authorized to institute proceedings before the Tribunal. He is of course a party to the proceedings (see e.g. s. 71), but he does not come before the Tribunal asserting a right to relief in either a personal or a representative capacity. He makes allegations of fact relevant to the questions the Tribunal is required by the Act to consider, and the Tribunal, if it is satisfied that the agreement or practice is examinable, has then to form and give expression to its own opinion as to whether the relevant restriction or practice is "contrary to the public interest". Even where the Commissioner makes submissions on these questions in order to assist the Tribunal, he is not seeking the vindication of any right or obligation. In particular, if he submits that a particular restriction or practice is or is not contrary to the public interest he is not thereby contending that a decision should be made for or against the existence of any right or obligation so as to be binding as between the parties to the restriction or practice, or as between them and either the Crown or the public. The inquiry is not into the validity of the agreement or the legality of the practice, as s. 51 shows most clearly. Even in relation to an agreement, the question is not whether it is contrary to public policy in the sense in which the term is used in the common law: cf. *In re Chemists' Federation Agreement* [No. 2] (1). The determination does not resolve any question as between opposed interests. It merely records whether the Tribunal has satisfied itself, first, that an agreement or practice has the characteristics which the Act comprehends in the word "examinable", and, secondly, that the restriction or practice, if examinable, is contrary to the public interest. Such determinations as these have quite often to be made in the exercise of administrative power. The fact that an official is given a power conditionally upon being satisfied of a particular state of facts—and so is authorized to determine unexaminably "the jurisdictional fact" upon which his power depends (if the expression be thought appropriate)—is no indication that in deciding whether he is so satisfied he is exercising judicial power. In the well-known judgment of Palles C.B. in *R.* v. *Local Government Board for Ireland* (2) there is a passage which has been

(1) [1958] 1 W.L.R. 1192, at p. 1212. (2) [1902] 2 I.R. 349.

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repeatedly cited in this Court and has been relied upon in the present case as tending against this view. The learned Chief Baron observed that if the existence of a ministerial power depends upon a contingency, although it may be necessary for the officer to determine whether the contingency has happened, in order to know whether he shall exercise the power, his determination does not bind, for as his Lordship went on to say:

> "The happening of the contingency may be questioned in an action brought to try the legality of the act done under the alleged exercise of the power. But where the determination binds, although it is based on an erroneous view of the facts or law, then the *power* authorizing it is judicial." (1)

The reference is to a power which depends upon the happening of a contingency. We are here concerned with a power which depends upon nothing but the Tribunal's own satisfaction that certain conditions exist. The determination of the Tribunal that it is so satisfied—the making of its "findings" (as s. 49 calls them)—does not bind in the sense in which Palles C.B. used the expression; that is to say, it does not conclude for all purposes any question as to which the Tribunal declares itself satisfied. It answers only the question whether the Tribunal is in fact so satisfied—and does not answer even that question conclusively, for if the Tribunal were to record that it was so satisfied when in fact it was not, the next step, which the Tribunal is authorized to take only if it is so satisfied, could be set aside by this Court in exercise of the jurisdictions which s. 102 (2) acknowledges.

A determination that an agreement or a practice is examinable therefore has, in my opinion, no point of contact with the concept of judicial action unless it derives it from the nature of the power to which it is preliminary. But the power which the Tribunal may exercise if satisfied on the preliminary point is to determine, "in accordance with its opinion", a question that is essentially non-justiciable. I so describe it for the reason that it does not depend upon the application of any ascertainable criterion. The Act requires the Tribunal in considering the question of the public interest to make a basic assumption and to take certain matters into consideration (s. 50), but the question upon which it has to pronounce is not as to whether the relevant restriction or practice satisfies an ascertained standard but as to whether it satisfies a description the content of which has no fixity—a description which refers the Tribunal ultimately to its own idiosyncratic conceptions and modes of thought. In words which I take from the joint

(1) [1902] 2 I.R., at p. 374.

judgment in *Reg.* v. *Spicer* ; *Ex parte Waterside Workers' Federation of Australia* (1), it may be said here that there is no "claim of right depending on the ascertainment of facts and the application to the facts of some legal criterion provided by the legislature". The judgment proceeded :

> "The existence of some judicial discretion to apply or withhold the appointed legal remedy is not necessarily inconsistent with the determination of such a matter in the exercise of the judicial power of the Commonwealth. But it is perhaps necessary to add that the discretion must not be of an arbitrary kind and must be governed or bounded by some ascertainable tests or standards." (1)

Similarly, to confer a power of discretionary judgment as to whether a restriction or practice has a specified quality may be to confer judicial power, but only if the quality is so described that its existence is to be judged by applying an objective test or standard supplied by the legislature. When the Tribunal, in conformity with s. 49 (1) (*b*), "determines, in accordance with its opinion, whether the relevant restrictions to which the proceedings relate are contrary to the public interest" it necessarily supplies for itself its own subjective criterion for deciding, as a matter of individual opinion, though on the assumption required by s. 50 (1) and taking into account all the matters specified in the Act, where the public interest appears to it to lie in the circumstances in which the restrictions or practice operate. Thus the work of the Tribunal is work which would be appropriate for the legislature itself to do if it had the time to consider individual cases. It would be obviously impracticable for the Parliament to apply its own ideas as to what is contrary to the public interest, either by passing a special Act for every individual case or by laying down a definition which in every case would be sure to produce a result satisfactory to it. There is probably no practicable alternative to setting up an authority which with some but incomplete guidance from the legislature will apply its own notions concerning the public interest. This course the *Trade Practices Act* adopts, contenting itself with prescribing the qualifications for membership of the Tribunal, giving a limited measure of guidance, and then relying upon the Executive's choice of members to ensure, so far as assurance is possible, that the notions applied will be such as the Parliament would approve.

None of the powers of the Tribunal, then, involves any adjudication upon a claim of right. This negative consideration, however,

(1) (1957) 100 C.L.R. 312, at p. 317.

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does not stand by itself. The effect given by the Act to a determination under s. 49 that a restriction or practice is contrary to the public interest is to render unenforceable for the future an agreement under which the restriction is accepted or the practice is provided for (s. 51), and to enable the Tribunal to make such orders as it thinks proper for restraining future conduct which falls within certain descriptions (s. 52). The determination itself has no operative effect: it constitutes the factum by reference to which the Act operates to alter the law in relation to the particular case. And an order under s. 52 (or an interim restraining order under s. 54) is in like case. It presents a direct contrast with an injunction granted by a court as a means of enforcing obligations that have been established by adjudication. The order restrains future conduct, not as being in breach of ascertained obligations, but as being in conformity with ascertained obligations or practices—not in order to ensure observance of them but to prevent observance of them, because it is considered that their observance would be against the public interest. The Act, particularly s. 52 (7), operates upon the order to give its provisions the force of law, and thus to alter the law for the future in relation to the particular case.

For these reasons the powers of the Tribunal seem to me to be of a nature foreign to the concept of judicial power. If analogy be sought it may be found in a regulation made under the authority of a statute, for a determination under s. 49 and an order under s. 52 or s. 54 are in aid of the law-making process.

In my opinion the attack upon the validity of the provisions conferring powers upon the Tribunal fails and the order nisi should be discharged.

MENZIES J. Since 1918, when *Alexander's Case* [*Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.*] (1), was decided, it has been established that it is contrary to the Constitution for Parliament to seek to establish a tribunal otherwise than as a federal court constituted under Ch. III of the Constitution and to attempt to confer upon that tribunal part of the judicial power of the Commonwealth. Such an unconstitutional grant of judicial power may be inseparable from the establishment of the Tribunal, so that the Tribunal itself falls. Where, however, the unconstitutional grant is separable from its establishment, the Tribunal stands, but without judicial power.

(1) (1918) 25 C.L.R. 434.

GROLLO ..... APPLICANT;

AND

PALMER AND OTHERS ..... RESPONDENTS.

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May 30, 31, *Sept* 21 1995

Brennan CJ, Deane, Dawson, Toohey, McHugh and Gummow JJ

Constitutional Law (Cth) — Judicial power of Commonwealth — Federal judges — Telecommunication interception warrant — Power to issue conferred on "eligible judges" — Whether designated persons — Whether power administrative or judicial — Whether exercise of power inconsistent with judicial function of federal court or judge — The Constitution (63 & 64 Vict c 12) s 51(v), Ch III — Telecommunications (Interception) Act 1979 (Cth), ss 6D, 6H, 7, 45, 46 — Crimes Act 1914 (Cth), ss 70, 79.

Divisions 3 (ss 35-44) and 4 (ss 45-61A) of Pt VI (amplified by ss 6D and 6H) of the *Telecommunications (Interception) Act* 1979 (Cth) conferred power to issue telecommunication interception warrants in specified circumstances on any federal judge who consented to being appointed as an "eligible judge" and was so appointed.

Held, by Brennan CJ, Deane, Dawson, Toohey and Gummow JJ, McHugh J dissenting, that ss 6D and 6H and Divs 3 and 4 of Pt VI of the Act were valid laws of the Commonwealth.

Per Brennan CJ, Deane, Dawson and Toohey JJ. (1) The power to issue a warrant must be exercised judicially, but this of itself does not characterise the power as a judicial power.

Aston v Irvine (1955) 92 CLR 353 at 363-365 and *Baker v Campbell* (1983) 153 CLR 52 at 81, applied.

(2) The power conferred by ss 45 and 46 to issue warrants is not part of the judicial power of the Commonwealth because it does not involve an adjudication to determine the rights of parties.

Love v Attorney-General (NSW) (1990) 169 CLR 307 at 321-322, applied.

Hilton v Wells (1985) 157 CLR 57 at 67, 78, referred to.

R v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254 (HCA); (1957) 95 CLR 529; [1957] AC 288 (PC), considered.

(3) The designated person conception, when adopted to acknowledge that there is no necessary inconsistency with the separation of powers mandated by Ch III of the Commonwealth Constitution if non-judicial power is vested in individual judges detached from the court they constitute, should not be rejected. But the power to confer non-judicial functions on judges as designated persons is subject to the conditions that the conferral must be consented to by the judge and the function must not be incompatible either with the judge's performance of judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power.

(4) The function conferred on federal judges to issue warrants is not incompatible with their status and independence, the exercise of their judicial power or the maintenance of public confidence in the exercise of the judicial power of the Commonwealth.

Herman v Deputy Attorney-General (Can) (1978) 91 DLR (3d) 3 at 4-5, disapproved.

Hilton v Wells (1985) 157 CLR 67 and *Mistretta v United States* (1989) 488 US 361, considered.

Per Gummow J. The real question is whether the performance of the functions under the Act by the eligible judges undermines the doctrine of the separation of powers by impeding the performance of their judicial functions. An impediment would arise if ss 70 and 79 of the *Crimes Act* 1914 (Cth) precluded a judge from disclosing a previous involvement in the issuing of an interception warrant. But the construction and operation of those provisions are subject to the higher duty imposed on a federal judge flowing from Ch III of the Constitution and, accordingly, no such impediment arises.

CASE STATED

Evidence was obtained against Bruno Grollo for use in a criminal prosecution by intercepting his telephone calls. The interception was performed by the Australian Federal Police pursuant to a warrant issued by Heerey J of the Federal Court under the *Telecommunications (Interception) Act* 1979 (Cth). The Act authorised a federal judge who was an "eligible judge" to issue an interception warrant, providing certain criteria were met (ss 45, 46). Grollo commenced a proceeding in the Federal Court of Australia claiming that the provisions relating to the issue of interception warrants were invalid. He also applied for injunctions to restrict the use of the information obtained pursuant to the interception warrant. A case was stated and question reserved for the consideration of a Full Court. The question reserved was: "Are sections 6D and 6H and Divisions 3 and 4 of Part VI of the Act invalid as being beyond the power of the Parliament of the Commonwealth of Australia?" The proceeding was removed into the High Court pursuant to s 40(1) of the *Judiciary Act* 1903 (Cth).

A R Castan QC (with him *R Merkel* QC and *J B R Beach*), for the applicant. Parliament may confer on a federal court only judicial power or power incidental or ancillary thereto. Such a conferral must be consistent with the incidents and requirements of Ch III of the Constitution and the proper exercise of the judicial power. Generally, if the power is being exercised by a judge of a federal court, the judge is exercising it as a member of the court. In a limited class of case, a power may be conferred on a judge personally and not in the capacity as a member of a federal court. Each of the above propositions was established in *R v Kirby; Ex parte Boilermakers' Society of*

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the Associate of an eligible judge. At no stage is the application or the warrant filed with the Court registry and, except in South Australia where a copy may be kept in security, all documents relating to the matter are retained or destroyed by the agency. Although not stated in the special case, s 50(2) requires the judge to keep a copy of a warrant granted on a telephone application.

The judge issues an interception warrant in the prescribed form (s 49(1)). The judge may "specify conditions or restrictions relating to interceptions" (s 49(2)) and may prescribe its operation for up to ninety days (s 49(3)). Upon expiration of the warrant, no extension is possible (s 46(4)). If required, a new warrant may be sought by an agency (s 46(5)). The warrant must also briefly state short particulars of each serious offence being investigated (s 46(7)).

