INTERNATIONAL COURT OF JUSTICE

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

(*TIMOR-LESTE v. AUSTRALIA*)

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ANNEXES 29 - 73

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Volume II: Annexes 29-73

Table of Contents

Annex 29: 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).

The Statute of the International Court of Justice

A Commentary

Second Edition

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IV. Assessment and Evaluation of Evidence, Standard of Proof, Probative Value

1. Assessment and Evaluation of Evidence

103 The evaluation and assessment of evidence is a field of international procedural law that has traditionally received little attention both from international courts and in the literature. In the past, courts and commentators have often been satisfied to point out that international courts have a large discretion in evaluating the probative value of individual pieces of evidence.[196] The criteria for, and the process of, the evaluation of evidence applied by international courts thus remained largely opaque.

104 Neither the ICJ Statute nor the Rules of Court contain any provisions on the issue. The Court has clarified that 'within the limits of its Statute and Rules, it has freedom in estimating the value of the various elements of evidence, though it is clear that general principles of judicial procedure necessarily govern the determination of what can be regarded as proved'.[197] This means that the Court is not bound by strict legal rules in its evaluation of the evidence; in particular, there are no formal standards which would ascribe a particular evidentiary value to a defined means of evidence. The Court may freely weigh the evidence before it. This is in accord with the principles governing the evaluation of evidence by other international courts and tribunals.[198]

105 In the *Armed Activities case* (DRC/Uganda), the Court has further explained the methodology of evaluating the evidence before it: The Court 'will examine the facts relevant to each of the component elements of the claims advanced by the Parties. In so doing, it will identify the documents relied on and make its own clear assessment of their weight, reliability and value'.[199]

106 In its assessment of the evidence, the Court will also take into account particular difficulties of a party in establishing a fact with direct evidence.[200]

2. Standard of Proof

107 The standard of proof determines when a specific fact can be regarded as proved by the ICJ, *i.e.* when a party bearing the burden of proof has discharged its burden. It refers to the degree of persuasion necessary for the Court to reach.[201] The constitutive documents of the ICJ are silent as to the question of the standard of proof, leaving it to the Court to elaborate relevant parameters.[202]

[196] See *e.g.* Sandifer.

[197] *Nicaragua case, supra*, fn. 5, ICJ Reports (1986), pp. 14, 40 (para. 60). See also: *(Bosnian) Genocide case, supra*, fn. 44, ICJ Reports (2007), pp. 43, 130 (para. 213).

[198] See *e.g.* Art. 25, para. 6 of the IUSCT Rules of Procedure: 'The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.' As to WTO panels, *cf.* Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 12 March 2001, para. 161: 'The Panel enjoyed a margin of discretion in assessing the value of the evidence, and the weight to be ascribed to that evidence. The Panel was entitled, in the exercise of its discretion, to determine that certain elements of evidence should be accorded more weight than other elements—that is the essence of the task of appreciating the evidence.'

[199] *Armed Activities case* (DRC/Uganda), *supra*, fn. 1, ICJ Reports (2005), pp. 168, 200 (para. 59).

[200] See *supra*, MN 40 *et seq.*

[201] See Kinsch, P., 'On the Uncertainties Surrounding the Standard of Proof in Proceedings before International Courts and Tribunals', in *Liber Fausto Pocar*, vol. 1 (Venturini, G./Bariatti, S., eds., 2009), p. 427.

[202] As to the standard of proof in international litigation generally see Benzing, pp. 504 *et seq.*

a) Regular or Default Standard of Proof

Although the ICJ has recently addressed the issue of the standard of proof in more detail, the Court's jurisprudence with regard to a default standard of proof remains inconsistent.[203] It has often referred to a standard of 'convincing evidence',[204] but has also used terms suggesting either a stronger requirement, such as 'conclusive evidence',[205] or a less stringent test, such as the 'balance of probabilities'[206] or the 'balance of evidence'.[207] In other cases, the ICJ has been content to say that the evidence submitted was 'not sufficient' to prove a certain point.[208] The default standard of proof has hence not been conclusively clarified by the ICJ, the Court seemingly using the various standards largely indiscriminately.[209] Nevertheless, it seems that the more recent statements of the Court point to a more stringent requirement than a balance of probabilities, an intermediate standard of proof resembling the standard of 'clear and convincing evidence' known from US law.[210] 108

b) Stricter Standard of Proof for 'Charges of Exceptional Gravity'

Reacting to criticism of individual judges that it is a requirement of transparency and procedural fairness that parties are aware of the relevant standard of proof when bringing a claim,[211] the ICJ has addressed the issue in considerable detail in the *(Bosnian) Genocide case*. Citing the *Corfu Channel case*, it made clear that facts underlying claims against a State involving charges of exceptional gravity (such as the acts listed in Art. III of the Genocide Convention) must 'be proved by evidence that is fully conclusive'.[212] They require the full conviction of the court.[213] Even though the Court did not adopt the standard of 'beyond reasonable doubt' normally applied in national and international criminal law,[214] the test employed may not differ substantially from such standard.[215] 109

[203] Riddell/Plant, p. 126; Del Mar, pp. 99–100. As to the standard of proof in proceedings on the request for the indication of provisional measures, see Del Mar, pp. 117–21.

[204] *Nicaragua case*, *supra*, fn. 5, ICJ Reports (1986), pp. 14, 24 (para. 29); *Armed Activities case* (DRC/Uganda), *supra*, fn. 1, ICJ Reports (2005), pp. 168, 208 (para. 83).

[205] *Corfu Channel case*, *supra*, fn. 51, Merits, ICJ Reports (1949), pp. 4, 17; *Armed Activities case* (DRC/Uganda), *supra*, fn. 1, ICJ Reports (2005), p. 168, 268 (para. 303).

[206] *Land, Island and Maritime Frontier Dispute*, *supra*, fn. 7, Judgment of 11 September 1992, ICJ Reports (1992), pp. 351, 506 (para. 248). See also: *Pulp Mills case*, *supra*, fn. 1, Sep. Op. Greenwood, ICJ Reports (2010), pp. 221, 230 (para. 26) and Keith, ICJ Reports (2010), pp. 121, 122–3 (para. 5), both arguing for the standard of 'balance of probabilities'.

[207] *Oil Platforms case*, *supra*, fn. 41, ICJ Reports (2003), pp. 161, 189 (para. 57).

[208] *Corfu Channel case*, *supra*, fn. 51, Merits, ICJ Reports (1949), pp. 4, 16; *Nicaragua case*, *supra*, fn. 5, ICJ Reports (1986), pp. 14, 37 (para. 54), p. 62 (para. 110), p. 85 (para. 159); *Pulp Mills case*, *supra*, fn. 1, ICJ Reports (2010), pp. 14, 97–8 (para. 254).

[209] Riddell/Plant, p. 129.

[210] See *e.g.* Teitelbaum, pp. 119, 126–7.

[211] *Oil Platforms case*, *supra*, fn. 41, Sep. Op. Higgins, ICJ Reports (2003), pp. 225, 233 (paras. 30 *et seq.*), noting that: 'Beyond a general agreement that the graver the charge the more confidence must there be in the evidence relied on, there is thus little to help parties appearing before the Court (who already will know they bear the burden of proof) as to what is likely to satisfy the Court.' See also *ibid.*, Sep. Op Buergenthal, ICJ Reports (2003), pp. 270, 286–7 (para. 41).

[212] *Corfu Channel case*, *supra*, fn. 51, Merits, ICJ Reports (1949), pp. 4, 17; *(Bosnian) Genocide case*, *supra*, fn. 44, ICJ Reports (2007), pp. 43, 129 (para. 209).

[213] *(Bosnian) Genocide case*, *supra*, fn. 44, ICJ Reports (2007), pp. 43, 129 (para. 209).

[214] Serbia proposed that this standard was appropriate: *ibid.*, p. 129 (para. 208).

[215] For a discussion see: Teitelbaum, pp. 119, 127–8; Ascensio, H., 'La responsabilité selon la Cour international de Justice dans l'affaire du génocide bosniaque', *RGDIP* 111 (2007), pp. 285, 296–87; Thienel, T., 'The Burden and Standard of Proof in the European Court of Human Rights', *GYIL* 50 (2008), pp. 543,

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SECOND EDITION

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THE RT HON. LORD JUSTICE TOMLINSON

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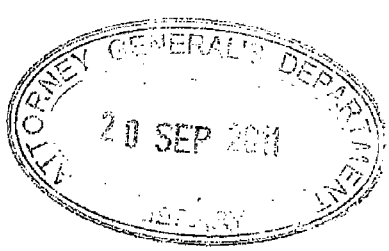

4.39 Rationale for the exception The reason for the exception is perhaps obvious: it is not in the interests of justice to protect communications made in furtherance of a criminal or fraudulent purpose.[85] In *Williams v Quebrada Railway, Land and Copper Company*[86] Kekewich J explained the exception as follows:

> It is of the highest importance, in the first place, that the rule as to privilege of protection from production to an opponent of those communications which pass between a litigant, or an expectant or possible litigant, and his solicitor should not be in any way departed from. However hardly the rule may operate in some cases, long experience has shewn that it is essential to the due administration of justice that the privilege should be upheld. On the other hand, where there is anything of an underhand nature or approaching to fraud, especially in commercial matters, where there should be the veriest good faith, the whole transaction should be ripped up and disclosed in all its nakedness to the light of the Court.[87]

4.40 In focusing upon the rationale for the rule, one can see why it has been said that the crime/fraud exception is not so much an exception to legal professional privilege, as a mark of the outer bounds of the definition of privilege.[88] It has been suggested that it is not that the privilege that would otherwise arise to protect the communications is ousted, but rather that the communications never become privileged at all in such circumstances.[89] However, it is suggested that the correct analysis is that the rule does operate as a procedural *exception* to legal professional privilege. This is because it would not be correct to say that the communications were never privileged if the allegation of crime or fraud turns out to be unfounded (although the privilege may have been frustrated if the exception is invoked in such circumstances).[90]

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[85] It is also said that communications in furtherance of a criminal or fraudulent purpose do not come within the ordinary scope of professional employment: see *R v Cox and Railton* (1884) 14 QBD 153, 167. See also A Newbold, 'The Crime/Fraud Exception to Legal Professional Privilege' (1990) 53 *MLR* 475. Newbold cites two main reasons for the exception. First, since the client is aware of his dishonest intention, he can have no legitimate expectation that the communications will be protected. Secondly, it would be unreasonable if a lawyer could not give evidence against a client if it subsequently transpired that the client had sought his advice for a criminal purpose.

[86] [1985] 2 Ch 751, 754–5.

[87] See also *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1986] 1 Lloyd's Rep 336, 338.

[88] See A Zuckerman, *Civil Procedure* (2nd edn, 2006), para 15.84. See also *Crescent Farm Sports v Sterling Offices* [1971] 1 Ch 553, 564 (*per* Goff J): 'The principle of the exception is that the communication in such circumstances is not in truth within the scope of professional privilege at all.' See also *McE v Prison Service of Northern Ireland* [2009] 1 AC 908, para 11 (*per* Lord Phillips).

[89] See *Carter v Northmore Hale Davy & Leake* 183 CLR 121, 134–6, cited by Toulson J in *General Mediterranean Holdings SA v Patel* [2000] 1 WLR 272, 285.

[90] See J Auburn, *Legal Professional Privilege: Law and Theory* (2000), 172, who considers that the 'traditional rationale' for the crime/fraud exception (namely that communications for a criminal or fraudulent purpose are outside the scope of the lawyer–client relationship such that no privilege arises) cannot be reconciled with the case law in this area. He concludes: 'it is a fantasy to think that the crime-fraud rule can be completely reconciled with the rationale for the substantive rule [of privilege]. The two rules (or rather, the rule and exception to it) do not promote the same interest. The crime-fraud rule represents a concession to the need for absolute confidentiality which is made in the

Annex 31: J Auburn, *Legal Professional Privilege: Law and Theory* (Hart Publishing, 2000).

Legal Professional Privilege: Law and Theory

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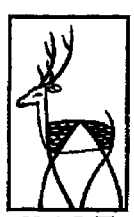

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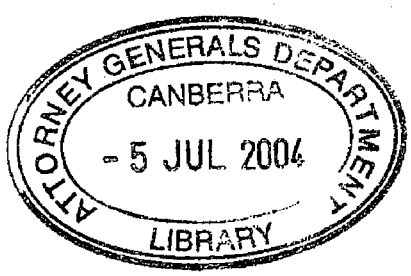

It is for this reason that it is sometimes said the crime-fraud rule is not an exception to the privilege at all.[68]

Adoption of the public policy rationale leads to a different result in this respect. Under this rationale the privilege could exist at the time the relevant communication was made, but then be overridden by a later decision to vitiate the previously valid privilege. One commentator has observed that the crime-fraud exception reflects a recognition that some values outweigh the values advanced by protecting confidential relations and so a balancing process must be involved.[69] For example, in the leading American statement of the exception, Cardozo J said that: "[t]he privilege takes flight if the relation is abused".[70] In *Francis and Francis* Lord Goff, in construing the statutory crime-fraud exception in section 10(2) of the Police and Criminal Evidence Act 1984, which he regarded as equivalent to and reflecting the common law, said that "[s]ubsection (2) is concerned to negative the legal privilege which would otherwise be conferred." In *R.* v. *Cox and Railton* itself Stephen J quotes a passage from *R.* v. *Orton* (a case he describes as "directly in point"[71]) which holds that in such cases "the fraudulent character of the communication takes away the privilege . . . it deprives the communication of the privilege".[72] Other cases have taken a similar view.[73] If a client believes his communications to be confidential at the time they are made, then has that expectation frustrated by the operation of a rule such as the crime-fraud rule, this may have an effect on the expectation of confidentiality held by other clients in the future. This issue will be returned to shortly. Such a result may damage the basis on which the non-rights-based instrumental rationale for the privilege as a whole operates. Thus there may be an important difference between the two rationales for the crime-fraud rule, in terms of the perceived impact on the privilege as a whole.

SECTION II: CHOOSING BETWEEN THE TWO RATIONALES

Assuming, then, that both rationales cannot apply at the same time, the issue then becomes one of choosing which rationale is more appropriate. This must be done because, as has been shown above, the two rationales have different effects in terms of the structure of the crime-fraud rule. The claims of the two rationales will be analysed initially as a matter of first principles, then by examining the consistency with other privilege rules and other elements within the

[68] E.g. *Carter* v. *The Managing Partner, Northmore Hale Davy & Leake* (1995) 183 CLR at 163, *per* McHugh J; *Re Moage* (1998) 26 ACSR 726 at 733 (Fed. Ct.).

[69] Note, "The Attorney–Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement" (1977) 91 *Harv LR* 464 at 467.

[70] *Clark* v. *United States* 289 US at 15–16. Although the case concerned juror contempt, Cardozo J's passage is widely cited as the authoritative statement on the law regarding the crime-fraud exception.

[71] R. v. *Cox and Railton* (1884) 14 QBD at 170.

[72] See *ibid.*, at 171.

[73] E.g. *In re Postlethwaite* (1886) 35 Ch D 722 at 726, *per* North J (Ch.).

Another problem may be where the client makes false statements relating to past actions. Advice concerning past illegal acts may be protected by the privilege, but false statements by the client relating to these past actions may be considered to be part of an ongoing fraud.[131] In such a circumstance the false statement may possibly not be privileged, even though the substance of the advice concerned a completed crime.[132]

Activating the crime-fraud rule by reference to ongoing conduct may be extremely problematic. It may be unclear whether the act has terminated, and, if it has terminated, whether subsequent acts and statements are made in furtherance of this act. Further, it is not at all clear that the crime-fraud rule should be concerned with impugning legal communications made after an essentially completed event (which may be criminal) has been effected. This must be what Ferguson JA had in mind in *Re United States of America* v. *Mammoth Oil* when he said:

> Let us stop to consider the now too common automobile accident in which someone is killed by an unknown person, after which the unknown driver goes to counsel, and, after communicating the facts for advice, directs the counsel to attend the inquest, watch the proceedings, and keep him advised. What would become of the principle [of legal professional privilege] if the counsel attending such inquest may be put in the witness box and questioned as to why and for whom he is attending and watching the proceedings? I am clearly of opinion that counsel so employed could and should refuse to answer such questions.[133]

An analysis which would lead to the displacement of the privilege in such circumstances strays dangerously close to conflict with one of the underlying assumptions of the privilege; that it is for the use of the guilty as well as of the innocent. If the goal of the privilege is the encouragement of candid legal communications, then surely it would be injurious to this goal to impugn all communications where there is *prima facie* evidence that the individual concerned was in fact guilty of a past act and had therefore sought advice for the purpose of evading punishment.[134]

However some of the cases have come close to this. For example, in *Plumb* v. *Monck and Bohm*[135] the accused was first charged with driving an uninsured car, for which he produced an insurance certificate as his defence to the charge. The certificate was dated four weeks prior to the date of the alleged offence. The

[131] Comment, "Developments in the Law-Privileged Communications" (1985) 98 *Harv LR* 1450 at 1510.

[132] E.g. see *United States* v. *Calvert* 523 F.2d 895 (8th Cir. 1975) (lies relating to the past act of murder and previous murders and frauds, but also made in pursuance of a future insurance fraud).

[133] *Re United States of America* v. *Mammoth Oil* [1925] 2 DLR at 974.

[134] This is different from the situation where there is a deliberate plan to evade punishment by means of commission of further offences, such as fleeing the jurisdiction or committing perjury: see *United States* v. *Gordon-Nikkar* 518 F.2d 972 (5th Cir. 1975); *In re Sealed Case (Synanon Church)* 754 F.2d 395 at 402 (DC Cir. 1985) ("To the limited extent that past acts of misconduct were the *subject* of the cover-up that occurred during the period of representation, however, then past violations properly may be a subject of grand jury inquiry.").

[135] *Plumb* v. *Monck* (1974) 4 ALR 405.

PARTIAL DISCLOSURE

The general rule for privilege is that the parties are free to decide the extent of their waiver.[6] Loss of privilege due to partial disclosure occurs where a party introduces into evidence part of a larger body of privileged material, while not affirmatively abandoning its claim to privilege over the remainder of the information.[7] The claim for further disclosure may be of another part of the same document[8] or of different documents considered to be part of the same transaction or subject matter.[9] However this principle applies only to the use of documents at trial, and not to disclosure made on discovery.[10] It is also possible that privilege may be lost over a document by mere reference to it in an expert's report or witness statement.[11] The rule of partial disclosure may also be the rea-

[6] *Lyell* v. *Kennedy* (1884) 27 Ch.D 1 at 24 (CA); *General Accident Fire and Life Assurance Corp Ltd* v. *Tanter* [1984] 1 WLR 100 at 114F (QB).

[7] Partial disclosure without waiver of the remainder of the communication is recognised under the Evidence Act 1995 (Aust.): see *Adelaide Steamship Co Ltd* v. *Spalvins* (1998) 152 ALR 418 at 426 (Fed. Ct.); *Towney* v. *Minister for Land* (1997) 147 ALR 402 (Fed. Ct.).

[8] E.g. *Great Atlantic Insurance Co* v. *Home Insurance Co* [1981] 2 All ER 485 (CA).

[9] E.g. *General Accident Fire and Life Assurance Corp Ltd* v. *Tanter* [1984] 1 WLR at 115 ("the extent of the waiver relates to the transaction to which that evidence goes. The extent of the transaction has to be determined"); R. v. *Secretary of State for Transport, ex p. Factortame Ltd, The Times*, 11 Sept. 1997 (DC) (although the Court held there was no loss of privilege as the two sets of documents related to different time periods and there was no unfairness resulting). Note that in *General Accident Fire and Life Assurance Corp Ltd* v. *Tanter* Hobhouse J said the test for the extent of waiver in relation to a particular conversation was not the subject matter test. Where documents are concerned the fairness test will usually lead to a consideration of whether the documents concern the same subject matter. The possibly different approach in Canada may be to look at all the circumstances of the case to determine whether the conduct is misleading: see *Lowry* v. *Canadian Mountain Holidays Ltd* (1984) 59 BCLR 137 at 142–3 (BC SC); *Stevens* v. *Canada (Privy Council)* (1997) 144 DLR (4th) 553 at 568 (Fed. Ct.). S. 126 of the Evidence Act 1995 (Aust.) states a different test, which is that disclosure of the connected documents be "reasonably necessary to enable a proper understanding of the communication or document". For the legislative history and comments on this provision, see *Towney* v. *Minister for Land* (1997) 147 ALR at 408–9, 412–14. This provision is different from the common law test: *ibid.* at 413.

[10] *Curlex Manufacturing Pty Ltd* v. *Carlingford Australia General Insurance Ltd* [1987] 2 Qd R 335 (Qld. SC); *G.E. Capital Group Ltd* v. *Bankers Trust Co* [1995] 1 WLR 172 at 175 (CA); *The "Sagheera"* [1997] 1 Lloyd's Rep 160 (QB); *Stevens* v. *Canada (Privy Council)* (1997) 144 DLR (4th) at 567.

[11] Under r. 31.14 of the Civil Procedure Rules 1998 a party may inspect documents referred to in another party's statement of case, witness statement, witness summary, affidavit or expert's report (but see r. 35.10(4) in relation to instructions referred to in experts' reports). Under the Rules of the Supreme Court there was some difference of opinion whether this amounted to waiver: see *Clough* v. *Tameside and Glossop Health Authority* [1998] 2 All ER 971 (QB) (waiver); *Vista Maritime Inc* v. *Sesa Goa*, Mance J, 24 Oct. 1997 (no waiver); for an analysis of the pre-CPR position see I.R. Scott, "Legal Professional Privilege in 'Connected' Documents" (1998) 17 *CJQ* 365. The filing and serving of witness statements in Australia does not lead to loss of the privilege in them under the regime of s. 122 of the Evidence Act 1995 (Aust.): see *Akins* v. *Abigroup Ltd* (1998) 43 NSWLR 539 (NSW CA), and the cases cited therein; *Nilson Industrial Electronics Pty Ltd* v. *Nationale Semiconductor Corp* (1994) 48 FCR 337; *contra Complete Technology Pty Ltd* v. *Toshiba (Australia) Pty Ltd* (1994) 53 FCR 125; also see R.J. Desiatnik, Legal Professional Privilege in Australia (Prospect Media, Sydney 1999) 105–6. For the purposes of waiver under the Evidence Act 1995 (Aust.) a mere reference to legal advice in a public statement will probably not suffice as waiver: *Ampolex Ltd* v. *Perpetual Trustee Co (Canberra) Ltd* (1996) 40 NSWLR 12 at 24 (NSW SC),

son why English courts have found that the privilege is waived when lawyers disclose their reasons for advising their criminal accused clients to remain silent in response to police questioning.[12] However in relation to this last category of cases, the courts have not expressly stated whether or not this is the actual reason for the waiver in this type of situation.[13]

The rationale for this exception to the privilege is not the fact of loss of confidentiality over the disclosed part of the communications.[14] There is no necessary reason why loss of confidentiality over one part of a group of privileged materials should be considered to have the same effect in relation to confidentiality over the rest of the materials. For similar reasons the rationale is also unlikely to be that the partial disclosure evinces an intention to abandon confidentiality. For example, in *Great Atlantic Insurance Co* v. *Home Insurance Co*[15] the considerations relating to truth-garbling discussed below were sufficient to lead to loss of the privilege despite a clear intent not to lose privilege over the remaining communications. The Australian case of *Attorney-General (N.T.)* v. *Maurice*[16] similarly did not depend on an intent of any sort. The better rationale for this exception to privilege is fairness and consistency.[17] As Hobhouse J expressed the matter in *General Accident Fire and Life Assurance Corp Ltd* v. *Tanter*, "[t]he underlying principle is one of fairness in the conduct of the trial and does not go further than that".[18] It may be misleading and therefore unfair to allow one party to present only part of a privileged communication.[19] This rationale has gained wide acceptance in all common law jurisdictions and appears to be a sound one.[20]

137 ALR 28 at 34 (HCA). Nor will the mere calling of an expert witness or the insubstantial reference to his instructions lead to loss of the privilege over those instructions: *Tirango Nominees Pty Ltd* v. *Dairy Vale Foods Ltd* (1998) 156 ALR 364 (Fed Ct); *Australian Competition and Consumer Commission* v. *Australian Safeways Stores Pty Ltd* (1998) 153 ALR 393 at 434 (Fed Ct.); also see the cases cited in Desiatnik, above, 126. However the relevant statutory provision requires disclosure of the "substance of the evidence" in any case. For another useful example of this broad principle in a different context, see *Towney* v. *Minister for Land* (1997) 147 ALR at 414.

[12] R. v. *Condron and Condron* [1997] 1 WLR 827; R. v. *Bowden* [1999] 1 WLR 823.

[13] See J. Auburn, "Implied Waiver and Adverse Inferences" (1999) 115 *LQR* 590.

[14] Comment, n. 2 above, 1633.

[15] [1981] 1 WLR 529.

[16] (1986) 161 CLR 475.

[17] *Ibid.* at 481, 487–8, 492–3; *Duplan Corp* v. *Deering Milliken Inc* 397 F Supp 1146 at 1161–2 (DC Sth Carolina 1975); *Burnell* v. *British Transport Commission* [1956] 1 QB 187 at 190 (CA); R. v. *Secretary of State for Transport, ex p. Factortame Ltd, The Times*, 11 Sept. 1997 ("I can see no unfairness to the applicants").

[18] [1984] 1 WLR at 114.

[19] E.g. see J.H. Wigmore and J.T. McNaughton, n. 1 above, 635; *Great Atlantic Insurance Co* v. *Home Insurance Co* [1981] 2 All ER at 492; *Nea Katerina Maritime Co Ltd* v. *Atlantic & Great Lakes Steamship Corp* [1981] Comm LR 138 (QB); *Derby & Co Ltd* v. *Weldon (No. 10)* [1991] 1 WLR 660 at 669 (Ch.); *Re Königsberg (a bankrupt)* [1989] 3 All ER 289 (Ch.).

[20] Australian courts have held that the test for loss of privilege under s. 122 of the Evidence Act 1995 (Aust.), which provides for loss of the privilege where the "substance of the evidence" has been disclosed, is a purely quantitative one: *Adelaide Steamship Co Ltd* v. *Spalvins* (1998) 152 ALR at 426; *Towney* v. *Minister for Land* (1997) 147 ALR at 412–14; *Telstra Corp* v. *BT Australasia Pty Ltd*

It should be noted that there is a tendency in the case law to assume that this is the *only* category of fairness-based waiver. This tendency can be seen among both text writers[21] and judges[22] alike. Another problem is the danger of partial disclosure developing into a formalised category divorced from its underlying rationale: that is, that courts will simply look to whether there has been a partial disclosure and fail to ask the essential question whether the partial disclosure has actually led to unfairness or prejudice.[23] This has already happened in a number of American cases in which waiver has been found even though there seems to be a lack of apparent detriment. Sometimes this is explicitly recognised,[24] however usually it is done more as a matter of oversight.[25] There are some signs of this tendency in Commonwealth cases as well. For example, in *Harbour Inn Seafoods Ltd* v. *Switzerland General Insurance*[26] the Court stated the rule that partial disclosure leads to waiver, with no mention of whether the disclosure actually caused unfairness or not.[27] In the foundation case of *Great Atlantic Insurance Co* v. *Home Insurance Co*[28] the only issue discussed was whether a partial disclosure occurred. Detriment was assumed. Fortunately, though, many cases in the Commonwealth stay closer to an investigation of the actual unfairness of the disclosure.[29] There may well be an argument for restricting the partial disclosure rule by imposing a direct requirement of unfairness or detriment.[30]

(1998) 156 ALR 634 (Fed. Ct.). This result is not necessarily dictated by the terms of the statutory provision. What amounts to the "substance of the evidence" may not be capable of simple objective assessment in isolation from the context. Also see *Ampolex Ltd* v. *Perpetual Trustee Company (Canberra) Ltd* (1996) 40 NSWLR 12 at 18–19 (SC) and R.J. Desiatnik, n. 11 above, at 159–60.

[21] E.g. see J.H. Wigmore and J.T. McNaughton, n. 1 above, 635.

[22] E.g. *Attorney-General (N.T.)* v. *Maurice* (1986) 161 CLR at 481, *per* Gibbs CJ and at 487–88 per Mason and Brennan JJ; but compare Deane J's apparently broader notion of fairness.

[23] Note that there should be no force in the complaint that a test of actual prejudice introduces an element of *ad hoc* assessment, as opposed to the essentially fixed-rule oriented nature of the privilege. This is because the partial disclosure doctrine already assumes loss of privilege from an event occurring after the client has reposed confidence in the lawyer and in circumstances where the client would often not be aware of the danger of loss of the privilege.

[24] E.g. *Nye* v. *Sage Products Inc* 98 FRD 452 at 453 (DC Ill. 1982): "[t]he papers submitted on this motion do not demonstrate that plaintiff's partial disclosure will result in some specific prejudice to the defendants . . . In defining the extent of a party's waiver of the privilege, a court is not required to determine whether the party has gained any particular tactical advantage by its partial disclosure".

[25] E.g. *R.J. Hereley & Son Co* v. *Stotler & Co* 87 FRD 358 (DC Ill. 1980).

[26] [1990] 2 NZLR at 383.45.

[27] But compare the same judgment, *ibid.* at 384.25, possibly taking fairness into account.

[28] [1981] 1 WLR 529.

[29] E.g. see *Attorney-General (N.T.)* v. *Maurice* (1986) 161 CLR at 489–90, finding partial disclosure but no prejudice.

[30] As can be seen in a number of American cases, such as *First Wisconsin Mortgage Trust* v. *First Wisconsin Corp* 86 FRD 160 at 174 (DC Wisc. 1980) ("fairness in this case does not require that their privilege should cease, and the Court will not require it"); *United States* v. *Aronoff* 466 F Supp at 863 ("the Government has not alleged any prejudice resulting from Aronoff's assertions about privileged communications . . . Consequently, their legal effect is to let a whisker out of the bag, but not the whole cat").

Annex 32: J Koshikawa, 'The Transfer of Chattels in the Conflict of Laws: Some Aspects of Transnational Law in Japan' (1971-1972) 21 *The American University Law Review* 513.

The Transfer of Chattels in the Conflict of Laws: Some Aspects of Transnational Law in Japan

JUNKICHI KOSHIKAWA*

Everything from shoes to teaching machines floods the world market. The transfer of chattels between nations will probably strengthen economic and social relationships. The transnational transaction of chattels is the problem of transnational society.[1] Ultimately what is needed, then, is a concerted effort on a transnational level. Thus, it is apparent that there is an international, or transnational aspect to the problem of the transfer of chattels.

The number of separate systems of law in the world that differ in their treatment of property make it essential that the courts of each system decide whether they should apply their own law or not. The answer is found in the application of the choice of law rules. Insofar as the problems herein involve the rules of the conflict of laws, their transnational character is evident.[2]

The Classification of Property

In Japanese domestic law, property is classified as immovables or movables. The Civil Code article 86 provides that land and things firmly affixed thereto are immovables, and all other things are movables. In Japanese transnational law, it appears unnecessary to elaborate the rules relating to the classification of a thing as movable or immovable as regards their transfer. First, it is essentially a classification not of things but of interests in things. Second, Japanese law provides that rights *in rem* relating to movables and immovables and other rights requiring registration are governed by the law of the place where they are situated.[3] According to Italian law, the law of the transferor's domicile governs the transfer of chattels since movables follow the

* Judge of the Nagoya District Court, Japan.

1. F. TONNIES, GEMINSCHAFT UND GESELLSCHAFT (1887).

2. Japanese law relating to the choice of law rules is contained in the LAW CONCERNING THE APPLICATION OF LAWS, Law No. 10 (June 21, 1898), *as amended* Law No. 7 (1942), Law No. 223 (1947) and Law No. 100 (1964).

3. APPLICATION OF THE LAWS, art. 10, ¶ 1.

owner. In Japan, however, courts and writers follow the *lex situs* theory in regard to the transfer of movables *inter vivos.*

Movables may be subclassified as either tangible (chattels and goods) or intangible (debts, industrial property rights, etc.). The term "tangible movables" is not quite appropriate when compared with the widely received term of "chattels." Chattel means any article of corporeal property other than land, buildings, and things annexed thereto.[4]

Contractual and Proprietary Questions

In French law the passing of property is effected by the agreement of the parties. In contrast, German law requires as a rule for the passing of property a physical act of delivery. German writers distinguish between contract and property. For instance, the contract sale is the cause for the transfer of property, whereas the transfer of ownership is effected by a separate transaction which consists of the valid consent of transferor and transferee to transfer ownership, and of a physical act of delivery. The Japanese Civil Code article 176 provides that the creation and transfer of real rights takes effect by a mere declaration of intention by the parties. And the Civil Code article 178 states that the assignment over a movable cannot be set up against a third person until the movable has been delivered. In Japanese law, like French law, the conclusion of a contract creating or transferring proprietary interests is sufficient for the transfer of ownership in specific chattels and no act of physical delivery is required. The contract creates both obligations and proprietary rights. However, in Japanese law, unlike French law, delivery is an important factor as regards the protection of third parties.[5]

Most Japanese writers draw a distinction between proprietary questions (*sachenrechtliche Fragen*) which are governed by the *lex situs* and contractual questions (*obligationenrechtlichen Wirkungen*) which are governed by the *lex contractus.*[6] Such a delineation between a contract and a transfer of property is not the intention of the Law concerning the Application of Laws which provides that the intention of the parties determines what country's law is to govern the formation and effect of a juristic act, and that when the intention of the parties is uncertain, the law of the place of acting governs.[7] Because a juristic act includes not

4. JAPANESE CIVIL CODE, art. 85, art. 86, ¶ 2.

5. JAPANESE CIVIL CODE, art. 178.

6. I. QUBO, THE OUTLINE OF THE PRIVATE INTERNATIONAL LAW 139 (1954); H. EGAWA, THE PRIVATE INTERNATIONAL LAW 183 (1957); T. KAWAKAMI, THE OUTLINE OF INTERNATIONAL SALE LAW 126 (1964).

7. JAPANESE CIVIL CODE, art. 7.

Annex 33: 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.

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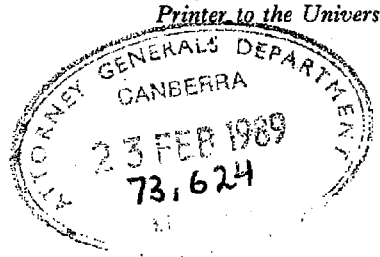

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PUBLIC INTERNATIONAL LAW AND THE *LEX SITUS* RULE IN PROPERTY CONFLICTS AND FOREIGN EXPROPRIATIONS*

By CHRISTOPHER STAKER[1]

I. INTRODUCTION

IN international law, State sovereignty is taken to mean that all States are in principle internally self-governing and externally independent[2]

[1] BA, LLB (Hons.); Attorney-General's Department, Canberra. The views expressed in this article are those of the author and not necessarily those of the Attorney-General's Department. The author would like to express his gratitude to Professor James Crawford for his helpful comments during the writing of this article.

[2] Verdross, *Völkerrecht* (5th edn., 1964), p. 7.

(b) *The Rule*

In matters concerning the 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.[52]

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. If the object is brought into the territory of a State, that State will recognize the validity of any title given or disposition made which was valid under the law of the situs of the property at the time it was given or made,[53] even if that disposition or acquisition of title would not have been possible on the relevant facts according to the law of the new situs.[54] Having recognized that title from a prior situs, the present situs may alter or transfer it or allow it to be altered or transferred by the operation of its own municipal law (whether that law consists of general rules of property in force before the object affected was brought into the territory of the situs or specific decrees aimed at effecting a particular disposition or change of title enacted while the object is present in the territory).[55]

[52] Rabel, op. cit. above (n. 26), at p. 30, citing examples from 23 jurisdictions. This practice has been consistent since the middle of the last century, before which title to movables was usually said to be governed by the 'personal' law of the owner (which, strictly speaking, begged the question) under the principle of *mobilia personam sequuntur* or *mobilia ossibus inhaerent*: see Rabel, ibid., pp. 8–15; Zaphiriou, *The Transfer of Chattels in Private International Law* (1956), p. 39.

[53] 'If personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere': *Cammell* v. *Sewell* (1858), 3 H & N 617, 638 (Exch.), 157 ER 617, 624, *per* Pollock CB; approved *Cammell* v. *Sewell* (1860), 5 H & N 728, 744–5, 157 ER 1371, 1378 (Exchequer Chamber) *per* Crompton J. The generality of this language is suggestive of a rule of public international law, since if the observation were merely one of English conflicts rules, one would have expected Pollock to have said 'that disposition is binding in this country' (cf. headnote to (1860) 5 H & N 728 at 728). This is borne out by the international arbitration in the case of *Liamco* v. *Libya*, loc. cit. above (n. 44), at p. 171: '[Clause 16] is . . . consistent with the principle of non-retroactivity of laws, which denies retrospective effect to a new legislation and asserts the respect of vested rights acquired under a previous legislation'. See also Crawford, 'Decisions of British Courts during 1985 . . .', this *Year Book*, 56 (1985), p. 311 at p. 319, discussing *Williams & Humbert Ltd.* v. *W & H Trade Marks (Jersey) Ltd.*, [1986] 1 All ER 129, *per* Lord Templeman at pp. 133–5: 'The interesting feature of this passage . . . is . . . the emphasis on [public] international law . . . as providing a basic justification for recognizing a foreign expropriatory law affecting property within the jurisdiction of the foreign State.'

[54] 'If we are to recognise the Norwegian law, and if according to that law the property passed by the sale in Norway to Clausen as an innocent purchaser, we do not think that the subsequent bringing of the property to England can alter the position of the parties' [even though in England Clausen would have obtained no title owing to the principle of *nemo dat quod non habet*]: *Cammell* v. *Sewell* (1860), 5 H & N 728 at 742–3, 157 ER 1371, 1377. Rabel, op. cit. above (n. 26), at pp. 70–1 n. 1, cites other examples from England, the US, France, Germany and Greece.

[55] Of course, if the title under a previous situs belongs to a non-national of the present situs and the operation of the present situs's municipal law is expropriatory, the State of the present situs will be under a duty to pay that person compensation.

This new determination will override any determination made by a previous situs[56] and in turn must be recognized by all States in the world until overriden by the municipal law of a subsequent situs.

Given the unusual consistency of State practice in the application of this rule, the number of authorities supporting it as a rule of private international law are too vast to mention,[57] and in fact its use has become so common that today often little is said about it.[58] Of interest to the *public* international lawyer is the fact that the rule appears to be applied by every State in the world (including communist countries,[59] Asian countries[60] and Latin American countries[61]), and the fact that some municipal judgments use broad language which suggests that local courts have an international obligation to apply the rule.[62] In West Germany for instance it has been held that, unlike other conflicts rules, the *lex situs* principle cannot be displaced by the forum's public policy.[63] Furthermore the rule has been applied in international arbitrations[64] and been embodied in much conventional law.[65]

[56] Lalive, *The Transfer of Chattels in the Conflict of Laws* (1955), p. 187, says that a 'second *lex situs* governs the validity of all acts done in respect of a chattel from the time it has entered the territory. This law also decides to what extent proprietary rights created under the original *lex situs* are to be recognised and how they may be exercised'. As his treatise is on the conflict of laws, Lalive fails to emphasize that a State may refuse to 'recognize' rights created under the original *lex situs* in the sense that it may alter or destroy them, but it must still pay compensation when this amounts to the expropriation of an alien's title acquired under the law of a previous situs.

[57] See, however, above, n. 52; Zaphiriou, op. cit. above (n. 52), at pp. 39–49.

[58] See, e.g., the report of *Masse en faillite de Gottlieb Meier* v. *Peters & Co.* (1967, Switzerland), *Clunet*, 103 (1976), p. 469: 'Rares sont les arrêts suisses qui ont l'occasion de rappeler le principe, trop fermement établi pour être souvent contesté de l'application de la loi du lieu de la situation (*lex rei sitae*) a la propriété des biens meubles.'

[59] Bogouslavski, 'Doctrine et pratique soviétiques en droit international privé', *Recueil des cours*, 170 (1981–I), p. 331 at p. 391; Szaszy, 'Private International Law in Socialist Countries', ibid., 111 (1964–I), p. 163 at p. 254.

[60] Ehrenzweig, Ikehara and Jensen, *American-Japanese Private International Law* (1964), pp. 55f.

[61] Montevideo Treaty on International Civil Law (1889), Article 26; Goldschmidt and Rodriguez-Novas, *American-Argentine Private International Law* (1966), p. 68.

[62] Above, n. 53; *Re Helbert Wagg*, [1956] 1 Ch. 323, 344, 22 ILR 480: 'Every civilised State must be recognised as having power to legislate in respect of movables situate within that State . . . and that such legislation must be recognised by other States as valid and effective to alter title to such movables'; *Firma Wichert* v. *Wichert* (1948, Switzerland), *Clunet*, 73–6 (1946–9), p. 185: 'Cette propriété doit être reconnue a l'extérieur [de la Tchécoslovaquie], notamment en Suisse, où il a apporté la marchandise.'

[63] Bundesgerichtshof 20.3.1963, ibid. 94 (1967), p. 438. This undermines the argument by Baade, 'Indonesian Nationalisation Measures Before Foreign Courts—A Reply', *American Journal of International Law*, 54 (1960), p. 801 at pp. 801–2. On public policy generally see below, Part IV (e).

[64] *Liamco* v. *Libya*, loc. cit. above (n. 44). Lipstein, 'Conflict of Laws before International Tribunals', *Transactions of the Grotius Society*, 27 (1942), p. 142 at p. 172, points out that in the substantial practice of the series of Mixed Arbitral Tribunals set up after the First World War, the *lex rei sitae* was 'applied in all cases where questions of property arise, whether in connection with contractual relations or not' (citing especially *Bartelous* v. *German Government*, *Recueil des décisions des tribunaux arbitraux mixtes*, vol. 3, p. 274 at p. 277), even though 'the prevalence of the *lex rei sitae* over every other test is less essential before international tribunals than before municipal courts, where the question of effectiveness is ever present'.

[65] Codigo Bustamente, Article 106, Montevideo Treaty on International Civil Law (1889), Article 26, Treaty of Montevideo (1940), Article 32, Benelux Convention (1960), Article 16.

The principle is applicable equally to immovables as to movables.[66] Immovables are in fact 'movables' in that they can be brought into the jurisdiction of a new State either by a shift in an international border[67] or by a complete change of sovereignty over the territory of a former State. The law governing the effect of State succession on property rights can thus be seen as a particular application of the *lex situs* rule. The International Law Commission's draft articles on State succession[68] provide that on succession property belonging to third States remains unaffected (Article 9) and that State debts are transferred and not extinguished (Article 17) so that the rights and obligations of the creditor remain unaffected (Article 18). The *lex situs* rule has also been observed in cases of State succession in customary international law.[69] In the *Mavrommatis Palestine Concessions* case[70] the Permanent Court of International Justice held that the administration of Palestine would be bound to recognize certain concessionary rights granted by Turkey prior to the First World War 'not in consequence of an obligation undertaken by the Mandatory, but in virtue of a general principle of international law'. In 1934 in the case of *The Railways of Zeltweg-Wolfsberg and Unterdrauburg-Woellan*[71] a special arbitral tribunal appointed by the Council of the League of Nations spoke of the 'principle of public international law that the rights derived by a private company from a deed of concession cannot be nullified or affected by the mere fact of a change in the nationality of the territory on which the public service conceded is operated'. Both these cases involved the grant of concessions,[72] but the general principle would apply equally to all forms of property.[73] It will

[66] Reese, 'General Course on Private International Law', *Recueil des cours*, 150 (1976–II), p. 1 at p. 143: 'The rules relating to land have been relatively untouched by the developments which have brought revolutionary changes in other areas of choice of law . . . questions concerning interests . . . in immovables are determined by the law that would be applied by the courts of the situs.' See also *Firma Wichert* v. *Wichert*, loc. cit. above (n. 48); *Bank of Africa* v. *Cohen*, [1909] 2 Ch. 129.

[67] For example, *Shapleigh* v. *Mier*, 83 F 2d 673, 299 US 468 (1937), *Annual Digest*, 8 (1935–7), No. 14.

[68] The whole area of State succession is currently undergoing codification by the International Law Commission. While some of the ILC's draft articles (*General Assembly Official Records*, 34th Session, Supplement 10, p. 7) are not totally consistent with the *lex situs* rule, the Commission recognizes that its work goes beyond existing customary international law (see Brownlie, op. cit. above (n. 24), at p. 652). Cf. below, n. 69. The main exception to the *lex situs* rule in cases of State succession is the fact that certain property belonging to the predecessor State will automatically pass to the successor State.

[69] Kaeckenbeeck, 'La Protection internationale des droits acquis', *Recueil des cours*, 59 (1937–I), p. 317 at p. 339.

[70] *PCIJ*, Series A, No. 2, at p. 28 (1924).

[71] *Annual Digest*, 7 (1933–4), No. 213, at p. 486.

[72] See further Gidel, *Des effets de l'annexion sur les concessions* (1904); Sayre, 'Change of Sovereignty and Concessions', *American Journal of International Law*, 12 (1918), p. 705.

[73] See *German Settlers in Poland* (1923), *PCIJ*, Series B, No. 6, especially at p. 36 (immovable property): *German Interests in Polish Upper Silesia* (1926), *PCIJ*, Series A, No. 7 (immovable property); *Lighthouses* arbitration (1956), *Reports of International Arbitral Awards*, vol. 12, p. 155 at p. 236 (private contracts and debts). See further O'Connell, *State Succession in Municipal Law and International Law* (1967), vol. 1, pp. 264–5, 272–7; Crawford, 'The Contribution of Professor D. P. O'Connell to the Discipline of International Law', this *Year Book*, 51 (1980), p. 1 at pp. 14–17, 25–31, 44–7.

be noted that a change of sovereignty over territory will bring about a change of legal situs not only of immovables but also of any movables situated in that territory at the time, which again emphasizes the similarity for international law purposes of property rights to both movables and immovables. The *lex situs* principle will apply to both types of right on a change of sovereignty, whether that change is brought about by peaceful agreement or by conquest—property rights created in the municipal law of the previous sovereign must be recognized by the municipal law of its successor.[74] That title may be transferred, amended or destroyed by that second municipal law,[75] but if such action would be expropriatory, there is a duty to pay compensation.[76]

(c) *The Doctrinal Basis of the Rule*

Having defined the rule, it should be emphasized that the only explanation for its existence is the need of international law for *some* rule by which it can define property for its own purposes, and State practice bears out the conclusion that the *lex situs* rule is the one which has been chosen. It may have been chosen because its operation is more convenient than other rules,[77] though it is submitted that other rules might have been chosen which also would have been perfectly workable.[78] But this

[74] *US* v. *Perchman* (1833), 7 Peters 51, *per* Marshall CJ at 86: '. . . it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominium over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilised world would be outraged, if private property should be generally confiscated, and private rights annulled.' This rule has been applied in numerous cases, accepted by leading authors and given expression in numerous treaties. See Briggs, *The Law of Nations—Cases, Documents and Notes* (2nd edn., 1952), p. 237; Sayre, loc. cit. above (n. 72); O'Connell, *The Law of State Succession* (1956), pp. 78ff., and the cases decided by the Great Britain–United States Arbitral Tribunal, *Reports of International Arbitral Awards*, vol. 6, pp. 92–190. *West Rand Mining Co.* v. *R*, [1905] 2 KB 391, 411, indicates that this doctrine is not limited to interests in immovables.

[75] i.e. the municipal law of the new situs cannot be applied to property retrospectively to the time before it was in the present situs: Kaeckenbeeck, 'The Protection of Vested Rights in International Law', this *Year Book*, 17 (1936), p. 1 at p. 2. See below, Part IV (b).

[76] Though not, of course, if the person whose title is expropriated is a national of the expropriating State (i.e. of the second sovereign). This would explain the result in *Kulakowski* v. *Szumkowski* (1928, Poland), *Annual Digest*, 4 (1927–8), No. 375, if it is assumed that the defendant in that case was a Polish national. See also the *William Webster* case (1925 British–American Tribunal), ibid. 3 (1925–6), No. 61, and *Ul Ltd.* v. *Polish State* (1932 Upper Silesian Arbitral Tribunal), ibid. 6 (1931–2), No. 35.

[77] Seidl-Hohenveldern, 'Extraterritorial Effects of Confiscations and Expropriations', *Modern Law Review*, 13 (1949), p. 69 at p. 69: 'Many solutions have been suggested. The most logical one and the one best suited to all circumstances lies in the acceptance of the maxim, that every State has a sovereign right to determine the fate of all property situated within its boundaries.' Reese, loc. cit above (n. 66), at p. 154: 'This rule, whatever may be its other attributes, produces predictability and uniformity of result. . . . In addition, the rule makes for ease of decision by the judge. These are substantial virtues which should not be abandoned unless clear cause for doing so has been shown.' See also Story, op. cit. above (n. 3), Section 379.

[78] For example, a rule that the system of law having the 'most significant relationship' to the property in question should govern: see Part VI, below. Though international trade and commerce might come to a standstill if there were no international law rule at all, it is not true that 'Business could not be carried on if [the rule] were not [the *lex situs*]' (*Re Anziani*, [1930] 1 Ch. 407, 420) or

Annex 34: N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract* (10th ed., LexisNexis Butterworths, 2012).

Cheshire and Fifoot

Law of Contract

Tenth Australian Edition

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> life, the stability of the family unit and the nurture of infant children until their legal majority an essential aspect of the corporate welfare of the community? Secondly, if they are, can it be said there is a general recognition in the community that those values demand that there must be no award of damages for the cost to the parents of rearing and maintaining a child who would not have been born were it not for the negligent failure of a gynaecologist in giving advice after performing a sterilisation procedure?

The court held that the first requirement, that the policy in issue must relate to an essential aspect of corporate welfare, was satisfied, as it concerned the value of human life, the stability of family units, and the nurture of infants; but the second, general communal recognition that damages should not include child-rearing costs, was not.[91]

Recognised heads of public policy

18.16 **Nature of heads of public policy.** It has long been conceded that 'public policy affords a measure of discretion to the courts'.[92] However, the courts have attempted to confer some stability on the concept of public policy by recognising 'heads of public policy'. But although there are well-recognised 'heads' of public policy that are considered below, it must be borne in mind that public policy is not static. In *Re Morris (dec'd)*[93] Jordan CJ said:

> From generation to generation ideas change as to what is necessary or injurious, so that 'public policy' is a variable thing ... New heads of public policy come into being and old heads undergo modification.[94]

Understandably the courts are cautious in recognising new heads of public policy, since the difficulty of identifying the existence and strength of any public consensus is so formidable.[95] They nevertheless recognise that the law is not immutable. New heads of public policy have been recognised in some recent decisions.[96]

It must also be borne in mind that established heads of public policy may clash in their application to a particular contract. So in *A v Hayden*[97] (see **18.32**) it was argued that the public interest in national security (see **18.31**) overrode the public interest in the administration of justice. Although the court rejected this argument on the facts, it acknowledged that, before applying any head of public policy, 'any opposing public interest must be identified and weighed in the balance'.[98]

91. Ibid at [77], [83]. See also Kirby J at [152], Callinan J at [299].
92. *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 at 248 (Kirby J).
93. (1943) 43 SR (NSW) 352; affirmed in *Lieberman v Morris* (1944) 69 CLR 69.
94. Ibid at 356; quoted in *A v Hayden* (1984) 156 CLR 532 at 558. In this way the court can keep abreast of the times: see *Brooks v Burns Philp Trustee Co* (1969) 121 CLR 432 at 457 (Windeyer J). See also *Cattanach v Melchior* [2003] HCA 38; (2003) 215 CLR 1 at [232] (Hayne J).
95. *A v Hayden* (1984) 156 CLR 532 at 559 (Mason J); *Cattanach v Melchior* [2003] HCA 38; (2003) 215 CLR 1 at [64], [83] (McHugh and Gummow JJ). Identification of a new head of public policy 'desirably, should be founded on empirical evidence, not mere judicial assertion': *Cattanach v Melchior*, ibid at [152] (Kirby J); compare *AG Australia Holdings Ltd v Burton* [2002] NSWSC 170 at [171] (Campbell J) (employee's confidentiality agreement not void on any ground of public policy).
96. For example, a 'public interest in permitting litigation funding': *Clairs Keeley (a firm) v Treacy* [2003] WASCA 299 at [82] (Murray J): see further **18.33**. See also *Taylor v Burgess* [2002] NSWSC 170 at [29]–[30] (contract to keep information of child's paternity secret held void). In *Cattanach v Melchior* [2003] HCA 38; (1984) 156 CLR 532 (see **18.15**) Hayne J identified a public policy against assessing the monetary value of a child: at [257]–[258]. The sale of human body parts may raise public policy issues: see George, (2005) 7 *UTSLRev* 11.
97. (1984) 156 CLR 532.
98. At 559–60 (Mason J); see also 577 (Wilson and Dawson JJ); 564 (Murphy J); 589 (Brennan J); 597 (Deane J). Compare *Sankey v Whitlam* (1978) 142 CLR 1 at 38–9, 56ff, 95–6.

The question in each case is whether the enforcement of a contract would be injurious to the communal interest.[99] The law recognises that *not* enforcing a contract may in some circumstances cause greater injury than its enforcement, notwithstanding an element of illegality. So in *Yango Pastoral Co Pty Ltd v First Chicago Aust Ltd*[100] the mischief that would have resulted from not enforcing the contracts in question was a ground for rejecting both the case for implying statutory prohibition (see **18.10**) and the case for invalidity based on public policy (see **18.18**).[101]

18.17 Established heads of public policy. The courts and commentators have not been unanimous in identifying established heads of public policy. Their number and formulation varies significantly. In this book the following heads of public policy are identified:

- contracts involving unlawful conduct or purpose: **18.18–18.25**;
- contracts prejudicial to the status of marriage: **18.26**;
- contracts involving sexual immorality: **18.27**;
- contracts to defraud the revenue: **18.28**;
- contracts prejudicing the impartiality of public officials: **18.29**;
- contracts fettering executive action, or statutory duties or powers: **18.30**;
- contracts prejudicial to national or international security: **18.31**;
- contracts prejudicial to the administration of justice: **18.32–18.33**;
- contracts excluding the jurisdiction of the courts: **18.34**; and
- contracts in unreasonable restraint of trade: **18.35–18.38**.

18.18 Contracts involving unlawful conduct. A contract may be contrary to public policy because its formation or performance involves unlawful conduct. Its formation or performance may be unlawful because it is:

- prohibited by legislation: **18.19–18.20**; or
- prohibited by common law: **18.21**.

A contract made for an unlawful purpose may be void even if its formation or performance was not as such illegal: **18.22–18.25**.

As with any other head of public policy, there can be no blanket rule. The fact that a contract involves unlawful conduct, whether at its inception, or in its performance or enforcement, does not automatically invalidate it. The court may enforce a contract notwithstanding that it involves unlawful conduct or is made for an unlawful purpose, if its enforcement is nevertheless in the public interest.[102]

18.19 Contracts to engage in conduct prohibited by legislation. Where the conduct relied on as illegal is prohibited by legislation, the first question must be whether a

99. *A v Hayden* (1984) 156 CLR 532 at 557, 571.
100. (1978) 139 CLR 410.
101. See especially ibid at 429, 433. See also *ET Fisher & Co Pty Ltd v English Scottish and Australian Bank Ltd* (1940) 64 CLR 84; *Brooks v Burns Philp Trustee Co* (1969) 121 CLR 432 at 452 (Windeyer J); *Farrow Mortgage Services Pty Ltd (in liq) v Edgar* (1993) 114 ALR 1.
102. See **18.16** above.

contract involving the conduct is expressly or impliedly prohibited by the legislation itself:[103] see 18.7–18.13 above. But even if no such prohibition can be established, a contract to engage in conduct that contravenes legislation may be void on the basis of public policy, because it is 'tainted with illegality':[104]

> The question then becomes whether, as a matter of public policy, the court should decline to enforce the contract because of its association with the illegal activity ... The refusal of the courts in such a case to regard the contract as enforceable stems not from express or implied legislative prohibition but from the policy of the law, commonly called public policy.[105]

It follows that whenever making or performing a contract contravenes legislation, public policy is potentially an independent bar to its enforcement.[106] In *Wilkinson v Osborne*[107] Isaacs J went so far as to say that 'whatever tends to defeat an enactment is necessarily against public policy'. Public policy may therefore make a contract void because it contravenes a statute even if the statute itself does not prohibit the contract. In *North v Marra Developments Ltd*:[108]

> North, a firm of stockbrokers, sued Marra for fees under a consultancy contract made in connection with the takeover of another company. As part of the takeover strategy, North agreed to buy Marra shares at high prices to cause a rise in their market value. This contravened s 70 of the Securities Industry Act 1970 (NSW), which provided: 'A person shall not create ... a false or misleading appearance with respect to the market for, or the price of, any securities.'

The High Court held that even if s 70 did not prohibit the contract, it was void because it constituted a common law conspiracy to deceive or to commit an offence. Mason J said:[109]

> 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. The appellants fail not because the agreement on which they sue is avoided by s 70, but because ... 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.

Stephen and Aickin JJ held that even if there was no conspiracy to deceive, North could not enforce the contract because there was 'a common law conspiracy involved in the agreement to engage in conduct constituting an offence contrary to s 70'.[110]

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103. *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 at 242, 245; *Bondlake Pty Ltd v The Owners — Strata Plan No 60285* [2005] NSWCA 35 at [28].
104. *Adelaide Development Co Pty Ltd v Pohlner* (1933) 49 CLR 25 at 35.
105. *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 at 227 (McHugh and Gummow JJ); see also *Ford Motor Company of Australia Ltd v Arrowcrest Group Pty Ltd* [2003] FCAFC 313 at [140].
106. So in *Yango Pastoral Co Pty Ltd v First Chicago Aust Ltd* (1978) 139 CLR 410 (see 18.10) it was alternatively argued that the court should refuse to enforce the contract on the ground of public policy. See also *Electric Acceptance Pty Ltd v Doug Thorley Caravans (Aust) Pty Ltd* [1981] VR 799 at 812; *Nonferral (NSW) Pty Ltd v Taufia* (1998) 43 NSWLR 312; *Corradini v Lovrinov Crafter Pty Ltd* (2000) 77 SASR 125.
107. (1915) 21 CLR 89 at 98.
108. (1981) 148 CLR 42. See also *Farrow Mortgage Services Pty Ltd (in liq) v Edgar* (1993) 114 ALR 1.
109. (1981) 148 CLR 42 at 60.
110. Ibid at 48.

18.20 Legislation primary determinant of public policy. However, cases must be rare in which public policy makes a contract void because it involves a breach of legislation, notwithstanding that the legislation itself neither expressly nor impliedly prohibits the contract. Thus, in *Fitzgerald v FJ Leonhardt Pty Ltd*[111] (see **18.10** above) the owner argued that, even if the Water Act did not make the drilling contract illegal, its enforcement was, nevertheless, against public policy. The High Court rejected this argument. The factors that precluded implying statutory prohibition (the wide powers given to the Controller of Water Resources, and the substantial penalties imposed on contraventions of the Act) also militated against a refusal to enforce it on the ground of public policy. The Act had been passed for the protection of the public, but it did not follow from this that any contract involving a contravention of the Act was unenforceable.[112]

In *Fitzgerald v FJ Leonhardt Pty Ltd* three members of the court[113] adopted the restrictions applied by McHugh J in *Nelson v Nelson*[114] to the application of public policy in the present context. These restrictions may be summarised as follows. In the first place,[115] the court will not refuse relief on the basis of illegal conduct where:

1. the claimant was ignorant of or mistaken about facts that make the conduct illegal;
2. the claimant is a member of a class for the benefit of which the statute was enacted;
3. the claimant was induced to act illegally by the fraud, oppression or undue influence of the other party; or
4. an intention to engage in illegal conduct was not carried into effect.116

In the second place, even if none of these factors apply, the court will still not refuse relief if:

(i) the sanction of refusing to enforce those rights is disproportionate to the seriousness of the unlawful conduct;[117]

(ii) the imposition of the sanction is necessary to protect the objects or policies of the statute; or

(iii) the statute does not intend that the sanctions shall be the only legal consequences of its breach.[118]

111. (1997) 189 CLR 215.
112. See especially ibid at 220; see also *Corradini v Lovrinov Crafter Pty Ltd* (2000) 77 SASR 125 at 140–1. However, legislation passed for the protection of the public is more likely to be interpreted as prohibiting contracts by implication: see fn 61, above. It is not obvious why this should be so.
113. McHugh and Gummow JJ ((1997) 189 CLR 215 at 228–30); Kirby J (ibid at 249–50).
114. (1995) 184 CLR 538 at 604–5; 612–13. The case concerned the enforcement of a (resulting) trust, not a contract, but the court proceeded on the basis that the same principles applied to trust and contract: see especially ibid at 556 (Deane and Gummow JJ).
115. Ibid at 604–5.
116. See 18.25.
117. A contract should not be held illegal if it involves only a minor or inadvertent prohibition or contravention or one of small public concern. Compare *Kerridge v Simmonds* (1906) 4 CLR 253; *South Australian Cold Stores Ltd v Electricity Trust of Australia* (1957) 98 CLR 65 at 74; *Braham v Walker* (1961) 104 CLR 366; *Electric Acceptance Pty Ltd v Doug Thorley Caravans (Aust) Pty Ltd* [1981] VR 799 at 810; *Re O'Connor's Bills of Costs* [1993] 1 Qd R 423; *Barac v Farnell* (1994) 53 FCR 193.
118. (1995) 184 CLR 538 at 613. These criteria were applied in *Nonferral (NSW) Pty Ltd v Taufia* (1998) 43 NSWLR 312 at 321 (contract of employment with illegal entrant held enforceable); *Corradini v Lovrinov Crafter Pty Ltd* (2000) 77 SASR 125 at 142 (building contract held enforceable notwithstanding non-compliance with statutory requirements of form and content); *Elvidge Pty Ltd v BGC Construction*

It will be seen that although these criteria leave intact the principle that breach of a statute may make a contract independently void on the basis of public policy,[119] they make the statute the primary determinant of the nature of that policy. 'Regard is to be had primarily to the scope and purpose of the statute to consider whether the legislative purpose will be fulfilled without regarding the contract as void and unenforceable.'[120] This means that factors that tend against express or implied statutory prohibition of the contract (see **18.8** and **18.10** above) will also tend against non-enforcement on the ground of public policy. In particular, the presence of specific statutory sanctions (see **18.12**) militates against any invalidation on the basis of public policy.[121]

18.21 Contracts to engage in conduct prohibited by common law. A contract by which the parties agree to engage in unlawful conduct is normally void as against public policy.[122] This clearly applies to a contract to engage in criminal conduct.[123] The principle extends to contracts providing for the commission of a criminal offence in a foreign country.[124]

The principle also applies to contracts to engage in non-criminal conduct prohibited by common law. So in *North v Marra Developments Ltd*[125] Mason J held that, even if the contract was not prohibited by the legislation, it was defeated by the 'common law illegality' of a conspiracy to deceive: see **18.18** above.[126]

An agreement to commit a statutory offence is also prohibited by the common law. Thus, in *North* Stephen and Aickin JJ decided the case on the basis that there was 'a common law conspiracy involved in the agreement to engage in conduct constituting an offence contrary to s 70': see **18.19** above.[127] In *Fitzgerald* (see **18.10** above) the court made it clear that, had there been an agreement to drill bores without permits,

Pty Ltd [2006] WASCA 264 at [50] (building contract held enforceable notwithstanding breach of legislation prohibiting departure from approved plan). See also *Harry Goudias Pty Ltd v Akakios* [2007] SASC at [46]ff.

119. A contract for the sale of shares involving breaches of ss 205–206 of the Corporations Act 2001 (Cth) was held to be unenforceable as falling squarely within the criteria (though without explanation) in *Raphael v Watson* [1998] 577 FCA.

120. *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 at 227 (McHugh and Gummow JJ). See also *Ford Motor Company of Australia Ltd v Arrowcrest Group Pty Ltd* [2003] FCAFC 313 at [140]; *Elvidge Pty Ltd v BGC Construction Pty Ltd* [2006] WASCA 264 at [52] (McLure JA); *Tonkin v Cooma-Monaro Shire Council* [2006] NSWCA 50 at [72].

121. See *Yango Pastoral Co Pty Ltd v First Chicago Aust Ltd* (1978) 139 CLR 410 especially at 428–9; *Nelson v Nelson* (1995) 184 CLR 538 especially at 616–17; *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 especially at 227, 251. See also *Ianotti v Corsaro* (1984) 36 SASR 127.

122. Although the cases mostly involve parties with knowledge of the illegality in question, ignorance of the law is no excuse where a contract cannot be performed without breaking it: *Hutchinson v Scott* (1905) 3 CLR 359 at 369; *Koala Pty Ltd v Queenslodge Pty Ltd* [1977] VR 164 at 175; *Burmic v Goldview* [2002] QCA 479 at 19.

123. *Electric Acceptance Pty Ltd v Doug Thorley Caravans (Aust) Pty Ltd* [1981] VR 799 at 812; compare *Barac v Farnell* (1994) 53 FCR 193.

124. *Fullerton Nominees Pty Ltd v Darmagio* [2000] WASCA 4; compare *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 75 ALR 353 especially at 459.

125. (1981) 148 CLR 42.

126. Ibid at 60. See also *ACT Gaming and Liquor Authority v Andonaros* (1991) 103 FLR 450 at 390 (contracts disposing of a business to conceal assets from the Family Court held illegal at common law); *Burmic Pty Ltd v Goldview Pty Ltd* [2002] QCA 479 at [23] (contract made with intention of contravening legislation prohibiting exhibition of advertisement without local government approval held to be criminal conspiracy).

127. (1981) 148 CLR 42 at 47.

it would have been void.[128] Similarly, in *Burmic v Goldview*[129] the Queensland Court of Appeal held that a contract to exhibit an advertising sign without applying for local government approval, where this was a statutory offence, was void. A contract to defraud a party's creditors is also against public policy on this basis.[130]

It has been asserted that a contract for the commission of a tort is similarly illegal on the basis of public interest.[131] Such claims could also be made in relation to other civil wrongs.[132] However, the idea that a contract involving conduct that is not prohibited, but merely subject to civil liability, should be regarded as illegal is not unproblematic. It can be argued that where a civil remedy exists for the conduct in question, the law should be slow in imposing the additional sanction of refusing to enforce a contract.[133]

18.22 **Contracts made for an unlawful purpose.** A contract that necessarily involves acts prohibited by law (see **18.19** and **18.21** above) is distinguished from a contract that does not itself break the law, but is nevertheless made with the intention or for the purpose of engaging in illegal conduct.[134] However, a contract made with such an intention or purpose may also be invalid on the basis of public policy[135] if a clear intention to break the law is proved, and the unlawful intention or purpose goes to the substance of the contract: see **18.23–18.24** below.

The modern origin of the principle that a contract made for an illegal purpose may be void, even if formation or performance of the contract is not in itself illegal, is a passage in the judgment of the English Court of Appeal in *Alexander v Rayson*,[136] first applied by an Australian court in *McCarthy Bros v The Dairy Farmers' Co-operative*.[137] The passage runs as follows:

> It often happens that an agreement which in itself is not unlawful is made with the intention of one or both parties to make use of the subject matter for an unlawful purpose, that is to say a purpose that is illegal, immoral or contrary to public policy. ... In such a case any party to the agreement who had the unlawful intention is precluded from suing upon it.