Upon the issue of a warrant, certain notices must be given before the interception is authorised. First, where the interception is of a telecommunications system operated by a carrier, notice must be given to the Managing Director of the carrier and the interception must occur as a result of action taken by an employee of the carrier (ss 47, 60). Secondly, where the warrant is obtained by an agency other than the AFP, the warrant must be notified to and received by or on behalf of the AFP's Commissioner of Police (ss 53, 54). The authority conferred by an interception warrant may be exercised only by approved members of the AFP (s 55).

The grounds of challenge to the validity of the Act

The applicant's counsel based their submissions on alternative propositions as to the nature of the power to issue interception warrants and as to the repository of the power to do so. If the power be regarded as administrative in nature and eligible judges be regarded as personae designatae, the provisions of the Act purporting to confer the power on those judges are said to be invalid because the power is such that its exercise is incompatible with judicial functions. Alternatively, the provisions which permit the appointment of all Federal Court judges and which have in fact permitted the appointment of a substantial majority of the judges of that Court to be "eligible Judges" are said to be merely a device which, in substance, vests non-judicial power in the judges of that Court. That is said to be contrary to the *Boilermakers* (28) exposition of the constitutional imperative of the separation of powers.

If, however, the power to issue an interception warrant be regarded as judicial in nature, a further submission challenges the validity of the provisions which confer the power not on a Court but on eligible judges as personae designatae. The different, and inconsistent, strands of argument require a determination of two issues: first, whether the

(28) *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (HCA); (1957) 95 CLR 529; [1957] AC 288 (PC).

power to issue an interception warrant is judicial or non-judicial in nature; second, whether the Act purports to confer that power on eligible judges as personae designatae consistently with the Constitution.

The nature of the power to issue interception warrants

Historically, the power to issue warrants to enter, search and seize — that is, warrants which authorise what would otherwise be a trespass to land or to goods — has been vested only in judicial officers or justices of the peace.

At first, the common law conferred no authority on justices of the peace to issue warrants to enter and search for stolen goods (29) but an authority in justices to issue such warrants was ultimately admitted (30). Although general warrants to search were illegal (31), warrants to enter and search for stolen goods in particular premises were issued by justices of the peace on oath of a felony committed. Those warrants were considered to be "judicial acts" (32) although they were not performed in court (33). As warrants were issued on sworn information, certiorari lay to review the sufficiency of the information to ground the issue of the warrant (34). Under modern procedure, judicial review is available to determine whether there is sufficient material placed before the issuing justice to enliven the power to issue the warrant (35). The power to issue a warrant to enter, search and seize must be exercised judicially (36). But these indicia do not stamp the power to issue a search warrant with the character of the judicial power of the Commonwealth (37). The issuing of a warrant can be described as a judicial act but not in the sense of an adjudication to determine the rights of parties (38). Although judicial review is available to review an exercise of the power to issue a warrant, it is available whether the power be classified as judicial or as administrative in nature (39). And although the duty to exercise the power to issue a warrant must be exercised judicially, that means only

(29) Coke, 4 *Institutes of the Laws of England*, pp 176-177.
(30) *Hale's Pleas of the Crown* (1800 ed), vol 2, pp 149-150, and see the report of *Entick v Carrington* (1765) 2 Wils KB 275 at 291 [95 ER 807 at 818].
(31) *Entick v Carrington* (1765) 19 St Tr 1029 at 1071-1072; *R v Inland Revenue Commissioners; Ex parte Rossminster Ltd* [1980] AC 952 at 1008.
(32) *Hale's Pleas of the Crown* (1800 ed), vol 2, p 150.
(33) See the discussion by Posner J in *United States v Torres* (1984) 751 F 2d 875 at 878.
(34) *R v Tillett; Ex parte Newton* (1969) 14 FLR 101 at 118.
(35) *George v Rockett* (1990) 170 CLR 104.
(36) *Baker v Campbell* (1983) 153 CLR 52 at 81; *Simpson v Attorney-General (NZ) [Baigent's Case]* [1994] 3 NZLR 667 at 674.
(37) *Aston v Irvine* (1955) 92 CLR 353 at 363-365.
(38) See *Electronic Rentals Pty Ltd v Anderson* (1971) 124 CLR 27 at 39.
(39) *R v Inland Revenue Commissioners; Ex parte Rossminster Ltd* [1980] AC 952 at 998-999.

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that the power must be exercised without bias and fairly weighing the competing considerations of privacy and private property on the one hand and law enforcement on the other (40). In *Love v Attorney-General (NSW)*, this Court held that the power conferred by a State law on the Supreme Court of New South Wales to issue a warrant authorising the use of a listening device was an administrative not a judicial power, though it was a power to be exercised judicially (41). Nor was the act of exercising the power a judicial act in the sense of an adjudication to determine the rights of parties (42). *Love's Case* was followed in *Coco v The Queen* (43). In *Hilton v Wells* (44), where a challenge was made to the validity of the vesting in judges of the Federal Court of the power to issue a warrant under s 20 of the Act (as it stood prior to the 1987 Amendment (45)), it was common ground that the power is not part of the judicial power of the Commonwealth (46). The submission that the power conferred by ss 45 and 46 is part of the judicial power of the Commonwealth should be rejected.

The character of the repositories of the power

In *Hilton v Wells*, the only question for decision (47) was whether the Act purported to confer non-judicial power on the Federal Court contrary to the doctrine in the *Boilermakers' Case* (48). The divergence of opinion on this question reflected a difference in the interpretations placed on the provisions of the Act as they stood before the 1987 Amendment (49). The power to issue warrants under s 20 was vested in "a Judge", a term defined by s 18 (as it then stood) to mean a judge of the Federal Court or of the Supreme Court of the Australian Capital Territory, or a judge of the Supreme Court of a State or of the Northern Territory "in respect of whom an appropriate arrangement" was applicable. The majority (Gibbs CJ, Wilson and Dawson JJ) said (50):

> "Where the power is conferred on a judge, rather than on a court, it will be a question whether the distinction was deliberate, and whether the reference to 'judge' rather than to 'court' indicates that the power was intended to be invested in the judge as an individual who, because he is a judge, possesses the necessary qualifications to

(40) *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 319, 322; *Ex parte Qantas Airways Ltd; Re Horsington* (1969) 71 SR (NSW) 291 at 301.
(41) *Love* (1990) 169 CLR 307 at 320-321.
(42) *Love* (1990) 169 CLR 307 at 321-322.
(43) (1994) 179 CLR 427 at 444.
(44) (1985) 157 CLR 57.
(45) *Telecommunications (Interception) Amendment Act* 1987 (Cth).
(46) *Hilton* (1985) 157 CLR 57 at 67, 78.
(47) See *Hilton* (1985) 157 CLR 57 at 69, 78.
(48) (1956) 94 CLR 254; (1957) 95 CLR 529; [1957] AC 288.
(49) *Jones v The Commonwealth* (1987) 61 ALJR 348 at 349; 71 ALR 497 at 498-499.
(50) *Hilton* (1985) 157 CLR 57 at 72-73.

> exercise it. Even if it were to be assumed that the fact that the power conferred by s 20 is conferred on 'a Judge' gives rise to a prima facie presumption that it is conferred on the judge as such, and that he will determine it as a member of the court to which he belongs, we consider that there are sufficient indications in the statute to rebut that presumption."

Their Honours considered that when the Act referred to judges of the Supreme Courts "in respect of whom an appropriate arrangement" had been made, the Parliament was intending to confer power on individual judges. In the case of judges of the Federal Court, the majority held it was "unlikely that the Parliament intended in other cases to refer to the judge as such and to confer power on the court". Further, as the nature of the power conferred by s 20 is "purely administrative and not incidental to the exercise of judicial power", their Honours thought it likely that Parliament intended the power to be exercised by a judge as a designated person. Finally, as the judge made no order as such and nothing that he did was enforced under the *Federal Court of Australia Act* 1976 (Cth), the power was vested in a judge as persona designata. Mason and Deane JJ, on the other hand, were of the view that the Act vested power in the Federal Court judges as such. The power was conferred upon all judges of the Federal Court indiscriminately (51). Mason and Deane JJ construed the Act in accordance with the principle on which the Court had acted in *Medical Board (Vict) v Meyer* (52) and *Aston v Irvine* (53) and held that the power was conferred on every judge as a member of the court. Their Honours accepted that a non-judicial power could be vested in a judge as a designated person but, in their Honours' view (54) —

> "to enable such a conclusion to be reached it must appear that in the performance of the function entrusted to him the judge is intended to act personally, detached from the court of which he is a member (cf *Queen Victoria Memorial Hospital v Thornton* (55)), so that the reference to the judge's judicial office is then seen not as a statement of the character in which the function is to be exercised, but as a qualification of his becoming a repository of the function".

By repealing s 18 and inserting s 6D in 1987, the Parliament eliminated the indiscriminate conferral of power on all judges of the Federal Court and thereby sought to overcome a factor which Mason and Deane JJ had regarded as a source of invalidity. The 1987 Amendment

(51) *Hilton v Wells* (1985) 157 CLR 57 at 81.
(52) (1937) 58 CLR 62 at 97.
(53) (1955) 92 CLR 353 at 366.
(54) *Hilton* (1985) 157 CLR 57 at 80-81. And see *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 566-567; *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at 413; 24 ALR 577 at 583-584.
(55) (1953) 87 CLR 144 at 152.

LOVE. . . . . APPELLANT;
PLAINTIFF,

AND

ATTORNEY-GENERAL FOR THE STATE OF NEW SOUTH WALES AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

PETERS AND ANOTHER . . . . APPELLANTS;
PLAINTIFFS,

ATTORNEY-GENERAL FOR THE STATE OF NEW SOUTH WALES AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1989-1990.

1989, *Nov.* 9, 10.

1990, *Feb.* 13.

Mason C.J., Brennan, Dawson, Toohey and Gaudron JJ.

Constitutional Law (Cth) — Inconsistency between Commonwealth and State laws — Commonwealth law prohibiting use of listening device for purpose of narcotics inquiries unless authorized by warrant issued by judge — State law prohibiting use of listening device — Prohibition not to apply where use authorized by warrant granted by Supreme Court — Whether inconsistent — Issue of warrant under State Act — Judicial or administrative act — Validity of warrant — The Constitution (63 & 64 Vict. c. 12), s. 109 — Customs Act 1901 *(Cth), s. 219B — Listening Devices Act* 1984 *(N.S.W.), ss.* 5, 16.

Section 5(1)(a) of the *Listening Devices Act* 1984 (N.S.W.) prohibited the use of a listening device to record or listen to a private conversation. Section 5(1) did not apply to the use of a device pursuant to a warrant granted under Pt 4: s. 5(2)(a). Section 16(1), which was in Pt 4, enabled the Supreme Court, upon complaint that a person suspected that a prescribed offence had been or was about to be committed and that for the purpose of investigating the offence or enabling evidence to be obtained the use of a device was necessary, by warrant to authorize that use if satisfied that

is a judicial order. In one sense — a loose sense — the warrant is a judicial act; it is an instrument issued by a judge of the Supreme Court. But the fact that it is an instrument issued by a judge of the Supreme Court does not stamp it with the character of a judicial order unless the warrant issues as a result of a determination made by the judge in his or her judicial capacity. To borrow the language of Lopes L.J. in *Royal Aquarium and Summer and Winter Garden Society v. Parkinson* (42):

> "The word 'judicial' has two meanings. It may refer to the discharge of duties exercisable by a judge or by justices in court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind — that is, a mind to determine what is fair and just in respect of the matters under consideration."

Where a statute confers power on a court or a judge there is the question whether the power is conferred upon the court or the judge as such: *Hilton v. Wells* (43). It has been said that where the power is conferred on a court, there is ordinarily a strong presumption that the court as such is intended: *Hilton v. Wells* (43). But the presumption is rebuttable and one of the important factors to be taken into account in determining that question of construction is whether the nature of the power is judicial: *Hilton v. Wells* (44).

The characterization of a power as judicial or non-judicial in nature arises most frequently in connexion with the rule that Ch. III of the Constitution does not allow the judicial power of the Commonwealth to be exercised "by a body established for purposes foreign to the judicial power" and does not allow "a combination with judicial power of functions which are not ancillary or incidental to its exercise but are foreign to it": *Reg. v. Kirby; Ex parte Boilermakers' Society of Australia* (45). That of course is not a restriction which applies to courts exercising power other than the judicial power of the Commonwealth. But the decisions of this Court relating to the exercise of judicial power in the particular context of Ch. III give expression to the settled principles governing the exercise of judicial power generally.

Judicial power has proved to be insusceptible of comprehensive definition, though its broad elements were identified by Griffith C.J. in *Huddart, Parker & Co. Pty. Ltd. v. Moorehead* (46): see *Labour Relations Board of Saskatchewan v. John East Iron Works*

(42) [1892] 1 Q.B. 431, at p. 452.
(43) (1985) 157 C.L.R. 57, at p. 72.
(44) (1985) 157 C.L.R., at p. 73.
(45) (1956) 94 C.L.R. 254, at p. 296.
(46) (1909) 8 C.L.R. 330, at p. 357.