128. (1997) 189 CLR 215 at 218–19 (Dawson and Toohey JJ), 226 (McHugh and Gummow JJ), 251–2 (Kirby J).
129. *Burmic Pty Ltd v Goldview Pty Ltd* [2002] QCA 479.
130. *ET Fisher & Co Pty Ltd v English Scottish and Australian Bank Ltd* (1940) 64 CLR 84. The applicable principles were reviewed by the Victorian Court of Appeal in *Scuderi v Morris* (2001) 39 ACSR 592. A mere intention to defraud creditors is not enough: see **18.28**.
131. See *Glenmont Investments Pty Ltd v O'Loughlin (No 2)* (2000) 79 SASR 185 at 229; see also *Government of Japan v Global Air Leasing Pty Ltd* [2003] QSC 221 at [74], [79]–[81].
132. For example, breach of fiduciary duty: *Thorby v Goldberg* (1964) 112 CLR 597 (directors of company fettering their power to act in best interest of shareholders); compare *ANZ Executors & Trustee Co Ltd v Quintex Australia Ltd* [1991] 2 Qd R 360.
133. See *Hutchinson v Scott* (1905) 3 CLR 359 at 368.
134. *North v Marra Developments Ltd* (1981) 148 CLR 42 at 47–8 (Stephen and Aickin JJ); *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 at 221, 226, 251–2; *Burmic Pty Ltd v Goldview Pty Ltd* [2002] QCA 479.
135. But not, of course, if legislation expressly or implicitly provides that the contract shall be valid notwithstanding an illegal purpose, eg, where a statute provides its own sanctions intended to exclude public policy: *Ianotti v Corsaro* (1984) 36 SASR 127.
136. [1936] 1 KB 169 at 182 (Scott LJ).
137. *McCarthy Bros (Milk Vendors) Pty Ltd v The Dairy Farmers' Co-operative Milk Company Ltd* (1945) 45 SR(NSW) 266.

In *McCarthy* this principle was applied to invalidate a contract to purchase milk made by an unlicensed milk vendor for the purpose of unlawful re-sale to its customers. The court held that although the contract to buy the milk was not itself prohibited, it was nevertheless void because it had been made for an illegal purpose (unlicensed re-sale). The principle has since been applied to invalidate contracts in several other cases,[138] and has been adopted in others as correctly stating the law, even if not applicable to the facts before the court: see below.

It is important to note that the illegal purpose principle, as formulated in *Alexander*, precludes enforcement of the contract only by a party with an unlawful intention, and not by an innocent party.[139] The position of innocent parties in relation to contracts against public policy generally is considered in **18.43** below.

18.23 Deliberate intention to act unlawfully required. Where a contract is claimed to be void because it was made for an illegal purpose, a deliberate intention to break the law must be clearly established. The fact that illegal conduct has actually occurred does not demonstrate that it was always intended.[140] The normal inference is that contracting parties make their contract intending to comply with the law, and the onus of showing the contrary rests on the party asserting an illegal purpose.[141] Indeed, it is normally an implied term that a party will not act illegally in performing the contract.[142]

So in *Hutchinson v Scott*:[143]

> Scott sued Hutchinson for an injunction restraining breach of an agreement granting Scott a lease of land 'for the purpose of searching for gold and other minerals'. Hutchinson argued that it was unlawful for a person to mine for gold without authority, and that Scott had no such authority. The contract was therefore void because it was necessarily made for an illegal purpose.

138. *T P Rich Investments Pty Ltd v Calderon* [1964] NSWR 709; *Effie Holdings Properties Pty Ltd v 3A International Pty Ltd* (1984) NSW ConvR 55-174 (sale of property structured by vendor so as to avoid income tax held not enforceable by vendor); *Freedom v AHR Constructions Pty Ltd* [1987] 1 Qd R 59 at 69 (same principle applies to purchaser seeking to defraud revenue); *Holdcroft v Market Garden Produce Pty Ltd* [2001] 2 Qd R 381 (share sale agreements disguised as employment contracts so as to defraud revenue held unenforceable). See also *Tonkawa Nominees Pty Ltd v Sword* (1987) 5 SR (WA) 1. See also *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 432 (Jacobs J); *Brownbill v Kenworth Truck Sales (NSW) Pty Ltd* (1981) 59 FLR 56 at 70.

139. See also *Holidaywise Koala Pty Ltd v Queenslodge Pty Ltd* [1977] VR 164 at 175.

140. In *Meehan v Jones* (1982) 149 CLR 571 a contract for the sale of an oil refinery stated falsely that a substantial deposit had been paid. The seller claimed that the contract was illegal because the buyer intended to use it to persuade potential lenders that the deposit had been paid. The court held that 'in the absence of a finding that the appellant intended or contemplated when he entered into the contract that he would use it for this purpose the case of illegality fails'. The fact that the appellant had actually used the contract to persuade lenders was no ground for holding it illegal: ibid at 595. See also *Drever v Drever* [1936] Arg L R 446; *Holidaywise Koala Pty Ltd v Queenslodge Pty Ltd* [1977] VR 164 at 168; *Government of Japan v Global Air Leasing Pty Ltd* [2003] QSC 221 at [81].

141. *Norton v Angus* (1926) 38 CLR 523; *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 at 226; compare *Martin v Martin* (1959) 110 CLR 297; *The National Mutual Life Association of Australasia Ltd v S H Hallas Pty Ltd* [1992] 2 Qd R 531; *Glover v Roche* [2003] ACTSC 19 at [33]; *BGC Australia Pty Ltd v Fremantle Port Authority* [2003] WASCA 250 at [33]; *Redglove Projects Pty Ltd v Ngunnawal Local Aboriginal Land Council* [2005] NSWSC 892 at [30]–[31].

142. *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 at 226 (McHugh and Gummow JJ).

143. (1905) 3 CLR 359. Compare *TP Rich Investments Pty Ltd v Calderon* [1964] NSWR 709 (intention by lessee to use premises unlawfully clearly established).

The court held that 'it must be taken that the parties intended that the lessee should do everything necessary to make searching for gold legal'. Where an agreement can be legally performed 'it is necessary to show a wicked intention to break the law'.[144] In a number of cases a contract has therefore been held to be valid because a clear intention to pursue an illegal purpose could not be proved.[145] Tacit acquiescence in an illegal pursuit by the other party may not be enough in this regard.[146]

18.24 Unlawful intention must go to substance of transaction. Even a clear intention to break the law is not enough to establish that a contract is against public policy if it does not go to the substance of the transaction. So in *Neal v Ayers*[147] it was held that a contract for the sale of a hotel was not unenforceable because it was contemplated that the purchaser would engage in illegal after-hours trade. Dixon and Evatt JJ said:

> The substantial purpose of the contract was to transfer the property on which a business was carried on ... The fact that ... the purchaser intended for a time to ... [un]lawfully trade ... could not invalidate the whole transaction, notwithstanding the vendor's knowledge of [that] intention. [The purchaser's] intention ... does not go to the substance of the transaction.[148]

18.25 Unrealised intention. It can be strongly argued that a mere intention to engage in unlawful conduct, never realised, should not without more be a basis for refusing enforcement of a contract. The High Court has adopted this view (grounded in the notion of 'repentance') in relation to contracts made for the purpose of defeating creditors' claims.[149] It has also been applied in other situations.[150] Nevertheless, in some contexts the courts have held that a contract made with the common intention of breaking the law was unenforceable as against public policy, even though the intention was never carried out.[151]

However, it seems that there is no basis for holding a contract invalid where the intention to engage in unlawful conduct could never in fact have been carried out. Thus, in *Gray v Pastorelli*[152] the vendor's intention to avoid income tax did not

144. Ibid at 370. See also *Holidaywise Koala Pty Ltd v Queenslodge Pty Ltd* [1977] VR 164 at 175; *The National Mutual Life Association of Australasia Ltd v S H Hallas Pty Ltd* [1992] 2 Qd R 531; *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 at 226, 237.
145. *Boulevarde Developments Pty Ltd v Toorumba Pty Ltd* [1984] 2 Qd R 371; *Edward Keller (Australia) Pty Ltd v Hennelly* (NSWSC, Brownie J), 9 July 1987, unreported); *Yaroomba Beach Development Company Pty Ltd v Coeur de Lion Investments Pty Ltd* (1989) 18 NSWLR 398; *The National Mutual Life Association of Australasia Ltd v S H Hallas Pty Ltd* [1992] 2 Qd R 531; see also *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 at 219, 220–1 (Dawson and Toohey JJ).
146. *Yaroomba Beach Development Company Pty Ltd v Coeur de Lion Investments Pty Ltd* (1989) 18 NSWLR 398 at 417.
147. (1940) 63 CLR 524.
148. Ibid at 531–2. See also *Government of Japan v Global Air Leasing Pty Ltd* [2003] QSC 221 at [85].
149. See *Payne v McDonald* (1908) 6 CLR 208; *Perpetual Executors and Trustees Association of Australia Ltd v Wright* (1917) 23 CLR 185; *Donaldson v Freeson* (1934) 51 CLR 598.
150. See *Hatcher v White* (1953) 53 SR (NSW) 285 at 298; *Government of Japan v Global Air Leasing Pty Ltd* [2003] QSC 221 at [84]. The principle has been also applied to contracts made with the intention of defrauding the revenue: see **18.28**.
151. *Neal v Ayers* (1940) 63 CLR 524 at 528, 531; *Clegg v Wilson* (1932) 32 SR (NSW) 109; *Marks v Jolly* (1938) 38 SR(NSW) 351 at 358; *Sykes v Stratton* [1972] 1 NSWLR 145; *Weston v Beaufils (No 2)* (1994) 122 ALR 240; *Fullerton Nominees Pty Ltd v Darmagio* [2000] WASCA 4
152. [1987] WAR 174; approved in *The National Mutual Life Association of Australasia Ltd v S H Hallas Pty Ltd* [1992] 2 Qd R 531 at 535; see also *Yaroomba Beach Development Company Pty Ltd v Coeur de*

preclude him from enforcing a contract of sale of land, because in fact no tax was payable in the circumstances.

18.26 Contracts prejudicial to the status of marriage. The notion that contracts that are prejudicial to marriage are contrary to public policy rests in the main on old decisions of doubtful relevance to modern Australian conditions. Australian authority is sparse, and has generally upheld contracts challenged on the basis of this principle.[153] However, in *Newcastle Diocese Trustees v Ebbeck*[154] the High Court held that a provision in a will providing for forfeiture of an interest bequeathed to the testator's son, if he and his wife did not profess the Protestant faith, was void because it was contrary to public policy. Windeyer J said that the 'policy of the law is not merely that marriages should not break up by divorce or separation. It is rather that the consortium of matrimony and all that that means should not be interfered with, hampered or embarrassed'.[155]

Since then, the Family Law Act 1975 (Cth) has introduced a 'no-fault' system of dissolution of marriage, and legislation recognising de facto relationships has been passed in some jurisdictions: see **18.27** below. Moreover, s 111A of the Marriage Act 1961 (Cth) (inserted in 1976) abolished the action for breach of promise of marriage, making irrelevant a line of authority relating to the validity of such promises made by or to persons already married.[156] The passing of this legislation, and the corresponding shift in public opinion that it reflects, raises the question of whether this head of public policy should be considered moribund or extinct.[157]

18.27 Contracts involving sexual immorality. The same question must be asked with respect to this related head of public policy, again based on old decisions[158] that now appear anachronistic, particularly in the light of legislative recognition of the rights of de facto spouses.[159] In *Andrews v Parker*[160] and *Seidler v Schallhofer*[161] contracts in which the consideration was the maintenance of a de facto relationship were held not to be contrary to public policy. In *Barac v Farnell*[162] the same conclusion was reached in relation to a contract of employment as a receptionist in a brothel. However, an

Lion Investments Pty Ltd (1989) 18 NSWLR 398 at 416–17. Contra *Effie Holdings Properties Pty Ltd v 3A International Pty Ltd* [1984] NSW ConvR 55-174 (not followed in *Gray*).

153. *Milliner v Milliner* (1908) 8 SR (NSW) 471 (term in partnership agreement between married couple providing for payment of liquidated damages and termination on commission of matrimonial offence held not against public policy); *Minister for Education v Oxwell and Moreschini* [1966] WAR 390 at 43 (teacher training agreement conditional on trainee not marrying held not contrary to public policy); *Money v Money (No 2)* [1966] 1 NSWR 248 and *Re Field* [1968] 1 NSWR 210 (agreement between husband and wife to separate held not contrary to public policy where parties have already separated or intend to separate shortly); contrast *Scott v Scott* (1904) 10 ALR 43 (antenuptial agreement not to live together after marriage held contrary to public policy).
154. (1960) 104 CLR 394.
155. Ibid at 415.
156. For example, *Psaltis v Schultz* (1948) 76 CLR 547.
157. Compare *Re Field* [1968] 1 NSWR 210 at 214 (Street J).
158. The classic case is *Pearce v Brooks* (1886) LR 1 Exch 213; [1861] All ER Rep 102 (contract of hire of vehicle used for purposes of prostitution held contrary to public policy).
159. For example, Social Services Act 1947 (Cth) ss 59–60; Superannuation Act 1976 (Cth) s 3; De Facto Relationships Act 1984 (NSW); De Facto Relationships Act 1991 (NT).
160. [1973] Qd R 93.
161. [1982] 2 NSWLR 80. See also Bates, (1983) 57 *ALJ* 460.
162. (1994) 53 FCR 193. See also *Realty World Pty Ltd v Rovera Constructions Pty Ltd* [1998] ACTSC 30.

agreement to provide meretricious sexual services, for example to maintain 'a mistress', was considered contrary to public policy and illegal in *Ashton v Pratt (No 2)*.[163]

18.28 Contracts to defraud the revenue. A contract that directly or indirectly operates so as to defraud the public revenue is contrary to public policy if it was made intentionally for that purpose. Many of the cases involving contracts held invalid because of an illegal purpose (see **18.22–18.24** above) fall into this category.[164] As noted previously, even a clear intention to defraud is not sufficient to render a contract illegal if in fact no contravention of the law eventuated, for example, because the intention was not carried out,[165] or because the tax liability sought to be evaded does not exist.[166]

18.29 Contracts prejudicing the impartiality of public officials. A person performing a public office must act impartially and in the interest of the community. A contract made by such a person that impairs his or her ability to do so is prima facie against public policy. In the leading case *Wilkinson v Osborne*:[167]

> Osborne and Jones were land agents and members of the NSW Parliament. Wilkinson engaged them for a fee to lobby the NSW government to purchase a particular property. A purchase ensued. Osborne and Jones sued Wilkinson for the fee.

The High Court unanimously rejected the claim, on the basis that the contract was against public policy. Griffith CJ said:[168]

> It would be deplorable that any doubt should exist whether such a bargain is tolerated by the law. It is the duty of the legislator to act according to his judgment and conscience uninfluenced by other considerations, least of all of a pecuniary nature.

The principle applies not only to contracts made by legislators, but by any holder of a public office.[169] It also extends to contracts between private parties that involve the improper collaboration of a public official.[170]

18.30 Contracts fettering executive action, or statutory duties or powers.[171] The government and its agents cannot by contract fetter the exercise of executive action, or

163. [2012] NSWSC 3 at [37]–[52]. The parties' arrangements, however, lacked an intention to be bound.
164. *Boulevarde Developments Pty Ltd v Toorumba Pty Ltd* (1984) 15 ATR 1197; *Effie Holdings Properties Pty Ltd v 3A International Pty Ltd* (1984) NSW ConvR 55-174; *Yaroomba Beach Development Co Pty Ltd v Coeur de Lion Investments Pty Ltd* (1989) 18 NSWLR 398; *Holdcroft v Market Garden Produce Pty Ltd* [2001] 2 Qd R 381 at [26]–[35]. A purpose in common with the other party is sufficient: *TP Rich Investments Pty Ltd v Calderon* [1964] NSWR 709 at 716; *Ianotti v Corsaro* (1984) 36 SASR 127 at 129.
165. *Drever v Drever* [1936] Arg LR 446; *Martin v Martin* (1959) 110 CLR 297; *Freedom v AHR Constructions Pty Ltd* [1987] 1 Qd R 59 at 69. The same rule applies to contracts made with intention to defraud creditors: see **18.28**.
166. *Gray v Pastorelli* [1987] WAR 174, applied in *Yaroomba Beach Development Co Pty Ltd v Coeur de Lion Investments Pty Ltd* (1989) 18 NSWLR 398 and *The National Mutual Life Association of Australasia Ltd v S H Hallas Pty Ltd* [1992] 2 Qd R 531; see also *Iannotti v Corsaro* (1984) 36 SASR 127. But compare *Effie Holdings Properties Pty Ltd v 3A International Pty Ltd* (1984) NSW ConvR 55-174; see also *Kennedy v Vercoe* (1960) 105 CLR 521 at 527.
167. (1915) 21 CLR 89; applied in *Horne v Barber* (1920) 27 CLR 494; see also *Wood v Little* (1921) 29 CLR 564; *R v Boston* (1923) 33 CLR 386 at 392, 401–4, 411.
168. (1915) 21 CLR 93.
169. For example, a shire councillor: *Wood v Little* (1921) 29 CLR 564; a candidate for election to parliament: *Taylor v Taylor* (1890) 11 NSWR 323. See also *City of Belmont v Link Interiors Pty Ltd* [1999] WASC 1013 (principle acknowledged though not applied).
170. See *Horney v Barber* (1920) 27 CLR 494.
171. See generally Seddon, *Government Contracts*, 5th ed, 2013, Ch 5.

the performance of a statutory duty, or the exercise of a statutory power or discretion.[172] Unless authorised by statute,[173] a contract with a government or government authority or official is illegal to the extent to which it restricts their capacity to act in the public interest.[174] So a promise by the executive government not to introduce, initiate or support particular legislation is invalid, because it constitutes an attempt to fetter the exercise of the power to legislate in the public interest.[175] The same principle applies to a promise by a public official[176] or local authority[177] to exercise a discretion in a particular way.

However, it is not easy to define the ambit of this head of public policy.[178] Any contract made by or on behalf of a government necessarily commits the government as a contracting party to its performance, and to that extent fetters its future discretion. This is true of contracts of employment, contracts for the supply of goods or services, and other professional or commercial contracts routinely made by or on behalf of governments. It is clear that such 'ordinary' contracts are not prohibited by public policy; indeed, their enforcement is in the public interest. The criteria by which such contracts are distinguished from those that involve an illegal fetter are elusive.[179] The need for caution in the application of this head of public policy has therefore often been stressed.[180]

18.31 Contracts prejudicial to national or international security. In *A v Hayden*[181] Mason J recognised the existence of a public interest in the preservation of national and international security. The other opinions mention only national

172. *Ansett Transport Industries v Commonwealth* (1977) 139 CLR 54 at 72, 74–5 (Mason J); *A v Hayden* (1984) 156 CLR 532 at 543 (Gibbs CJ); *BGC Australia Pty Ltd v Fremantle Port Authority* [2003] WASCA 250 at [30]–[31].
173. Where statutory approval for a contract exists there is no room for any argument based on public policy: *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54 at 77 (Mason J); *City of Camberwell v Camberwell Shopping Centre Pty Ltd* [1994] 1 VR 163; *Port of Portland Pty Ltd v Victoria* [2010] HCA 44; (2010) 85 ALJR 182 at [18]; Rollnik, (2011) 38 *ABLR* 136.
174. Compare *City of Subiaco v Heytesbury Properties Pty Ltd* (2001) 24 WAR 146 [2001] at [46] (Ipp JA).
175. *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54.
176. For example, *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54 at 74 (Secretary of the Department of Transport must act in the public interest notwithstanding any contract to the contrary). See also *Watson's Bay and South Shore Ferry Co v Whitfield* (1919) 27 CLR 268 (ministerial discretion); *Upper Hunter Timbers Pty Ltd v Forestry Commission of NSW* [2001] NSWCA 64 (discretion of licensing authority).
177. *Rocca v Ryde Municipal Council* [1962] NSWR 600 (planning process illegally fettered by contract); *City of Subiaco v Heytesbury Properties Pty Ltd* (2001) 24 WAR 146 [2001] (ditto); but see *Altmann v Corporation of the City of Adelaide* (1986) 43 SASR 353 at 366 (contract fettering licensing process enforced); *Commonwealth v Hooper* (1992) 2 CCH Contract Reporter 90-010 at 89,287–8 (grant of right of pre-emption held valid); *L'Huillier v Victoria* [1996] 2 VR 465 (contract promising to reappoint public servant held enforceable).
178. It must not be confused with the doctrine of 'executive necessity', which entitles the government to break any contract 'with impunity' if 'a clear and convincing case has been made out to justify the Crown walking away from the contract': Seddon, *Government Contracts*, 5th ed, 2013, at [5.3]. The prerogative of government is invoked here, not any illegality of the contract.
179. See *L'Huillier v Victoria* [1996] 2 VR 465 at 479 (Callaway JA). It has been suggested that the conflict between private interest and public purpose can be resolved by withholding specific performance and injunction but allowing damages: Hogg, (1970) 44 *ALJ* 154 at 159. This argument was rejected in *City of Subiaco v Heytesbury Properties Pty Ltd* (2001) 24 WAR 146 at [53].
180. *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54 at 74; see also *Director of Posts and Telegraphs v Abbott* (1974) 2 ALR 625 at 636; *Manock v South Australia* (1979) 83 LSJS 64 at 74; *Northern Territory of Australia v Skywest Pty Ltd* (1987) 48 NTR 20 at 47; *Commonwealth v Hooper* (1992) 2 CCH Contract Reporter 90-010 at 89,287–8.
181. (1984) 156 CLR 532 at 560.

security,[182] but it is convenient to regard national and international security as forming a single category of public policy. To this category may be allocated:

- contracts prejudicial to effective intelligence operations by authorised government agencies;[183]
- contracts made in time of war that benefit an enemy country;[184] and
- contracts that impair relations with a friendly country.[185]

It may be that this head of public policy will become increasingly significant in the light of the rise of national and international terrorism in this century.

18.32 Contracts prejudicial to the administration of justice. Any contract 'having a tendency, however slight, to interfere with the administration of justice' is contrary to public policy: *A v Hayden*.[186] In that case:

> The plaintiffs, who were members of the Australian Secret Intelligence Service, were participants in a training exercise in a hotel in Melbourne in which guests and staff of the hotel were threatened, and property was damaged. The Victorian police wished to bring criminal charges, and asked the Commonwealth to reveal the identity of the participants. The plaintiffs sued for injunctions to enforce an express term in their contract of employment with the Commonwealth that their identity would be kept confidential.

The High Court held that although the promise by the Commonwealth not to disclose the identity of its employees was not prohibited by law, it was nevertheless contrary to public policy, because it prevented the government from revealing information that would assist in the investigation of a crime, and this interfered with the administration of justice.

This head of public policy has been applied in a wide variety of contexts.[187] Examples are contracts to conceal or procure the concealment of a crime;[188] not to prosecute or to stifle a prosecution;[189] not to give evidence at a trial;[190] to conceal evidence from a

182. Ibid at 548, 564, 574–5, 588, 597; see also *Alister v R* (1984) 154 CLR 404 at 436.
183. This was the basis on which the argument on behalf of the national interest was put in *A v Hayden* (1984) 156 CLR 532. The definition of 'security' in s 4 of the Australian Security Intelligence Organisation Act 1979 (Cth) may be relevant: see (1984) 58 *ALJ* 67.
184. Contracts with persons or entities who are an 'alien enemy' are prima facie illegal (unless made with the authority of the government: *Donohoe v Schroeder* (1916) 22 CLR 362 at 365). The expression 'alien enemy' may extend to citizens of Australia or of a friendly or neutral country who are resident in enemy or enemy-controlled territory: *Anglo-Czechoslovak and Prague Credit Bank v Janssen* [1943] VLR 185; *Perpetual Trustee Co (Ltd) v Aroney* (1944) SR (NSW) 313. A state of war may survive the termination of hostilities, in the absence of a contrary declaration by the government: *Schering AG v Parmedica Pty Ltd* (1950) 68 WN (NSW) 137; 52 SR (NSW) 16; compare *Bayer Pharma Pty Ltd v Farbenfabriken Bayer AG* (1965) 120 CLR 285 at 291, 330, 343. The effect of armed conflict without declaration of war is controversial: see O'Connell, (1953) 27 *ALJ* 504 at 510–11. The validity of a contract under which performance is conditional on the termination of a war is doubtful: *Donohoe v Schroeder* (1916) 22 CLR 362 at 364.
185. For example, a contract which involves conduct in a friendly country illegal by the law of that country: *Kay's Leasing Corp Pty Ltd v Fletcher* [1964–65] NSWR 25 at 35.
186. (1984) 156 CLR 532 at 553, 557 (Mason J); see also at 543 (Gibbs CJ); 586 (Brennan J). See also *Sullivan v Sclanders* [2000] SASC 273; *Durban Roodeport Deep Ltd v Mostert* [2004] WASC 9 at [27].
187. See generally Horton, (2002) 22 *Proctor* 16.
188. *A v Hayden* (1984) 156 CLR 532 at 554.
189. *Callaghan v O'Sullivan* [1925] VLR 664; *Goldsbrough Mort & Co Ltd v Black* (1926) 29 WALR 37; *Clegg v Wilson* (1932) 32 SR (NSW) 109; *Public Service Employees Credit Union Cooperative Ltd v Campion* (1984) 75 FLR 131; compare *A v Hayden* (1984) 156 CLR 532.
190. *A v Hayden*, ibid.

court;[191] to pay for evidence of specified content or character;[192] and to compromise legal proceedings arising from an offence that is a matter of public concern.[193]

However, despite the uncompromising form of the dictum quoted above, it is clear that not every agreement that has the slightest tendency to interfere with the judicial process is contrary to public policy. In particular, not every contractual interference with civil (as distinct from criminal)[194] process is invalid. A confidentiality clause in an employment contract is not contrary to public policy just because it precludes an employee from giving information to a solicitor in connection with civil proceedings.[195] Nor is a confidentiality clause in a commercial contract with a government agency invalid because it has the result of precluding access to commercial documents under freedom of information legislation.[196] A duty of confidentiality is not readily displaced in favour of a civil litigant if there is no public interest at stake other than the resolution of the dispute.[197]

18.33 **Litigation-funding agreements.** Interference with the administration of justice has often been relied on as a ground of invalidating contracts to fund or support civil litigation brought by or on behalf of another party. At common law a person who improperly encourages another to bring a civil action commits the tort of maintenance, and a person who agrees to share in the proceeds of such an action commits the tort or crime of champerty. These torts have been abolished by statute in Victoria, South Australia, New South Wales and the Australian Capital Territory,[198] but in each case the legislation expressly preserves the power of the court to declare contracts involving maintenance or champerty void as against public policy.[199] The

191. *ACT Gaming and Liquor Authority v Andonaros* (1991) 103 FLR 450.
192. *Deloitte Touche Tohmatsu v Cridlands Pty Ltd* [2003] FCA 1413 at [107].
193. *Kerridge v Simmonds* (1906) 4 CLR 19 (compromise of action for criminal libel held not a matter of public concern); compare *A v Hayden* (1984) 156 CLR 532 at 554.
194. Even interference with the criminal process may not invalidate a contract where the crime is trivial: *A v Hayden* (1984) 156 CLR 542 at 54–6 (Gibbs CJ)
195. *AG Australia Holdings Ltd v Burton* [2002] NSWC 170. 'Solicitors sitting in their offices do not have the power to relieve people from, or override, contractual obligations of confidence, merely because they wish to obtain information to use in litigation', ibid at [214] (Campbell J). See also Horton, (2002) 22 *Proctor* 16. Other examples of contracts not against public policy notwithstanding their capacity to affect the course of legal proceedings include litigation-funding agreements (see **18.33**), solicitor–client agreements requiring advance payment of fees, contracts to settle litigation: ibid at [117]. However, potential interference with civil proceedings can invalidate a contract where its enforcement would lead to perversion of justice: ibid at [108]. See also *Rapid Metal Developments (Australia) Pty Ltd v Anderson Formrite Pty Ltd* [2005] WASC 255 at [111]–[112].
196. *BGC Australia Pty Ltd v Fremantle Port Authority* [2003] WASCA 250 at [44].
197. *Richards v Kadian* [2005] NSWCA 328 at [84], [160].
198. ACT: Civil Law (Wrongs) Act 2002 (ACT) s 221 (tort); Law Reform (Miscellaneous Provisions) Act 1955 s 68 (crime); NSW: Maintenance, Champerty and Barratry Abolition Act 1993 (NSW) ss3–4 (tort and crime); SA: Criminal Law Consolidation Act 1935 Sch 11 (crime); Vic: Wrongs Act 1958 s 32 (tort); Crimes Act 1958 s 322A (crime).
199. *Reilly v Melbourne Tramway and Omnibus Co* [1893] 19 VLR 75; *Newton v Gapes* (1910) 12 WALR 86; *Jones v Bouffier* (1911) 12 CLR 579 at 621; *Roux v Australian Broadcasting Commission* [1992] 2 VR 577 at 605; *UTSA Pty Ltd v Ultra Tune Australia Pty Ltd* [1997] 1 VR 667; *Re Tosich Construction Pty Ltd* (1997) 73 FCR 219; 143 ALR 18; *Magic Menu Systems Pty Ltd v AFA Facilitation Pty Ltd* (1997) 142 ALR 198 at 206; *Quach v Huntof Pty Ltd* [2000] NSWSC 932; *NAB Ltd v Market Holdings Pty Ltd (in liq)* [2001] NSWSC 253; *Smits v Roach* [2002] NSWSC 241; *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41; (2006) 229 CLR 386 at [66]–[67]. See also ALRC Report No 75, *Costs shifting — Who Pays for Litigation*, ALRC 27, AGPS, Canberra, 1995, Ch 13; ALRC Report No 89, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89, AGPS, Canberra, 1999.

traditional view is that the maintainer must have a genuine interest in the litigation in question to avoid such a declaration.[200] However, the modern proliferation of a variety of legal assistance and litigation support schemes has led contemporary courts to adopt a less restrictive approach in applying public policy than was formerly the case.[201] Such arrangements have been upheld in a number of cases, notwithstanding that the litigation-funder was motivated by commercial profit.[202] In some cases, however, commercial funding agreements have nevertheless been held to be against public policy, and funded litigation has been stayed as an abuse of process.[203] These decisions must now be treated with caution, in the light of *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*.[204] In that case the High Court upheld the validity of a commercial litigation-funding scheme, indicating unequivocally that such schemes are not in general invalid on grounds of public policy. The facts were as follows:

> In 1997 the High Court declared state licence fees imposed on tobacco wholesalers, but passed on by them to retailers, to be constitutionally invalid.[205] Subsequently the High Court held that retailers could recover from wholesalers all licence fee payments collected from retailers but not yet transmitted to the taxing authority.[206] Firmstone Pty Ltd wrote to tobacco retailers, asking for authority to take legal action on their behalf to recover these amounts. Firmstone undertook to bear costs if the action was unsuccessful. Firmstone's 'success fee' was one-third of any money received by the retailer from the tobacco wholesaler. Firmstone also retained any legal costs awarded to a retailer. Firmstone issued summonses providing for an 'opt-in' procedure to a class action. Over 2000 retailers opted in. The defendants moved for a stay of proceedings, claiming that they constituted an abuse of process, in that they were based on agreements contrary to public policy.

A strong majority of the High Court (5:2) held that, even if the funding agreements between Firmstone and the retailers involved maintenance and champerty, they were not invalid as offending against public policy,[207] at least in those jurisdictions where maintenance and champerty were no longer torts.[208]

200. *Re Tosich Construction Pty Ltd* (1997) 73 FCR 219; 143 ALR 18 at 227; *Re Daniel Efrat Consulting Services Pty Ltd* (1999) 162 ALR 429 at 437. But an agreement by which a lawyer engaged to pursue a claim is remunerated by a 'contingency fee', ie, a fee payable only if the claim is successful, is champertous and therefore illegal, except to the extent permitted by legislation (eg Legal Profession Act 2004 (NSW) s 186): *Smits v Roach* [2002] NSWSC 241.

201. *Stevens v Keogh* (1946) 72 CLR 1; *Clyne v Bar Association of NSW* (1960) 104 CLR 186; *Brew v Whitlock* [1967] VR 449; *Beard v Baulkham Hills Shire Council* (1986) 7 NSWLR 273; *In the Marriage of Sheehan* (1991) 104 FLR 57; *Roux v Australian Broadcasting Commission* [1992] 2 VR 577; *Halliday v High Performance Personnel Pty Ltd* (1993) 113 ALR 637; *Magic Menu Systems Pty Ltd v AFA Facilitation Pty Ltd* (1997) 142 ALR 198; *Quach v Huntof Pty Ltd* [2000] NSWSC 932 at [12]. See also Abramowicz, (2005) 114 *Yale LJ* 697; Aitken, (2006) 28 *Sydney LR* 171.

202. The modern case law was fully reviewed by Mason P in *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83 at [88]ff (affirmed *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41; (2006) 229 CLR 386). See also North, (2005) 43 *Law Society Journal (NSW)* 66; Aitken, (2006) 28 *Syd LR* 171.

203. Most notably in *Clairs Keeley (a Firm) v Treacy* [2003] WASCA 299.

204. [2006] HCA 41; (2006) 229 CLR 386.

205. *Ha v New South Wales* (1997) 189 CLR 465.

206. *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516.

207. However, a majority also held that the retailers' claims could not be litigated as a representative claim because it did not qualify as such under rule 13(1) of the Supreme Court Rules 1970 (NSW) Pt 8.

208. See [2006] HCA 41; (2006) 229 CLR 386 at [85]. Applied in *Deloitte Touche Tohmatsu v JP Morgan Portfolio Services Ltd* [2007] FCAFC 52. See also *T S & B Retail v 3Fold Resources (No 3)* (2007) 158 FCR 444 at 465.

Gummow, Hayne and Crennan JJ[209] held that there is no general rule that an agreement to maintain an action in return for a share of the proceeds is contrary to public policy, even where the maintainer actively seeks out potential litigants, maintains control of the litigation, and hopes to earn a significant profit.[210] They rejected the argument that such agreements are inherently inimical to the due administration of justice, while acknowledging that their operation is subject to rules of abuse of process.[211] They quoted, with evident approval,[212] from the judgment of Mason P in the Court of Appeal:

> The law now looks favourably on funding agreements that offer access to justice so long as any tendency to abuse of process is controlled ... Public policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation.[213]

The assignment of a cause of action for damages is in principle champertous. Where a litigation-funding agreement includes such an assignment, it may be more vulnerable to a claim of invalidity for that reason.[214] The law of champerty in relation to assignment is considered in **Chapter 8** of this book.[215]

18.34 Contracts excluding the jurisdiction of the courts. The parties to a contract cannot altogether remove the resolution of disputes arising under it from the jurisdiction of the courts.[216] The courts will not surrender to the parties themselves, or to other tribunals, the ultimate power of defining their legal rights and obligations.[217] It is well settled that any provision in a contract that excludes (or 'ousts') the jurisdiction of the courts to perform this role is against public policy.[218] The basis of this head of public policy is the protection of a citizen's 'inalienable

209. Gleeson CJ and Kirby J in agreement: [2006] HCA 41; (2006) 229 CLR 386 at [1], [146].
210. Ibid at [88]–[90].
211. Ibid at [93]. Whether the funded litigation is an abuse of process depends on whether the role of the funder has corrupted or is likely to corrupt the processes of the court to a sufficient degree: ibid at [63].
212. Ibid at [63]–[65].
See also *Deloitte Touche Tohmatsu v JP Morgan Portfolio Services Ltd* [2007] FCAFC 52 at [37]–[50].
213. *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83 at [105].
214. The invalidity of the funding agreement in *Clairs Keeley (a Firm) v Treacy* [2003] WASCA 299 was expressly based on the view that it conferred control of the litigation to the funder to such an extent as to amount to a de facto assignment of the cause of action: [2003] WASCA 299 at [134], [141]; see also *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41; (2006) 229 CLR 386 at [261].
215. See 8.7.
216. As the parties cannot, by contract, oust the court's jurisdiction so it follows that they cannot do so by raising an estoppel: *In the matter of Woodcock* ((FC), Appeal No SA, CSA 63/96, No AD 4674 of 1996, unreported).
217. It seems that the parties may validly agree to appoint a final arbiter on questions of fact: *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 at 652 (clause that bank manager's certificate should be conclusive evidence of amount of indebtedness held valid); compare *Reed Construction Pty Ltd v State Rail Authority of NSW* (1987) 3 BCL 384.
218. *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643; *Brooks v Burns Philp Trustee Co* (1969) 121 CLR 432; *South Australian Railways Commissioner v Egan* (1973) 130 CLR 506; see also *Murphy v Benson* (1942) 42 SR (NSW) 66; *Novamaze Pty Ltd v Cut Price Deli Pty Ltd* (1995) 128 ALR 540. The principle does not apply to clauses stipulating that a contract is subject to a foreign jurisdiction: *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197. Nor does the principle operate to prevent parties from making an agreement not intended to create legal relations: see 5.14–5.15.

right' to have recourse to the courts.[219] The fundamental principle was stated by the High Court in *Dobbs v National Bank of Australasia Ltd*:[220]

> No contractual provision which attempts to disable a party from resorting to the Courts of law was ever recognized as valid. It is not possible for a contract to create rights and at the same time to deny to the other party in whom they vest the right to invoke the jurisdiction of the Courts to enforce them.

A partial exclusion of the jurisdiction of the courts is as unenforceable as a complete exclusion. So in *Brooks v Burns Philp Trustee Co*[221] a clause by which a wife agreed to give up all claims for alimony or maintenance in return for specified weekly payments was held to be void, notwithstanding that the husband agreed to consent to court orders for payment of those amounts.[222] A prohibition against seeking an injunction may similarly be unenforceable.[223] A term in a contract can amount to an illegal ouster though not expressed as such, if it operates as a strong disincentive to recourse to the court.[224]

A term relinquishing the right to sue in a court of law is therefore unenforceable, as is a term in a contract that provides for the exclusive and final determination of any dispute between the parties by a non-curial third party.[225] So in *South Australian Railways Commissioner v Egan*[226] a clause in a construction contract provided that disputes touching any 'breach of contract, or ... any other matter or thing in any way connected with or relating to this contract' must be referred to the Chief Engineer for Railways 'whose decision thereon shall be final'.[227] The clause was, according to Menzies J, 'a barefaced attempt to oust the jurisdiction of the courts', and 'certainly invalid'.[228] Similarly, the members of a voluntary association cannot confer exclusive power to determine the rights of members on their own tribunal.[229]

This does not mean, however, that the parties to a contract cannot make the right to sue in a court conditional on prior determination by a third party.[230] So in *South Australian Railways Commissioner v Egan*[231] another clause in the contract provided that no action should be brought to recover money under the contract

219. *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 at 652.
220. (1935) 53 CLR 643 at 652 (Rich, Dixon, Evatt and McTiernan JJ).
221. (1969) 121 CLR 432 at 438.
222. Compare *Macqueen v Frackelton* (1909) 8 CLR 673; *Solicitor-General v Wylde* (1945) 46 SR (NSW) 83. Distinguish the compromise of a dispute: *Lieberman v Morris* (1944) 69 CLR 69 at 80; *Felton v Mulligan* (1971) 124 CLR 385–6; see further **4.24–4.28, 22.6.**
223. *Bateman Project Engineering Pty Ltd v Resolute Ltd* [2000] WASC 284.
224. *Novamaze Pty Ltd v Cut Price Deli Pty Ltd* (1995) 128 ALR 540 (application for interlocutory injunction; clause in franchise agreement entitling franchisor to move in and eject franchisee if franchisee commenced or threatened proceedings; held potential ouster of jurisdiction); see also *Bateman Project Engineering Pty Ltd v Resolute Ltd* [2000] WASC 284 at [21].
225. *South Australian Railways Commissioner v Egan* (1973) 130 CLR 506 at 513.
226. (1973) 130 CLR 506.
227. The clause in addition identified numerous specific disputes referable to the Chief Engineer, and provided for an appeal procedure on further specified points. The clause takes up nearly two pages of the Commonwealth Law Reports. Menzies J referred to the contract as 'perhaps the most wordy, obscure and oppressive contract that I have come across': ibid at 512.
228. Ibid at 513.
229. *Harbottle Brown & Co Pty Ltd v Halstead* (1968) 88 WN (Pt 1) NSW 432.
230. Or on some other such condition: see *Hong Kong Bank of Australia Ltd v Larobi Pty Ltd* (1991) 23 NSWLR 593; but compare *Marek v CGA Fire & Accident Insurance Co Ltd* (1985) 2 BCL 401.
231. (1973) 130 CLR 506 at 513.

'unless and until' the claimant 'shall have obtained a certificate, order or award from the Chief Engineer for Railways for the amount sued for'. The High Court held that this did not oust the jurisdiction of the court, but meant only that no cause of action could arise until a certificate or award was given.[232]

Similarly, a clause that makes arbitration a condition precedent to legal action (a so-called *Scott v Avery* clause) is not an ouster of jurisdiction.[233] However, such a clause now has no effect as a result of uniform commercial arbitration legislation passed by the States and Territories.[234] An 'ordinary' arbitration clause by which the parties to a contract agree to submit disputes to arbitration is not against public policy. Such a clause does not purport to preclude action in the courts,[235] and failure to comply with it is therefore an actionable breach of contract.[236] On that basis the court may, in its discretion, stay an action brought in breach of the clause.[237]

While arbitration clauses thus do not offend public policy, other forms of dispute resolution provisions involving the determination of rights by third parties may be more open to objection. In *Baulderstone Hornibrook Engineering Pty Ltd v Kayah Holdings Pty Ltd*[238] a clause in an engineering contract provided for the resolution of disputes by a Referee who 'shall act as an expert and not as an arbitrator. The decision of the Referee shall be final and binding'. Heenan J held that the clause was void because it was not an arbitration clause, and purported to oust the jurisdiction of the court. However, similar clauses relegating disputes to expert determination have been upheld in a number of cases,[239] on the basis that where a party sues without first complying with such a clause the court may stay the proceeding.[240] Modern courts are increasingly recognising the convenience of allowing contracting

232. See also *Bond v Larobi Pty Ltd* (1992) 6 WAR 489 at 499–500 (clause in a guarantee making a guarantor's right to sue co-guarantors for contribution conditional on full payment of the creditor held not invalid: 'it is properly to be characterised as a modification of legal or equitable rights which the plaintiff has and not as an abrogation of his entitlement to go to a court ... Access to the courts is delayed, not denied'). Compare *Hong Kong Bank of Australia Ltd v Larobi Pty Ltd* (1991) 23 NSWLR 593.

233. See *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 at 652; *Anderson v G H Michell and Sons Ltd* (1941) 65 CLR 543 at 549–50; *South Australian Railways Commissioner v Egan* (1973) 130 CLR 506 at 519; *Swanson v Board of Land and Works* [1928] VLR 283; *Adelaide Steamship Industries Pty Ltd v Commonwealth* (1974) 10 SASR 203; *Parr v Rural Agents Pty Ltd* [1975] 2 NSWLR 347. This applies also to clauses providing for mediation or conciliation: see *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194.

234. See s 55 of the Commercial Arbitration Acts of 1984 (ACT, NSW, Vic); 1985 (NT, WA); 1986 (SA, Tas); 1990 (Qld).

235. *Bulk Chartering & Consultants Australia Pty Ltd v T&T Metal Trading Pty Ltd (The Krasnogrosk)* (1993) 31 NSWLR 18; cf *Atlantic Civil Pty Ltd v Water Administration Ministerial Corp* (1992) 39 NSWLR 468.

236. *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643. It has been held in the UK that damages may be awarded for such a breach: *Mantovani v Carapelli SpA* [1980] 1 Lloyd's Rep 375.

237. See s 53 of the Commercial Arbitration Acts; *Huddart Parker Ltd v The Ship Mill Hill* (1950) 81 CLR 502 at 508–9; *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996; *Computershare Ltd v Perpetual Registrars Ltd* [2000] VSC 233.

238. (1997) 14 BCL 277. See also Jacobs, (2000) 74 *ALJ* at 858; Campbell, (2005) 16 *ADRJ* 104.

239. *Savcor Pty Ltd v New South Wales* (2001) 52 NSWLR 587; *The Heart Research Institute Ltd v Psiron Ltd* [2002] NSWC 646; *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] QSC; *Australia Pacific Airports (Melbourne) Pty Ltd v Nuance Group (Australia) Pty Ltd* [2005] VSCA 133; *Straits Exploration (Australia) Pty Ltd v Murchison United Nl* [2005] WASCA 241; *Toll (FHL) Pty Ltd v Prixcar Services Pty Ltd* [2007] VSC 187.

240. *Straits Exploration (Australia) Pty Ltd v Murchison United NL* [2005] WASCA 241 at [15]. Conversely the court may restrain a party from proceeding with an expert determination where there are proceedings in the court dealing with the same dispute: ibid at [30].

parties to provide for the non-judicial determination of commercial disputes,[241] even if legal rights depend to some extent on that determination.[242]

The rule against clauses ousting the jurisdiction of the courts applies not only in relation to the determination of rights arising under the contract itself, but also in relation to the ouster of other rights, for example, rights arising in equity,[243] or by statute. Such a clause may be no less contrary to public policy than a clause removing the court's power to determine the effect of a contract. So in *Brooks v Burns Philp Trustee Co*:[244]

> Burns Philp, as executor of Brooks' estate, applied to the court to determine whether the estate was liable to make payments to his widow (the appellant), under a deed executed by the couple after she had commenced divorce proceedings and indicated an intention to sue for alimony. By cl 1 of the deed he covenanted to pay her a weekly sum for life. By cl 2 she covenanted to accept this in full settlement of all claims for alimony and maintenance.

The High Court held that cl 2 was unenforceable as against public policy because it purported to oust the jurisdiction of the court to make orders for alimony and maintenance conferred on it by legislation.[245] However, not every promise to surrender a statutory right is necessarily against public policy. The issue must depend on the nature of the right and the purpose of the legislation in question.[246]

18.35 Contracts in unreasonable restraint of trade.[247] A long-established principle of public policy is that land, goods, services, rights and other economic valuables should be freely transferable. A contract never to alienate land is therefore void.[248]

241. See *The Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646 at [16]–[33]; *Australia Pacific Airports (Melbourne) Pty Ltd v Nuance Group (Australia) Pty Ltd* [2005] VSCA 133 at [50]; *Straits Exploration (Australia) Pty Ltd v Murchison United NL* [2005] WASCA 241 at [14].
242. *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] QSC 135 at [15].
243. See *Bond v Larobi Pty Ltd* (1992) 6 WAR 489.
244. (1969) 121 CLR 432; see also *Felton v Mulligan* (1971) 124 CLR 367; *Re Morris* (1943) 43 SR (NSW) 352; *O'Loughlin v O'Loughlin* [1958] VR 649; *In the marriage of Wright* (1977) 29 FLR 10; compare *Qantas Airways v Gubbins* (1992) 28 NSWLR 26.
245. The court further held that the husband's promise to pay in cl 1 was also unenforceable, because it was dependent on the wife's promise in cl 2 to give up her claims: see **18.41**. The effect of maintenance agreements is now governed by the Family Law Act 1975 (Cth).
246. *Felton v Mulligan* (1971) 124 CLR 367 at 376–7, 406–7; see also *Great Fingall Consolidated Ltd v Sheehan* (1905) 3 CLR 177; *Brown v R* (1986) 160 CLR 171 at 208; *Commonwealth v Verwayen* (1990) 170 CLR 394. Clauses attempting to exclude liability for misleading conduct under the Australian Consumer Law are invalid: see **11.133**.
247. The doctrine invalidating unreasonable restraints of trade is not confined to contracts but applies to all restraints of trade, however imposed: eg *Buckley v Tutty* (1971) 125 CLR 353 at 375–6; *Quadramain Pty Ltd v Sevastopol Investments Pty Ltd* (1976) 133 CLR 390 at 40; *Aerial Taxi Cabs Cooperative Society Ltd v Lee* (2000) 102 FCR 125. The roots of the doctrine lie in the concern of medieval English law to restrain monopolies and other anti-competitive practices, particularly in the distribution of food and the operation of guilds: see Heydon, *The Restraint of Trade Doctrine*, 3rd ed, 2008,1–6.
248. *Hall v Busst* (1960) 104 CLR 206; *Nullagine Investments Pty Ltd v The Western Australian Club Inc* (1993) 177 CLR 635; *Cattanach v Melchior* [2003] HCA 38; (1984) 156 CLR 532 at [61]. The precise boundaries of the rule, in particular in relation to partial restraints on alienation, are unsettled: see *Reuthlinger v MacDonald* [1967] 1 NSWLR 88; *Caboche & Bond v Ramsay* (1993) 119 ALR 215; *Allstate Prospecting Pty Ltd v Posgold Mines Ltd* (unreported, SC of Tasmania, Zeeman J, 27 April 1995); *Wollondilly Shire Council v Picton Power Lines Pty Ltd* (1994) 33 NSWLR 551; *Elton v Cavill (No 2)* (1994) 34 NSWLR 289; *John Nitschke Nominees Pty Ltd v Hahndorf Golf Club Inc* [2004] SASC 128 at [100]–[129] (Besanko J, Mullighan and Gray JJ concurring; full review of authorities).

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

1 of 1 DOCUMENT: Halsbury's Laws of Australia/110 -- Contract/V ILLEGALITY/(3) EFFECTS OF ILLEGALITY/(B) Actions Dependent on Illegality in Contract for Success

(B) ACTIONS DEPENDENT ON ILLEGALITY IN CONTRACT FOR SUCCESS

The paragraph below is current to **31 May 2003**

[110-7280] *Ex turpi* maxim The basic maxim of the common law, *ex turpi causa non oritur actio*,[1] applies to causes of action which depend for their enforcement on an illegal contract.[2] The maxim, although itself confined to the law of contract, states one aspect of a broader principle of public policy.[3]

Therefore, if the plaintiff[4] is relying on the illegality for a cause of action, relief will be refused even if illegality has not been specifically pleaded.[5] The maxim is applied by the court, not for the benefit of the defendant, but to protect the public by refusing to allow the machinery of the courts to be used to assist the commission (or furtherance) of illegal acts, which might be achieved by the enforcement of rights arising from illegal acts.[6]

The application of the maxim does not depend on whether the illegality in question rendered the contract void:[7] it is sufficient that the plaintiff committed some illegal act when performing the contract.[8] Moreover, the effect of illegality is to prevent a plaintiff from recovering under a contract even though the plaintiff can show that at the time of making the contract the plaintiff had no intent to break the law and that at the time of performance the plaintiff did not know that what he or she was doing was illegal.[9] However, the courts have warned against applying the maxim too rigidly.[10] Moreover, recent cases question the application of the ex turpi rule in a more general way, and may restrict it to claims which involve the direct enforcement of an illegal contract.[11]

The fact that the plaintiff has committed an unlawful act is not necessarily conclusive, assuming that the contract is not illegal, or contrary to public policy, and the court must inquire whether the public interest dictates a conclusion adverse to the plaintiff.[12] The nature of the unlawful act, the degree of knowledge and the likelihood that enforcement of the contract would encourage the repetition of the act are factors which may be considered.[13] Indeed, there are suggestions in the recent cases that the *ex turpi* rule is not always applicable even if the contract is illegal or contrary to public policy, provided that the particular claim which the plaintiff seeks to make is not expressly prohibited by the statute or common law rule which gives rise to the illegality.[14]

Notes

1 That is, no cause of action arises out of illegality. See, for example, *Holman v Johnson* (1775) 1 Cowp 341 at 343; [1775-1802] All ER Rep 98; (1775) 98 ER 1120 at 1121 per Lord Mansfield (no court will lend its aid to one who founds a cause of action upon an immoral or an illegal act).

2 See *Smith v Jenkins* (1970) 119 CLR 397 at 410-14; [1970] ALR 519; (1970) 44 ALJR 78 per Windeyer J; *Nelson v Nelson* (1995) 184 CLR 538 at 561; 132 ALR 133 at 151; 70 ALJR 47; [1995] 19 Leg Rep 14 per Deane and Gummow JJ; *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 at 220; 143 ALR 569 at 571; 71 ALJR 653 per Dawson and Toohey JJ. See also *McKenna v Perecich* [1973] WAR 56 at 64 .

3 See *Gollan v Nugent* (1988) 166 CLR 18 at 46; 82 ALR 193; 63 ALJR 11 per Deane, Dawson, Toohey and Gaudron JJ. Compare *Nelson v Nelson* (1995) 184 CLR 538 at 595-7; 132 ALR 133 at 178-9; 70

ALJR 47; [1995] 19 Leg Rep 14
per Toohey J. Although in England the maxim is itself regarded as having a wider application (see, for example, *Hardy v Motor Insurers' Bureau* [1964] 2 QB 745 at 767; [1964] 2 All ER 742; [1964] 3 WLR 433
; *Clunis v Camden and Islington Area Health Authority* [1998] QB 978 at 986; [1998] 3 All ER 180; [1998] 2 WLR 902 at 907-8
per the court, CA) the effect is the same: *Pitts v Hunt* [1991] 1 QB 24; [1990] 3 All ER 344; [1990] 3 WLR 542
, CA. See also *Fire and All Risks Insurance Co Ltd v Powell* [1966] VR 513 at 522
, SC(VIC), Full Court (where an erroneous view of scope of maxim did not affect the decision). For application of the broader principle to claims in tort see NEGLIGENCE [300-150] (defence of illegality to action in negligence), TORT.

4 That is, the person invoking the aid of the court.

5 See *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724 at 728, 732; [1891-94] All ER Rep 654
; *Noble v Maddison* (1912) 12 SR (NSW) 435 at 436; 29 WN (NSW) 137
; *Knowles v Fuller* (1947) 48 SR (NSW) 243 at 245; 65 WN (NSW) 65
; *North v Marra Developments Ltd* (1981) 148 CLR 42 at 60; 37 ALR 341; 56 ALJR 106; 6 ACLR 386
; *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 at 220; 143 ALR 569 at 571; 71 ALJR 653
per Dawson and Toohey JJ. As to pleading illegality see generally [110-7020].

6 See, for example, *Re Arbitration between Mahmoud and Ispahani* [1921] 2 KB 716 at 729; [1921] All ER Rep 217
, CA; *Chai Sau Yin v Liew Kwee Sam* [1962] AC 304 at 311
, PC.

7 See, for example, *TP Rich Investments Pty Ltd v Calderon* [1964] NSWR 709 at 716
; *North v Marra Developments Ltd* (1981) 148 CLR 42 at 60; 37 ALR 341; 56 ALJR 106; 6 ACLR 386
.

8 The contract may be enforceable by the defendant: see *Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374 at 388
per Devlin LJ, CA (if at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent. If the intent is held in common, it is not enforceable at all).

9 See *Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374 at 388
per Devlin LJ, CA.

10 See, for example, *Hardy v Motor Insurers' Bureau* [1964] 2 QB 745; [1964] 2 All ER 742; [1964] 3 WLR 433
(plaintiff entitled to compensation for personal injuries under agreement between government and insurer providing for payment to injured person in respect of liability of uninsured driver even though plaintiff's injuries caused by unlicensed vehicle the driver of which committed criminal offences); *Fire and All Risks Insurance Co Ltd v Powell* [1966] VR 513
, SC(VIC), Full Court (use of vehicle in contravention of statute did not preclude claim under insurance contract which did not exclude liability for the claim and the insured did not deliberately cause loss). See also *Charlton v Fisher* [2002] QB 578; [2001] 3 WLR 1435
, CA. Although these cases rely on a view that the *ex turpi* maxim is wider than accepted in *Gollan v Nugent* (1988) 166 CLR 18 at 46; 82 ALR 193; 63 ALJR 11
per Deane, Dawson, Toohey and Gaudron JJ, this is not a reason for doubting the decisions.

11 See generally *Nelson v Nelson* (1995) 184 CLR 538; 132 ALR 133; 70 ALJR 47; [1995] 19 Leg Rep 14

; *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215; 143 ALR 569; 71 ALJR 653

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12 The suggestions in several English cases (see, for example, *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 at 35; [1988] 2 All ER 23; [1988] 2 WLR 517
, CA; *Howard v Shirlstar Container Transport Ltd* [1990] 3 All ER 366; [1990] 1 WLR 1292
) that relief should ultimately be governed by an overriding rule of public policy, that is, the 'public conscience test', were discredited by the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340; [1993] 3 All ER 65; [1993] 3 WLR 126
. Although the High Court in *Nelson v Nelson* (1995) 184 CLR 538 at 593 per Toohey J, at 605-8, 612 per McHugh J; 132 ALR 133 at 176, 186-8, 192; 70 ALJR 47; [1995] 19 Leg Rep 14
refused to apply the law there stated, it did not in terms approve the conscience test. See also *Gollan v Nugent* (1988) 166 CLR 18 at 33-5; 82 ALR 193; 63 ALJR 11
per Brennan J.

13 See, for example, *Fire and All Risks Insurance Co Ltd v Powell* [1966] VR 513
, SC(VIC), Full Court (use of vehicle without permit in contravention of statute did not preclude claim under insurance contract since criminal act was not so antisocial that the claim should be refused in the public interest).

14 See *Nelson v Nelson* (1995) 184 CLR 538 at 557-61 per Deane and Gummow JJ, at 611 per McHugh J; 132 ALR 133 at 148-51, 191; 70 ALJR 47; [1995] 19 Leg Rep 14
; *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 at 228-9; 143 ALR 569 at 578; 71 ALJR 653
per McHugh and Gummow JJ.

The paragraph below is current to **31 May 2003**

[110-7285] No action for damages or debt A plaintiff is not entitled to recover damages, whether in contract or in tort, if the cause of action depends on illegality for its success.[1]

Similarly, no action is available to recover a debt which would otherwise be due under an illegal contract.[2]

Common illustrations are claims for the agreed price of land under an illegal sale of land contract, claims by suppliers of goods for the price of goods sold under illegal sale contracts or payments due under illegal contracts of lease or hire, and claims for work done or services rendered under illegal employment and agency contracts.[3]

However, the ex turpi maxim will not apply if the contract is not illegal and there is no reliance on any illegal act.[4] Moreover, claims in restitution, which often involve a claim similar to an action in debt, may sometimes be brought in respect of the plaintiff's performance.[5]

Notes

1 See, for example, *Cohen v Kittell* (1889) 22 QBD 680
(commission agent who failed to place bet not liable for amount of prospective gains, less the prospective losses and his commission, since wagering contracts (if made) were void); *Nicholls v Stanton* (1915) 15 SR (NSW) 337; 32 WN (NSW) 102
(action in respect of a fraudulent misrepresentation which induced plaintiff to purchase a motor car unsuccessful where the contract was illegal by statute because plaintiff had to prove and rely on contract); *Re Arbitration between Mahmoud and Ispahani* [1921] 2 KB

716; [1921] All ER Rep 217
, CA (no claim for non-acceptance of goods where sale of goods contract expressly prohibited by statute); *Bradshaw v Gilbert's (A'asian) Agency (Vic) Pty Ltd* (1952) 86 CLR 209; [1952] ALR 969; (1952) 26 ALJ 441
(no claim where sale of goods at a price greater than maximum fixed by regulation prohibited); *Thomas Brown and Sons Ltd v Fazal Deen* (1962) 108 CLR 391; [1963] ALR 378; (1962) 36 ALJR 229
(action for defendants' failure to return goods deposited with defendants under illegal bailment contract failed because it was necessary for the plaintiffs to rely on the contract). Contrast *Fire and All Risks Insurance Co Ltd v Powell* [1966] VR 513
, SC(VIC), Full Court (insurance contract not void or illegal where employee used vehicle in contravention of statute and claim for indemnity under policy available).

2 See *McCarthy Bros (Milk Vendors) Pty Ltd v Dairy Farmers' Co-op Milk Co Ltd* (1945) 45 SR (NSW) 266
(statutory rebate not recoverable where plaintiff carried on illegal business). See also *Dressy Frocks Pty Ltd v Bock* (1951) 51 SR (NSW) 390; 68 WN (NSW) 287
, SC(NSW), Full Court (money lent under illegal contract).

3 See, for example, *Pearce v Brooks* (1866) LR 1 Ex 213; [1861-73] All ER Rep 102
(hire not recoverable where goods hired out under illegal and sexually immoral contract); *Wild v Simpson* [1919] 2 KB 544; [1918-19] All ER Rep 682; (1919) 121 LT 326
, CA (employee cannot recover wages earned in performing illegal employment contract); *Wilkinson v Osborne* (1915) 21 CLR 89; 16 SR (NSW) 95; 22 ALR 57
; *Wood v Little* (1921) 29 CLR 564
(commission not recoverable under illegal agency contracts); *Australian Real Estate Investment Co Ltd v Gillis* [1935] SASR 148
(balance of price of land not recoverable where contract illegal); *J Dennis & Co Ltd v Munn* [1949] 2 KB 327; [1949] 1 All ER 616
(no entitlement to payment for unlicensed building work); *Chai Sau Yin v Liew Kwee Sam* [1962] AC 304
(no action for price of goods sold to partnership under illegal contract); *JM Allan (Merchandising) Ltd v Cloke* [1963] 2 QB 340; [1963] 2 All ER 258
(hire not recoverable where goods hired out for unlawful purpose); *TP Rich Investments Pty Ltd v Calderon* [1964] NSWR 709
(no action available on dishonoured cheque where plaintiff lessor stipulated for unlawful use of premises); *Ambassador Refrigeration Pty Ltd v Trocadero Building and Investment Co Pty Ltd* [1968] 1 NSWR 75
(price of defective goods not recoverable where contract impliedly prohibited by statute); *Pretorius Pty Ltd v Muir & Neil Pty Ltd* [1976] 1 NSWLR 213
(price of goods not recoverable under contract for sale of therapeutic substance prohibited by statute); *North v Marra Developments Ltd* (1981) 148 CLR 42; 37 ALR 341; 56 ALJR 106; 6 ACLR 386
(stockbrokers not entitled to remuneration where they participated in illegal conduct in conspiring to deceive public). See also *Henderson v Amadio Pty Ltd (No 2)* (1996) 62 FCR 221; 140 ALR 596 at 602; 20 ACSR 367
per Heerey J (claim for amounts which would otherwise have been payable under mortgage and guarantee failed where contracts illegal).

4 See *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 at 220; 143 ALR 569 at 571; 71 ALJR 653
per Dawson and Toohey JJ (plaintiff in no way relied on illegality in establishing cause of action for contract debt arising from performance of drilling contract in the course of which a statutory offence was committed by the defendant). Compare *Hall v Woolston Hall Leisure Ltd* [2000] 4 All ER 787; [2001] 1 WLR 225
, CA (statutory rights arising on discrimination by dismissal of employee not affected by employee's knowledge that employer engaged in tax evasion).

5 See [110-7390], [110-7395].

The paragraph below is current to **31 May 2003**

[110-7290] No recovery of money or property transferred If an action to recover money transferred to the defendant depends for its success on reliance on the illegality, the action will not generally be available.[1]

Similarly, if an action to recover property transferred to the defendant depends for its success on reliance on the illegality, the action will not be available.[2]

However, these cases applying this rule were decided before unjust enrichment was adopted[3] as the basis for restitution, and the scope of the rule may need to be reconsidered in the light of application of that concept in recent cases.[4] In any event, the approach to such claims is not now as strict as in the past, being qualified by the principles regulating restitution for an unjust enrichment.[5]

Notes

1 See, for example, *Kearley v Thomson* (1890) 24 QBD 742; [1886-90] All ER Rep 1055 , CA (plaintiff failed in action to recover money paid to solicitors because their contract not to appear at public examination of bankrupt was illegal and he relied on the illegality); *Harse v Pearl Life Assurance Co* [1904] 1 KB 558; [1904-7] All ER Rep 630; [1904] WN 44 , CA (non-recoverability of premiums paid under insurance policy void for want of insurable interest); *George v Greater Adelaide Land Development Co Ltd* (1929) 43 CLR 91; [1930] ALR 72; (1929) 3 ALJ 316 (part payment of purchase price under a contract of sale which contravened statute irrecoverable where it was paid to a party to the contract pursuant to the contract); *Berg v Sadler* [1937] 2 KB 158; [1937] 1 All ER 637 (no recovery of money paid under criminal attempt to obtain goods by false pretences); *Cheers v Pacific Acceptance Corp Ltd* (1960) SR (NSW) 1 (money paid under prohibited hire-purchase agreement not recoverable). For a suggestion that *Cheers v Pacific Acceptance Corp Ltd* (1960) SR (NSW) 1 is inconsistent with *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192; [1960] 1 All ER 177; [1960] 2 WLR 127 , PC see *Henderson v Amadio Pty Ltd (No 2)* (1996) 62 FCR 221; 140 ALR 596 at 605; 20 ACSR 367 per Heerey J.

2 See, for example, *M'Cahill v Henty* (1878) 4 VLR (E) 68 (no order for reconveyance of land available when the transferee received title pursuant to illegal contract); *Taylor v Chester* (1869) LR 4 QB 309; [1861-73] All ER Rep 154 (action in respect of half of a £50 bank note pledged as security for the payment of a debt arising out of the supply of wine and suppers for consumption in a debauch in a brothel failed); *Chettiar v Chettiar* [1962] AC 294; [1962] 1 All ER 494; [1962] 2 WLR 548 (action for retransfer of land transferred without consideration not available where transfer pursuant to agreement to deceive administration). Compare *Bigos v Bousted* [1951] 1 All ER 92 (share certificate not recoverable where given as security in illegal currency transaction). Contrast *Drever v Drever* [1936] ALR 446; (1936) 10 ALJ 207 (order for return of certificates of title where no consideration and defence of illegality not made out).

3 See [110-11645].

4 See further [110-7390], [110-7395].

5 See, for example, *Hurst v Vestcorp Ltd* (1988) 12 NSWLR 394 at 445-6; 13 ACLR 17; 6 ACLC 286 per McHugh JA (Kirby P agreeing), CA(NSW) (money paid under contract not severable from prohibited contract is recoverable where there is no legislative intention to deny a claim in restitution and debtor would be unjustly enriched). See also *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 at 231; 143 ALR 569 at 580; 71 ALJR 653 per McHugh and Gummow JJ.

The paragraph below is current to **31 May 2003**

[110-7295] Other remedies The equitable remedies of specific performance[1] and injunction[2] are not available where a contract is illegal[3] or unenforceable.[4] For example, no relief by way of injunction will be given to enforce a restraint clause which is contrary to public policy and void or unenforceable on that ground.[5] Other remedies, such as rectification,[6] declaration or an account of profits will also be refused in most cases.[7]

However, these are all remedies which generally assume the validity of the contract, and other remedies, particularly remedies in restitution based on an unjust enrichment, may be available where independent of the contract.[8]

Notes

1 See generally [110-11840]-[110-11895].

2 See generally [110-11900]-[110-11935].

3 See, for example, *Chapman v Wade* [1939] SASR 298 at 302-4 (no jurisdiction to order the specific performance of a contract for the sale of land prohibited by statute). Contrast, for example, *Langley v Foster* (1906) 4 CLR 167 (defendant's agreement to lease land and timber to plaintiff construed as offering so much as defendant could lawfully transfer and specifically enforceable on that basis).