Ltd. (47). For present purposes it is sufficient for us to refer to the observations of Kitto J. in *Reg. v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty. Ltd.* (48):

> "Thus a judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist. It is right, I think, to conclude from the cases on the subject that a power which does not involve such a process and lead to such an end needs to possess some special compelling feature if its inclusion in the category of judicial power is to be justified."

In this case, the appellants suggested two features which they said justified the inclusion of the power to issue warrants under the State Act in the category of judicial power. First, the statute confers the power, not upon a judge, but upon the Supreme Court itself. Secondly, notice of an application for a warrant is required to be served on the Attorney-General pursuant to s. 17. Neither of these features is compelling. The fact that a power is conferred upon a court suggests that the power is judicial in nature. But that is only one of the factors to be considered (*Reg. v. Spicer; Ex parte Australian Builders' Labourers' Federation* (49); see also *Farbenfabriken Bayer Aktiengesellschaft v. Bayer Pharma Pty. Ltd.* (50)) and it has limited significance when the function in question closely resembles those that have traditionally been classified as non-judicial. The power to issue a warrant under s. 16 of the State Act stands in a similar position to the power to issue a summons, held to be a "matter of procedure" (*Donohoe v. Chew Ying* (51)) and most probably an "administrative or ministerial act": *Electronic Rentals Pty. Ltd. v. Anderson* (52). See also *Aston v. Irvine* (53).

The reasoning in *Hilton v. Wells* demands that undue emphasis

(47) [1949] A.C. 134, at p. 149.
(48) (1970) 123 C.L.R. 361, at pp. 374-375.
(49) (1957) 100 C.L.R. 277, at p. 305.
(50) (1959) 101 C.L.R. 652, at pp. 659-660.
(51) (1913) 16 C.L.R. 364, at p. 369.
(52) (1971) 124 C.L.R. 27, at p. 39.
(53) (1955) 92 C.L.R. 353, at p. 365.

not be placed upon the fact that the power is conferred upon the court. No doubt the legislature intended that the power would be exercised in a judicial manner by persons who are judges in order to allay any public misgivings about the issue of warrants under the State Act. But that has to do with the manner in which the power is exercised rather than with the nature of the power. Although the character of the repository of power is an important indicium of the nature of the power, it is not necessarily conclusive.

The requirement of service of notice upon the Attorney-General and not upon the person in relation to whom a warrant is sought indicates that the power is administrative rather than judicial. The very nature of the activities authorized by a warrant precludes notice to the individual whose privacy will be affected by action taken under the warrant. But the selection of a member of the executive government as the person to be served, whose role is to be afforded "an opportunity to be heard in relation to the granting of the warrant" (s. 17(2)), strongly suggests that in issuing a warrant the judge is not engaged in a judicial determination of the rights of the parties.

However, the conclusion that the power to issue warrants pursuant to s. 16 of the State Act is not judicial is not decisive of the question whether or not the act of issuing a warrant is itself judicial. A similar question arose in *Hilton v. Wells*. In that case the power to issue warrants pursuant to s. 20 of the *Telecommunications (Interception) Act* was conceded to be administrative. Gibbs C.J., Wilson and Dawson JJ. (54) found sufficient indications in the statute to rebut any presumption that the power, conferred upon a judge, was conferred on the judge "as such". There the power was conferred upon a judge; here it is conferred upon the court. In the face of the indications that the issuing of a warrant pursuant to s. 16 of the State Act is an administrative act, this distinction is insufficient for the appellants' purposes.

Although the administrative power to issue a warrant is in terms conferred upon the court rather than the several judges of the court, the exercise of the power is essentially administrative in nature. The warrant is the outcome of a complaint upon which the judge must bring his or her judicial mind to bear and decide on the material before him or her whether the warrant should issue. The judge is under a duty to act judicially and to that extent the issue of the warrant is a judicial act but it is not a "judicial act in the same sense as is an adjudication to determine the rights of parties", to use the

(54) (1985) 157 C.L.R., at pp. 72-73.

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words of Windeyer J. in *Electronic Rentals* (55). It is not an order inter partes from which a party whose conversations may be overheard has a right of appeal. To adapt the language used in *Hilton v. Wells* (56), under s. 16 a judge makes no order and nothing that he or she does is enforced as an order of the court. Therefore, if a warrant is granted, its effect depends entirely upon the State Act.

Moreover, it may be that, on its true construction, the statute does not impose an obligation on a judge to perform the function of issuing warrants but gives him or her the option of consenting to do so or not: see *Jones v. The Commonwealth* (57). After all, exercise of the power may disqualify a judge from sitting in a case in which evidence is sought to be given of a conversation intercepted pursuant to the warrant.

There are, of course, many cases in which the issue of a warrant has been described as a judicial act: see, for example, the decisions referred to by Fox J. in *Reg. v. Tillett; Ex parte Newton* (58); Feldman, *Law Relating to Entry, Search and Seizure* (1986), par. 4.07, n. 1. But these cases, for the most part, are concerned with the availability of relief by way of certiorari and prohibition. Consequently they focus on the question whether the issuing authority had a duty to act judicially and, on occasions, judges have answered this question in the affirmative by stating that the issue of the warrant is a judicial act. The better view is that the issue of the warrant under s. 16 is a step in the administrative process and is thus an administrative function. Granted that a judge considering an application for a warrant under s. 16 is bound to act judicially, that is, in a just and fair manner, with judicial detachment, this circumstance is not conclusive, for the same is true of many administrative powers: *Tasmanian Breweries* (59); *Electronic Rentals* (60).

Although the appellants relied on the comments of Mason C.J. and Toohey J. in *Murphy v. The Queen* (61) to support the view that a warrant issued under the State Act is a judicial order, the precise issue now under consideration was not argued in that case and we do not consider that the comments made in that case govern this issue.

Once it is accepted that the warrant is not a judicial order, it

(55) (1971) 124 C.L.R., at p. 39.
(56) (1985) 157 C.L.R., at p. 73.
(57) (1987) 61 A.L.J.R. 348, at p. 349; 71 A.L.R. 497, at p. 499.
(58) (1969) 14 F.L.R. 101, at pp. 118-119.
(59) (1970) 123 C.L.R., at p. 373.
(60) (1971) 124 C.L.R., at p. 39.
(61) (1989) 167 C.L.R. 94, at pp. 105-106.

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becomes an instrument made pursuant to a circumscribed statutory authority. Although on its face the warrant could be interpreted as purporting to authorize what would otherwise be a breach of Commonwealth law, it is necessary to construe the warrant by reference to the width of the enabling statutory provision. As soon as this is done, it is clear that the warrant can and must be construed so as not to do what the statute itself does not purport to do, namely, authorize a breach of s. 219B of the *Customs Act*. The result is that the warrants in this case are wholly valid and the appeals must be dismissed.

The respondents did not seek to have the declarations of partial invalidity made by the Court of Appeal set aside, presumably because those declarations related only to the use of listening devices for the purposes of federal narcotics inquiries, for which federal warrants would be required in any event. There is therefore no basis for this Court to set aside the declarations.

It remains only to consider the respondents' applications for special leave to cross-appeal on the ground that s. 219B of the *Customs Act*, when it refers to a person acting by arrangement with a member of the Australian Federal Police, does not include a member of a State police force acting as part of a joint federal/State task force. In the circumstances, the answer to that question has no bearing upon the outcome of the present proceedings and no relevance to the criminal proceedings against the appellants under State law. The case is therefore not appropriate for the grant of special leave.

The appeals and the applications for special leave to cross-appeal should all be dismissed with costs.

Appeals dismissed with costs.
Applications for special leave to cross-appeal refused with costs.

Solicitors for the appellant Love, *Marsdens*.

Solicitors for the appellants Peters, *Newman Freeman*.

Solicitor for the first respondent, *H. K. Roberts*, Crown Solicitor for the State of New South Wales.

Solicitor for the second respondent, *S. E. O'Connor*, Solicitor for Public Prosecutions.

R.A.S.

Annex 27: *Rose v. The King* [1947] 88 CCC 114.

ROSE v. THE KING.

Quebec Court of King's Bench, Appeal Side, Galipeault, St. Jacques, Barclay, Bissonnette and Gagne JJ. November 20, 1946.

Evidence VI A, XI B—Diplomatic immunity—Documents stolen from foreign Embassy by employee of Embassy submitted by Crown as evidence—

The privilege of diplomatic immunity given to an Ambassador by international law extends to himself, his personnel, dwelling, documents, archives and correspondence, and can be renounced only by his own State. But where acts committed by the diplomatic corps tend to put the safety of the State to which the corps is accredited in peril, then the immunity fails before that higher interest. The question of what immunity is granted is strictly for the Executive. Where, therefore, the Executive has submitted documents stolen from the Russian Embassy, which might otherwise be held privileged, for use in a prosecution of one of its own citizens, and Russia has made no claim to immunity in respect of the documents, the Courts have no jurisdiction to determine whether the documents are privileged, and whether the Executive has committed a breach of international law. The Executive having become seized of the documents and having determined to use them, the documents were the property of the Executive, and free from any privilege. Similarly, the Executive having decided that the witness who produced the documents, being a former employee in the Russian Embassy was not a diplomatic agent, and the witness claiming no immunity, no one else could put forward any claim that the immunity should prevent the witness from giving evidence in respect of the documents.

Semble that in any event, although the documents came from the Russian Embassy, they were from the offices of a military attaché, the witness was one of his staff, and the Ambassador had no access to them, and therefore the witness could not be said to be one of the Ambassador's personnel, nor the documents part of the Ambassador's documents and archives.

Cases Judicially Noted: *R. v. A. B.*, [1941] 1 K.B. 454, refd to.

Evidence III A—Conspiracy II—Hearsay evidence of statements and acts of conspirators admitted after conspiracy shown by direct evidence—Order of submission of evidence—Circumstantial evidence—

Once there has been direct evidence tending to prove the existence of a conspiracy, hearsay evidence as to things said and done by one conspirator in furtherance of the common design becomes admissible evidence against all the other conspirators, and may be used to support proof of the actual existence of the conspiracy. Where, therefore, there is ample direct evidence that the accused agreed with other persons to obtain information for communication to a foreign power, contrary to the *Official Secrets Act*, 1939 (Can.), c. 49, evidence of another witness as to what was done with the information, and documents proved to have been written by another of the conspirators which showed certain acts done

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could be given and submitted to the jury without transgressing any rule of international law. All that part of the evidence is legal.

To sum up, I believe that diplomatic immunity is relative; that the Courts must give effect to it and accord its advantage to every diplomatic agent who claims it; that the privilege of taking advantage of the immunity of a foreign State cannot be admitted for a Canadian citizen in litigation between his Government and himself, when he is not part of a foreign diplomatic corps; to impose, through a judicial decision, immunity upon a State which does not claim any, would be casting a slur upon its dignity, its sovereignty, and, through a gesture as ungracious as unexpected, would elevate a simple suit to a degree of international importance and create, at least in theory, a diplomatic conflict contrary to the will of the executive power itself.

I have too much respect for public international law to sanction such a theory.

Re hearsay evidence.

The learned counsel for the defence maintains, in the second place, that if the privilege of immunity is rejected by this Court, it must nevertheless consider the evidence given by Gouzenko and the documents that he produced as illegal, because they constitute only hearsay evidence.

The statements of Gouzenko and the documentary evidence that he brings in are facts outside of his personal action, his own doings. He was an intermediary between the conspirators in Canada and the espionage cell in Moscow. The contents of what he was given to transmit and what he received for retransmission were not of his personal knowledge. He was a conspirator in the work confided to him, but he was not a conspirator in the action. Unless therefore we are able to connect this evidence with some principle which takes it out of the general rule, it would be necessary to hold this hearsay evidence illegal. In fact, it is a strict doctrine in all jurisdictions, both civil and criminal, that hearsay evidence is not admissible. The reason therefor is known, which is, that the facts related by witnesses who have not experienced them, that statements which others have communicated to them and which were not heard with their own senses, are not capable of verification, prevent

right, even though they have arrived at court in the first place, to disregard that and to leave as this defendant did. Section 7(2) is there to deal with such cases.

FRENCH J. I agree.

Appeal dismissed.

Solicitors: Crown Prosecution Service, Manchester; Treasury Solicitor.