4 See, for example, *Lindner v Murdock's Garage* (1950) 83 CLR 628; 24 ALJ 566 (covenant in employment contract in unreasonable restraint of trade); *Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd* [1934] AC 181 , PC (covenant in sale of business contract in unreasonable restraint of trade). Contrast, for example, *Pearson v Arcadia Stores Guyra Ltd (No 1)* (1935) 53 CLR 571; [1935] ALR 295; (1936) 9 ALJ 120 (injunction to restrain breach of valid restraint covenant on sale of business); *Orton v Melman* [1981] 1 NSWLR 583 , McLelland J (injunction granted restraining the defendant from practising as medical practitioner in breach of restraint clause in partnership deed severable under (NSW) Restraints of Trade Act 1976).

5 See [110-7160]-[110-7245].

6 See, for example, *DJE Constructions Pty Ltd v Maddocks* [1982] 1 NSWLR 5; (1981) 38 ALR 185; 6 ACLR 171; (1981) CLC ¶40-732 , CA(NSW) (no rectification of share register where claim based on agreement which, if it existed, was illegal by companies legislation prohibiting the giving of financial assistance to purchase shares). See generally on rectification [110-5565]-[110-5620].

7 See, for example, *Noble v Maddison* (1912) 12 SR (NSW) 435; 29 WN (NSW) 137 (no account of profits under partnership agreement when defendant entered into illegal contracts); *Munro v Morrison* [1980] VR 83

(no declaration that defendant held land on trust for plaintiff available where claim founded on illegal transaction). See also *Henderson v Amadio Pty Ltd (No 2)* (1996) 62 FCR 221; 140 ALR 596 at 610; 20 ACSR 367 per Heerey J (contribution). However, an agent may be bound to account for money (or property) received from a third party even though the principal's contract with the third party is illegal: see also AGENCY [15-190].

8 See generally [110-7390], [110-7395].

The paragraph below is current to **31 May 2003**

[110-7300] Generally no estoppel There is generally no estoppel[1] to prevent a defendant setting up illegality as a defence to an action framed in reliance on illegality.[2] Estoppel may, however, be relevant where the fault of the plaintiff is relevant and at issue.[3]

Notes

1 See [110-810]-[110-915], [110-9485]-[110-9495] and generally EQUITY, ESTOPPEL.

2 See, for example, *Re Arbitration between Mahmoud and Ispahani* [1921] 2 KB 716 at 729, 732; [1921] All ER Rep 217 , CA (seller could not, in an action for damages for breach of contract, rely on the buyer's representation that he possessed licence as creating an estoppel precluding reliance on statutory illegality); *Hatcher v White* (1953) 53 SR (NSW) 285; 70 WN (NSW) 189 , SC(NSW), Full Court (plaintiff unable to sue on a contract requiring a permit because defendant not estopped from setting up a defence of illegality to such a claim). See also *Day Ford Pty Ltd v Sciacca* [1990] 2 Qd R 209 at 216 per Macrossan CJ .

3 See, for example, *Psaltis v Schultz* (1948) 76 CLR 547 at 558; 49 SR (NSW) 59; [1948] 2 ALR 502; (1948) 22 ALJ 328 per Dixon J (action for breach of promise available, notwithstanding rule of public policy (see [110-7155]), if the promisee was ignorant of the fact that the promisor was married when promise made; however actions for breach of promises to marry have now been abolished (see (CTH) Marriage Act 1961 s 111A)). As to 'fault' see further [110-7305]-[110-7355].

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Annex 36: '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).

DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW

2002

Sally J. Cummins
David P. Stewart
Editors

Office of the Legal Adviser
United States Department of State

INTERNATIONAL LAW INSTITUTE

an international treaty, uncaring of justice at home, but that by upsetting existing treaty relationships American diplomats abroad may well be denied lawful protection of their lives and property to which they would otherwise be entitled." *Id.*

These concerns are central to this case. If the United States is prevented from carrying out its international obligations to protect the privileges and immunities of representatives to the United Nations, adverse consequences may well occur. Wood Decl., ¶ 19. At a minimum, the United States may hear objections for failing to honor its obligations not only from the Bangladesh Mission, but also from other United Nations member countries whose representatives derive diplomatic immunity from the same sources relied upon by Mr. and Mrs. Hoque in this action, and from the United Nations itself. *Id.* Indeed, a ruling by this Court limiting the diplomatic immunities of representatives to the United Nations in this country could, if applied generally, lead to erosion of the necessary and respected protections accorded by diplomatic immunities. Wood Decl., ¶ 20. As noted by the Second Circuit in *767 Third Avenue*, "Recent history is unfortunately replete with examples demonstrating how fragile is the security for American diplomats and personnel in foreign countries; their safety is a matter of real and continuing concern." 988 F.2d at 301.

* * * *

2. Vienna Convention on Diplomatic Relations: Saudi Arabian Embassy Documents

On December 11, 2002, William H. Taft, IV, Legal Adviser of the Department of State, appeared before the U.S. House of Representatives Committee on Government Reform, to address issues related to the Vienna Convention on Diplomatic Relations as applied to the correspondence and archives of an embassy. The committee convened the hearing to address the refusal of the Saudi Arabian embassy to comply with committee subpoenas for archives and documents of the embassy that had been passed to a third party, based on Saudi Arabia's claim that the documents were entitled

to protection under the Vienna Convention on Diplomatic Relations. The committee believed such requested documents could potentially further the investigation of kidnapped Americans in Saudi Arabia. The following excerpts from Mr. Taft's statement discuss the importance of the protection by the Vienna Convention to the interests of the United States abroad.

The full text of Mr. Taft's testimony is available at *www.state.gov/s/l/c8183.htm.*

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* * * *

In analyzing the Convention's proper interpretation, we must also weigh the legitimate interests of the United States overseas. We too rely heavily on the protections of the Vienna Convention. As the Committee knows, the Convention protects our embassies from intrusion, our diplomats from arrest, and our communications and archives from interference. Our diplomats and embassies are on the front lines in the fight against global terrorism. As we analyze the precise questions the Committee has raised, we must remain cognizant of the overall importance of the Convention to U.S. interests. U.S. agencies must therefore consider whether lack of protection under the Convention of all documents and information such as are sought by the Committee here would adversely affect our ability to carry out our responsibilities overseas.

Let me give you some concrete examples. The State Department uses local nationals and personnel to fill some positions in our embassies. Unlike U.S. citizen employees sent overseas by the Department, local nationals do not generally have immunity from compulsory process, so they must appear in a court or elsewhere if they receive a subpoena. Our research to date indicates that, in a number of instances, the Department has in fact asserted that the official information in the possession of a local national working in the embassy is "archival" under the Vienna Convention and thus inviolable. Our experience has been that when the local national appears and declines to answer questions about official activities, the issue is not pursued in that way. If countries take the view that these local personnel working with the U.S.

Government could be compelled to release information otherwise protected as Embassy archives, we would object strongly. And we believe Congress would expect us to do so.

Some of the same concerns extend to situations where we are relying on outside contracting. For example, the Department uses outside contractors for embassy construction. In such situations, cleared U.S. contractors and personnel build our embassies in sensitive posts working with information we provide them. To the best of our knowledge, up to the present, there has never been a situation in which foreign authorities have pressed one of these contractors to produce such information. If that were to happen, we would work vigorously in an attempt to protect the information. We would look seriously at asserting a claim of privilege, or inviolability, under the Vienna Convention. We would also consider other possible privileges and protections, such as state secrets, that might apply to these and other situations.

Examples such as these highlight why we are proceeding carefully in developing our conclusions.

On those rare occasions when U.S. Embassy representatives have been asked to appear before foreign legislatures, we have declined to do so on grounds of immunity under the Vienna Convention. On the same basis, U.S. embassies do not, as a matter of general practice, provide formal documentary submissions to foreign legislatures. The more information we require from embassies and their contractors, the more difficult it will clearly be for the United States to avoid reciprocal requests overseas.

It is in the context of these practices and functions of the United States Government that we analyze the Vienna Convention issues presented by the Committee's requests. Our starting point, shared we understand by the Committee and the Saudi government, is that embassy information and documentation in the embassy is inviolable and immune from process and similarly information in the hands of accredited diplomats and other embassy personnel is protected. Under Article 24 of the Convention, embassy archives are immune "wherever they may be" and "at any time." Under Article 27, embassy correspondence is "inviolable" and the state in which the embassy is located has an obligation to respect these rights and to protect free communication of the embassy. In this

respect the Vienna Convention binds the entire U.S. government, not just the executive branch.

The issue the Committee posed, as we understand it, is whether these materials retain that immunity under the Convention when they are given to, or relied upon by, third parties. As I have noted, this is a novel and complex question. In contemplating the reach of the Convention, we would need to consider a number of issues, including among others: what may constitute "archives" (an undefined term in the treaty), exactly what documents and other information may be encompassed in a demand for production, and the relationship of the person who holds the information to the embassy.

One of the difficulties in resolving the reach of the Vienna Convention in this context is that it has rarely been tested by courts here or abroad. There is little reported practice. So the mere fact that archives have passed to a third party does not resolve the issue.

* * * *

D. INTERNATIONAL ORGANIZATIONS

1. Immunity from Suit of the United Nations

On October 15, 2002, the United States filed a Statement of Interest in *Kamya v. United Nations*, No. 02–01176, U.S. District Court for the District of Columbia, expressing its view that, absent an express waiver, the United Nations is immune from suit in the courts of the United States. The complaint in *Kamya* related to a dispute between the United Nations and two different groups of claimants, both of which alleged to have owned premises in Mogadishu, Somalia, that the United Nations used between 1993 and 1995. The dispute was submitted to an arbitral tribunal, which issued a monetary award to the claimants. The United Nations refused to make payment pursuant to the award until the claimants agreed on the appropriate distribution of the award or entered into an escrow agreement. The award beneficiaries then filed

Australian Security Intelligence Organisation Act 1979

No. 113, 1979 as amended

Compilation start date:	28 May 2014
Includes amendments up to:	Act No. 33 2014

Prepared by the Office of Parliamentary Counsel, Canberra

An Act relating to the Australian Security Intelligence Organisation

Part I—Preliminary

1 Short title

This Act may be cited as the *Australian Security Intelligence Organisation Act 1979*.

2 Commencement

This Act shall come into operation on a date to be fixed by Proclamation.

3 Repeal

The *Australian Security Intelligence Organisation Act 1956* and the *Australian Security Intelligence Organisation Act 1976* are repealed.

4 Definitions

In this Act, unless the contrary intention appears:

activities prejudicial to security includes any activities concerning which Australia has responsibilities to a foreign country as referred to in paragraph (b) of the definition of ***security*** in this section.

acts of foreign interference means activities relating to Australia that are carried on by or on behalf of, are directed or subsidised by or are undertaken in active collaboration with, a foreign power, being activities that:

(a) are clandestine or deceptive and:

(i) are carried on for intelligence purposes;

(ii) are carried on for the purpose of affecting political or governmental processes; or

(iii) are otherwise detrimental to the interests of Australia; or

(b) involve a threat to any person.

ASIS has the meaning given by the *Intelligence Services Act 2001*.

attacks on Australia's defence system means activities that are intended to, and are likely to, obstruct, hinder or interfere with the performance by the Defence Force of its functions or with the carrying out of other activities by or for the Commonwealth for the purposes of the defence or safety of the Commonwealth.

Australia, when used in a geographical sense, includes the external Territories.

authority of a State:

(a) in Part IV—has the meaning given by subsection 35(1); and

(b) otherwise—includes:

(i) a Department of State of a State, or a Department of the Public Service of a State; and

(ii) a body, whether incorporated or not, established for public purposes by or under a law of a State; and

(iii) a body corporate in which a State or a body referred to in subparagraph (ii) has a controlling interest.

authority of the Commonwealth includes:

(a) a Department of State or an Agency within the meaning of the *Public Service Act 1999*;

(aa) a Department within the meaning of the *Parliamentary Service Act 1999*;

(b) the Defence Force;

(c) a body, whether incorporated or not, established for public purposes by or under a law of the Commonwealth or of a Territory;

(d) the holder of an office established for public purposes by or under a law of the Commonwealth or of a Territory;

(e) a prescribed body established in relation to public purposes that are of concern to the Commonwealth and any State or States; and

(f) a body corporate in which the Commonwealth or a body referred to in paragraph (c) has a controlling interest.

carriage service provider has the same meaning as in the *Telecommunications Act 1997*.

carrier has the same meaning as in the *Telecommunications Act 1997*.

certified copy, in relation to a warrant or an instrument revoking a warrant, means a copy of the warrant or instrument that has been certified in writing by the Director-General or a Deputy Director-General to be a true copy of the warrant or instrument.

Committee on Intelligence and Security means the Parliamentary Joint Committee on Intelligence and Security established under the *Intelligence Services Act 2001*.

data storage device means a thing (for example, a disk or file server) containing (whether temporarily or permanently), or designed to contain (whether temporarily or permanently), data for use by a computer.

Defence Department means the Department of State that deals with defence and that is administered by the Minister administering section 1 of the *Defence Act 1903*.

Defence Minister means the Minister administering section 1 of the *Defence Act 1903*.

Deputy Director-General means an officer of the Organisation who holds office as Deputy Director-General of Security.

DIGO has the meaning given by the *Intelligence Services Act 2001*.

Director-General means the Director-General of Security holding office under this Act.

DSD has the meaning given by the *Intelligence Services Act 2001*.

Foreign Affairs Minister means the Minister administering the *Diplomatic Privileges and Immunities Act 1967*.

foreign intelligence means intelligence about the capabilities, intentions or activities of people or organisations outside Australia.

foreign power means:

(a) a foreign government;

(b) an entity that is directed or controlled by a foreign government or governments; or

(c) a foreign political organisation.

frisk search means:

(a) a search of a person conducted by quickly running the hands over the person's outer garments; and

(b) an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person.

intelligence or security agency means any of the following:

(a) the Australian Secret Intelligence Service;

(b) the Office of National Assessments;

(c) that part of the Defence Department known as the Defence Imagery and Geospatial Organisation;

(d) that part of the Defence Department known as the Defence Intelligence Organisation;

(e) that part of the Defence Department known as the Defence Signals Directorate.

Judge means a Judge of a court created by the Parliament.

law enforcement agency means an authority of the Commonwealth, or an authority of a State, that has functions relating to law enforcement.

ordinary search means a search of a person or of articles on his or her person that may include:

(a) requiring the person to remove his or her overcoat, coat or jacket and any gloves, shoes and hat; and

(b) an examination of those items.

Organisation means the Australian Security Intelligence Organisation.

permanent resident means a person:

(a) in the case of a natural person:

(i) who is not an Australian citizen;

(ii) whose normal place of residence is situated in Australia;

(iii) whose presence in Australia is not subject to any limitation as to time imposed by law; and

(iv) who is not an unlawful non-citizen within the meaning of the *Migration Act 1958*; or

(b) in the case of a body corporate:

(i) which is incorporated under a law in force in a State or Territory; and

(ii) the activities of which are not controlled (whether directly or indirectly) by a foreign power.

politically motivated violence means:

(a) acts or threats of violence or unlawful harm that are intended or likely to achieve a political objective, whether in Australia or elsewhere, including acts or threats carried on for the purpose of influencing the policy or acts of a government, whether in Australia or elsewhere; or

(b) acts that:

(i) involve violence or are intended or are likely to involve or lead to violence (whether by the persons who carry on those acts or by other persons); and

(ii) are directed to overthrowing or destroying, or assisting in the overthrow or destruction of, the government or the constitutional system of government of the Commonwealth or of a State or Territory; or

(ba) acts that are terrorism offences; or

(c) acts that are offences punishable under the *Crimes (Foreign Incursions and Recruitment) Act 1978*, the *Crimes (Hostages) Act 1989* or Division 1 of Part 2, or Part 3, of the *Crimes (Ships and Fixed Platforms) Act 1992* or under Division 1 or 4 of Part 2 of the *Crimes (Aviation) Act 1991*; or

(d) acts that:

(i) are offences punishable under the *Crimes (Internationally Protected Persons) Act 1976*; or

(ii) threaten or endanger any person or class of persons specified by the Minister for the purposes of this subparagraph by notice in writing given to the Director-General.

promotion of communal violence means activities that are directed to promoting violence between different groups of persons in the Australian community so as to endanger the peace, order or good government of the Commonwealth.

security means:

(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
  (i) espionage;
  (ii) sabotage;
  (iii) politically motivated violence;
  (iv) promotion of communal violence;
  (v) attacks on Australia's defence system; or
  (vi) acts of foreign interference;

  whether directed from, or committed within, Australia or not; and

(aa) the protection of Australia's territorial and border integrity from serious threats; and

(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

seizable item means anything that could present a danger to a person or that could be used to assist a person to escape from lawful custody.

serious crime means conduct that, if engaged in within, or in connection with, Australia, would constitute an offence against the law of the Commonwealth, a State or a Territory punishable by imprisonment for a period exceeding 12 months.

staff member of a body (however described) includes:

(a) the head (however described) of the body, or another person who holds an office or appointment in relation to the body; and

(b) a person who is otherwise a member of the staff of the body (whether an employee of the body, a consultant or contractor to the body, or a person who is made available by an authority of the Commonwealth, an authority of a State, or other person, to perform services for the body).

State includes the Australian Capital Territory and the Northern Territory.

strip search means a search of a person or of articles on his or her person that may include:

(a) requiring the person to remove all of his or her garments; and

(b) an examination of the person's body (but not of the person's body cavities) and of those garments.

Territory does not include the Australian Capital Territory or the Northern Territory.

terrorism offence means:

(a) an offence against Subdivision A of Division 72 of the *Criminal Code*; or

(b) an offence against Part 5.3 of the *Criminal Code*.

Note: A person can commit a terrorism offence against Part 5.3 of the *Criminal Code* even if no terrorist act (as defined in that Part) occurs.

violence includes the kidnapping or detention of a person.

4A Application of the *Criminal Code*

Chapter 2 of the *Criminal Code* (except Part 2.5) applies to all offences against this Act.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

5 Extension of Act to external Territories

This Act extends to every external Territory.

Part III—Functions and powers of Organisation

Division 1—General

17 Functions of Organisation

(1) The functions of the Organisation are:

(a) to obtain, correlate and evaluate intelligence relevant to security;

(b) for purposes relevant to security, to communicate any such intelligence to such persons, and in such manner, as are appropriate to those purposes;

(c) to advise Ministers and authorities of the Commonwealth in respect of matters relating to security, in so far as those matters are relevant to their functions and responsibilities.

(ca) to furnish security assessments to a State or an authority of a State in accordance with paragraph 40(1)(b);

(d) to advise Ministers, authorities of the Commonwealth and such other persons as the Minister, by notice in writing given to the Director-General, determines on matters relating to protective security; and

(e) to obtain within Australia foreign intelligence pursuant to section 27A or 27B of this Act or section 11A, 11B or 11C of the *Telecommunications (Interception and Access) Act 1979*, and to communicate any such intelligence in accordance with this Act or the *Telecommunications (Interception and Access) Act 1979*; and

(f) to co-operate with and assist bodies referred to in section 19A in accordance with that section.

(2) It is not a function of the Organisation to carry out or enforce measures for security within an authority of the Commonwealth.

(a) equivalent to a position occupied by an SES employee; or
(b) designated as an office of Coordinator by the Director-General under section 85.

25 Search warrants

Issue of search warrant

(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.

Authorisation in warrant

(3) The warrant must be signed by the Minister and must authorise the Organisation to do specified things, subject to any restrictions or conditions specified in the warrant, in relation to the subject premises, which must also be specified in the warrant.

Things that may be specified in warrant

(4) The things that may be specified are any of the following that the Minister considers appropriate in the circumstances:
(a) entering the subject premises;
(b) searching the subject 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 other container in which there is reasonable cause to believe that any such records or other things may be found;
(c) inspecting or otherwise examining any records or other things so found, and making copies or transcripts of any such

record or other thing that appears to be relevant to the collection of intelligence by the Organisation in accordance with this Act;

(d) removing and retaining any record or other thing so found, for the purposes of:

(i) inspecting or examining it; and

(ii) in the case of a record—making copies or transcripts of it, in accordance with the warrant;

(e) any thing reasonably necessary to conceal the fact that any thing has been done under the warrant;

(f) any other thing reasonably incidental to any of the above.

Personal searches may be specified

(4A) The Minister may also specify any of the following things if he or she considers it appropriate in the circumstances:

(a) conducting an ordinary search or a frisk search of a person if:

(i) the person is at or near the subject premises when the warrant is executed; and

(ii) there is reasonable cause to believe that the person has on his or her person records or other things relevant to the security matter;

(b) inspecting or otherwise examining any records or other things so found, and making copies or transcripts of any such record or other thing that appears to be relevant to the collection of intelligence by the Organisation in accordance with this Act;

(c) removing and retaining any record or other thing so found, for the purposes of:

(i) inspecting or examining it; and

(ii) in the case of a record—making copies or transcripts of it, in accordance with the warrant.

Certain personal searches not authorised

(4B) Subsection (4A) does not authorise a strip search or a search of a person's body cavities.

Time period for retaining records and other things

(4C) A record or other thing retained as mentioned in paragraph (4)(d) or (4A)(c) may be retained:

(a) if returning the record or thing would be prejudicial to security—only until returning the record or thing would no longer be prejudicial to security; and

(b) otherwise—for only such time as is reasonable.

Other things that may be specified

(5) The Minister may also specify any of the following things if he or she considers it appropriate in the circumstances:

(a) where there is reasonable cause to believe that data relevant to the security matter may be accessible by using a computer or other electronic equipment, or a data storage device, brought to or found on the subject premises—using the computer, equipment or device for the purpose of obtaining access to any such data and, if necessary to achieve that purpose, adding, deleting or altering other data in the computer, equipment or device;

(b) using the computer, equipment or device to do any of the following:

(i) inspecting and examining any data to which access has been obtained;

(ii) converting 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 removing any such document;

(iii) copying 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 any data storage device and removing the device;

(c) any thing reasonably necessary to conceal the fact that any thing has been done under the warrant;

(d) any other thing reasonably incidental to any of the above.

Certain acts not authorised

(6) Subsection (5) does not authorise the addition, deletion or alteration of data, or the doing of any thing, that interferes with, interrupts or obstructs the lawful use by other persons of a computer or other electronic equipment, or a data storage device, found on the subject premises, or that causes any loss or damage to other persons lawfully using the computer, equipment or device.

Authorisation of entry measures

(7) The warrant must:
  (a) authorise the use of any force that is necessary and reasonable to do the things specified in the warrant; and
  (b) state whether entry is authorised to be made at any time of the day or night or during stated hours of the day or night.

Statement about warrant coming into force

(8) The warrant may state that it comes into force on a specified day (after the day of issue) or when a specified event happens. The day must not begin nor the event happen more than 28 days after the end of the day on which the warrant is issued.

When warrant comes into force

(9) If the warrant includes such a statement, it comes into force at the beginning of the specified day or when the specified event happens. Otherwise, it comes into force when it is issued.

Duration of warrant

(10) The warrant must specify the period during which it is to be in force. The period must not be more than 90 days, although the Minister may revoke the warrant before the period has expired.

Issue of further warrants not prevented

(11) Subsection (10) does not prevent the issue of any further warrant.

Intelligence Services Act 2001

No. 152, 2001 as amended

Compilation start date:	28 May 2013
Includes amendments up to:	Act No. 54, 2013

Prepared by the Office of Parliamentary Counsel, Canberra

Part 2—Functions of the agencies

6 Functions of ASIS

(1) The functions of ASIS are:

(a) to obtain, in accordance with the Government's requirements, intelligence about the capabilities, intentions or activities of people or organisations outside Australia; and

(b) to communicate, in accordance with the Government's requirements, such intelligence; and

(c) to conduct counter-intelligence activities; and

(d) to liaise with intelligence or security services, or other authorities, of other countries; and

(da) to co-operate with and assist bodies referred to in section 13A in accordance with that section; and

(e) to undertake such other activities as the responsible Minister directs relating to the capabilities, intentions or activities of people or organisations outside Australia.

(2) The responsible Minister may direct ASIS to undertake activities referred to in paragraph (1)(e) only if the Minister:

(a) has consulted other Ministers who have related responsibilities; and

(b) is satisfied that there are satisfactory arrangements in place to ensure that, in carrying out the direction, nothing will be done beyond what is necessary having regard to the purposes for which the direction is given; and

(c) is satisfied that there are satisfactory arrangements in place to ensure that the nature and consequences of acts done in carrying out the direction will be reasonable having regard to the purposes for which the direction is given.

(3) A direction under paragraph (1)(e) must be in writing.

Note: If the Minister gives a direction under paragraph (1)(e), the Minister must give a copy of the direction to the Inspector-General of Intelligence and Security as soon as practicable after the direction is given to the head of ASIS (see section 32B of the *Inspector-General of Intelligence and Security Act 1986*).

(3A) A direction under paragraph (1)(e) is not a legislative instrument.

(4) In performing its functions, ASIS must not plan for, or undertake, activities that involve:

(a) paramilitary activities; or

(b) violence against the person; or

(c) the use of weapons;

by staff members or agents of ASIS.

Note 1: This subsection does not prevent ASIS from being involved with the planning or undertaking of activities covered by paragraphs (a) to (c) by other organisations provided that staff members or agents of ASIS do not undertake those activities.

Note 2: For other limits on the agency's functions and activities see sections 11 and 12.

Note 3: For ***paramilitary activities*** see section 3.

(5) Subsection (4) does not prevent:

(a) the provision of weapons, or training in the use of weapons or in self-defence techniques, in accordance with Schedule 2; or

(b) the use of weapons or self-defence techniques in accordance with Schedule 2.

(6) ASIS must not provide weapons, or training in the use of weapons or in self-defence techniques, other than in accordance with Schedule 2.

(7) In performing its functions, ASIS is not prevented from providing assistance to Commonwealth authorities, including to the Defence Force in support of military operations, and to State authorities.

6A Committee to be advised of other activities

If the responsible Minister gives a direction under paragraph 6(1)(e), the Minister must as soon as practicable advise the Committee of the nature of the activity or activities to be undertaken.

Note: For ***Committee*** see section 3.

6B Functions of DIGO

The functions of DIGO are:

(a) to obtain geospatial and imagery intelligence about the capabilities, intentions or activities of people or organisations

11 Limits on agencies' functions

(1) The functions of the agencies are to be performed only in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being and only to the extent that those matters are affected by the capabilities, intentions or activities of people or organisations outside Australia.

(2) The agencies' functions do not include:

(a) the carrying out of police functions; or

(b) any other responsibility for the enforcement of the law.

However, this does not prevent the agencies from:

(c) obtaining intelligence under paragraph 6(1)(a), 6B(a), (b), or (c) or 7(a) and communicating any such intelligence that is relevant to serious crime to the appropriate law enforcement authorities; or

(d) in the case of ASIS—performing the function set out in paragraph 6(1)(da) or providing assistance as mentioned in subsection 6(7); or

(e) in the case of DIGO—performing the functions set out in paragraphs 6B(e) and (f); or

(f) in the case of DSD—performing the functions set out in paragraphs 7(e) and (f).

Note: For ***police functions*** and ***serious crime*** see section 3.

(2AA) An agency may communicate incidentally obtained intelligence to appropriate Commonwealth or State authorities or to authorities of other countries approved under paragraph 13(1)(c) if the intelligence relates to the involvement, or likely involvement, by a person in one or more of the following activities:

(a) activities that present a significant risk to a person's safety;

(b) acting for, or on behalf of, a foreign power;

(c) activities that are a threat to security;

(d) activities related to the proliferation of weapons of mass destruction or the movement of goods listed from time to time in the Defence and Strategic Goods List (within the meaning of regulation 13E of the *Customs (Prohibited Exports) Regulations 1958*);

(e) committing a serious crime.

(2A) The agencies' functions do not include undertaking any activity for the purpose of furthering the interests of an Australian political party or other Australian political organisation.

(3) Subsection (1) does not apply to the functions described in paragraphs 6(1)(da), 6B(b), (c), (d), (e), (f) and (g), and 7(c), (d), (e) and (f).

12 Limits on agencies' activities

An agency must not undertake any activity unless the activity is:

(a) necessary for the proper performance of its functions; or

(b) authorised or required by or under another Act.

12A Special responsibilities of Directors and Director-General

The Director of DIGO, the Director of DSD and the Director-General must take all reasonable steps to ensure that:

(a) his or her agency is kept free from any influences or considerations not relevant to the undertaking of activities as mentioned in paragraph 12(a) or (b); and

(b) nothing is done that might lend colour to any suggestion that his or her agency is concerned to further or protect the interests of any particular section of the community, or with undertaking any activities other than those mentioned in paragraph 12(a) or (b).

13 Co-operation with other authorities in connection with performance of agency's own functions

(1) Subject to any arrangements made or directions given by the responsible Minister, an agency may cooperate with:

(a) Commonwealth authorities; and

(b) State authorities; and

(c) authorities of other countries approved by the Minister as being capable of assisting the agency in the performance of its functions;

so far as is necessary for the agency to perform its functions, or so far as facilitates the performance by the agency of its functions.

Note: For ***Commonwealth authority*** and ***State authority*** see section 3.

Part 6—Miscellaneous

39 Communication of certain information—ASIS

(1) A person is guilty of an offence if:

(a) the person communicates any information or matter that was prepared by or on behalf of ASIS in connection with its functions or relates to the performance by ASIS of its functions; and

(b) the information or matter has come to the knowledge or into the possession of the person by reason of:

(i) his or her being, or having been, a staff member or agent of ASIS; or

(ii) his or her having entered into any contract, agreement or arrangement with ASIS; or

(iii) his or her having been an employee or agent of a person who has entered into a contract, agreement or arrangement with ASIS; and

(c) the communication was not made:

(i) to the Director-General or a staff member by the person in the course of the person's duties as a staff member; or

(ii) to the Director-General or a staff member by the person in accordance with a contract, agreement or arrangement; or

(iii) by the person in the course of the person's duties as a staff member or agent, within the limits of authority conferred on the person by the Director-General; or

(iv) with the approval of the Director-General or of a staff member having the authority of the Director-General to give such an approval.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

(2) A prosecution for an offence against subsection (1) may be instituted only by the Attorney-General or with the Attorney-General's consent.

39A Communication of certain information—DIGO

(1) A person commits an offence if:

(a) the person communicates any information or matter that was prepared by or on behalf of DIGO in connection with its functions or relates to the performance by DIGO of its functions; and

(b) the information or matter has come to the knowledge or into the possession of the person by reason of:

(i) his or her being, or having been, a staff member of DIGO; or

(ii) his or her having entered into any contract, agreement or arrangement with DIGO; or

(iii) his or her having been an employee or agent of a person who has entered into a contract, agreement or arrangement with DIGO; and

(c) the communication was not made:

(i) to the Director of DIGO or a staff member by the person in the course of the person's duties as a staff member; or

(ii) to the Director of DIGO or a staff member by the person in accordance with a contract, agreement or arrangement; or

(iii) by the person in the course of the person's duties as a staff member, within the limits of authority conferred on the person by the Director of DIGO; or

(iv) with the approval of the Director of DIGO or of a staff member having the authority of the Director of DIGO to give such an approval.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

(2) A prosecution for an offence against subsection (1) may be instituted only by the Attorney-General or with the Attorney-General's consent.

40 Communication of certain information—DSD

(1) A person is guilty of an offence if:

(a) the person communicates any information or matter that was prepared by or on behalf of DSD in connection with its

functions or relates to the performance by DSD of its functions; and

(b) the information or matter has come to the knowledge or into the possession of the person by reason of:

(i) his or her being, or having been, a staff member of DSD; or

(ii) his or her having entered into any contract, agreement or arrangement with DSD; or

(iii) his or her having been an employee or agent of a person who has entered into a contract, agreement or arrangement with DSD; and

(c) the communication was not made:

(i) to the Director of DSD or a staff member by the person in the course of the person's duties as a staff member; or

(ii) to the Director of DSD or a staff member by the person in accordance with a contract, agreement or arrangement; or

(iii) by the person in the course of the person's duties as a staff member, within the limits of authority conferred on the person by the Director of DSD; or

(iv) with the approval of the Director of DSD or of a staff member having the authority of the Director of DSD to give such an approval.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

(2) A prosecution for an offence against subsection (1) may be instituted only by the Attorney-General or with the Attorney-General's consent.

41 Publication of identity of staff

(1) A person is guilty of an offence:

(a) if:

(i) the person identifies a person as being, or having been, an agent or staff member of ASIS; and

(ii) the identification is not of the Director-General or such other persons as the Director-General determines; or

(b) if:

(i) the person makes public any information from which the identity of such a person could reasonably be inferred, or any information that could reasonably lead to the identity of such a person being established; and

(ii) the Minister or Director-General has not consented in writing to the information being made public; and

(iii) the information has not been made public by means of broadcasting or reporting proceedings of the Parliament (other than proceedings of the Committee) as authorised by the Parliament.

Penalty: Imprisonment for 1 year or 60 penalty units, or both.

Note: For ***staff member*** see section 3.

(2) A prosecution for an offence against subsection (1) may be instituted only by the Attorney-General or with the Attorney-General's consent.

42 Annual report

(1) As soon as practicable after each year ending on 30 June, the Director-General must give to the Minister a report on the activities of ASIS during the year.

(2) The report must include information about any cooperation by ASIS with an authority of another country in planning or undertaking activities covered by paragraphs 6(4)(a) to (c). The report must set out the number of occasions on which such cooperation occurred and the broad nature of each cooperation.