[Reported by BARBARA SCULLY, Barrister-at-Law]

[COURT OF APPEAL]

FAYED v. AL-TAJIR

[1983 F. No. 596]

1986 Dec. 9, 10, 11, 15; 1987 Feb. 19 — Kerr, Croom-Johnson and Mustill L.JJ.

Conflict of Laws—Sovereign immunity—Diplomatic immunity—Embassy internal memorandum—Memorandum severely critical of plaintiff—Action by plaintiff for damages for libel—Memorandum disclosed on discovery—Whether memorandum protected by absolute privilege

The defendant was a former ambassador of a friendly foreign state. At the material time he was not an accredited diplomat, but he was regarded by the embassy staff and by his government as having authority. He was subsequently re-appointed ambassador. His name was subscribed to an internal embassy memorandum, which was later admitted to have been sent on his orders, although not written or sent by himself, addressed to the counsellor at the embassy. The memorandum pointed out the counsellor's misconduct in granting the plaintiff embassy concessions and informed him of his transfer to another post. It was severely critical of the plaintiff. The plaintiff brought an action claiming damages for libel allegedly contained in the memorandum, alleging publication to, inter alios, the chargé d'affaires at the embassy and to the country's foreign affairs ministry. The defendant accepted responsibility for the memorandum and pleaded diplomatic immunity, but purported to waive the immunity for the action. He also pleaded that the memorandum was the subject of absolute privilege. The judge held that there had been no publication outside the embassy, accepted the plea of absolute privilege and dismissed the action.

On appeal by the plaintiff:—

Held, dismissing the appeal, that where an action was based on the contents and publication of an embassy document the court faced conflicting aspects of public policy, namely, the need to confine to a minimum curtailment of a litigant's right to seek redress for a wrong committed in England and the need to confine to a minimum meddling by the court in the affairs of a foreign sovereign; that normally the latter aspect should prevail unless the circumstances of a particular case warranted its disregard (post, pp. 730F–H, 731A–B); that the concept of international comity and inviolability of diplomatic documents led to the conclusion that the dispute was not justiciable in English courts; and that, accordingly, the judge had rightly held that the memorandum was protected by absolute privilege (post, pp. 732G–H, 733E–F, 735B–E).

Chatterton v. Secretary of State for India in Council [1895] 2 Q.B. 189, C.A. and *Rose v. The King* [1947] 3 D.L.R. 618 considered.

Per Kerr L.J. The waiver of the immunity from suit of the defendant did not destroy the claim for immunity of the document, since that was justified by the character of the document, irrespective of the defendant's submission to the court's jurisdiction against him personally (post, p. 737B–C).

Decision of Stocker L.J., sitting as an additional judge of the Queen's Bench Division, affirmed.

The following cases are referred to in the judgments:

Anderson v. Hamilton (Note) (1816) 8 Price 244

Buttes Gas and Oil Co. v. Hammer [1982] A.C. 888; [1981] 3 W.L.R. 787; [1981] 3 All E.R. 616, H.L.(E.)

Chatterton v. Secretary of State for India in Council [1895] 2 Q.B. 189, C.A.

Congreso del Partido, I [1983] 1 A.C. 244; [1981] 3 W.L.R. 328; [1981] 2 All E.R. 1064, H.L.(E.)

Dickinson v. Del Solar [1930] 1 K.B. 376

Gibbons v. Duffell (1932) 47 C.L.R. 520

Hart v. Gumpach (1872) L.R. 4 P.C. 439, P.C.

Hasselblad (G.B.) Ltd. v. Orbinson [1985] Q.B. 475; [1985] 2 W.L.R. 1; [1985] 1 All E.R. 173, C.A.

Home v. Lord Bentinck (1820) 2 Brod. & B. 130

Isaacs (M.) and Sons Ltd. v. Cook [1925] 2 K.B. 391

Jackson v. Magrath (1947) 75 C.L.R. 293

Merricks v. Nott-Bower [1965] 1 Q.B. 57; [1964] 2 W.L.R. 702; [1964] 1 All E.R. 717, C.A.

Peerless Bakery Ltd. v. Watts [1955] N.Z.L.R. 339

Reg. v. Lewes Justices, Ex parte Secretary of State for the Home Department [1973] A.C. 388; [1972] 3 W.L.R. 279; [1972] 2 All E.R. 1057, H.L.(E.)

Richards v. Naum [1967] 1 Q.B. 620; [1966] 3 W.L.R. 1113; [1966] 3 All E.R. 812, C.A.

Rose v. The King [1947] 3 D.L.R. 618

Royal Aquarium and Summer and Winter Garden Society Ltd. v. Parkinson [1892] 1 Q.B. 431, C.A.

Szalatnay-Stacho v. Fink (1945) 174 L.T. 191; [1947] K.B. 1; [1946] 2 All E.R. 231, C.A.

The following additional cases were cited in argument:

Alcom Ltd. v. Republic of Colombia [1984] A.C. 580; [1984] 2 W.L.R. 750; [1984] 2 All E.R. 6, H.L.(E.)

Baccus S.R.L. v. Servicio Nacional del Trigo [1957] 1 Q.B. 438; [1956] 3 W.L.R. 948; [1956] 3 All E.R. 715, C.A.

Empresa Exportadora de Azucar v. Industria Azucarera Nacional S.A. [1983] 2 Lloyd's Rep. 171, C.A.

Empson v. Smith [1966] 1 Q.B. 426; [1965] 3 W.L.R. 380; [1965] 2 All E.R. 881, C.A.

Mellenger v. New Brunswick Development Corporation [1971] 1 W.L.R. 604; [1971] 2 All E.R. 593, C.A.

Reg. v. Madan [1961] 2 Q.B. 1; [1961] 2 W.L.R. 231; [1961] 2 All E.R. 588, C.C.A.

Sengupta v. Republic of India [1983] I.C.R. 221, E.A.T.

APPEAL from Stocker L.J., sitting as an additional judge of the Queen's Bench Division.

On 3 May 1983 the plaintiff, Mr. Muhammed Fayed, issued a writ seeking damages for libel contained in a memorandum dated 7 September 1982 which was published, or caused to be published by the defendant, Mr. Mohammed Mahdi al-Tajir, to Mr. Nabil Hijazi who was counsellor at the Embassy of the United Arab Emirates. The defendant was the head of the embassy at the time pending his re-appointment as the ambassador. Copies of the memorandum were sent to the chargé d'affaires and the foreign affairs ministry of the Emirates. The defendant, in his defence, pleaded that he had diplomatic status but stated that he waived it for the present proceedings. He also pleaded that the memorandum, being an internal document of the embassy of his country, was privileged. However, the memorandum was disclosed on discovery in the proceedings.

Stocker L.J. dismissed the action holding that the memorandum was protected by absolute privilege.

By a notice of appeal dated 14 March 1986 the plaintiff appealed on the grounds, inter alia, that (1) the judge erred in law in holding that the communication by the defendant of the words complained of to Mr. Nabil Hijazi was protected by absolute privilege, the sole reason why he did not give judgment for the plaintiff; (2) the judge erred in apparently holding, for the first time, that the class of absolute privilege applied by the Court of Appeal in *Chatterton v. Secretary of State for India in Council* [1895] 2 Q.B. 189, 190, 192–193, to "officers of state" and to communications "relating to matters of state," in the context of the British Crown, would extend to cover communications between the diplomats or other servants of a foreign state, that being the only class of absolute privilege relied upon by the defendant; (3) in particular, the judge erred in law in apparently treating the memorandum complained of in that action as a communication "relating to matters of state" and the individuals concerned, the defendant and Mr. Nabil Hijazi, as being "officers of state" within the *Chatterton* principle; (4) whether or not absolute privilege should be so extended was a question best left to Parliament, in the absence of any case law directly in point, particularly in view of the foreign policy implications which would in effect require

A to be assessed de novo; (5) in any event, even if, contrary to the plaintiff's submissions, communications passing between the ambassador of a friendly foreign state and one of the senior embassy officials ordinarily did require to be protected by absolute privilege, the judge erred on the facts before him in upholding the defence because at the time the memorandum was published the defendant, it was conceded, was neither the ambassador nor accredited to the Court of St. James in B any other capacity; (6) the appropriate test to apply in deciding whether to extend the *Chatterton* principle was whether there were "overwhelmingly strong reasons of public policy" which rendered it necessary so to do: *Gibbons v. Duffell* (1932) 47 C.L.R. 520, 534, and thus the judge erred in holding that there was such a necessity for the hitherto very limited and special protection of absolute privilege in the C circumstances confronting him; (7) in particular, no such necessity could be demonstrated in circumstances where (a) qualified privilege would ordinarily attach to official embassy documents and (b) the authors of such documents would be protected by diplomatic immunity from suit arising under the Vienna Convention, as embodied in the Diplomatic Privileges Act 1964, which the instant case the sovereign state concerned had chosen to waive; (8) the judge further failed to take any or any D sufficient account of the following considerations: (a) the principle described by Lopes L.J. in *Royal Aquarium and Summer and Winter Garden Society Ltd. v. Parkinson* [1892] 1 Q.B. 431, 451, to the effect that "[absolute privilege] seems rather to attach to the person or character of the person writing or speaking the defamatory matter, whereas [qualified privilege] to the occasion when the defamatory matter E is written or spoken," (b) the doubts expressed by the Court of Appeal in *Szalatnay-Stacho v. Fink* [1947] K.B. 1 and *Richard v. Naum* [1967] 1 Q.B. 620 as to whether the absolute privilege enjoyed by communications relating to matters of state would extend to documents published by the officials of foreign governments, (c) the unchallenged evidence of Mr. Nabil Hijazi that it would not have been within the scope of the defendant's authority, even if he had been ambassador at the material F time, to order Mr. Hijazi's transfer back to the United Arab Emirates, which purported to be the object of the memorandum complained of; and (9) the judge misdirected himself as to the effect of the passages cited from the speech of Lord Wilberforce in *Buttes Gas and Oil Co. v. Hammer* [1932] A.C. 888, 930–932. Those related to the entirely separate question of jurisdiction to review the transactions of sovereign states, G which was so remote from the present issue of absolute privilege as to afford no guidance one way or the other and in the present case it was not disputed that the judge had jurisdiction to determine the issues in accordance with English law.

By a respondent's notice the defendant sought to have the judge's judgment affirmed on the grounds, inter alia, that (1) if, contrary to the judge's decision and to the defendant's submissions, the public interest H of the United Kingdom did not require that absolute privilege should be attached to the communication of the words complained of to Mr. Nabil Hijazi, absolute privilege should nonetheless attach to that communication as an aspect of the state immunity which was enjoyed by the United

Arab Emirates in respect of all documents and archives of its embassy in the United Kingdom and in particular communications emanating from that embassy concerning the employment of the officers of that embassy and the absolute privilege claimed in the defence survived the waiver of the diplomatic immunity on whichever of those two bases that privilege was properly to be founded; and (2) if, as was the plaintiff's submission, only a qualified privilege were to be attached to the communication of the words complained of to Mr. Nabil Hijazi, that privilege would be defeasible upon proof of malice yet an inquiry as to the presence or absence of malice would involve an examination of the motives of the United Arab Emirates in the person of its officers in effecting Mr. Nabil Hijazi's transfer from its embassy in London to its foreign affairs ministry in Abu Dhabi and that was not an inquiry on which a United Kingdom court should embark.

The facts are set out in the judgment of Mustill L.J.

David Eady Q.C. and *Stephen Suttle* for the plaintiff. The scope of absolute privilege as a defence in defamation actions has been stated as the privilege attached "to communications at the highest level of government and civil service, but it is uncertain how far down the official scale the protection extends:" *Duncan and Neil on Defamation*, 2nd ed. (1983), para. 13.29, p. 88. In *Chatterton v. Secretary of State for India in Council* [1895] 2 Q.B. 189, 191–192, 194, the Court of Appeal held that a communication from the Secretary of State for India to the Parliamentary Under Secretary for India, i.e. from one government minister to another, was protected by absolute privilege see also *Fraser on Libel and Slander (Law and Practice)*, 7th ed. (1936), p. 127. Here, the defendant and Mr. Nabil Hijazi were not "officers of state" within the *Chatterton* principle nor was the memorandum a communication "relating to matters of state."

Absolute privilege cannot extend to officers of state and to communications relating to matters of state between the diplomats or other servants of a foreign state. *M. Isaacs and Sons Ltd. v. Cook* [1925] 2 K.B. 391 has been the only authority where a communication made by the High Commissioner of Australia in the United Kingdom to the Prime Minister of Australia under the High Commissioner Act 1909 of the Commonwealth of Australia was held to be protected by absolute privilege. But since that case was decided before the Statute of Westminster 1931 and the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act 1952 it should now be distinguished. In *Szalatnay-Stacho v. Fink* [1947] K.B. 1 and *Richards v. Naum* [1967] 1 Q.B. 620 the Court of Appeal declined to afford absolute privilege to communications between the officials of foreign governments relating to matters of state. [Reference was made to *Hart v. Gumpach* (1872) L.R. 4 P.C. 439.]

The defendant here, by invoking privilege, is seeking an extension of the *Chatterton* principle so wide that only Parliament ought to effect it. In any case, absolute immunity requires "overwhelmingly strong reasons of public policy:" *Gibbons v. Duffell* (1932) 47 C.L.R. 520, 534. There was no necessity, whether resulting from public policy or otherwise, for

A an extension of absolute privilege to the memorandum complained of. Protection would have been available to the defendant under articles 31 and 32 of the Vienna Convention on Diplomatic Relations, which was given the force of law by Parliament in section 2(1) of the Diplomatic Privilege Act 1964, by means of diplomatic immunity and by qualified privilege, subject to malice. [Reference was made to *Jackson v. Magrath* (1947) 75 C.L.R. 293.] The absolute privilege would run counter to the B Act of 1964. If foreign diplomats are to be accorded the strict privilege so that there would be no remedy even in cases of express malice or abuse that would involve fundamental issues of foreign policy and would best be left to Parliament.

Moreover, the defendant here lacked the official status in making the publication complained of and absolute privilege is attached to the C person or character of the person writing or speaking the defamatory matter: Lopes L.J. in *Royal Aquarium and Summer and Winter Garden Society Ltd. v. Parkinson* [1892] 1 Q.B. 431, 451.

The judge observed that he was influenced by parts of Lord Wilberforce's speech in *Buttes Gas and Oil Co. v. Hammer* [1982] A.C. 888, 930–932. But Lord Wilberforce was considering an entirely separate principle, namely the unwillingness of the English courts to adjudicate D on the transactions of foreign sovereign states.

"Immunity" in the Act of 1964 is to be contrasted with the term "inviolable." The former connotes immunity from suit which relates only to persons. The latter is used to cover physical inviolability, that is, the host state will not, through any of its agencies "break in upon" archives, correspondence and such like: *Anderson v. Hamilton (Note)* (1816) 8 E Price 244. However, diplomats are protected both by physical inviolability (see article 29 of the Vienna Convention) and by immunity from suit: see article 30. Documents need, and are given, only physical inviolability. The Convention does not make it unlawful to sue in respect of words contained in an embassy document nor to make reference to words in such a document in any legal proceedings. Documents of state can be protected also by public interest immunity from subpoena or discovery: F *Chatterton v. Secretary of State for India in Council* [1895] 2 Q.B. 189, applying *Anderson v. Hamilton (Note)*, 8 Price 244, and *Home v. Lord Bentinck* (1820) 2 Brod. & B. 130. But neither of these principles is relevant, since publication was admitted.

No aspect of sovereign or state immunity is involved here. The action has not been brought against the state. There is no question of an G act of state in the sense of *Buttes Gas and Oil Co. v. Hammer* [1982] A.C. 888 and *Empresa Exportadora de Azucar v. Industria Azucarera Nacional S.A.* [1983] 2 Lloyd's Rep. 171. [Reference was made to *Dickinson v. De Solar* [1930] 1 K.B. 376, 381.]

If, however, state immunity does arise in the instant case under section 2(3) of the Act of 1964 the waiver is an intervention by the United Arab Emirates in these proceedings. Section 2 of the State H Immunity Act 1978 does not exempt such intervention. Thus it would constitute a submission to the court. It is impossible to construe "intervention" as referring to a party, since parties do not "intervene." [Reference was made to *Baccus S.R.L. v. Servicio Nacional del Trigo*

[1957] 1 Q.B. 438; *Reg. v. Madan* [1961] 2 Q.B. 1 and *Empson v. Smith* [1966] 1 Q.B. 426.] Thus the only question here is whether there extends to the defendant, in respect of his admitted publication, a defence of absolute privilege by reason of some imperative of English public policy.

E. C. Evans-Lombe Q.C., *Geoffrey Shaw* and *Lady Hazel Fox* for the defendant. The classes of documents and types of circumstances are not closed where the English courts will afford absolute privilege on grounds of public policy: *Merricks v. Nott-Bower* [1965] 1 Q.B. 57, 73, and *Hasselblad (G.B.) Ltd. v. Orbinson* [1985] Q.B. 475. [Reference was made to *Reg. v. Lewes Justices, Ex parte Secretary of State for the Home Department* [1973] A.C. 388.] The limits of privilege are different: *M. Isaacs and Sons Ltd. v. Cook* [1925] 2 K.B. 391 and *Gibbons v. Duffell* (1932) 47 C.L.R. 520. [Reference was made to *Anderson v. Hamilton (Note)*, 8 Price 244.] Acts of an official of a foreign embassy should be considered acts of the foreign government: *Mellenger v. New Brunswick Development Corporation* [1971] 1 W.L.R. 604. [Reference was made to *Peerless Bakery Ltd. v. Watts* [1955] N.Z.L.R. 339 as an example of the application of *Chatterton v. Secretary of State for India in Council* [1895] 2 Q.B. 189 and *Alcom Ltd. v. Republic of Columbia* [1984] A.C. 580.]

An embassy document which is made public by an act of an embassy official is not covered by diplomatic or state immunity. If that is not correct then the judge was right in holding that the memorandum here was inter-departmental document which dealt with the transfer of an official of the embassy back to his own country. As such the memorandum was a record of a public act of a foreign sovereign acting within its sovereign powers: *Sengupta v. Republic of India* [1983] I.C.R. 221. Even though the document in the instant case was made in West Germany it was signed on behalf of the defendant and though the defendant at the time was not formally appointed as the ambassador, he was treated as such by his country. The plaintiff only came to know about the memorandum because it was disclosed to him by the person to whom it was addressed. The memorandum thus is a diplomatic document: *Rose v. The King* [1947] 3 D.L.R. 618. Under section 1 of the State Immunity Act 1978 a foreign sovereign state's immunity extends to such documents and they are immune from the jurisdiction of the English courts by rules of international law and comity which form part of the English law: *Halsbury's Laws of England*, 4th ed., vol. 18 (1977), para. 1548, p. 794. The Act of 1978 does not withdraw such immunity: sections 6 and 16(1)(*b*).

Accordingly, unless the United Arab Emirates waive its immunity in respect of the memorandum an action for libel founded on it cannot be brought in English courts. Here, there is no waiver by the Emirates.

The plaintiff seems to be accepting that the memorandum came into existence in the circumstances of qualified privilege. A defence plea of such a privilege could have been answered with a plea of malice. In such a situation the court would have had to investigate the defendant's motives in dismissing Mr. Nabil Hijazi from his post and his transfer. That would have amounted to an investigation into the motives of an

officer of the Emirates in the exercise of the sovereign power of that state. The English courts do not embark upon such an investigation *Buttes Gas and Oil Co. v. Hammer* [1982] A.C. 888. This supports the judge's view that the memorandum should be given the protection of absolute privilege.

Eady Q.C. replied.

Cur. adv. vult.

19 February. The following judgments were handed down.

MUSTILL L.J. This curious case springs from a dispute within the London Embassy of the United Arab Emirates.

The defendant is Mr. Muhammed Mahdi al-Tajir. For some years he was ambassador of the United Arab Emirates ("the Emirates") to the Court of St. James. The Emirates are a federation of Arab states, one of which is the Emirate of Dubai. At the material time, H. H. Sheikh Rashid was ruler of Dubai and vice-president of the Emirates. During August 1982 the defendant resigned as ambassador of the Emirates in London, for reasons which suggest that it was contemplated throughout that in due course he would resume his office. For about the next 12 months he continued to concern himself with the affairs of the Emirates in two ways. First, he maintained his position as adviser to the ruler of Dubai, a role which he had performed for many years. Second, he appears to have acted for internal purposes as de facto head of mission. During this period there was no person occupying the office of ambassador. Although, upon the defendant's resignation as ambassador, he ceased to be on the list of those recognised as diplomats accredited to the Court of St. James, his status was such that, in the words of the trial judge, he was regarded both by the foreign ministry in the United Arab Emirates and by the staff at the embassy in London as having authority. On 15 November 1983 the defendant was re-appointed as ambassador in London, and he continued to hold that post until November 1986, when he once more resigned: an event which occurred after the trial of the present action but before the argument of the appeal.

During the interregnum between the resignation of the defendant in August 1982 and his re-appointment in November 1983 there was no ambassador in post. The senior official in the embassy and formal chef de mission was Mr. Mirza al-Sayegh, the chargé d'affaires. The second in command was the counsellor, Mr. Nabil Hijazi. The third secretary was Mr. Al Hashimi.

The plaintiff, Mr. Muhammed Fayed, is a businessman with substantial interests in the United Kingdom. He had for a number of years been prominent in the affairs of the Emirates, and had been on close terms with the defendant. One of the fruits of this relationship had been the procurement by the defendant on his behalf of certain privileges at Heathrow Airport, notably concerning the use of the V.I.P. lounge, and access for his limousines to various restricted areas. These privileges had been renewed for him from year to year through the intermediacy of Mr. Nabil Hijazi.

In course of time the relationship between the plaintiff and the defendant took a turn for the worse: so much so that on 7 September 1982, during the interval between the resignation of the defendant as ambassador and his subsequent re-appointment, a memorandum came into existence in terms sharply critical of the plaintiff. I return at a later stage to the circumstances in which this document came to be written. It is sufficient for present purposes to say that it was addressed to Mr. Nabil Hijazi (the counsellor), with copies to Mr. Mirza al-Sayegh (the chargé d'affaires) and to the ministry of foreign affairs in Abu Dhabi. The document was subscribed with the word "ambassador" followed by the Arabic equivalent of "per pro," then the signature of Mirza al-Sayegh, and finally the name of the defendant.

Since this memorandum is the document in suit in the present action I must set out its text in full. In translation, it read:

"EMBASSY OF THE UNITED ARAB EMIRATES
"Inter-departmental memorandum
"From: H.E. The Ambassador
"To: Counsellor Nabil Hijazi
"Ref:
"Date 7/9/1982
"Greetings,

"I was dismayed to learn that you have contacted the airport authorities for the purpose of granting Mr. Muhammed Fayed two passes to enter Heathrow Airport in his car in the name of the embassy. I was extremely annoyed to receive such a report as I have personally warned you of the consequences of having any dealings with that person under the name of the embassy. You have promised to cancel all the arrangements made by the embassy in his favour. You made that promise several weeks ago in the presence of Mr. Mirza Al-Sayegh. However, this has not been fulfilled. I was surprised to learn from my colleagues in the embassy that Mr. Fayed started to use the V.I.P. lounge at the airport impersonating the identity of the adviser of Sheikh Zayed. In addition he used two car passes. This has caused great embarassment to me and to the embassy staff, as it happened without their knowledge. The matter has come to the notice of the British Foreign Office and also to the notice of the ministry of foreign affairs in Abu Dhabi. We have rectified the situation by withdrawing the above status and cancelling the tickets. You are well aware of the outcome if Mr. Fayed had managed to enter prohibited goods into this country using the above capacity and in the name of the embassy. This could have caused deterioration in the relationship between the embassy and the authorities concerned, relationships which we were able to strengthen since the establishment of this embassy till the present, let alone the deterioration of the relationship between the embassy and H.H. Sheikh Zayed as a result of impersonating the identity of the adviser of His Highness by an unknown person.

"Therefore, I have decided to transfer you to the head office of the ministry of foreign affairs in Abu Dhabi, referring the whole matter to the ministry to take whatever action they deem necessary.

A I have informed the departments concerned in the embassy that your diplomatic status has now been withdrawn and instructed them to claim any possessions under your charge which are the property of the embassy, such as the car and the house leased for your use.

"This takes effect from today's date.

"I have also notifed the British Foreign Office of this action.

"Finally, would you please accept my sincere thanks and
B appreciation of your previous service in this embassy which I hope will continue in the ministry of foreign affairs in the future,

"Ambassador

"p.p. (Signature)

"Mahdi Al-Tajir

C "Copy to Mr. Mirza Sayegh, Chargé d'Affairs to put this into effect and then take full charge of the responsibilities of Mr. Nabil Hijazi.

"Copy to the ministry of foreign affairs in Abu Dhabi to complete the arrangements of transfer in accordance with normal procedure."

D As contemplated by its terms, this document was delivered to and read by Mr. Nabil Hijazi, and also by certain officials in the ministry at Abu Dhabi. This led to the temporary recall of Mr. Nabil Hijazi for discussions, but ultimately he returned to his post as counsellor in London. Meanwhile, Mr. Nabil Hijazi has shown the memorandum to the plaintiff. His motives for doing so were controversial, but there is no
E suggestion that his act was the consequence of any express authorisation by the defendant or anyone else.

On 3 May 1983, the plaintiff issued the writ in the present action, claiming damages for libel contained in the memorandum, and alleging publication to Mr. Nabil Hijazi. An injunction was also claimed. The writ was followed on 27 May 1983 by a statement of claim also alleging that the defendant wrote and published the letter to Mr. Nabil Hijazi or
F caused it to be so written and published. It was pleaded that the plain and ordinary meaning of the words was that:

"(i) The plaintiff had obtained two passes to enter Heathrow Airport in his car under false pretences, that is to say by pretending to be acting on behalf of the embassy of the United Arab Emirates. (ii) The plaintiff had impersonated the identity of an adviser Sheikh
G Zayed in the V.I.P. lounge at Heathrow Airport. (iii) The plaintiff had been using these devices with a view to importing unlawfully prohibited goods into the United Kingdom."