43 Regulations

The Governor-General may make regulations prescribing matters:

(a) required or permitted to be prescribed by this Act; or

(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Criminal Code Act 1995

No. 12, 1995 as amended

Compilation start date: 24 June 2014

Includes amendments up to: Act No. 31, 2014

This compilation has been split into 2 volumes

Volume 1:	**sections 1–5**
	Schedule (sections 1.1–261.3)
Volume 2:	Schedule (sections 268.1–480.6)
	Schedule (Dictionary)
	Endnotes

Each volume has its own contents

Prepared by the Office of Parliamentary Counsel, Canberra

Part 5.2—Offences relating to espionage and similar activities

Division 90—Preliminary

90.1 Definitions

(1) In this Part:

article includes any thing, substance or material.

information means information of any kind, whether true or false and whether in a material form or not, and includes:

(a) an opinion; and

(b) a report of a conversation.

intelligence or security agency has the meaning given by section 85ZL of the *Crimes Act 1914*.

record, in relation to information, means a record of information in any form, including but not limited to, a document, paper, database, software system or other article or system containing information or from which information can be derived.

security or defence of a country includes the operations, capabilities and technologies of, and methods and sources used by, the country's intelligence or security agencies.

sketch includes a representation of a place or thing.

the Commonwealth includes the Territories.

(2) In this Part, unless the contrary intention appears:

(a) expressions referring to obtaining, recording, using, having in possession, communicating or retaining include obtaining, recording, using, having in possession, communicating or retaining in whole or in part, and whether the thing or information itself, or only the substance, effect or description of the thing or information, is obtained, recorded, used, possessed, communicated or retained; and

(b) a reference to a sketch, document or article or to information is to be read as including a reference to a copy of, a part of or

a copy of a part of a sketch, document or article or information.

(3) For the purposes of this Part, a place that is occupied by, or a thing that is under the control of, the Commonwealth is taken to belong to the Commonwealth.

(4) This Part applies to and in relation to a document or article regardless of who made it and what information it contains.

Division 91—Offences relating to espionage and similar activities

91.1 Espionage and similar activities

(1) A person commits an offence if:

(a) the person communicates, or makes available:

(i) information concerning the Commonwealth's security or defence; or

(ii) information concerning the security or defence of another country, being information that the person acquired (whether directly or indirectly) from the Commonwealth; and

(b) the person does so intending to prejudice the Commonwealth's security or defence; and

(c) the person's act results in, or is likely to result in, the information being communicated or made available to another country or a foreign organisation, or to a person acting on behalf of such a country or organisation.

Penalty: Imprisonment for 25 years.

(2) A person commits an offence if:

(a) the person communicates, or makes available:

(i) information concerning the Commonwealth's security or defence; or

(ii) information concerning the security or defence of another country, being information that the person acquired (whether directly or indirectly) from the Commonwealth; and

(b) the person does so:

(i) without lawful authority; and

(ii) intending to give an advantage to another country's security or defence; and

(c) the person's act results in, or is likely to result in, the information being communicated or made available to another country or a foreign organisation, or to a person acting on behalf of such a country or organisation.

Penalty: Imprisonment for 25 years.

(3) A person commits an offence if:

(a) the person makes, obtains or copies a record (in any form) of:

(i) information concerning the Commonwealth's security or defence; or

(ii) information concerning the security or defence of another country, being information that the person acquired (whether directly or indirectly) from the Commonwealth; and

(b) the person does so:

(i) intending that the record will, or may, be delivered to another country or a foreign organisation, or to a person acting on behalf of such a country or organisation; and

(ii) intending to prejudice the Commonwealth's security or defence.

Penalty: Imprisonment for 25 years.

(4) A person commits an offence if:

(a) the person makes, obtains or copies a record (in any form) of:

(i) information concerning the Commonwealth's security or defence; or

(ii) information concerning the security or defence of another country, being information that the person acquired (whether directly or indirectly) from the Commonwealth; and

(b) the person does so:

(i) without lawful authority; and

(ii) intending that the record will, or may, be delivered to another country or a foreign organisation, or to a person acting on behalf of such a country or organisation; and

(iii) intending to give an advantage to another country's security or defence.

Penalty: Imprisonment for 25 years.

(5) For the purposes of subparagraphs (3)(b)(i) and (4)(b)(ii), the person concerned does not need to have a particular country, foreign organisation or person in mind at the time when the person makes, obtains or copies the record.

(6) A person charged with an offence under this section may only be remanded on bail by a judge of the Supreme Court of a State or Territory. This subsection has effect despite anything in section 93.1.

Note: Section 93.1 deals with how a prosecution is instituted.

(7) Section 15.4 of the *Criminal Code* (extended geographical jurisdiction—category D) applies to offences under this section.

91.2 Defence—information lawfully available

(1) It is a defence to a prosecution of an offence against subsection 91.1(1) or (2) that the information the person communicates or makes available is information that has already been communicated or made available to the public with the authority of the Commonwealth.

(2) It is a defence to a prosecution of an offence against subsection 91.1(3) or (4) that the record of information the person makes, obtains or copies is a record of information that has already been communicated or made available to the public with the authority of the Commonwealth.

Note: A defendant bears an evidential burden in relation to the matters in subsections (1) and (2). See subsection 13.3(3).

Division 93—Prosecutions and hearings

93.1 Institution of prosecution

(1) A prosecution under this Part may be instituted only by, or with the consent of, the Attorney-General or a person acting under the Attorney-General's direction.

(2) However:

(a) a person charged with an offence against this Part may be arrested, or a warrant for his or her arrest may be issued and executed; and

(b) such a person may be remanded in custody or on bail;

even if the consent of the Attorney-General or a person acting under his or her direction has not been obtained, but no further proceedings are to be taken until that consent has been obtained.

(3) Nothing in this section prevents the discharging of the accused if proceedings are not continued within a reasonable time.

93.2 Hearing in camera etc.

(1) This section applies to a hearing of an application or other proceedings before a federal court, a court exercising federal jurisdiction or a court of a Territory, whether under this Act or otherwise.

(2) At any time before or during the hearing, the judge or magistrate, or other person presiding or competent to preside over the proceedings, may, if satisfied that it is in the interest of the security or defence of the Commonwealth:

(a) order that some or all of the members of the public be excluded during the whole or a part of the hearing; or

(b) order that no report of the whole or a specified part of, or relating to, the application or proceedings be published; or

(c) make such order and give such directions as he or she thinks necessary for ensuring that no person, without the approval of the court, has access (whether before, during or after the hearing) to any affidavit, exhibit, information or other document used in the application or the proceedings that is on the file in the court or in the records of the court.

(3) A person commits an offence if the person contravenes an order made or direction given under this section.

Penalty: Imprisonment for 5 years.

Crimes Act 1914

No. 12, 1914 as amended

Compilation start date: 24 June 2014

Includes amendments up to: Act No. 31, 2014

This compilation has been split into 2 volumes

Volume 1: sections 1–23W
Volume 2: sections 23WA–91
Schedule
Endnotes

Each volume has its own contents

Prepared by the Office of Parliamentary Counsel, Canberra

Part VI—Offences by and against public officers

70 Disclosure of information by Commonwealth officers

(1) A person who, being a Commonwealth officer, publishes or communicates, except to some person to whom he or she is authorized to publish or communicate it, any fact or document which comes to his or her knowledge, or into his or her possession, by virtue of being a Commonwealth officer, and which it is his or her duty not to disclose, shall be guilty of an offence.

(2) A person who, having been a Commonwealth officer, publishes or communicates, without lawful authority or excuse (proof whereof shall lie upon him or her), any fact or document which came to his or her knowledge, or into his or her possession, by virtue of having been a Commonwealth officer, and which, at the time when he or she ceased to be a Commonwealth officer, it was his or her duty not to disclose, shall be guilty of an offence.

Penalty: Imprisonment for 2 years.

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

National Security Information (Criminal and Civil Proceedings) Act 2004

Act No. 150 of 2004 as amended

This compilation was prepared on 24 May 2011
taking into account amendments up to Act No. 127 of 2010

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

Contents

Division 2—National security and related definitions

8 Meaning of *national security*

In this Act, ***national security*** means Australia's defence, security, international relations or law enforcement interests.

9 Meaning of *security*

In this Act, ***security*** has the same meaning as in the *Australian Security Intelligence Organisation Act 1979*.

10 Meaning of *international relations*

In this Act, ***international relations*** means political, military and economic relations with foreign governments and international organisations.

11 Meaning of *law enforcement interests*

In this Act, ***law enforcement interests*** includes interests in the following:

(a) avoiding disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation, foreign intelligence and security intelligence;

(b) protecting the technologies and methods used to collect, analyse, secure or otherwise deal with, criminal intelligence, foreign intelligence or security intelligence;

(c) the protection and safety of informants and of persons associated with informants;

(d) ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation's government and government agencies.

Division 4—Other interpretation provisions

16 Disclosure of information in permitted circumstances

A person discloses information ***in permitted circumstances*** if:

(a) the person is the prosecutor in a federal criminal proceeding and the person discloses the information in the course of his or her duties in relation to the proceeding; or

(b) the person discloses the information in circumstances specified by the Attorney-General in a certificate or advice given under section 26, 28, 38F or 38H.

17 Meaning of *likely to prejudice national security*

(1) A disclosure of information is ***likely to prejudice national security*** if there is a real, and not merely a remote, possibility that the disclosure will prejudice national security.

(2) The contravention of a requirement is ***likely to prejudice national security*** if there is a real, and not merely a remote, possibility that the contravention will prejudice national security.

18 Operation of other Acts etc.

This Act does not affect the operation of the provisions of any other Act, other than:

(a) sections 26, 27, 29, 43 to 45 and 48 of the *Evidence Act 1995*; and

(b) sections 70, 80 and 80A of the *Judiciary Act 1903*.

19 General powers of a court

Power of a court in a federal criminal proceeding

(1) The power of a court to control the conduct of a federal criminal proceeding, in particular with respect to abuse of process, is not affected by this Act, except so far as this Act expressly or impliedly provides otherwise.

(1A) In addition to the powers of a court under this Act in a federal criminal proceeding, the court may make such orders as the court

considers appropriate in relation to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information if:

(a) the court is satisfied that it is in the interest of national security to make such orders; and

(b) the orders are not inconsistent with this Act or regulations made under this Act.

Consideration of a matter in relation to closed hearings in a federal criminal proceeding not to prevent later stay order

(2) An order under section 31 does not prevent the court from later ordering that the federal criminal proceeding be stayed on a ground involving the same matter, including that an order made under section 31 would have a substantial adverse effect on a defendant's right to receive a fair hearing.

Power of a court in a civil proceeding

(3) The power of a court to control the conduct of a civil proceeding, in particular with respect to abuse of process, is not affected by this Act, except so far as this Act expressly or impliedly provides otherwise.

(3A) In addition to the powers of a court under this Act in a civil proceeding, the court may make such orders as the court considers appropriate in relation to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information if:

(a) the court is satisfied that it is in the interest of national security to make such orders; and

(b) the orders are not inconsistent with this Act or regulations made under this Act.

Consideration of a matter in relation to closed hearings in a civil proceeding not to prevent later stay order

(4) An order under section 38L does not prevent the court from later ordering that the civil proceeding be stayed on a ground involving the same matter, including that an order made under section 38L would have a substantial adverse effect on the substantive hearing in the proceeding.

Factors to be considered when deciding whether to order a stay of a civil proceeding

(5) In deciding whether to order a stay of the civil proceeding, the court must consider:

(a) the extent of any financial loss that a party would suffer as a result of the proceeding being stayed; and

(b) whether a party has reasonable prospects of obtaining a remedy in the proceeding; and

(c) any other matter the court considers relevant.

20 When an order of a court ceases to be subject to appeal

An order of a court ***ceases to be subject to appeal*** when:

(a) the period for appealing against the order ends without an appeal being made; or

(b) if an appeal is made against the order—the appeal is finally determined or otherwise disposed of.

Australian Capital Territory

Legal Profession (Solicitors) Rules 2007

Subordinate Law SL2007- 31

made under the

Legal Profession Act, 2006, section 580(1).

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1 Name of instrument

This instrument is the Legal Profession (Solicitors) Rules 2007.

2 Commencement

This instrument commences on 1 October 2007.

3 Making and Repeal of Rules

The law society council makes the attached Legal Profession (Solicitors) Rules 2007.

The Legal Profession (Solicitors) Rules 2006 are repealed.

In the opinion of the law society council, the amendments to the rules do not justify publication in accordance with subsections 583(1) to (4) because of the minor or technical nature of the amendments to the Legal Profession (Solicitors) Rules 2006.

Greg Walker
Immediate Past President and Councillor
for the Law Society of the Australian Capital Territory

27 September 2007

Australian Capital Territory

Legal Profession (Solicitors) Rules 2007

Subordinate Law SL2007- 31

made under the

Legal Profession Act 2006

actlawsociety

LAW SOCIETY OF THE AUSTRALIAN CAPITAL TERRITORY

Legal Profession (Solicitors) Rules 2007

Page

CONTENTS

Page

[CONTENTS cont.]

RELATIONS WITH CLIENTS

Practitioners should serve their clients competently and diligently. They should be acutely aware of the fiduciary nature of their relationship with their clients, and always deal with their clients fairly, free of the influence of any interest which may conflict with a client's best interests. Practitioners should maintain the confidentiality of their clients' affairs, but give their clients the benefit of all information relevant to their clients' affairs of which they have knowledge. 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.

1. **Acceptance of Retainer - (Instructions to Act or Provide a Legal Service)**

1.1 A practitioner should treat his or her client fairly and in good faith, giving due regard to the client's position of dependence upon the practitioner, his or her special training and experience and the high degree of trust which a client is entitled to place in a practitioner.

1.2 A practitioner must act honestly, fairly, and with competence and diligence in the service of a client, and should accept instructions, and a retainer to act for a client, only when the practitioner can reasonably expect to serve the client in that manner and attend to the work required with reasonable promptness.

1.3 (a) A practitioner must not accept instructions in a field of practice in which he or she possesses insufficient knowledge and skill to provide competent representation to the client unless:

(i) the practitioner is able, without undue delay and cost to the client, to obtain such knowledge and skill either through private study and research or through the association with him or her of another lawyer of established competence in that field; or

(ii) where access to the relevant body of knowledge or to a lawyer of established competence in the field is not readily available, the practitioner warns the client of those facts and of the likely delay and cost in acquiring the requisite knowledge and skill and the client voluntarily consents to the practitioner acting in the matter.

(b) A practitioner should take such steps as are reasonably necessary to maintain and improve his or her knowledge and skill in the fields of law in which he or she practises.

2. Confidentiality

2.1 A practitioner must not, during, or after termination of, a retainer, disclose to any person, who is not a partner or employee of the practitioner's firm, any information, which is confidential to a client of the practitioner, and acquired by the practitioner during the currency of the retainer, unless :

(a) the client authorises disclosure;

(b) the practitioner is permitted or compelled by law to disclose;

(c) the practitioner discloses information in circumstances in which the law would probably compel its disclosure, despite a client's claim of legal professional privilege, and for the sole purpose of avoiding the probable commission or concealment of a felony; or

(d) necessary for replying to or defending any charge or complaint as to conduct or professional behaviour brought against the practitioner or his or her partners, associates or employees or to respond to a requirement under sub-Rule 41.2.

2.2 A practitioner's obligation to maintain the confidentiality of a client's affairs is not limited to information which might be protected by legal professional privilege, and is a duty inherent in the fiduciary relationship between the practitioner and client.

3. Acting Against a Former Client

Consistent with the duty which a practitioner has to preserve the confidentiality of a client's affairs, a practitioner must not accept a retainer to act for another person in any action or proceedings against, or in opposition to, the interest of a person :

(a) for whom the practitioner or the firm, of which the practitioner was a partner, has acted previously; and

(b) from whom the practitioner or the practitioner's firm has thereby acquired information confidential to that person and material to the action or proceedings; and

that person might reasonably conclude that there is a real possibility the information will be used to the person's detriment.

4. **Practitioners employed otherwise than by a practitioner**

A practitioner, who is employed by a corporation or by any other person who is not a practitioner, must not, despite any contrary direction from the practitioner's employer, act as a practitioner in the performance of any legal work or service in breach of any of the provisions of the *Legal Profession Act 2006*.

5. **Termination of Retainer**

5.1 A practitioner must complete the work or legal service required by the practitioner's retainer, unless :

(a) the practitioner and the practitioner's client have otherwise agreed;

(b) the practitioner is discharged from the retainer by the client; or

(c) the practitioner terminates the retainer for just cause, and on reasonable notice to the client.

5.2 Despite the above Rule, a practitioner, who has accepted instructions to act for a defendant required to stand trial for a criminal offence, must not terminate the retainer and withdraw from the proceedings on the ground that the client has failed to make arrangements satisfactory to the practitioner for payment of the practitioner's costs, unless the practitioner has, at a time reasonably in advance of the date appointed for the commencement of the trial, or the commencement of the sittings of the Court in which the trial is listed :

(a) served notice in writing on the client of the practitioner's intention to terminate the retainer and withdraw from the proceedings at the expiration of seven (7) days if the client fails, within that time, to make satisfactory arrangements for payment of the practitioner's costs; and

(b) delivered a copy of that notice to the Registrar of the Court in which the trial is listed to commence.

5.3 Without limiting the general application of Rule 5.1, a practitioner, who is acting for a legally assisted client in any proceedings, may terminate the practitioner's retainer upon giving reasonable notice in writing to the client of the practitioner's intention so to do, if the client's grant of legal aid is withdrawn, or otherwise terminated, and the client is unable to make any other satisfactory arrangements for payment of the practitioner's costs which would be incurred if the retainer continued.

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.

6.2 Upon completion or termination of a practitioner's retainer, a practitioner must, when requested so to do by the practitioner's client, give to the client, or another person authorised by the client, any documents related to the retainer to which the client is entitled, unless :

(a) the practitioner has completed the retainer; or

(b) the client has terminated the practitioner's retainer; or

(c) the practitioner has terminated the retainer for just cause and on reasonable notice; and

the practitioner claims a lien over the documents for costs due to the practitioner by the client.

6.3 Despite Rule 6.2, a practitioner who claims to exercise a lien for unpaid costs over a client's documents, which are essential to the client's defence or prosecution of current proceedings, must:

(a) deal with the documents as provided in Rule 26, if another practitioner is acting for the client; or

(b) upon receiving satisfactory security for the unpaid costs, deliver the documents to the client.

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.

7. Acting for more than one party

7.1 For the purposes of this Rule:

(a) "proceedings or transaction" mean any action or claim at law or in equity, or any dealing between parties, which may affect, create, or be related to, any legal or equitable right or entitlement or interest in property of any kind.

(b) "party" includes each one of the persons or corporations who, or which, is jointly a party to any proceedings or transaction.

(c) "practitioner" includes a practitioner's partner or employee and a practitioner's firm.

7.2 A practitioner who intends to accept instructions from more than one party to any proceedings or transaction must be satisfied, before accepting a retainer to act, that each of the parties is aware that the practitioner is intending to act for the others and consents to the practitioner so acting in the knowledge that the practitioner:

(a) may be, thereby, prevented from :

(i) disclosing to each party all information, relevant to the proceedings or transaction, within the practitioner's knowledge; or,

(ii) giving advice to one party which is contrary to the interests of another; and

(b) will cease to act for all parties if the practitioner would, otherwise, be obliged to act in a manner contrary to the interests of one or more of them.

7.3 If a practitioner, who is acting for more than one party to any proceedings or transaction, determines that the practitioner cannot continue to act for all of the parties without acting in a

manner contrary to the interests of one or more of them, the practitioner must thereupon cease to act for all parties.

7.4 A practitioner or a firm of practitioners must not act :

(a) for both buyer and seller in a matter concerning the sale of land or the sale of a business in the Australian Capital Territory;

(b) in the course of carrying on practice in the Australian Capital Territory for both buyer and seller in a matter concerning the sale of land or the sale of a business;

(c) for both mortgagor and mortgagee in a matter concerning the mortgage of land in the Australian Capital Territory excepting discharges of mortgages; or

(d) in the course of carrying on practice in the Australian Capital Territory for both mortgagor and mortgagee in a matter concerning the mortgage of land.

7.5 Notwithstanding the provisions of Rule 7.4, a practitioner or a firm of practitioners may act for both parties provided that:

(a) the parties:

(i) are existing clients of the practitioner or of the firm of practitioners for whom the practitioner or the firm (as the case may be) has previously acted;

(ii) are related bodies corporate as defined in the Corporations Act; or

(iii) are related by blood, adoption or marriage (either de jure or de facto).

(b) Rule 7.4 is brought to the knowledge of both parties; and

(c) both parties, with knowledge of Rule 7.4, instruct the practitioner or the firm of practitioners in writing in the form of either Schedules 1 or 2 to act in the matter.

7.6 A practitioner or firm of practitioners should not act :

(a) for lessor and lessee in a matter concerning the leasing of land in the Australian Capital Territory excepting the surrender of subleases; or

(b) in the course of carrying on practice in the Australian Capital Territory for both lessor and lessee in a matter concerning the leasing of land.

7.7 Notwithstanding the provisions of Rule 7.6, a practitioner or a firm of practitioners may act for both parties provided that:

(a) Rule 7.6 is brought to the knowledge of both parties; and

(b) both parties, with knowledge of Rule 7.6, instruct the practitioner or the firm of practitioners in writing in the form of Schedule 3 to act in the matter.

8. **Avoiding Conflict of Interest (where practitioner's own interest involved)**

8.1 A practitioner must not, in any dealings with a client :

(a) allow the interests of the practitioner or an associate of the practitioner to conflict with those of the client.

(b) exercise any undue influence intended to dispose the client to benefit the practitioner in excess of the practitioner's fair remuneration for the legal services provided to the client.

8.2 A practitioner must not accept instructions to act for a person in any proceedings or transaction affecting or related to any legal or equitable right or entitlement or interest in property, or continue to act for a person engaged in such proceedings or transaction when the practitioner is, or becomes, aware that the person's interest in the proceedings or transaction is, or would be, in conflict with the practitioner's own interest or the interest of an associate.

9. A Practitioner Receiving a Benefit under a Will or other Instrument

9.1 For the purposes of this Rule:

"substantial benefit" means a benefit which has a substantial value relative to the financial resources and assets of the person intending to bestow the benefit.

9.2 A practitioner who receives instructions from a person to draw a will appointing the practitioner an executor must inform that person in writing before the client signs the will:

(a) of any entitlement of the practitioner to claim commission;

(b) of the inclusion in the will of any provision entitling the practitioner, or the practitioner's firm, to charge professional fees in relation to the administration of the estate; and

(c) if the practitioner has an entitlement to claim commission, that the person could appoint as executor a person who might make no claim for commission.

9.3 A practitioner who receives instructions from a person to:

(a) draw a will under which the practitioner or an associate will, or may, receive a substantial benefit other than any proper entitlement to commission (if the practitioner is also to be appointed executor) and the reasonable professional fees of the practitioner or the practitioner's firm; or

(b) draw any other instrument under which the practitioner or an associate will, or may, receive a substantial benefit in addition to the practitioner's reasonable remuneration, including that payable under a conditional costs agreement,

must decline to act on those instructions and offer to refer the person, for advice, to another practitioner who is not an associate of the practitioner, unless the person instructing the practitioner is either:

(c) a member of the practitioner's immediate family; or

(d) a practitioner, or a member of the immediate family of a practitioner, who is a partner, employer, or employee, of the practitioner.

10. Practitioner and Client - Borrowing Transactions

10.1 A practitioner must not borrow any money, nor permit or assist an associate to borrow any money from a person :

(a) who is currently a client of the practitioner, or the practitioner's firm;

(b) for whom the practitioner or practitioner's firm has provided legal services, and who has indicated continuing reliance upon the advice of the practitioner, or practitioner's firm in relation to the investment of money; or

(c) who has sought from the practitioner, or the practitioner's firm, advice in respect of the investment of any money, or the management of the person's financial affairs.

10.2 This Rule does not prevent a practitioner or an associate borrowing from a client which is recognised by the practitioner's professional association as a business entity engaged in money lending.

PRACTITIONERS' DUTIES TO THE COURT

Practitioners, in all their dealings with the courts, whether those dealings involve the obtaining and presentation of evidence, the preparation and filing of documents, instructing an advocate or appearing as an advocate, should act with competence, honesty and candour. Practitioners should be frank in their responses and disclosures to the Court, and diligent in their observance of undertakings which they give to the Court or their opponents.

11. Preparation of Affidavits

11.1 If a practitioner is:

(a) aware that a client is withholding information required by an order or rule of a court, with the intention of misleading the court, or

(b) informed by a client that an affidavit, of the client, filed by the practitioner, is false in a material particular,

and the client will not make the relevant information available, or allow the practitioner to correct the false evidence, the practitioner must, on reasonable notice, terminate the retainer and, without disclosing the reasons to the court, give notice of the practitioner's withdrawal from the proceedings.

11.2 A practitioner must not draw an affidavit alleging criminality, fraud, or other serious misconduct unless the practitioner believes on reasonable grounds that:

(a) factual material already available to the practitioner provides a proper basis for the allegation;

(b) the allegation will be material and admissible in the case, as to an issue or as to credit; and

(c) the client wishes the allegation to be made after having been advised of the seriousness of the allegation.

12. **Practitioner a Material Witness in Client's Case**

A practitioner must not appear as an advocate and, unless there are exceptional circumstances justifying the practitioner's continuing retainer by the practitioner's client, the practitioner must not act, or continue to act, in a case in which it is known, or becomes apparent, that the practitioner will be required to give evidence material to the determination of contested issues before the court.

13. **Admission of Guilt**

13.1 If a practitioner's client, who is the accused or defendant in criminal proceedings, admits to the practitioner before the commencement of, or during, the proceedings, that the client is guilty of the offence charged, the practitioner must not, whether acting as instructing practitioner or advocate :

(a) put a defence case which is inconsistent with the client's confession;

(b) falsely claim or suggest that another person committed the offence; or

(c) continue to act if the client insists on giving evidence denying guilt or requires the making of a statement asserting the client's innocence.

13.2 A practitioner may continue to act for a client who elects to plead "not guilty" after admitting guilt to the practitioner, and in that event, the practitioner must ensure that the prosecution is put to proof of its case, and the practitioner may argue that the evidence is insufficient to justify a conviction or that the prosecution has otherwise failed to establish the commission of the offence by the client.

14. Admission of Perjury

14.1 If a practitioner's client admits to the practitioner, during or after any proceedings, while judgment is reserved, that the client has given materially false evidence or tendered a false or misleading document in the proceedings, the practitioner must :

(a) advise the client that the Court should be informed of the false evidence, and request the client's authority to inform the Court and correct the record; and

(b) if the client refuses to provide that authority, withdraw from the proceedings immediately, and terminate the retainer.

15. **Bail**

15.1 A practitioner must not promote, or be a party to, any arrangement whereby the bail provided by a surety is obtained by using the money of the accused person, or by which the surety is given an indemnity by the accused person or a third party acting on behalf of the accused person.

15.2 A practitioner must not become the surety for the practitioner's client's bail.

Australian Capital Territory

Legal Profession Act 2006

A2006-25

Republication No 27

Effective: 12 June 2014

Republication date: 12 June 2014

Last amendment made by A2014-18
(republication for amendments by A2014-17)

Authorised by the ACT Parliamentary Counsel

About this republication

The republished law

This is a republication of the *Legal Profession Act 2006* (including any amendment made under the *Legislation Act 2001*, part 11.3 (Editorial changes)) as in force on 12 June 2014. It also includes any commencement, amendment, repeal or expiry affecting this republished law to 12 June 2014.

The legislation history and amendment history of the republished law are set out in endnotes 3 and 4.

Kinds of republications

The Parliamentary Counsel's Office prepares 2 kinds of republications of ACT laws (see the ACT legislation register at www.legislation.act.gov.au):

- authorised republications to which the *Legislation Act 2001* applies
- unauthorised republications.

The status of this republication appears on the bottom of each page.

Editorial changes

The *Legislation Act 2001*, part 11.3 authorises the Parliamentary Counsel to make editorial amendments and other changes of a formal nature when preparing a law for republication. Editorial changes do not change the effect of the law, but have effect as if they had been made by an Act commencing on the republication date (see *Legislation Act 2001*, s 115 and s 117). The changes are made if the Parliamentary Counsel considers they are desirable to bring the law into line, or more closely into line, with current legislative drafting practice.

This republication includes amendments made under part 11.3 (see endnote 1).

Uncommenced provisions and amendments

If a provision of the republished law has not commenced, the symbol **U** appears immediately before the provision heading. Any uncommenced amendments that affect this republished law are accessible on the ACT legislation register (www.legislation.act.gov.au). For more information, see the home page for this law on the register.

Modifications

If a provision of the republished law is affected by a current modification, the symbol **M** appears immediately before the provision heading. The text of the modifying provision appears in the endnotes. For the legal status of modifications, see the *Legislation Act 2001*, section 95.

Penalties

At the republication date, the value of a penalty unit for an offence against this law is $140 for an individual and $700 for a corporation (see *Legislation Act 2001*, s 133).

Australian Capital Territory

Legal Profession Act 2006

Contents

Contents

Evidence Act 1995

Act No. 2 of 1995 as amended

This compilation was prepared on 1 July 2012
taking into account amendments up to Act No. 132 of 2011

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

Part 3.10—Privileges

Division 1—Client legal privilege

117 Definitions

(1) In this Division:

client includes the following:

(a) a person or body who engages a lawyer to provide legal services or who employs a lawyer (including under a contract of service);

(b) an employee or agent of a client;

(c) an employer of a lawyer if the employer is:

(i) the Commonwealth or a State or Territory; or

(ii) a body established by a law of the Commonwealth or a State or Territory;

(d) if, under a law of a State or Territory relating to persons of unsound mind, a manager, committee or person (however described) is for the time being acting in respect of the person, estate or property of a client—a manager, committee or person so acting;

(e) if a client has died—a personal representative of the client;

(f) a successor to the rights and obligations of a client, being rights and obligations in respect of which a confidential communication was made.

confidential communication means a communication made in such circumstances that, when it was made:

(a) the person who made it; or

(b) the person to whom it was made;

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.

confidential document means a document prepared in such circumstances that, when it was prepared:

(a) the person who prepared it; or

(b) the person for whom it was prepared;

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.

lawyer means:

(a) an Australian lawyer; and

(b) an Australian-registered foreign lawyer; and

(c) an overseas-registered foreign lawyer or a natural person who, under the law of a foreign country, is permitted to engage in legal practice in that country; and

(d) an employee or agent of a lawyer referred to in paragraph (a), (b) or (c).

party includes the following:

(a) an employee or agent of a party;

(b) if, under a law of a State or Territory relating to persons of unsound mind, a manager, committee or person (however described) is for the time being acting in respect of the person, estate or property of a party—a manager, committee or person so acting;

(c) if a party has died—a personal representative of the party;

(d) a successor to the rights and obligations of a party, being rights and obligations in respect of which a confidential communication was made.

(2) A reference in this Division to the commission of an act includes a reference to a failure to act.

118 Legal advice

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

(a) a confidential communication made between the client and a lawyer; or

(b) a confidential communication made between 2 or more lawyers acting for the client; or

(c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or another person;

for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

119 Litigation

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

(a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or

(b) the contents of a confidential document (whether delivered or not) that was prepared;

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

120 Unrepresented parties

(1) Evidence is not to be adduced if, on objection by a party who is not represented in the proceeding by a lawyer, the court finds that adducing the evidence would result in disclosure of:

(a) a confidential communication between the party and another person; or

(b) the contents of a confidential document (whether delivered or not) that was prepared, either by or at the direction or request of, the party;

for the dominant purpose of preparing for or conducting the proceeding.

121 Loss of client legal privilege: generally

(1) This Division does not prevent the adducing of evidence relevant to a question concerning the intentions, or competence in law, of a client or party who has died.

(2) This Division does not prevent the adducing of evidence if, were the evidence not adduced, the court would be prevented, or it could reasonably be expected that the court would be prevented, from enforcing an order of an Australian court.

(3) This Division does not prevent the adducing of evidence of a communication or document that affects a right of a person.

122 Loss of client legal privilege: consent and related matters

(1) This Division does not prevent the adducing of evidence given with the consent of the client or party concerned.

(2) Subject to subsection (5), this Division does not prevent the adducing of evidence if the client or party concerned has acted in a way that is inconsistent with the client or party objecting to the adducing of the evidence because it would result in a disclosure of a kind referred to in section 118, 119 or 120.

(3) Without limiting subsection (2), a client or party is taken to have so acted if:

(a) the client or party knowingly and voluntarily disclosed the substance of the evidence to another person; or

(b) the substance of the evidence has been disclosed with the express or implied consent of the client or party.

(4) The reference in paragraph (3)(a) to a knowing and voluntary disclosure does not include a reference to a disclosure by a person who was, at the time of the disclosure, an employee or agent of the client or party or of a lawyer of the client or party unless the employee or agent was authorised by the client, party or lawyer to make the disclosure.

(5) A client or party is not taken to have acted in a manner inconsistent with the client or party objecting to the adducing of the evidence merely because:

(a) the substance of the evidence has been disclosed:

(i) in the course of making a confidential communication or preparing a confidential document; or

(ii) as a result of duress or deception; or

(iii) under compulsion of law; or

(iv) if the client or party is a body established by, or a person holding an office under, an Australian law—to the Minister, or the Minister of the Commonwealth, the State or Territory, administering the law, or part of the law, under which the body is established or the office is held; or

(b) of a disclosure by a client to another person if the disclosure concerns a matter in relation to which the same lawyer is providing, or is to provide, professional legal services to both the client and the other person; or

(c) of a disclosure to a person with whom the client or party had, at the time of the disclosure, a common interest relating to the proceeding or an anticipated or pending proceeding in an Australian court or a foreign court.

(6) This Division does not prevent the adducing of evidence of a document that a witness has used to try to revive the witness's memory about a fact or opinion or has used as mentioned in section 32 (Attempts to revive memory in court) or 33 (Evidence given by police officers).

123 Loss of client legal privilege: defendants

In a criminal proceeding, this Division does not prevent a defendant from adducing evidence unless it is evidence of:

(a) a confidential communication made between an associated defendant and a lawyer acting for that person in connection with the prosecution of that person; or

(b) the contents of a confidential document prepared by an associated defendant or by a lawyer acting for that person in connection with the prosecution of that person.