Next, on 28 June the defendant swore an affidavit setting out that he had in the past resigned as ambassador, but that his re-appointment was awaiting confirmation from the United Kingdom authorities. He went on
H to summarise his relationship with the ruler. He concluded:

"10. It will be observed from the statement of claim that the plaintiff complains of a document purporting to be an inter-departmental memorandum published within the [United Arab

Emirates] embassy and dated 1 September 1982. At that date I was no longer ambassador and had left the country the previous month to return to Dubai, and I was at that time visiting Germany with H.H. Sheikh Rashid who was undergoing medical treatment in Baden Baden. I neither wrote nor signed the memorandum. I have no knowledge of the circumstances in which it came to be written.

"11. I am advised that, since I have arrived in this country to take up my appointment as ambassador, the Foreign Office having been notified of my appointment, I am immune from the jurisdiction of this court . . .

"13. In any event it is my respectful submission that this . . . court should decline to investigate in these libel proceedings or at all an internal communication made within a foreign embassy. If there are to be proceedings in respect of such a communication, then in my respectful submission they would be more conveniently dealt with, with less oppressive consequences for me, in the courts of Dubai where, so my solicitors advise me having made inquiries of their own, civil remedies for falsehoods and penal provisions for defamation exist, in addition to the remedies available via the Sharia or religious law where a person's reputation has been injured."

This affidavit was followed by an application to a Queen's Bench master for an order to set aside service on the ground:

"the defendant having been out of jurisdiction when the writ was issued and/or serving and striking out the endorsement on the writ and/or the statement of claim and/or dismissing or staying this action, upon the grounds that the defendant is immune from the jurisdiction of this . . . court and/or that it is oppressive for this action to be brought in England when it would be dealt with conveniently by a court in the United Arab Emirates and/or that the content and circumstances of publication of the memorandum complained of in this action are such that its author is protected by an absolute privilege and/or that this . . . court cannot or should not inquire into it, should be dismissed."

The application was dismissed on 11 July 1983, and although a notice of appeal was lodged, it appears that this was never proceeded with. One month later the defendant's reinstatement as ambassador became effective.

The next step took place during January 1984, when a defence was served, denying that the defendant had written or published or caused to be written or published the letter in question. The pleading concluded:

"6. Further or in the alternative, the document reproduced in paragraph 1 of the statement of claim appears on its face to be an inter-departmental memorandum of the embassy of the United Arab Emirates. Communications relating to matters of state, made by one officer of state to another, are absolutely privileged and cannot be made the subject of an action for libel.

"7. The defendant was the ambassador of the United Arab Emirates to the Court of St. James until 1 August 1982, and since

his re-appointment in 1983 is again the ambassador of the United Arab Emirates. For the avoidance of doubt, and for the purpose of this action only, he hereby expressly waives any claim of his to diplomatic immunity.

"8. Further or in the further alternative, this . . . court should decline jurisdiction upon the ground that it is not the convenient or appropriate forum for the resolution of this action. Each party is a citizen of the United Arab Emirates and ordinarily resident in Dubai. The plaintiff's complaint is in respect of a document which appears on its face to be in his own language and to have passed from one fellow countryman of his to another, within the embassy of his own country. The Emirate of Dubai has courts and a law of defamation."

Nothing of any materiality then happened until 15 November 1985, when the plaintiff re-amended his statement of claim to allege publication to a list of 12 persons: it is unnecessary to state the details. Soon afterwards, in response to an interrogatory the defendant deposed:

"As to Nabil Hijazi I did not send the said memorandum to him. A memorandum containing the said words was written and sent to Nabil Hijazi by Mirza Al-Sayegh Chargé d'Affaires on or about 7 September 1982. At a meeting between, inter alia, myself and the said Mirza Al-Sayegh he sought my advice as to whether such a memorandum should be sent. I advised him that he should act in what he considered to be the best interests of the United Arab Emirates and its embassy for which, after my resignation as ambassador he was then responsible and did not seek to dissuade him from his proposed course. I have therefore given instructions to my solicitors to amend my defence so as to accept responsibility for publication of the said memorandum to Nabil Hijazi."

There was then a consequential amendment to the defence, maintaining the denial that the defendant wrote or sent the letter, but admitting that he caused it to be sent.

Thus matters stood when the action came to trial. A substantial issue which had to be explored by the judge, but which did not arise before us, was whether there was publication in the United Kingdom to any of the persons named in the list added to the statement of claim by re-amendment: for it was conceded that the defence of absolute privilege could not be established if such wider publication occurred and was a natural consequence of the initial publication to the addressee. In the event, the judge held that so far as there was any publication outside the embassy, this was neither intended by the defendant nor the natural and probable consequence of the publication by him to Mr. Nabil Hijazi. There was no appeal against this finding.

Accordingly, the issue left for decision was whether the publication by a person acting as ambassador although not accredited as such, to the counsellor of the embassy with a copy to chargé d'affaires, of a document concerning the conduct of the addressee in his official capacity, and the termination of his posting, was actionable at the suit of the plaintiff in the English court. The judge held that it was not, on the

ground set out in paragraph 6 of the defence—namely that the document, being a communication by one officer of state to another, relating to a matter of state, was the subject of absolute privilege and could not be made the subject of an action for libel.

On the hearing of the appeal, the arguments on both sides were cast in wider terms than before the judge. Accordingly, it is convenient to begin with a survey of the statutes and reported decisions touching on this branch of the law. These may be arranged according to subject matter, as follows.

1. The immunity from production of certain categories of state documents. It is unnecessary to enter here into the complexities, not yet fully resolved, of "class privilege." It is sufficient to say that since the 18th century the courts have recognised the need to abstain from requiring the production of communications addressed by or to high officers of state relating to matters within their competence. As Lord Ellenborough C.J. said, in relation to letters from the Under Secretary of State for the Colonial Department to the Secretary of State, "I do not like the breaking in upon this correspondence:" *Anderson v. Hamilton (Note)* (1816) 8 Price 244, 246.

2. The refusal by the court to allow certain categories of documents, or copies of them, to be proved and put in evidence at the trial: see *Home v. Lord Bentinck* (1820) 2 Brod. & B. 130 and *Chatterton v. Secretary of State for India in Council* [1895] 2 Q.B. 189.

3. The recognition, by treating the publication as the subject of absolute privilege, that the publication of certain categories of state documents does not found a cause of action in damages. Such publication has been referred to as an "act of state." That documents of this kind may be the subject of absolute privilege is undoubted, and it is clear that the court must take into account the position occupied by the sender and the recipient, and the nature and subject matter of the communication. The precise boundaries of the protection have, however, yet to be established: contrast *Chatterton v. Secretary of State for India in Council* (despatch by Secretary of State to Under Secretary concerning the removal of the plaintiff to the half pay list); *Royal Aquarium and Summer and Winter Garden Society Ltd. v. Parkinson* [1892] 1 Q.B. 431 (oral report by member of London County Council to a meeting of the council concerning the grant of licences); *M. Isaacs and Sons Ltd. v. Cook* [1925] 2 K.B. 391 (report by Australian High Commissioner to Prime Minister on commercial matters involving the interests of the Commonwealth); *Gibbons v. Duffell* (1932) 47 C.L.R. 520 (report on subordinate by police inspector to superintendent); *Jackson v. Magrath* (1947) 75 C.L.R. 293; *Peerless Bakery Ltd. v. Watts* [1955] N.Z.L.R. 339 (communication by Minister of Industry and Commerce to the Secretary of the Wheat Commission); *Merricks v. Nott-Bower* [1965] 1 Q.B. 57 (minute by deputy commissioner of police to commissioner regarding transfer of senior officers); *Reg. v. Lewes Justices, Ex parte Secretary of State for Home Department* [1973] A.C. 388 (letter by assistant chief constable to Gaming Board in response to a request for information concerning an application for a gaming licence) and

Hasselblad (G.B.) Ltd. v. Orbinson [1985] Q.B. 475 (letter of complaint to Commission of European Community).

4. The immunity from suit of an officer of the Crown in respect of acts done abroad otherwise than under colour of legal right. This also is referred to as immunity in respect of an "act of state." It is unnecessary to cite the authorities since they are far from the present point.

5. The refusal of the court, save in exceptional cases, to inquire into the validity and policy of foreign municipal legislation so far as it relates to matters done purportedly in furtherance of such legislation within the territory of the foreign state. This also is often referred to as an example of "act of state." Here again, citation is unnecessary.

6. The abstention by the court, in certain circumstances, from adjudication upon the act of a foreign sovereign state—at least when the act is done within the territory of the foreign state. This doctrine, also described as being concerned with "act of state," was discussed in *Buttes Gas and Oil Co. v. Hammer* [1982] A.C. 888.

7. The refusal by the court to entertain any claim against a foreign sovereign or state, or a diplomatically accredited officer thereof, except in respect of certain types of transaction, unless the immunity is waived by the sovereign or a person having the power to communicate a waiver on his behalf: the State Immunity Act 1978. This principle does not deny the existence of a cause of action against the sovereign or his officer, but rather makes it impossible for the cause of action to be enforced: see *Dickinson v. Del Solar* [1930] 1 K.B. 376, 381.

8. The recognition by the state and by the courts that the person of the foreign sovereign and his accredited officers should be protected from affront: article 29 of the Vienna Convention on Diplomatic Relations, as set out in Schedule 1 to the Diplomatic Privileges Act 1964.

9. As an aspect of the principle just stated, the recognition by the state and by the courts that the correspondence of the sovereign and the documents of his diplomatic mission touching on its functions should be kept inviolate, in the sense that they must be protected from harm, and from perusal and use without the sovereign's consent: see for a partial re-enactment of this long established principle of international law, article 24 of the Vienna Convention.

I have divided the cases and statutes into categories to illustrate why in my judgment the application of them by analogy to a new situation should be embarked on with caution. Thus, the doctrine that certain types of document are invulnerable has developed over the years from a notion that they should not be taken out of the hands of high officers of state, to a refusal to allow them to be given in evidence, and finally to a ruling that such documents (or more accurately the publication of them) are the subject of absolute privilege. These consequences are not the same, as was pointed out by Roche J. in *M. Isaacs and Sons Ltd. v. Cook* [1925] 2 K.B. 391, 398, and Starke J. in *Gibbons v. Duffell,* 47 C.L.R. 520, 529. Granted, it is usually of no moment to either party whether the plaintiff fails for want of proof, or because the publication is incapable of founding a cause of action: see the observations of Lord Wilberforce in *Buttes Gas and Oil Co. v. Hammer* [1982] A.C. 888, 930,

and Starke J. in *Gibbons v. Duffell,* 47 C.L.R. 520, 530. But the distinction may be important in a case such as the present, where the document, its contents and its publication are admitted in the pleadings, and where the document is disclosed on discovery and put in evidence at the trial without objection.

Again, there is a risk that the terminology may prove misleading. The types of case identified as items 4, 5 and 6 above have all been discussed in terms of the label "act of state." Yet they are really quite unrelated, as regards their effect, boundaries and underpinnings of policy. There is a temptation to believe, because the events with which the present action is concerned were in one sense "foreign" and because they bear some resemblance to the type of English communication which has been characterised as an "act of state" in the passage from *Fraser on Libel and Slander (Law and Practice),* 7th ed. (1936), p. 127, quoted in more than one of the cases, that we are here concerned with a "foreign act of state." This might encourage the court to explore the limits of that doctrine, such as were discussed in *I. Congreso del Partido* [1983] 1 A.C. 244, and treat them as applicable here. In my judgment this would be a mistake.

Furthermore, although it is quite clear that the protection is derived in every one of these cases from considerations of public policy, it is equally clear that these considerations are not the same throughout. Thus the rationale of cases such as *Chatterton v. Secretary of State for India in Council* [1895] 2 Q.B. 189, is that the direct interests of the community in the United Kingdom demand that an officer of a certain status should be able to communicate candidly on certain subjects without running the risk of being brought before the court as defendant or witness, and examined on the accuracy or honesty of what he has written. Plainly, there is no such direct interest where the document passes between two persons quite unconnected with the government and administration of the realm, on matters which are equally so unconnected. If there is to be the protection now claimed by the defendant it must either rest on the grounds of comity which in one shape or another underlie items 5 to 9 above, or on some other ground altogether.

For these reasons I would prefer not to venture any extension of the principle exemplified by *Chatterton v. Secretary of State for India in Council,* to documents created within and for the purposes of a foreign diplomatic mission. Rather, I would look to see whether there is any ground upon which immunity should be granted because the United Kingdom has an interest in conceding to other states those privileges which it would in kindred circumstances wish to be accorded by the foreign state.

Before addressing this question it is convenient to deal with four reported cases which might be said to shed light on the present problem.

The first is *Hart v. Gumpach* (1872) L.R. 4 P.C. 439. The defendant was the inspector general of customs of the Chinese government at a time when a unique condominium existed after the Treaties of Tientsin. The plaintiff had been professor of mathematics and astronomy at a college of western language and science which had been established by the Chinese government. The plaintiff raised an action before a court in

A China, which had jurisdiction over disputes between British subjects. Amongst his complaints was an allegation that the defendant had libelled him in a letter written to the head of a body called the Foreign Board at Peking. On appeal to the Privy Council against a verdict in favour of the plaintiff it was held that the communication was at least subject to qualified privilege. The Board did not, as I understand their opinion, reach a distinct conclusion on whether it was also entitled to absolute
B privilege, there being insufficient facts upon which to decide the question, and since a retrial was ordered it must, I think, be taken that a case for absolute privilege was not made out. But this cannot in my judgment be regarded as any authority against the defendant in the present case, for the circumstances of the two actions are quite different. The one concerned a claim by one British subject against another in respect of
C acts done abroad, in fulfilment of an office in a government which, so far as the court was concerned, was in one sense "local," and in another not. Here by contrast the claim springs from dealings between foreigners in England in relation to the business of a government which is not in any sense local, but which has an embassy here entitled to the protection of the English state and the English court.

Next, there was *M. Isaacs and Sons Ltd. v. Cook* [1925] 2 K.B. 391.
D The plaintiffs carried on business in London as auctioneers of fruit. The defendant was High Commissioner of the Commonwealth of Australia in the United Kingdom. In the course of his duties he wrote a report on the outcome of sales of Australian fruit, in terms which the plaintiffs alleged were defamatory of themselves. The defendant contended that the report was absolutely privileged. The plaintiffs argued for the
E contrary view, primarily on the ground that the matter was of a commercial nature and did not concern a state matter, such as was involved in *Chatterton v. Secretary of State for India in Council* [1895] 2 Q.B. 189. On a preliminary issue, Roche J. held in favour of the defendant. In my judgment, there are two reasons why this decision does not point to any conclusion in the present case. First, because the question whether the principle stated in *Fraser on Libel and Slander*
F *(Law and Practice),* 1st ed. (1893), p.95, and adopted in *Chatterton v. Secretary of State for India in Council* [1895] 2 Q.B. 189, 191, and other cases had any application at all to a communication between persons who were not, in the most direct sense, officers of the Crown, does not appear to have been canvassed. Second, because the closeness of the relationship between the Commonwealth of Australia and the United
G Kingdom involved considerations of public policy much more immediate than those called forth by the need to maintain cordially reciprocal relations with foreign states. I think it unsafe to make any assumption as to what Roche J. would have held if the suit had concerned the transactions of persons, who owed no allegiance to the Crown, regarding the business of a foreign state.

At first sight, the next case in chronological sequence, namely
H *Szalatnay-Stacho v. Fink* [1947] K.B. 1, appears much closer to the present point. It is, however, necessary to examine rather carefully what the case actually decided. The plaintiff, a Czech national, was the Czechoslovak diplomatic representative in Egypt during the second

world war. The defendant, also a Czech national, was the chief military prosecutor of the Czech army. The defendant had received a number of written statements concerning the activities of the plaintiff whilst on diplomatic service. He forwarded these statements to the Military Office of the President of the Czech Republic (in exile), with a covering letter which explained that since the plaintiff was a civilian the defendant had no jurisdiction to bring criminal proceedings against him, but that the charges made in the statements were so grave that he considered it his duty to bring them to the attention of the President. He then went on to enumerate sections of the Czech criminal law which were alleged to have been contravened. Ultimately this letter came to the notice of the plaintiff, who brought an action in libel in the English court, to which the defendant responded with a plea of absolute privilege.

At first instance, this plea was upheld. Henn-Collins J. took little time to dispose of arguments that the publication was privileged because the dossier was an act of state, or a step in the proceedings of a military tribunal, so as to bring it within the protection afforded by the reported cases. As to the former, the communication did not take place at a sufficiently high level to qualify as a state matter, of the kind contemplated in *Chatterton v. Secretary of State for India in Council* [1895] 2 Q.B. 189. As to the latter, it had nothing to do with disciplinary proceedings, and did not touch any matter over which the military tribunal had any jurisdiction.

The judge did however give effect to another consideration. Expert evidence had established that an action such as the one before him would be inconceivable in Czechoslovakia, since the defendant was a state official and acting as such. Having reached this point, the judge continued (1945) 174 L.T. 191, 193:

> "That raises the question whether, by the comity of nations, His Majesty's courts should extend to communications such as this, passing between Czech nationals on Czech affairs, the same protection as their own domestic courts would afford. It is, of course, only by comity that protection could be afforded, even to the acts of state of a foreign govenment, for we, here, have no direct interest in the good government of any foreign power, however friendly—but equally, of course, we have an indirect interest; and it has been indicated in *Hart v. Gumpach*, L.R. 4 P.C. 439, that in some circumstances it may be against the public interests of this country to entertain a suit involving an inquiry into reports made by an officer in the service of a foreign state to the government of that state, and that one of those circumstances would be the fact that such a communication would be protected in the foreign state. That, as I have found, is the case with this communication. Is it proper in this case to apply the doctrine which the Privy Council thought it might be proper to apply in the very circumstances which have arisen here? If the comity of nations is ever to be applied, it should surely be applied where the document in question was published in this country only because the foreign government, being our allies, were our guests while their unhappy country was occupied by our common enemy. I therefore think I

A ought to apply it, and to hold that this dossier is absolutely privileged."

On appeal, the case took a rather strange course. Counsel for the defendant expressly disclaimed the ground of comity on which Henn-Collins J. had decided in his favour, and also any argument based on act of state, the sole ground relied upon being that the defendant's report B was a step in judicial proceedings. The Court of Appeal rejected this argument for very much the same reasons as were given in the court below. It was, however, considered necessary also to discuss the argument which the defendant had disclaimed. Delivering the judgment of the court, Somervell L.J. said, at p. 11:

"Before considering this reasoning, it is necessary, in order to deal C with Mr. Slade's first argument under this issue, to consider the question on somewhat wider lines. The application of the principle of absolute privilege to foreign official documents is one on which there is little, if any, direct authority. The principle in our law is based on public interest, and, as it seems to us, would not necessarily apply to corresponding foreign documents. At the material time the Czechoslovak government was in this country as D our ally in the war. This was an unprecedented state of affairs. Whatever may be the position in normal circumstances it may well be that in these circumstances the public interest would justify the application to Czechoslovak official documents of the principle applied to our own documents."

E Somervell L.J. then went on to discuss the question whether the document was the first step in criminal proceedings, and after dealing with this continued, at p. 12:

"Henn-Collins J. based his decision, as we have stated, on a different principle. Although the document was made and published in England, he felt that he must consider what would have been the rights of the parties if the action had come before a Czechoslovakian F court. In *Hart v. Gumpach,* L.R. 4 P.C. 439, the observations were obiter and the position was, as it seems to us, essentially different. The action was brought before Her Majesty's Supreme Court for China. It was between two British subjects, both in the service of the Chinese Government, and was based on false representations alleged to have been made by the defendant in his official capacity G in China. In that case, therefore, everything had happened in China, the country whose law it was suggested might be applied to the documents. Here everything happened in England. Having due regard to the exceptional position of the Czechoslovak Government, we do not think that the principle of the comity of nations compels or entitles the courts of this country to apply Czechoslovak law to acts done here, in proceedings in tort between Czechoslovak H citizens, that law giving a general protection in civil suits to acts done by officials, which is not afforded under our law. This would be to make an inroad on a very fundamental principle. If there is to be such an application of foreign law in the circumstances set out

it would, in our opinion, have to be expressly provided for by legislation. We, therefore, decide that this document was not absolutely privileged."

Although these passages might perhaps be regarded as obiter dicta since they were dealing with a proposition which had not been advanced, I would have thought it right to give effect to them, if they had been directly in point. But I do not think that they are. The document in suit here is not just a "foreign official document" but an embassy document; the issue is not whether the court should allow to the defendant such immunities from liability or suit as he would have enjoyed if he had been sued in his own country under his own law, but whether the litigation is of a kind upon which the English court should engage itself at all. This being so, I believe that *Szalatnay-Stacho v. Fink* [1947] K.B. 1, does not preclude this court from tackling the present problem de novo.

Finally, there was *Richards v. Naum* [1967] 1 Q.B. 620. The subject matter of the alleged libel was a report by a colonel in the office of special investigations in the United States Air Force, stationed in England, to a general in that force, concerning the continued employment of the plaintiff, a civilian investigative officer. If the court had decided whether absolute privilege attached to such a document, the case would have been of the greatest interest. But it did not, the sole conclusion expressed being that the law was insufficiently certain, and the facts and the law so likely to be intertwined, that the issue was not one which could appropriately be decided as a preliminary point. Unfortunately, therefore, *Richards v. Naum* does not advance the present discussion.

In these circumstances, I am unable to find in any statute or decided case a rule of law which leads directly to a solution of the issue now before the court. Specifically, there is to my mind nothing material in the cases in the first three categories listed above, all of which are concerned with what may be termed "United Kingdom act of state," for these are founded on considerations of public policy which have no bearing on the present case. I therefore do not pause to discuss the questions, much pressed in argument, whether if this line of authority had been relevant the positions occupied by the defendant, Mr. Nabil Hijazi and the plaintiff, and the nature and circumstances of the document and publication sued upon, were such as to bring this action within its scope. If there is to be immunity from liability, it must rest on the other aspect of public policy, described briefly by the word "comity." Here it seems to me that there are matters which provide an important background to any consideration of the problem, even though not pointing unequivocally to a solution, namely that (i) the law of nations, as reflected in the Vienna Convention treats embassy documents as sacrosanct, and (ii) there are situations in which the English court will find it inexpedient to investigate the actions of a foreign state or legislature, even though they fall within its formal jurisdiction.

Against this background, one returns to the question: Should the English court engage upon an inquiry as to the merits of a letter written or caused to be written by one person exercising high supervisory

A functions in a foreign embassy to a senior official of that embassy concerning the latter's continued employment at the embassy, and raising questions as to the conduct of the plaintiff (a foreign national) in relation to privileges obtained for him by the embassy? We are here, as elsewhere in this field, faced with conflicting aspects of public policy: the need to confine to an absolute minimum any curtailment of the right of a litigant to bring an action for recompense in respect of wrong committed in England, and the need to confine to an absolute minimum any meddling by the English court in the affairs of a foreign sovereign. In general, it would seem to me that the latter consideration should prevail, unless there is some objection in general or in the circumstances of this particular case.

So far as concerned the general objections, the plaintiff relied on the following. First, that there was no need to grant absolute privilege to communications of this kind, since qualified privilege would furnish the defendant with all the protection which in justice he could reasonably require. In my view, whilst this objection might have force if we were considering immunity based on "act of state," it is beside the point here, since the issues of justification and malice which would often be opened up by a plea of qualified privilege would require precisely that inquiry into the workings of the foreign embassy which (if I am right in the general approach suggested above) an English court ought to abjure.

Next, it is urged that diplomatic immunity is sufficient to secure the interests of justice and to maintain the dignity of the foreign sovereign, and that there is no need to superimpose on this a doctrine which would enable a person to publish damaging material in England without any cause of action even coming into existence. I can see much more force in this argument, but I must disagree. The respect owed by one state to the sovereign of another and to his diplomatic representatives is allied to but not the same as a voluntary abstention by the courts of the receiving state from inquiring into the conduct of his embassy. A foreign sovereign might well take the view that his dignity would be impaired rather than maintained by insisting on a personal immunity for one of his officers in respect of a civil suit, and I believe that in practice such an attitude is nowadays by no means uncommon. But this is not inconsistent with an attitude on the part of the court that the matter is not apt for investigation, and that the author of an embassy document such as the present should be answerable (if at all) for what he says only in the courts of his own country.

Allied to the argument just discussed is the point that whereas the statutes confer on the diplomat, both inviolability of person and immunity from suit, there is in the case of documents an express reference only to inviolability. I do not find this argument convincing. The statutes and conventions do not form a complete code for the operation of public policy in the field of comity, as witness the various versions of the doctrine of foreign act of state, all of which are creations of the common law. I can see no reason why the fact that a particular ground of policy does not have statutory recognition should prevent the court from giving it whatever weight may be thought fit.

Finally, it is contended that if immunity is granted in circumstances such as these, the net will be cast wider than if the subject had been a communication between officers of the Crown. This is factually correct, in the sense that persons of less rank than the high officers of state contemplated by the *Chatterton* line of authority would be enabled to avoid liability. I do not however regard this as a valid objection, since the considerations of policy are quite different, and may be expected to yield different results in the individual case.

Those were the grounds upon which the plaintiff contended that communications of this general type were not the subject of immunity. There were in addition certain aspects of this particular case where, so it was argued, the court should not uphold the pleaded defence. First, it was submitted that since the document in suit has not been the subject of any contested application for disclosure and adduction in evidence, but has rather been disclosed voluntarily in the list of documents, admitted in the pleadings and put in evidence without objection: so that no question of violating embassy documents can arise. This is true enough, but the conduct of the trial has lain in the hands of the defendant individual, not of the Government of the Emirates. No renunciation by the government of its right to be free from the inspection of its affairs by the English court (if indeed such a renunciation could be effective) is to be inferred merely from the fact that it has taken no step to intervene: and in any event, I have not founded my conclusion in favour of the defendant directly on article 24 of the Vienna Convention, but have rather used it as a part of the general background against which the considerations of public policy are to be assessed. Similarly, I do not regard it as conclusive that in this particular instance no inquiry into the merits of the dispute will be required, since there are no pleas of justification or qualified privilege; for it seems to me that the decision by the court as to whether or not an action of this kind should be entertained ought not to depend on a decision by the individual parties as to the way in which they choose to contest it.