Note: ***Associated defendant*** is defined in the Dictionary.

124 Loss of client legal privilege: joint clients

(1) This section only applies to a civil proceeding in connection with which 2 or more parties have, before the commencement of the proceeding, jointly retained a lawyer in relation to the same matter.

(2) This Division does not prevent one of those parties from adducing evidence of:

(a) a communication made by any one of them to the lawyer; or

(b) the contents of a confidential document prepared by or at the direction or request of any one of them;

in connection with that matter.

Annex 45: *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth).

Foreign Passports (Law Enforcement and Security) Act 2005

No. 15, 1938 as amended

Compilation start date:	29 June 2013
Includes amendments up to:	Act No. 103, 2013

Prepared by the Office of Parliamentary Counsel, Canberra

About this compilation

The compiled Act

This is a compilation of the *Foreign Passports (Law Enforcement and Security) Act 2005* as amended and in force on 29 June 2013. It includes any amendment affecting the compiled Act to that date.

This compilation was prepared on 5 August 2013.

The notes at the end of this compilation (the ***endnotes***) include information about amending Acts and instruments and the amendment history of each amended provision.

Uncommenced provisions and amendments

If a provision of the compiled Act is affected by an uncommenced amendment, the text of the uncommenced amendment is set out in the endnotes.

Application, saving and transitional provisions for amendments

If the operation of an amendment is affected by an application, saving or transitional provision, the provision is identified in the endnotes.

Modifications

If a provision of the compiled Act is affected by a textual modification that is in force, the text of the modifying provision is set out in the endnotes.

Provisions ceasing to have effect

If a provision of the compiled Act has expired or otherwise ceased to have effect in accordance with a provision of the Act, details of the provision are set out in the endnotes.

Contents

An Act relating to foreign passports and other foreign travel documents

Part 1—Preliminary

1 Short title

This Act may be cited as the *Foreign Passports (Law Enforcement and Security) Act 2005*.

2 Commencement

This Act shall commence on a date to be fixed by Proclamation.

4 Extension of Act to Territories

This Act shall extend to the Territories.

5 Interpretation

(1) In this Act, unless the contrary intention appears:

Australia includes the Territories.

competent authority means a competent authority for the purposes of section 13, 14 or 15.

document includes:

(a) any paper or other material on which there is writing; or

(b) any paper or other material on which there are marks, figures, symbols or perforations that are:

(i) capable of being given a meaning by persons qualified to interpret them; or

(ii) capable of being responded to by a computer, a machine or an electronic device; or

(c) any article or material (for example, a disk or a tape) from which information is capable of being reproduced with or without the aid of any other article or device.

enforcement officer means:

(a) an officer of Customs within the meaning of the *Customs Act 1901*; or

(b) a member or a special member of the Australian Federal Police; or

(c) an officer of the police force of a State or Territory; or

(d) a person, or a person who is one of a class of persons, authorised in writing by the Minister to exercise the powers and perform the functions of an enforcement officer.

foreign passport means a passport issued by or on behalf of the government of a foreign country.

foreign travel document means:

(a) a foreign passport; or

(b) a document of identity issued for travel purposes by or on behalf of the government of a foreign country (whether or not also issued for another purpose).

Minister's determination means an instrument made by the Minister for the purposes of this Act under section 24.

5A Application of the *Criminal Code*

Chapter 2 of the *Criminal Code* applies to all offences against this Act.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Division 2—Demands for foreign travel documents

16 Demand for foreign travel document if authorised by Minister

(1) If a competent authority makes a request under section 13, 14 or 15 in relation to a person, the Minister may order the surrender of the person's foreign travel documents.

(2) If the Minister has made an order under subsection (1), an enforcement officer may demand that the person surrender to the officer the person's foreign travel documents.

(3) If the person does not immediately surrender the person's foreign travel documents, the officer may:
  (a) seize the person's foreign travel documents; and
  (b) seize any foreign travel document of the person that is not in the possession or control of any person.

(4) Subsection (3) does not authorise an enforcement officer to enter premises that the officer would not otherwise be authorised to enter.

(5) A person commits an offence if:
  (a) an enforcement officer demands under subsection (2) that the person surrender the person's foreign travel documents; and
  (b) the officer informs the person that the Minister has ordered the surrender of the person's foreign travel documents and that the officer is authorised to make the demand; and
  (c) the officer informs the person that it may be an offence not to comply with the demand; and
  (d) the person has possession or control of one or more of the person's foreign travel documents; and
  (e) the person fails to surrender those documents to the officer immediately.

  Penalty: Imprisonment for 1 year or 20 penalty units, or both.

(6) A foreign travel document obtained by an enforcement officer under this section may be retained for so long as there is a competent authority who:

(a) believes on reasonable grounds that a circumstance mentioned in section 13 or 14 applies in relation to the person; or

(b) suspects on reasonable grounds that a circumstance mentioned in section 15 applies in relation to the person.

(7) Despite subsection (6), a foreign travel document must be returned to the person to whom it was issued if, on review by the Administrative Appeals Tribunal:

(a) the Tribunal sets aside the decision of the Minister to order the surrender of the document; and

(b) either:

(i) the Tribunal substitutes a decision not to order the surrender of the document; or

(ii) the Tribunal remits the matter for reconsideration and, on that reconsideration, the Minister decides not to order the surrender of the document.

17 Demand for suspicious foreign travel document

(1) An enforcement officer may demand that a person surrender to the officer:

(a) a foreign travel document that has been obtained, or that the officer suspects on reasonable grounds has been obtained, by means of a false or misleading statement, false or misleading information or a false or misleading document; or

(b) a foreign travel document or other document that has been used, or that the officer suspects on reasonable grounds has been used, in the commission of an offence against this Act.

(2) A person commits an offence if:

(a) an enforcement officer demands under subsection (1) that the person surrender a document; and

(b) the officer informs the person that the officer is authorised to demand that document; and

(c) the officer informs the person that it may be an offence not to comply with the demand; and

(d) the person has possession or control of the document; and

(e) the person fails to surrender the document to the officer immediately.

Penalty: Imprisonment for 1 year or 20 penalty units, or both.

(3) A document surrendered to an enforcement officer under this section may be retained for so long as there is an enforcement officer who suspects on reasonable grounds:

(a) that the document was obtained by means of a false or misleading statement, false or misleading information or a false or misleading document; or

(b) that the document has been used in the commission of an offence against this Act.

Foreign States Immunities Act 1985

Act No. 196 of 1985 as amended

This compilation was prepared on 3 March 2010
taking into account amendments up to Act No. 8 of 2010

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting and Publishing,
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Contents

An Act relating to foreign State immunity

Part I—Preliminary

1 Short title [*see* Note 1]

This Act may be cited as the *Foreign States Immunities Act 1985*.

2 Commencement [*see* Note 1]

The provisions of this Act shall come into operation on such day as is, or such respective days as are, fixed by Proclamation.

3 Interpretation

(1) In this Act, unless the contrary intention appears:

agreement means an agreement in writing and includes:

(a) a treaty or other international agreement in writing; and

(b) a contract or other agreement in writing.

Australia when used in a geographical sense, includes each of the external Territories.

bill of exchange includes a promissory note.

court includes 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.

Department of Foreign Affairs means the Department administered by the Minister who administers the *Diplomatic Privileges and Immunities Act 1967*.

diplomatic property means property that, at the relevant time, is in use predominantly for the purpose of establishing or maintaining a diplomatic or consular mission, or a visiting mission, of a foreign State to Australia.

foreign State means a country the territory of which is outside Australia, being a country that is:

(a) an independent sovereign state; or

(b) a separate territory (whether or not it is self-governing) that is not part of an independent sovereign state.

initiating process means an instrument (including a statement of claim, application, summons, writ, order or third party notice) by reference to which a person becomes a party to a proceeding.

law of Australia means:

(a) a law in force throughout Australia; or

(b) a law of or in force in a part of Australia;

and includes the principles and rules of the common law and of equity as so in force.

military property means:

(a) a ship of war, a Government yacht, a patrol vessel, a police or customs vessel, a hospital ship, a defence force supply ship or an auxiliary vessel, being a ship or vessel that, at the relevant time, is operated by the foreign State concerned (whether pursuant to requisition or under a charter by demise or otherwise); or

(b) property (not being a ship or vessel) that is:

(i) being used in connection with a military activity; or

(ii) under the control of a military authority or defence agency for military or defence purposes.

Minister for Foreign Affairs means the Minister who administers the *Diplomatic Privileges and Immunities Act 1967*.

proceeding means 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.

property includes a chose in action.

separate entity, in relation to a foreign State, means a natural person (other than an Australian citizen), or a body corporate or corporation sole (other than a body corporate or corporation sole that has been established by or under a law of Australia), who or that:

(a) is an agency or instrumentality of the foreign State; and

(b) is not a department or organ of the executive government of the foreign State.

(2) For the purposes of the definition of ***separate entity*** in subsection (1), a natural person who is, or a body corporate or a corporation sole that is, an agency of more than one foreign State shall be taken to be a separate entity of each of the foreign States.

(3) Unless the contrary intention appears, a reference in this Act to a foreign State includes a reference to:

(a) a province, state, self-governing territory or other political subdivision (by whatever name known) of a foreign State;

(b) the head of a foreign State, or of a political subdivision of a foreign State, in his or her public capacity; and

(c) the executive government or part of the executive government of a foreign State or of a political subdivision of a foreign State, including a department or organ of the executive government of a foreign State or subdivision;

but does not include a reference to a separate entity of a foreign State.

(4) A reference in this Act to a court of Australia includes a reference to a court that has jurisdiction in or for any part of Australia.

(5) A reference in this Act to a commercial purpose includes a reference to a trading, a business, a professional and an industrial purpose.

(6) A reference in this Act to the entering of appearance or to the entry of judgment in default of appearance includes a reference to any like procedure.

4 External Territories

This Act extends to each external Territory.

5 Act to bind Crown

This Act binds the Crown in all its capacities.

6 Savings of other laws

This Act does not affect an immunity or privilege that is conferred by or under the *Consular Privileges and Immunities Act 1972*, the *Defence (Visiting Forces) Act 1963*, the *Diplomatic Privileges and Immunities Act 1967* or any other Act.

7 Application

(1) Part II (other than section 10) does not apply in relation to a proceeding concerning:

(a) a contract or other agreement or a bill of exchange that was made or given;

(b) a transaction or event that occurred;

(c) an act done or omitted to have been done; or

(d) a right, liability or obligation that came into existence;

before the commencement of this Act.

(2) Section 10 does not apply in relation to a submission mentioned in that section that was made before the commencement of this Act.

(3) Part III and section 36 do not apply in relation to a proceeding instituted before the commencement of this Act.

(4) Part IV only applies where, by virtue of a provision of Part II, the foreign State is not immune from the jurisdiction of the courts of Australia in the proceeding concerned.

8 Application to courts

In the application of this Act to a court, this Act has effect only in relation to the exercise or performance by the court of a judicial power or function or a power or function that is of a like kind.

Part II—Immunity from jurisdiction

9 General immunity from jurisdiction

Except as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding.

10 Submission to jurisdiction

(1) A foreign State is not immune in a proceeding in which it has submitted to the jurisdiction in accordance with this section.

(2) A foreign State may submit to the jurisdiction at any time, whether by agreement or otherwise, but a foreign State shall not be taken to have so submitted by reason only that it is a party to an agreement the proper law of which is the law of Australia.

(3) A submission under subsection (2) may be subject to a specified limitation, condition or exclusion (whether in respect of remedies or otherwise).

(4) Without limiting any other power of a court to dismiss, stay or otherwise decline to hear and determine a proceeding, the court may dismiss, stay or otherwise decline to hear and determine a proceeding if it is satisfied that, by reason of the nature of a limitation, condition or exclusion to which a submission is subject (not being a limitation, condition or exclusion in respect of remedies), it is appropriate to do so.

(5) An agreement by a foreign State to waive its immunity under this Part has effect to waive that immunity and the waiver may not be withdrawn except in accordance with the terms of the agreement.

(6) Subject to subsections (7), (8) and (9), a foreign State may submit to the jurisdiction in a proceeding by:

(a) instituting the proceeding; or

(b) intervening in, or taking a step as a party to, the proceeding.

(7) A foreign State shall not be taken to have submitted to the jurisdiction in a proceeding by reason only that:

(a) it has made an application for costs; or

(b) it has intervened, or has taken a step, in the proceeding for the purpose or in the course of asserting immunity.

(8) Where the foreign State is not a party to a proceeding, it shall not be taken to have submitted to the jurisdiction by reason only that it has intervened in the proceeding for the purpose or in the course of asserting an interest in property involved in or affected by the proceeding.

(9) Where:

(a) the intervention or step was taken by a person who did not know and could not reasonably have been expected to know of the immunity; and

(b) the immunity is asserted without unreasonable delay;

the foreign State shall not be taken to have submitted to the jurisdiction in the proceeding by reason only of that intervention or step.

(10) Where a foreign State has submitted to the jurisdiction in a proceeding, then, subject to the operation of subsection (3), it is not immune in relation to a claim made in the proceeding by some other party against it (whether by way of set-off, counter-claim or otherwise), being a claim that arises out of and relates to the transactions or events to which the proceeding relates.

(11) In addition to any other person who has authority to submit, on behalf of a foreign State, to the jurisdiction:

(a) the person for the time being performing the functions of the head of the State's diplomatic mission in Australia has that authority; and

(b) a person who has entered into a contract on behalf of and with the authority of the State has authority to submit in that contract, on behalf of the State, to the jurisdiction in respect of a proceeding arising out of the contract.

11 Commercial transactions

(1) A foreign State is not immune in a proceeding in so far as the proceeding concerns a commercial transaction.

(2) Subsection (1) does not apply:

(a) if all the parties to the proceeding:

(i) are foreign States or are the Commonwealth and one or more foreign States; or

(ii) have otherwise agreed in writing; or

(b) in so far as the proceeding concerns a payment in respect of a grant, a scholarship, a pension or a payment of a like kind.

(3) In this section, ***commercial transaction*** means a commercial, trading, business, professional or industrial or like transaction into which the foreign State has entered or a like activity in which the State has engaged and, without limiting the generality of the foregoing, includes:

(a) a contract for the supply of goods or services;

(b) an agreement for a loan or some other transaction for or in respect of the provision of finance; and

(c) a guarantee or indemnity in respect of a financial obligation;

but does not include a contract of employment or a bill of exchange.

12 Contracts of employment

(1) A foreign State, as employer, is not immune in a proceeding in so far as the proceeding concerns the employment of a person under a contract of employment that was made in Australia or was to be performed wholly or partly in Australia.

(2) A reference in subsection (1) to a proceeding includes a reference to a proceeding concerning:

(a) a right or obligation conferred or imposed by a law of Australia on a person as employer or employee; or

(b) a payment the entitlement to which arises under a contract of employment.

(3) Where, at the time when the contract of employment was made, the person employed was:

(a) a national of the foreign State but not a permanent resident of Australia; or

(b) an habitual resident of the foreign State;

subsection (1) does not apply.

(4) Subsection (1) does not apply where:

(a) an inconsistent provision is included in the contract of employment; and

(b) a law of Australia does not avoid the operation of, or prohibit or render unlawful the inclusion of, the provision.

(5) Subsection (1) does not apply in relation to the employment of:

(a) a member of the diplomatic staff of a mission as defined by the Vienna Convention on Diplomatic Relations, being the Convention the English text of which is set out in the Schedule to the *Diplomatic Privileges and Immunities Act 1967*; or

(b) a consular officer as defined by the Vienna Convention on Consular Relations, being the Convention the English text of which is set out in the Schedule to the *Consular Privileges and Immunities Act 1972*.

(6) Subsection (1) does not apply in relation to the employment of:

(a) a member of the administrative and technical staff of a mission as defined by the Convention referred to in paragraph (5)(a); or

(b) a consular employee as defined by the Convention referred to in paragraph (5)(b);

unless the member or employee was, at the time when the contract of employment was made, a permanent resident of Australia.

(7) In this section, permanent resident of Australia means:

(a) an Australian citizen; or

(b) a person resident in Australia whose continued presence in Australia is not subject to a limitation as to time imposed by or under a law of Australia.

13 Personal injury and damage to property

A foreign State is not immune in a proceeding in so far as the proceeding concerns:

(a) the death of, or personal injury to, a person; or

(b) loss of or damage to tangible property;

caused by an act or omission done or omitted to be done in Australia.

14 Ownership, possession and use of property etc.

(1) A foreign State is not immune in a proceeding in so far as the proceeding concerns:

(a) an interest of the State in, or the possession or use by the State of, immovable property in Australia; or

(b) an obligation of the State that arises out of its interest in, or its possession or use of, property of that kind.

(2) A foreign State is not immune in a proceeding in so far as the proceeding concerns an interest of the State in property that arose by way of gift made in Australia or by succession.

(3) A foreign State is not immune in a proceeding in so far as the proceeding concerns:

(a) bankruptcy, insolvency or the winding up of a body corporate; or

(b) the administration of a trust, of the estate of a deceased person or of the estate of a person of unsound mind.

15 Copyright, patents, trade marks etc.

(1) A foreign State is not immune in a proceeding in so far as the proceeding concerns:

(a) the ownership of a copyright or the ownership, or the registration or protection in Australia, of an invention, a design or a trade mark;

(b) an alleged infringement by the foreign State in Australia of copyright, a patent for an invention, a registered trade mark or a registered design; or

(c) the use in Australia of a trade name or a business name.

(2) Subsection (1) does not apply in relation to the importation into Australia, or the use in Australia, of property otherwise than in the course of or for the purposes of a commercial transaction as defined by subsection 11(3).

16 Membership of bodies corporate etc.

(1) A foreign State is not immune in a proceeding in so far as the proceeding concerns its membership, or a right or obligation that relates to its membership, of a body corporate, an unincorporated body or a partnership that:

(a) has a member that is not a foreign State or the Commonwealth; and

(b) is incorporated or has been established under the law of Australia or is controlled from, or has its principal place of business in, Australia;

being a proceeding arising between the foreign State and the body or other members of the body or between the foreign State and one or more of the other partners.

(2) Where a provision included in:

(a) the constitution or other instrument establishing or regulating the body or partnership; or

(b) an agreement between the parties to the proceeding;

is inconsistent with subsection (1), that subsection has effect subject to that provision.

17 Arbitrations

(1) Where a foreign State is a party to an agreement to submit a dispute to arbitration, then, subject to any inconsistent provision in the agreement, the foreign State is not immune in a proceeding for the exercise of the supervisory jurisdiction of a court in respect of the arbitration, including a proceeding:

(a) by way of a case stated for the opinion of a court;

(b) to determine a question as to the validity or operation of the agreement or as to the arbitration procedure; or

(c) to set aside the award.

(2) Where:

(a) apart from the operation of subparagraph 11(2)(a)(ii), subsection 12(4) or subsection 16(2), a foreign State would not be immune in a proceeding concerning a transaction or event; and

(b) the foreign State is a party to an agreement to submit to arbitration a dispute about the transaction or event;

then, subject to any inconsistent provision in the agreement, the foreign State is not immune in a proceeding concerning the recognition as binding for any purpose, or for the enforcement, of an award made pursuant to the arbitration, wherever the award was made.

(3) Subsection (1) does not apply where the only parties to the agreement are any 2 or more of the following:

(a) a foreign State;

(b) the Commonwealth;

(c) an organisation the members of which are only foreign States or the Commonwealth and one or more foreign States.

18 Actions *in rem*

(1) A foreign State is not immune in a proceeding commenced as an action *in rem* against a ship concerning a claim in connection with the ship if, at the time when the cause of action arose, the ship was in use for commercial purposes.

(2) A foreign State is not immune in a proceeding commenced as an action *in rem* against a ship concerning a claim against another ship if:

(a) at the time when the proceeding was instituted, the ship that is the subject of the action *in rem* was in use for commercial purposes; and

(b) at the time when the cause of action arose, the other ship was in use for commercial purposes.

(3) A foreign State is not immune in a proceeding commenced as an action *in rem* against cargo that was, at the time when the cause of action arose, a commercial cargo.

(4) The preceding provisions of this section do not apply in relation to the arrest, detention or sale of a ship or cargo.

(5) A reference in this section to a ship in use for commercial purposes or to a commercial cargo is a reference to a ship or a cargo that is commercial property as defined by subsection 32(3).

19 Bills of exchange

Where:

(a) a bill of exchange has been drawn, made, issued or indorsed by a foreign State in connection with a transaction or event; and

(b) the foreign State would not be immune in a proceeding in so far as the proceeding concerns the transaction or event;

the foreign State is not immune in a proceeding in so far as the proceeding concerns the bill of exchange.

20 Taxes

A foreign State is not immune in a proceeding in so far as the proceeding concerns an obligation imposed on it by or under a provision of a law of Australia with respect to taxation, being a provision that is prescribed, or is included in a class of provisions that is prescribed, for the purposes of this section.

21 Related proceedings

Where, by virtue of the operation of the preceding provisions of this Part, a foreign State is not immune in a proceeding in so far as the proceeding concerns a matter, it is not immune in any other proceeding (including an appeal) that arises out of and relates to the first-mentioned proceeding in so far as that other proceeding concerns that matter.

22 Application of Part to separate entities

The preceding provisions of this Part (other than subparagraph 11(2)(a)(i), paragraph 16(1)(a) and subsection 17(3)) apply in relation to a separate entity of a foreign State as they apply in relation to the foreign State.

Part III—Service and judgments

23 Service of initiating process by agreement

Service of initiating process on a foreign State or on a separate entity of a foreign State may be effected in accordance with an agreement (wherever made and whether made before or after the commencement of this Act) to which the State or entity is a party.

24 Service through the diplomatic channel

(1) Initiating process that is to be served on a foreign State may be delivered to the Attorney-General for transmission by the Department of Foreign Affairs to the department or organ of the foreign State that is equivalent to that Department.

(2) The initiating process shall be accompanied by:
  (a) a request in accordance with Form 1 in the Schedule;
  (b) a statutory declaration of the plaintiff or applicant in the proceeding stating that the rules of court or other laws (if any) in respect of service outside the jurisdiction of the court concerned have been complied with; and
  (c) if English is not an official language of the foreign State:
    (i) a translation of the initiating process into an official language of the foreign State; and
    (ii) a certificate in that language, signed by the translator, setting out particulars of his or her qualifications as a translator and stating that the translation is an accurate translation of the initiating process.

(3) Where the process and documents are delivered to the equivalent department or organ of the foreign State in the foreign State, service shall be taken to have been effected when they are so delivered.

(4) Where the process and documents are delivered to some other person on behalf of and with the authority of the foreign State, service shall be taken to have been effected when they are so delivered.

(5) Subsections (1) to (4) (inclusive) do not exclude the operation of any rule of court or other law under which the leave of a court is required in relation to service of the initiating process outside the jurisdiction.

(6) Service of initiating process under this section shall be taken to have been effected outside the jurisdiction and in the foreign State concerned, wherever the service is actually effected.

(7) The time for entering an appearance begins to run at the expiration of 2 months after the date on which service of the initiating process was effected.

(8) This section does not apply to service of initiating process in a proceeding commenced as an action *in rem*.

25 Other service ineffective

Purported service of an initiating process upon a foreign State in Australia otherwise than as allowed or provided by section 23 or 24 is ineffective.

26 Waiver of objection to service

Where a foreign State enters an appearance in a proceeding without making an objection in relation to the service of the initiating process, the provisions of this Act in relation to that service shall be taken to have been complied with.

27 Judgment in default of appearance

(1) A judgment in default of appearance shall not be entered against a foreign State unless:

(a) it is proved that service of the initiating process was effected in accordance with this Act and that the time for appearance has expired; and

(b) the court is satisfied that, in the proceeding, the foreign State is not immune.

(2) A judgment in default of appearance shall not be entered against a separate entity of a foreign State unless the court is satisfied that, in the proceeding, the separate entity is not immune.

28 Enforcement of default judgments

(1) Subject to subsection (6), a judgment in default of appearance is not capable of being enforced against a foreign State until the expiration of 2 months after the date on which service of:

(a) a copy of the judgment, sealed with the seal of the court or, if there is no seal, certified by an officer of the court to be a true copy of the judgment; and

(b) if English is not an official language of the foreign State:

(i) a translation of the judgment into an official language of the foreign State; and

(ii) a certificate in that language, signed by the translator, setting out particulars of his or her qualifications as a translator and stating that the translation is an accurate translation of the judgment;

has been effected in accordance with this section on the department or organ of the foreign State that is equivalent to the Department of Foreign Affairs.

(2) Where a document is to be served as mentioned in subsection (1), the person in whose favour the judgment was given shall give it, together with a request in accordance with Form 2 in the Schedule, to the Attorney-General for transmission by the Department of Foreign Affairs to the department or organ of the foreign State that is equivalent to that Department.

(3) Where the document is delivered to the equivalent department or organ of the foreign State in the foreign State, service shall be taken to have been effected when it is so delivered.

(4) Where the document is delivered to some other person on behalf of and with the authority of the foreign State, service shall be taken to have been effected when it is so delivered.

(5) The time, if any, for applying to have the judgment set aside shall be at least 2 months after the date on which the document is delivered to or received on behalf of that department or organ of the foreign State.

(6) Where a judgment in default of appearance has been given by a court against a foreign State, the court may, on the application of the person in whose favour the judgment was given, permit, on such terms and conditions as it thinks fit, the judgment to be

enforced in accordance with this Act against the foreign State before the expiration of the period mentioned in subsection (1).

29 Power to grant relief

(1) Subject to subsection (2), a court may make any order (including an order for interim or final relief) against a foreign State that it may otherwise lawfully make unless the order would be inconsistent with an immunity under this Act.

(2) A court may not make an order that a foreign State employ a person or re-instate a person in employment.

Part IV—Enforcement

30 Immunity from execution

Except as provided by this Part, 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.

31 Waiver of immunity from execution

(1) A foreign State may at any time by agreement waive the application of section 30 in relation to property, but it shall not be taken to have done so by reason only that it has submitted to the jurisdiction.

(2) The waiver may be subject to specified limitations.

(3) An agreement by a foreign State to waive its immunity under section 30 has effect to waive that immunity and the waiver may not be withdrawn except in accordance with the terms of the agreement.

(4) A waiver does not apply in relation to property that is diplomatic property or military property unless a provision in the agreement expressly designates the property as property to which the waiver applies.

(5) In addition to any other person who has authority to waive the application of section 30 on behalf of a foreign State or a separate entity of the foreign State, the person for the time being performing the functions of the head of the State's diplomatic mission in Australia has that authority.

32 Execution against commercial property

(1) Subject to the operation of any submission that is effective by reason of section 10, section 30 does not apply in relation to commercial property.

(2) Where a foreign State is not immune in a proceeding against or in connection with a ship or cargo, section 30 does not prevent the arrest, detention or sale of the ship or cargo if, at the time of the arrest or detention:

(a) the ship or cargo was commercial property; and

(b) in the case of a cargo that was then being carried by a ship belonging to the same or to some other foreign State—the ship was commercial property.

(3) For the purposes of this section:

(a) commercial property is property, other than diplomatic property or military property, that is in use by the foreign State concerned substantially for commercial purposes; and

(b) property that is apparently vacant or apparently not in use shall be taken to be being used for commercial purposes unless the court is satisfied that it has been set aside otherwise than for commercial purposes.

33 Execution against immovable property etc.

Where:

(a) property:

(i) has been acquired by succession or gift; or

(ii) is immovable property; and

(b) a right in respect of the property has been established as against a foreign State by a judgment or order in a proceeding as mentioned in section 14;

then, for the purpose of enforcing that judgment or order, section 30 does not apply to the property.

34 Restrictions on certain other relief

A penalty by way of fine or committal shall not be imposed in relation to a failure by a foreign State or by a person on behalf of a foreign State to comply with an order made against the foreign State by a court.

35 Application of Part to separate entities

(1) This Part applies in relation to a separate entity of a foreign State that is the central bank or monetary authority of the foreign State as it applies in relation to the foreign State.

(2) Subject to subsection (1), this Part applies in relation to a separate entity of the foreign State as it applies in relation to the foreign State if, in the proceeding concerned:

(a) the separate entity would, apart from the operation of section 10, have been immune from the jurisdiction; and

(b) it has submitted to the jurisdiction.

Part V—Miscellaneous

36 Heads of foreign States

(1) Subject to the succeeding provisions of this section, the *Diplomatic Privileges and Immunities Act 1967* extends, with such modifications as are necessary, in relation to the person who is for the time being:

(a) the head of a foreign State; or

(b) a spouse of the head of a foreign State;

as that Act applies in relation to a person at a time when he or she is the head of a diplomatic mission.

(2) This section does not affect the application of any law of Australia with respect to taxation.

(3) This section does not affect the application of any other provision of this Act in relation to a head of a foreign State in his or her public capacity.

(4) Part III extends in relation to the head of a foreign State in his or her private capacity as it applies in relation to the foreign State and, for the purpose of the application of Part III as it so extends, a reference in that Part to a foreign State shall be read as a reference to the head of the foreign State in his or her private capacity.

37 Effect of agreements on separate entities

An agreement made by a foreign State and applicable to a separate entity of that State has effect, for the purposes of this Act, as though the separate entity were a party to the agreement.

38 Power to set aside process etc.

Where, on the application of a foreign State or a separate entity of a foreign State, a court is satisfied that a judgment, order or process of the court made or issued in a proceeding with respect to the foreign State or entity is inconsistent with an immunity conferred by or under this Act, the court shall set aside the judgment, order or process so far as it is so inconsistent.

39 Discovery

(1) A penalty by way of fine or committal shall not be imposed in relation to a failure or refusal by a foreign State or by a person on behalf of a foreign State to disclose or produce a document or to furnish information for the purposes of a proceeding.

(2) Such a failure or refusal is not of itself sufficient ground to strike out a pleading or part of a pleading.

40 Certificate as to foreign State etc.

(1) The Minister for Foreign Affairs may certify in writing that, for the purposes of this Act:

(a) a specified country is, or was on a specified day, a foreign State;

(b) a specified territory is or is not, or was or was not on a specified day, part of a foreign State;

(c) a specified person is, or was at a specified time, the head of, or the government or part of the government of, a foreign State or a former foreign State; or

(d) service of a specified document as mentioned in section 24 or 28 was effected on a specified day.

(2) The Minister for Foreign Affairs may, either generally or as otherwise provided by the instrument of delegation, delegate by instrument in writing to a person his or her powers under subsection (1) in relation to the service of documents.

(3) A power so delegated, when exercised by the delegate, shall, for the purposes of this Act, be deemed to have been exercised by the Minister.

(4) A delegation under subsection (2) does not prevent the exercise of the power by the Minister.

(5) A certificate under this section is admissible as evidence of the facts and matters stated in it and is conclusive as to those facts and matters.

41 Certificate as to use

For the purposes of this Act, a certificate in writing given by the person for the time being performing the functions of the head of a foreign State's diplomatic mission in Australia to the effect that property specified in the certificate, being property:

(a) in which the foreign State or a separate entity of the foreign State has an interest; or

(b) that is in the possession or under the control of the foreign State or of a separate entity of the foreign State;

is or was at a specified time in use for purposes specified in the certificate is admissible as evidence of the facts stated in the certificate.

42 Restrictions and extensions of immunities and privileges—general

(1) Where the Minister is satisfied that an immunity or privilege conferred by this Act in relation to a foreign State is not accorded by the law of the foreign State in relation to Australia, the Governor-General may make regulations modifying the operation of this Act with respect to those immunities and privileges in relation to the foreign State.

(2) Where the Minister is satisfied that the immunities and privileges conferred by this Act in relation to a foreign State differ from those required by a treaty, convention or other agreement to which the foreign State and Australia are parties, the Governor-General may make regulations modifying the operation of this Act with respect to those immunities and privileges in relation to the foreign State so that this Act as so modified conforms with the treaty, convention or agreement.

(3) Regulations made under subsection (1) or (2) that are expressed to extend or restrict an immunity from the jurisdiction may be expressed to extend to a proceeding that was instituted before the commencement of the regulations and has not been finally disposed of.

(4) Regulations made under subsection (1) or (2) that are expressed to extend or restrict an immunity from execution or other relief may be expressed to extend to a proceeding that was instituted before the commencement of the regulations and in which procedures to

give effect to orders for execution or other relief have not been completed.

(5) Regulations in relation to which subsection (3) or (4) applies may make provision with respect to the keeping of property, or for the keeping of the proceeds of the sale of property, with which a proceeding specified in the regulations is concerned, including provision authorising an officer of a court to manage, control or preserve the property or, if, by reason of the condition of the property, it is necessary to do so, to sell or otherwise dispose of the property.

(6) Regulations under this section have effect notwithstanding that they are inconsistent with an Act (other than this Act) as in force at the time when the regulations came into operation.

(7) Jurisdiction is conferred on the Federal Court of Australia and, to the extent that the Constitution permits, on the courts of the Territories, and the courts of the States are invested with federal jurisdiction, in respect of matters arising under the regulations but a court of a Territory shall not exercise any jurisdiction so conferred in respect of property that is not within that Territory or a Territory in which the court may exercise jurisdiction and a court of a State shall not exercise any jurisdiction so invested in respect of property that is not within that State.

42A Extension of immunities—emergency prevention and management

(1) This section applies if the Minister is satisfied that a foreign State (or a separate entity of a foreign State) is providing, or is to provide, assistance or facilities:

(a) to the Australian Government, or the government of a State or Territory; and

(b) for the purposes of preparing for, preventing or managing emergencies or disasters (whether natural or otherwise) in Australia.

(2) The Governor-General may make regulations excluding or modifying the application of section 13 (personal injury and damage to property) with respect to the foreign State (or the separate entity of the foreign State) in relation to acts or omissions

done or omitted to be done by the foreign State (or the entity) in the course of the provision of the assistance or facilities.