Equally, I do not think it an answer that the defendant was not an ambassador at the relevant time. This would indeed have been important if the case were to be assimilated to the *Chatterton* line of authority, for as Lopes L.J. observed in *Royal Aquarium and Summer and Winter Garden Society Ltd. v. Parkinson* [1892] 1 Q.B. 431, 451, that kind of immunity appears to attach to the person rather than the character of the document. However, for the reasons already stated I believe that the reverse is true when questions of comity are involved, and if I am right in treating this as the type of document which the English court ought not to admit as the foundation of a suit, the formal position of the writer should not be conclusive.

For these reasons therefore I would arrive at the same conclusion as the judge, albeit by a rather different route. Since the matter in fact proceeded to trial I would give effect to the conclusion by holding that the document was subject to absolute privilege. Whether at an earlier stage the court's unwillingness to enter on the matter could have been demonstrated by staying the proceedings need not now be discussed. (In this connection I should mention that neither party contended that the

A interlocutory proceedings before the master during 1983 had the result of creating an issue estoppel, or otherwise affecting the outcome of the trial itself).

In conclusion, I must draw attention to the waiver of diplomatic immunity contained in paragraph 7 of the defence which had been a source of concern in two respects, both arising from the defendant's dual capacity as head of the mission (which consequent authority to waive
B diplomatic immunity for all members of the mission, including himself) and as litigant (with consequent power to determine the shape of the issues before the court). First, because of the apparent inconsistency between the waiver of immunity and the assertion of absolute privilege. I say "apparent" because on reflection I do not consider that there is any real conflict between the two; since although both immunities derive
C ultimately from the same general concept of comity, the means by which this concept is put into effect are not indentical, and do leave room for a stance enabling the foreign sovereign at the same time to permit his representative to put himself formally in peril of a judgment, and yet to permit him also to raise a defence which will maintain the assertion that embassy transactions are not a proper subject for inquiry.

The second ground for hesitation was the form in which the waiver
D of sovereign immunity was expressed. I have no doubt that this was inappropriate. The defence was a document formulated on behalf of the defendant qua individual litigant, not ambassador, and was not the correct vehicle for a renunciation of the immunities belonging to the foreign sovereign. If my conclusion on the main issue had been that the appeal ought to be allowed, and judgment given for the plaintiff, it
E would have been for careful consideration whether the court of its own motion should make inquiries so as to satisfy itself that the defendant did indeed have authority to convey the waiver. In the event, however, the waiver has no potential effect on the outcome of the proceedings. Bearing in mind that the defendant was not an accredited diplomat at the time when the action was commenced, and that it proceeded to trial and judgment without any question being raised, I think it legitimate to
F allow the matter to rest.

For these reasons, therefore, I would dismiss the appeal.

Croom-Johnson L.J. I have read the judgments of both Kerr and Mustill L.JJ. I agree with them and have nothing to add.

G Kerr L.J. The memorandum whose contents and publication form the basis of this action for libel was in every respect a "diplomatic" or "embassy" document in the sense that it appertained to the embassy in this country of a friendly sovereign state. It was the property of the embassy or of the foreign state. It was an inter-departmental memorandum on embassy paper addressed by one embassy official to another, both acting within the course of their official duties. Publication
H of its contents by or on behalf of the defendant took place only within the embassy and to its ministry of foreign affairs. And the contents of the document related to the plaintiff only in the context of matters which were of concern to the embassy, to the dignity of the state which

it represented, and to their joint relations with H.M. Government. The fact that the contents may not have been of a high degree of importance to the foreign state in comparison with their seriousness for the plaintiff's reputation must be irrelevant to the status of the document as such. Even without each and every of the attributes of the document enumerated above—and I express no opinion about the point at which the line falls to be drawn—there can be no doubt that the document falls within article 24 of the Vienna Convention on Diplomatic Relations which provides (Schedule 1 to the Diplomatic Privileges Act 1964): "The archives and documents of the mission shall be inviolable at any time and wherever they may be." As Mustill L.J. said at the beginning of his judgment, this is a curious case. It is curious that a dispute arising out of a document of this nature should have found its way into our courts. Since it did, it is not surprising that this resulted from a curious combination of circumstances. The document, or a copy of it, came into the possession of the plaintiff. When he issued his writ, the defendant was not the ambassador. He had been the ambassador and knew that he would shortly be re-appointed. In the interim he exercised the authority of head of mission internally, to the knowledge of all concerned. He had neither written nor dictated the memorandum. But he had discussed the problems reflected in its contents in the course of his position as de facto head of mission. He was therefore in a doubly ambivalent situation. First, he was not the author of the memorandum. But when an action for defamation was brought upon it, he felt that he must accept responsibility for it in the circumstances. Secondly, when he was then re-appointed to the post of ambassador and his defence fell to be served, this expressly waived his diplomatic immunity, for reasons and in circumstances which are unclear, as mentioned below. At the same time, however, and more or less in the same breath, he has maintained throughout, on various grounds and in different ways, that an action founded upon this embassy document is not properly justiciable in our courts. This is no doubt a situation without precedence in our jurisprudence. But in the upshot, because of this curious combination of circumstances, it is necessary to decide as a matter of principle whether or not this action is properly maintainable and should be allowed to proceed, in which case our courts would have to adjudicate on the issues raised by the contents and publication of this document.

What would that involve in practice? In the normal course of an action of this kind it must involve the truth or otherwise of the allegations concerning the plaintiff; the circumstances in which these allegations were made, for the purpose of seeking to establish a prima facie defence of qualified privilege; and then no doubt the usual issue as to the good faith or possible malice of the person responsible for them. Having regard to the contents of the document, the full ventilation and exposure of these issues, and the decision of our courts upon them, would be bound to intrude upon the internal policies and practices of this embassy, and thereby reflect upon the United Arab Emirates in a manner which might affect relations with this country.

However, the embarrassment for the United Arab Emirates which could result from the public discussion of the issues likely to be raised in

A this particular case is not in itself any ground for deciding whether this dispute is properly justiciable in our courts. That question must be decided as a matter of principle by reference to the nature and status of the document on which the claim is based. But the likely consequences of justiciability for the dignity of a foreign friendly state and its embassy in this country illustrate the need for the application of a rule of public policy in order to decide that question.

B I share entirely the views of Mustill L.J. that the justiciability of the dispute raised by this document cannot be determined by a process of attempting to put the present case into one of the categories of related issues raised by earlier cases in different contexts in times when international relations may have been less sensitive. The present case is sufficiently unparalleled in our corpus juris to require an independent

C approach, undeterred by the traditional reluctance of our courts to create new applications of rules of public policy. In that connection, and in the same way as Mustill L.J., I have reached the clear conclusion that the broad concept of international comity, in combination with the settled rule within that concept expressed by the "inviolability" of diplomatic documents, require us to hold that this dispute is not justiciable in our courts. In the context of an action for defamation this

D consequence can be expressed by holding that the publication of this document in the circumstances of this case is protected by absolute privilege; and I so hold. But the appropriate terminology is secondary to the non-justiciability of this dispute as a matter of principle. In that connection I think that it is irrelevant at what point and by what procedural means the objection to its justiciability is raised; viz. whether

E by an application to strike out the action, or by objecting to the production or admissibility of the document on discovery or in evidence, or by a defence of absolute privilege. The principles of comity and "inviolability" must be the same in all cases, at any rate where the action is founded upon the contents and publication of an embassy document.

Despite the novelty of the issue raised by this case, it seems to me

F that this conclusion is consistent with the general tenor of the authorities to which we were referred and not inconsistent with any of them. I derived the greatest direct assistance from the learned discussion of this question in the judgment of Bissonnette J. in the Supreme Court of Quebec in *Rose v. The King* [1947] 3 D.L.R. 618, with which the other members of the court agreed. The facts were briefly as follows. The

G defendant was a Canadian subject who had been convicted on charges of conspiracy with a group of Russian and Canadian subjects to violate the provisions of the Official Secrets Act 1939 in various ways which were prejudicial to the safety of Canada. Part of the evidence against him was contained in documents which Gouzenko, a cypher clerk in the Russian embassy in Ottawa, had stolen from the embassy files of the Russian Military Attaché, Zabotin, the central figure in a spy ring,

H which Gouzenko had handed over to the Royal Canadian Mounted Police. The documents were produced by Gouzenko as a witness at the trial and formed an important part of the evidence for the prosecution. The defendant Rose thereupon claimed that the documents were

inadmissible on the ground that they were privileged and immune from use in any legal proceedings. Bissonnette J. summed up this argument, at p. 639:

> "He maintains, and I feel well seized of his argument, both in his statement and at the hearing, that immunity, being an absolute privilege resulting from jus gentium, every court of justice, as soon as the matter sub judice permits establishing that this privilege is put in peril, is, erga omnes, without jurisdiction or competence to hear or to receive the deposition of a diplomatic agent and to take cognizance of documents which he offers in evidence, without the consent of the state that he represents."

The judgment continues with a lengthy and detailed review of the principles of international law relevant to this argument, with copious citations from text books of high authority. The fact that most of these were French is irrelevant, since the principles are those of jus gentium, and it was expressly pointed out that there was no relevant Canadian statute which affected the issue. The judge's conclusion that diplomatic documents were "inviolable" anticipated the use of the same term in the Vienna Convention of 1961, as do many passages from his judgment. The interesting point for present purposes, however, is the width of his conclusion about the concept of inviolability. He said, at p. 646:

> "International law creates a presumption of law that documents coming from an embassy have a diplomatic character and that every court of justice must refuse to acknowledge jurisdiction or competence in regard to them."

This conclusion is supported by *Denza on Diplomatic Law* (1976), (published by Oceana Publications Inc. and the British Institute of International and Comparative Law) in the author's commentary on article 24 of the Vienna Convention, at p. 110, to which we were also referred.

In *Rose v. The King* [1947] 3 D.L.R. 618 Bissonnette J. went on to hold that the immunity of diplomatic documents from use in legal proceedings was not absolute and that it did not avail the defendant in that case. He held that it could not be invoked by a Canadian citizen in litigation between his government and himself; nor when the documents revealed an abuse of diplomatic privilege by the foreign state which constituted a threat to the safety of the receiving state; nor—semble and quaere—in cases where no one connected with the foreign state or its embassy claimed any privilege for the documents. But none of these considerations applies here. Having read and re-read the judgment of Bissonnette J. I find that it fully supports my instinctive conclusion that the contents and publication of this embassy document must be treated as immune from the process of our courts for the purposes of an action such as the present. It falls within the concept of "inviolability" in the wide sense stated above, and no possible exception to that concept can be of any relevance in the present case.

I equally agree with the remarks of Mustill L.J. expressing doubts about the circumstances concerning the defendant's waiver of diplomatic

immunity. These involve two aspects which need to be emphasised. First, there is no inconsistency in principle between a waiver of the diplomatic immunity of a defendant and the assertion of a claim for immunity of a diplomatic or embassy document whose contents are sought to be introduced into the proceedings against him. Admittedly, the co-existence of the waiver and of the assertion is extraordinary in the present case, because every issue raised against the defendant, whose personal immunity has been waived, stems from the contents and publication of a document whose immunity has been asserted in the same breath. But I cannot see that this makes any difference in principle. It merely produces an extraordinary and apparently unprecedented situation. The waiver of the immunity from suit of the defendant does not destroy the claim for immunity of the document, since this is justified by the character of the document, irrespective of the defendant's submission to the court's jurisdiction against him personally.

The second aspect is that the fact and circumstances of the waiver of the defendant's immunity are perplexing and unsatisfactory. It is elementary that only the sovereign can waive the immunity of its diplomatic representatives. They cannot do so themselves. For that reason alone the defendant's defence filed in the proceedings against him is not an appropriate vehicle for the manifestation of the sovereign's decision to waive the defendant's immunity. Moreover, a waiver which only purports to be manifested in this manner gives rise to doubts as to whether it really represents the act and will of the sovereign. In the present case I have remained throughout in the gravest doubt about the knowledge and understanding of the sovereign, the United Arab Emirates, concerning the issues and perhaps even the pendency of these proceedings. But, in the same way as Mustill L.J., I do not see that any purpose would be served at this stage by taking these aspects any further. I would only add that if I had felt any doubt about the correctness of the judge's decision in favour of the defence of absolute privilege, then I would—for myself—not have been willing to reverse his decision and allow this action to proceed without having made an attempt, through the Foreign and Commonwealth Office, to ascertain the attitude of the United Arab Emirates to this action.

I agree that this appeal should be dismissed.

Appeal dismissed.
Defendant's costs of appeal.
Costs below undisturbed.
Leave to appeal refused.

Solicitors: McKenna & Co.; Fox & Gibbons.

8 April 1987. The Appeal Committee of the House of Lords (Lord Bridge of Harwich, Lord Templeman and Lord Oliver of Aylmerton) dismissed a petition by the plaintiff for leave to appeal.

A. R.