Note: Section 22 applies section 13 to a separate entity of a foreign State.

43 Regulations

The Governor-General may make regulations, not inconsistent with this Act, prescribing matters:

(a) required or permitted by this Act to be prescribed; or

(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

DECREE-LAW NO. 3/2009
OF

NATIONAL INTELLIGENCE SERVICE

The consolidation of the democratic State based the rule of law and the affirmation of Timor-Leste as an independent country capable of facing the new threats emerging from the commission of acts of terrorism, sabotage, espionage and transnational organised crime demand the approval by the Government of the present juridical regime that establishes the National Intelligence Service, hereinafter referred to in short as SNI.

Pursuant to the law, SNI is a personalised service of the State with the responsibility to produce intelligence that contributes to the safeguarding of national independence, national interests, external security and the guarantee of internal security, the prevention of sabotage, terrorism, espionage, organised crime, as well as the prevention of acts which, by their nature, may alter or destroy the constitutionally established State based on the rule of law.

SNI is a personalised service of the State with internal and external competence and is barred from committing acts involving violation of rights, liberties and guarantees enshrined in the Constitution or acts falling under the exclusive competence of other authorities exercising internal security functions, including the Public Prosecution and the Courts, and its members are prevented from arresting people and from initiating criminal proceedings.

The present law reaffirms the competence of the Government in conducting the national security policy and determines the direct tutelage of the Prime Minister over SNI. It also reaffirms that this body is exclusively at the service of the State and is strictly barred from pursuing any political or partisan activity.

The present law further determines that the Interministerial Commission on Internal Security (established in the framework of the Internal Security Law) also operates as a consultative body insofar as intelligence is concerned, with a new body for operational coordination being established, to be known as Technical Commission, which will allow a

better efficacy and articulation in the exchange of intelligence between SNI and security and defense services.

A political-parliamentary monitoring system to oversee the activity and processing of data collected by SNI is hereby established. Such activity is to be carried out by an independent commission referred to as Monitoring Council and composed of one member designated by the President of the Republic and two members elected by absolute majority of the Members of the National Parliament for a five-year term. In addition, the possibility for each and every citizen to request the Monitoring Council to cancel or rectify erroneous and irregularly obtained acts or acts that violate individual rights, liberties and guarantees is equally guaranteed by the present statute.

Such options are commonly associated to the need to establish a public service that contributes to the affirmation of Timor-Leste as an independent country, capable of protecting itself from threats that may jeopardise national sovereignty or subvert the constitutionally established State based on the rule of law.

Thus, pursuant to subparagraph d) of article 116 of the Constitution, the Government enacts the following to have the force of law:

Chapter I
NATURE, FUNCTIONS, COMPETENCES AND DUTIES

Article 1
Establishment

The Organic of the National Intelligence Service, hereinafter referred to as SNI, is hereby established.

Article 2
Nature

1. The National Intelligence Service (SNI) is a personalised service of the State falling under the direct responsibility of the Prime Minister and enjoys administrative and financial autonomy.

2. SNI is exclusively at the service of the State and exercises its functions in compliance with the Constitution of the Democratic Republic of Timor-Leste and the laws, and in accordance with the provisions of the present law.

Article 3
Functions

SNI is the sole organism entrusted with the responsibility to produce intelligence that contributes towards the safeguarding of national independence, national interests and external security, including the guarantee of internal security in preventing sabotage, terrorism, espionage, organised crime and actions that, by their nature, may alter or destroy the constitutionally established State based on the rule of law.

Article 4
Limits to its activities

SNI is barred from committing acts falling under the exclusive competence of any of the other authorities exercising internal security functions, including the Public Prosecution and the Courts, and its members are prevented from detaining people and initiating criminal proceedings.

Article 5
Material competence

It is incumbent upon SNI, in the framework of its functions, to:

a) Systematically promote research, collection, analysis, interpretation and storage of intelligence and data.

b) Whenever so requested, inform the Prime Minister and the entities contained in a list designated by the latter, with the President of the Republic coming first on the list, of the result of its activities.

c) Prepare studies and documents in accordance with instructions from the Prime Minister;

d) Study and propose to the Prime Minister the adoption of mechanisms for collaboration and coordination between SNI and foreign intelligence and security forces and services.

e) Inform the competent authorities of the facts likely to constitute criminal offences with a view to their investigation and prosecution, safeguarding however the provisions contained in the law on State Secrecy.

f) Inform the competent authorities, in accordance with the law, of news and intelligence that come to its knowledge relating to internal security and to crime prevention and repression.

Article 6
Territorial competence

SNI shall be competent throughout the entire territorial space under the sovereign powers of the Democratic Republic of Timor-Leste.

Article 7
General and special duties of collaboration

1. Citizens have the duty to collaborate in fulfilling the objectives of national security by observing the provisions contained in the present law, by complying with the instructions and lawful warrants of the authorities and by not obstructing the regular exercise of the competences of the security forces and services.

2. Functionaries and agents of the State or of public law corporate bodies, including members of public companies management organs, have the special duty to collaborate with the security forces and services, in accordance with the law.

3. Any individual vested with senior and middle-level management functions, including inspection or monitoring functions within any Public Administration organ or service, has the duty to promptly inform the competent security forces and services of facts that come to their knowledge in the exercise, or by virtue, of their functions and that constitute a preparation, attempt, or execution of particularly serious criminal acts, namely acts of sabotage, espionage,

terrorism, trafficking in stupefacients and psychotropic substances, trafficking in weapons, as well as other forms of organised crime, including the commission of acts which, by their nature, may jeopardise, alter or destroy the constitutionally established democratic State.

4. Violating the provisions contained in the preceding paragraphs shall imply disciplinary and criminal liability, pursuant to the law.

Chapter II
Organs and Services

Article 8
Organs

The following are organs of SNI:

a) The Director-General;

b) The Administrative Council.

Article 9
Director-General

1. SNI shall be headed by a Director-General appointed by the Prime Minister whose post, for remuneration purposes, shall be equated to that of a Minister.

2. The appointment referred to in the preceding paragraph shall be mandatorily preceded by information to, and consultation with, the President of the Republic.

3. The Director-General shall be assisted by two Deputy Directors-General and substituted, in his or her absence and impediments, by any one of them nominated to that effect.

Article 10
Competence of the Director-General

It shall be particularly incumbent upon the Director-General:

a) To represent SNI;

b) To superiorly guide the activity of SNI and the respective Data Centre, as well as to exercise the functions of inspection, superintendence and coordination;

c) To preside over the Administrative Council;

d) To execute the generic and specific instructions of the Prime Minister, as well as the decisions of the Monitoring Council;

e) To guide the preparation of the SNI budget;

f) To prepare the plan of activities for the ensuing year, including the report of activities of the preceding year, and submit them to the Prime Minister for approval;

g) To preside over the Technical Commission.

Article 11
Duties of the Director-General

The following shall be duties of the Director-General:

a) To ensure the normal internal functioning of SNI and assign the human and material resources in an efficient manner;

b) Not to interfere in any activity of a political nature and not to be a member of a political party.

c) To keep the Prime Minister permanently informed of the activities of SNI;

d) Not to make statements on the activities of SNI to the media unless authorised by the Prime Minister where the need exists do to so;

e) To keep an impartial and neutral stance insofar as the treatment of matters and operations entrusted to him or her is concerned.

Article 12
Competence of the Administrative Council

1. The Administrative Council shall be composed of the Director-General, the Deputy Directors-General and the head of the administrative service.

2. It shall be incumbent upon the Administrative Council:

   a) To prepare the draft annual budget and submit it to the Prime Minister for approval;

   b) To manage the budget appropriations;

   c) To authorise the commitment of expenses within the limits determined by instruction of the Prime Minister.

Article 13
Central Services

1. The following shall be central services of SNI:

   a) The Department of Internal Intelligence;

   b) The Department of External Intelligence;

   c) The Administrative Service.

2. The internal organisation of each service or department shall be determined by instruction of the Prime Minister following a proposal by the Director-General.

Chapter III
RECRUITMENT, SELECTION AND TRAINING STAFF

Article 14
Staffing Table

1. The organs and services of SNI shall be staffed with permanent or hired functionaries of the Public Administration.

2. The senior and middle-level management posts, as well as the technical posts of the services composing SNI, may be filled with civilian, police or military specialists, pursuant to the Statute of the Civil Service.

3. The exercise of functions by police or military members or civil servants on secondment shall not prejudice their career progression rights.

Article 15
Training

1. Recruitment and training of the SNI staff shall take into account the special nature of the service and shall cover specialised training in the respective activity.

2. For the purposes of the preceding paragraph, the organisation and nature of the respective training courses shall be regulated in a specific statute.

Article 16
General Requirements for recruitment

The following shall be indispensable requirements for the recruitment and appointment of technical staff for SNI:

a) Recognised civic idoneity;

b) High professional competence;

c) Minimum academic qualifications corresponding to grade 12.

Article 17
Special requirements for recruitment

The following shall be special requirements for recruiting staff for SNI:

a) To have Timorese original nationality;

b) To be aged between 25 and 35 years;

c) To subject himself or herself to the conditions for recruitment and selection;

d) Not to exercise any political or partisan functions;

e) Not to have been judicially sentenced for committing a common crime corresponding to a penalty of imprisonment;

f) Not to have participated in any acts against the constitutionally established State based on the rule of law;

g) Not to have collaborated with any foreign intelligence service.

Article 18
Rights

In addition to the rights provided for in the Statute of the Civil Service, members of SNI shall have the following rights:

a) The right to receive specific training for the exercise of their functions;

b) The right to use and carry a fire arm under conditions to be regulated by the Director-General of SNI;

c) The right to free movement in public places with restricted access against exhibition of their respective identification card;

d) The right to a specific remuneration statute;

e) For purposes of retirement, the right to benefit from a 25% increase in the period of time of service rendered.

Article 19
Restrictions

1. Members of SNI shall be subject to the following restrictions:

a) Exercise their functions on an exclusive basis and refrain from exercising any other activity, including that of a liberal or entrepreneurial nature;

b) Refrain from convening or participating in any political, partisan or trade unionist activity;

c) Refrain from making public statements of a political, partisan or trade unionist character;

d) Refrain from exercising the right to strike.

2. Members of SNI shall be considered to be permanently available for their service.

Chapter IV
Discipline

Article 20
Applicable Rules

On matters of a disciplinary nature, the provisions for Public Administration in general shall apply subsidiarily to SNI staff in all that is not expressly provided for in the present statute.

Article 21
Disciplinary offences

1. Disciplinary offence shall mean the violation, by SNI functionaries or agents, of their respective functional duties, namely:

a) The commission of an act that is outside of the functions and competences of SNI;

b) The access to, use, or communication of data or intelligence in violation of rules relating to such activities.

c) Attempt and negligence are punishable.

Article 22
Disciplinary sanctions

1. The disciplinary sanctions provided for in the Civil Service Disciplinary Statute shall be applicable to the functionaries and agents of SNI.

2. The following shall be special sanctions applicable to functionaries and agents of SNI;

   a) Cessation of the secondment;

   b) Rescission of the administrative contract of appointment.

Article 23
Disciplinary competence

1. The Director-General of SNI shall have competence to apply any disciplinary sanction.

2. The Deputy Directors-General shall have competence to apply any disciplinary sanction up to the penalty of suspension in relation to functionaries assigned to the services falling under their competence.

Article 24
Preventive suspension

A preventive suspension of the functionary or agent may be decreed whenever his or her presence is considered to be inconvenient for the service or for establishing the truth.

CHAPTER V
DATA CENTRE

Article 25
Data Processing Centre

1. SNI shall posses a Data Centre compatible with the nature of its services and it shall be incumbent upon it to process and store the data and intelligence collected in the framework of its activity.

2. The Data Centre shall be established in a compartmented manner and shall be based on the specific nature of each of the organs and services of SNI.

Article 26
Functioning

The criteria and rules necessary to the functioning of the Data Centre, as well as the regulations indispensable for guaranteeing the security of the processed intelligence, shall be approved by the Council of Ministers. The Inter-Ministerial Commission on Internal Security shall be consulted to that effect.

Article 27
Access to the Data Base

1. Functionaries or agents, civilian or military, may only have access to the data and intelligence stored in the Data Centre as long as they are authorised by their respective hierarchical superiors and any use of such data and intelligence for purposes alien to SNI shall be prohibited.

2. Without prejudice to the monitoring powers provided for in law for the Monitoring Council, no entity alien to SNI may have access to the data and intelligence stored in the Data Centre.

Article 28
Cancellation and rectification of data

1. Where an error occurs in the process of entering data or intelligence, or where an irregularity occurs in their processing, the processing entity shall be obliged to inform of such error to the Monitoring Council.

2. Any person who, by an act of any functionary or agent of authority, or in the course of a judicial or administrative proceeding, becomes acquainted with data related to him or her and which he or she considers to be erroneous, irregularly obtained or of a nature that violates his or her personal rights, liberties and guarantees may, without prejudice to the right to resort to courts, request the

Monitoring Council to undertake the necessary verification and order the cancellation or rectification of data found to be incomplete and erroneous.

CHAPTER VI
SECURITY

Article 29
Security rules

1. Activities of SNI shall for all purposes be considered classified and of interest for national security.

2. All documents relating to matters referred to in article 3 shall be covered by the State Secrecy.

3. The activity of research, collection, analysis, interpretation, classification and storage of intelligence relating to the competences of SNI, including the respective results, shall be subject to the duty of secrecy.

Article 30
Depositions or statements

1. No member of SNI summoned to depose or to make statements before judicial authorities may disclose facts covered by the State Secrecy or be subjected to enquiries on the same matters.

2. Where the judicial authority considers that the refusal to depose or make statements pursuant to the preceding paragraph is unjustified, it may request confirmation with the Prime Minister.

CHAPTER VII
FINAL PROVISIONS

Article 31
Appointment and dismissal

1. Instructions to appoint and dismiss functionaries and agents of SNI shall not require endorsement from the National Budget Commission nor their publication in the Official Gazette.

2. Functionaries and agents of SNI shall be considered on duty as from the date of their installation.

Article 32
Omissions

The doubts and omissions arising from the interpretation and application of the present law shall be settled subsidiarily by the Statute of the Civil Service.

Article 33
Entry into force

The present statute shall enter into force 30 days after its publication.

Approved by the Council of Ministers on 6 October 2008.

The Prime Minister,

Kay Rala Xanana Gusmão

Promulgated on 18/12/2008

For publication

The President of the Republic

José Ramos-Horta

Annex 48: *Decree Law No. 19/2009 (Penal Code of the Democratic Republic of Timor-Leste)* (Timor-Leste).

DECREE LAW No. 19/2009
APPROVES THE PENAL CODE

Addressing the need to construct its legal system, the preparation and approval of the Penal Code of Timor-Leste was raised by its elected politicians as one of the legislative priorities to ensure fundamental rights and freedoms enshrined in the Constitution of the Democratic Republic of Timor-Leste.

This present legal document is the result of work conducted by a commission of Timorese and international experts who acted under government guidance and in compliance to the limits and content established in the law of legislative authorization on criminal matters approved in the National Parliament.

The rules adopted and enshrined herein, in addition to respecting the specific social and cultural realities of Timorese society, likewise have embraced suggestions put forth by national and international organizations, contributions from diverse legal entities active in Timor-Leste as well as teachings gleaned from comparative law.

We wish to highlight that this approved Penal Code, more than an end in itself, is primarily a fundamental step in the construction of the Timorese legal system, and is thus open to future enhancements that advances in international law, judicial practice and lessons from law may recommend.

Therefore, In the use of the legislative authorization granted within the scope of articles 1 and 2 of Law no. 13/2008, of 13 October and under the terms of article 96 of the Constitution, the Government does hereby decree that the following shall be valid as law:

Article 1 Approval of the Penal Code

The Penal Code published and attached and that is an integral part of this present law is hereby approved.

Article 2 Act of repeal

1. The Indonesian Penal Code, in force within the legal system under the terms of provisions in article 1 of Law 10/2003 is hereby repealed.
2. All isolated legal provisions present in legislation are hereby repealed that: a) Provide for and establish penalties for acts defined as crimes in the Penal Code herein approved; b) Enshrine provisions contrary to those adopted in the General Part of the Penal Code.

Article 3 Entry into force

The present law and Penal Code shall enter into force on the 60th day after publication of the same. Approved by the Council of Ministers on March 18, 2009

Prime Minister,

_____

(Kay Rala Xanana Gusmão)

Minister of Justice,

_____

(Lúcia M. B. F. Lobato)

Promulgated on

To be published.

President of the Republic,

_____

(José Ramos Horta)

ANNEX

PENAL CODE

I - The restoration of independence and approval of the Constitution of the Democratic Republic of Timor-Leste in 2002 resulted in the need for the country to adopt its own legal system, one that is modern and enshrines fundamental rights as described in constitutional precepts and reflecting the social reality of the country. It was necessary to maintain the Indonesian Penal Code in force to provide the State with a valid criminal law, although the same proved to be inadequate to the new reality of the country and in many cases, called for legal remedies contrary to the new constitutional principles adopted.

As the Timorese people have their own specificities and identity, there was a compelling need to prepare its own Penal Code, with its own intrinsic philosophy based on principles and values inherent to modern societies and that addresses current requirements faced by the country.

A commission of Timorese and international experts was established by the 1st Constitutional Government, which proceeded to prepare a Draft Law for the Penal Code, which, even though the Law of Legislative Authorization on penal matters was approved, was unable to promulgate the former before the end of its legislative term.

In early 2008, with a new executive, a new proposal for a Law of legislative authorization was presented to the National Parliament for approving the Penal Code and work to review the draft law of the Penal Code was restarted, the same having undergone amendments and been subject to broad public discussion. After approval of the legislative authorization, it fell to the Council of Ministers of the IV Constitutional Government to approve the Penal Code.

II - The General Part constitutes Book I of the Penal Code, and integrates the fundamental principles of criminal law enshrined in the Constitution of the Democratic Republic of Timor-Leste, with international conventions, treaties and agreements adopted by the Timorese domestic legal system.

As this code is based on the Democratic Rule of Law, in the General Part enshrines the principle of human dignity, respect for individual freedoms of each citizen and the responsibility of the State to intervene only when unsupportable harm to legal interests fundamental to life in society is observed. In such events, the State assumes the right to mete punishment and the social duty to reintegrate the offender into society. Equally the reflections of the Rule of Law are the principles of legality, culpability and humanity. The enshrinement of the principle of legality, as the fundamental principle of Criminal Law, provided for in article 31 of the Constitution, determines that any act or omission may only be considered a crime and punished as such, when and if provided for in law. Adherence to this principle results in disallowing any use of analogy when qualifying a crime, so that the Court cannot qualify any specific act as a crime, nor define danger to self and others or determine a penalty or security measure by applying an analogous interpretation of rules contained in the Penal Code.

The principle of non-retroactivity of criminal law forbids retroactive application of criminal law, except in cases where the same is concretely demonstrated to be more lenient to the accused. This is also correlated with the principle of legality.

The principle of humanity, in turn, enshrined in articles 29 and 32 of the Constitution, is the guiding principle upon which is based the prohibition against applying the death penalty as well as ordering penalties or security measures of a perpetual nature or of unlimited or indefinite duration.

The guiding principles for selecting the rules that form this present Code are those of need, proportionality and suitability, and form the foundation for applying each penalty or security measure. The aim is always the protection of legal interests essential to life in society and the social reintegration of the offender.

The principle of culpability has been followed, as an assumption for applying penalties, ensuring that there can be no penalty without guilt (***nulla poena sine culpa***). This principle places a form of limitation on the power of the State, insofar as the measure of punishment can never exceed the measure of guilt. The principle of guilt or culpability is also reflected in the treatment given to errors regarding unlawfulness, providing exemption from criminal liability due to age or if any psychological disturbance is confirmed, which diminishes criminal liability of the perpetrator due to lack of culpability.

With regards to legal consequences of punishable acts, observe that penalties are always executed as a teaching or re-socializing tool, with different means of applying sanctions presented in the Code that do not involve institutionalization.

Whenever either a liberty-depriving or non-liberty depriving penalty is alternatively applicable, the court must give preference to the non-liberty depriving penalty, whenever this adequately and sufficiently fulfils the purpose of the punishment and meets the requirements for reproving and preventing crime (article 62).

Therefore alternative penalties are given pre-eminence, particularly in situations of petty or less serious crimes. Specifically, penalties such as fines and community service have been enshrined as means to best ensure intended social reintegration of the offender.

Penalties of fines are set in days, thus enabling them to better adapt to the guilt of the perpetrator and his or her economic and financial conditions, varying the amount set for each day of fine according to the economic and financial status of the convict and his or her personal expenses.

On the other hand, different rules for converting fines into days of imprisonment are established in the event of failure to pay fines, in order to differentiate penalties of fines that are the primary penalty from fines that are substitution for imprisonment. Regarding community service as a sanction not involving institutional confinement, the Code took care to clarify and systematize certain fundamental aspects of this option, leaving its further development and concrete application to an autonomous law.

The penalty of imprisonment then should only be applied when the others have shown themselves to be inadequate to fulfil the objectives of preventing and reproving crime. Minimum and maximum duration of the penalties of imprisonment have been established from between 30 days and 25 years, with the possibility of extending the maximum limit to 30 years in cases specifically provided for in law.

Corollary to social reintegration of offenders is the provision of suspending execution of a prison sentence, applicable in cases where the concrete measure of the punishment does not exceed 3 years and no outstanding need for prevention of future crimes disallows it. Suspension of execution of a prison sentence may be conditioned to performance of certain duties or rules of conduct or subject to monitoring by reintegration services.

Security measures of limited duration have been adopted for those exempt from criminal liability by reason of mental disorder, particularly internment measures, whenever danger to self and others warrants. Life sentences are not permitted, and security measures must be terminated whenever the danger to self and others that legitimated them ends, allowing, in the case of foreigners, that said orders may be substituted by deportation from the country.

The Penal Code, in its defense of values and legal interests essential to life in society, has distinguished crimes of a public nature, which must be warded by the State, from those less serious crimes, which depend upon the exercise of the right to file complaint by the bearer of the right, pursuant to provisions already adopted in criminal procedural legislation. Whenever the exercise of the right to file complaint is provided in the description of the legal definition of the crime in the Special Part of the Penal Code, the same are considered as semi-public crimes.

With regards to extinguishment of criminal liability and the effects thereof, the General Part of the Code sets statutes of limitations for criminal prosecution, penalties, security measures and accessory penalties, as well as defines situations where suspension may be warranted. Nevertheless, the decision was made to have no statute of limitation for criminal prosecution and related penalties when dealing with war crimes, crimes against peace or crimes against humanity and freedom.

Lastly, the Code provides for other cases leading to extinguishment of liability, such as death of the perpetrator, amnesty or pardon.

III - It is acknowledged that the Special Part of Penal Codes is the part that causes the greatest impact on public opinion, insofar as it selects certain assets, interests and values that a given society and a certain time in history deem to warrant protection under criminal law, thus, raising the same to the category of criminal legal interests. In the specific case of the Penal Code of Timor-Leste, the legislature sought to base the articles adopted herein on options that the Constitution had already previously enshrined as being the collective will of Timorese society.

The systematization adopted in this Part is an affirmation of the moment in history of the country and reflects the fundamental interests and values that have constructed this fledgling nation. It is therefore no surprise that the first title of this book respectively addresses protection of peace, humanity and freedom as cornerstone

values in a democratic society, regarding the hierarchy of values described in the Fundamental Law whilst also addressing international obligations assumed by the country when it subscribed to and ratified the Statute of the International Criminal Court.

Title II describes crimes against individuals, providing special protection to eminently personal legal interests, particularly protection of life, physical integrity, personal freedom, sexual freedom and protection of privacy.

Voluntary termination of pregnancy is described as a punishable crime under the terms of provisions in article 145 of this Code.

This title in general and particularly in the provisions on crimes against physical integrity, special relevance is given to the introduction of crimes of mistreatment of minors and spouses, fundamental provisions to the affirmation of the rule of law and protection of human rights in Timorese society.

Equally highlighted is the qualification of the practice of slavery and human trafficking as a criminal offense, fruit of the humanist concept that guided the preparation of this Code.

Title III describes crimes against life in democratic society, highlighting crimes against public order, state security and life in society, as well as electoral crimes and crimes against public authority.

This Title in general, and within the scope of crimes against life in society, include provisions for specific definitions of crimes against the environment, a reflection of the increasing concern by society in preserving natural resources and protecting the environment, punishing unsustainably harmful practices involving fauna, flora and natural habitats.

Protection of assets is addressed in Title IV of this Book, where a system of standards is constructed upon the legal definition of the most common crimes found in diverse laws, such as larceny, theft, robbery, abuse of trust and property damage. These crimes are legally defined as being either simple or aggravated, weighing circumstances such as value, nature of the item taken, ways and means of commission, whether violence was present, and other circumstances that could significantly increase the guilt or unlawfulness of the perpetrator.

Crimes of obstruction of justice and crimes committed in performance of public office are listed in Titles V and VI where punishment for falsity in procedural acts, forms of obstruction of justice, failure to perform and to deny justice are provided for, as are others, such as bribery, malfeasance of magistrates or public servants and attorneys and public defenders.

Other acts of assisting offenders within the domain of justice are criminalized, as are classic crimes of defamatory false information, simulation of crime and failure to report crime.

Within the general performance of public duties, the Code criminalizes conduct by public officials who commit crimes of corruption, embezzlement, abuse of power or public force or unlawful involvement in public affairs by anyone holding public office. This Penal Code broadens the concept of public official to include other analogous situations such as officials of international organizations, foreign public officials performing activities in the country or any person called to perform or participate in an activity included in public administrative or juridical office.
Title VII provides a legal definition of crimes of forgery of documents, technical reports, currency and stamps or franks, weights and measures, office stamps, currency plates and paper, describing the respective penalties according to the nature, evidentiary or trust value or public use or disposal of the forged objects, providing for seizure and forfeiture and loss of objects used for said purpose.

Lastly, Title VIII defines crimes against the economy, providing for criminalization of money laundering, following the most recent doctrine on criminalization of anti-economic activities, tax fraud and smuggling and evasion of duties, regarding customs or border issues. The Code maintains criminal punishment for disobedience of requisition of assets ordered by the Government as well as behavior likely to disturb, harm or hinder performance of certain public acts such as public competitive exams, tenders or court auctions.

Throughout this Code, there is an attempt to strike a balance between the abstract criminal framework, addressing the type of crime and its severity, with the hierarchy of legal interests protected by each article and the maximum limits established for prison sentences.

Another factor characterizing the legislative alternatives chosen in the Penal Code is the differentiated treatment given to more serious crimes, where, generally speaking, the only penalty provided is a prison sentence.

As a rule, for less serious crimes, on the other hand, the definition of the crime usually enables the court, according to the circumstances, to decide on either the alternative of imprisonment or penalty of fine, enshrining as criminal guidance policy the acknowledgment of a fine as an autonomous penalty and not complementary to the main penalty.

The approval of this present Code provides the Timorese State with yet another modern and adequate legal instrument to provide criminal law services of the highest quality whilst respecting fundamental rights of its citizens, obliging magistrates, public defenders, attorneys, court officers and other legal actors who make these legal instruments the tools of their daily work to engage in ongoing education, strengthening the national legal system and the Democratic Rule of Law.

Article 193. Disobedience to an order of dispersal
1. Any person who fails to obey a lawful order to withdraw from a public gathering or meeting issued by a competent authority, with the warning that failure to obey constitutes a crime, is punishable with up to 2 years imprisonment or a fine.
2. If the disobedient person is the promoter of the meeting or gathering, the same is punishable with up to 3 years imprisonment or a fine.

Article 194. Abuse of public signals or uniform
1. Any person who abusively utilizes a warning or distress signal or call, or pretends that outside assistance is needed due to a disaster, danger or situation of collective necessity, is punishable with up to 1 year imprisonment or a fine.
2. Any person who unduly or abusively uses a uniform, attire or insignia which identifies a public or international activity, authority or institution, as a means to more easily commit any unlawful act, incurs the same penalty.

Article 195. Usurpation of office
1. Any person who, without authorization, holds any office or performs any acts expected to be exercised or performed solely by a public official, military commander or law enforcement officer, assuming said office to him or herself either expressly or tacitly, is punishable with up to 3 years imprisonment.
2. The same penalty shall apply to any person who exercises a profession for which law requires title or fulfilment of certain requirements, assuming to him or herself, either expressly or tacitly, the holding of such a title or fulfilment of said requirements when, in fact, they do not.
3. The same penalty shall be applied to any person who continues to exercise public duties after having been officially notified of dismissal or suspension from office.

CHAPTER II
CRIMES AGAINST STATE SECURITY

Article 196. High Treason
Any person who, by means of violence, threat of violence, usurpation or abuse of office of sovereignty, hinders or attempts to hinder the exercise of national sovereignty on the whole or part of the territory of Timor-Leste or poses danger to the integrity of national territory as a form of subjecting or delivering it to foreign sovereignty, is punishable with 15 to 30 years imprisonment.

Article 197. Providing services to or collaborating with hostile armed forces
1. Any Timorese citizen who collaborates with a foreign country or group or representatives thereof, or who serves under the flag of a foreign country during a war or armed action against Timor-Leste, is punishable with 12 to 25 years imprisonment.
2. Preparatory acts relating to any of the cases described above carry a penalty of 5 to 15 years imprisonment.
3. Any person who, being a Timorese national or resident of Timor-Leste, commits any acts required to aid or facilitate any armed action or war against Timor-Leste by a foreign country or group, is punishable with 10 to 20 years imprisonment.

Article 198. Sabotage against national defense
Any person who, with intent to harm or endanger national defense, totally or partially destroys, damages, or renders unserviceable:
a) Works or materials pertaining or assigned to the armed forces;
b) Roads or means of communication or transport;
c) Any other facilities related to communications or transportation; or
d) Factories or depots,
is punishable with 5 to 15 years imprisonment.

Article 199. Campaign against peace efforts
Any person who, being a Timorese national or resident of Timor-Leste, at a time of preparation for war or being at war, by any means disseminates or makes public, rumors or statements, of his or her own or of another party, in the knowledge that these are wholly or partially false, seeking to disrupt peace efforts being made by Timor-Leste or to assist a hostile foreign power, is punishable with 5 to 15 years imprisonment.

Article 200. Breach of State secrets
1. Any person who, jeopardizing interests of the Timorese State concerning its foreign security or conduct of its foreign policy, conveys or renders accessible to an unauthorized person or makes public any fact, document, plan, object, knowledge or any other information that should, due to said interest, have been maintained in secret, is punishable with 3 to 10 years imprisonment.
2. Any person who collaborates with a foreign government or group with intent to commit any of the acts referred to in the previous subarticle or to enlist or aid another person charged with committing the same, is punishable with the same penalty provided for in the previous subarticle.
3. If the perpetrator of any of the acts described in the previous subarticles holds any political, public or military office who should have, due to the nature thereof, refrained said person from committing such an act more than any ordinary citizen, the same is punishable with 5 to 15 years imprisonment.

Article 201. Diplomatic disloyalty
Any person who, officially representing the Timorese State, with intent to harm national rights or interests:
a) Conducts State affairs with a foreign government or international organization; or
b) Makes commitments on behalf of Timor-Leste without being duly authorized to do so;
is punishable with 5 to 15 years imprisonment.

Article 202. Violation of the Rule of Law
1. Any person who, by means of violence, threat of violence or incitement to civil war, attempts to overthrow, change or subvert constitutionally established rule of law, is punishable with 5 to 15 years imprisonment.
2. If the act described above is committed by means of armed violence, the penalty is 5 to 20 years imprisonment.
3. Public incitement or distribution of weapons to be used for committing any of the acts described above carries, respectively, the penalty that corresponds to an attempt.

Article 203. Attempt against the highest representative of an organ of national sovereignty

1. Any person who attempts against the life, physical integrity or liberty of the highest representative of an organ of national sovereignty or any person substituting the same pursuant to the Constitution or any person elected or appointed to said organ, even if not yet sworn in, is punishable with 8 to 20 years imprisonment.
2. In the case of a consummated crime against life, physical integrity or liberty, the perpetrator is punishable with 12 to 25 years imprisonment.
3. The penalties provided in the previous subarticles are correspondingly applicable, whenever the acts described therein are committed against foreign persons in the situation referred to subarticle 1 above, ambassadors and heads of international organizations while in Timor-Leste.

Article 204. Coercion against constitutional bodies

1. Any person who, by means of violence or threat of violence, hinders or restricts the free performance of duties of an organ of national sovereignty is punishable with 3 to 10 years imprisonment.
2. If the acts described in the preceding subarticle are conducted against a district or local government authority, the penalty is 2 to 6 years imprisonment.
3. If said acts referred in subarticle 1 above are committed against members of those agencies, limits to the penalty provided for in subarticles 1 and 2 shall be reduced by one half.

Article 205. Disrupting operation of a constitutional body

Any person who, by means of riot, disorderly conduct or jeering, unlawfully disrupts the operation of any organ referred to in the previous article or performance of duties of any person member of the same, is punishable with up to 1 year imprisonment or a fine.

Article 206. Disrespect for national symbols

Any person who publicly, by word, gesture or dissemination of writing, or by another means of public communication, disrespects the national flag or anthem, coat of arms or emblems of Timorese national sovereignty or fails to show due respect to the same, is punishable with up to 3 years imprisonment or fine.

CHAPTER III
CRIMES AGAINST LIFE IN SOCIETY
SECTION I
CRIMES POSING COLLECTIVE DANGER

Article 207. Driving without a license

Any person who uses a motor vehicle without having a license as required by law, is punishable with up to 2 years imprisonment or a fine.

Article 208. Driving under the influence of alcohol or psychotropic substances

1. Any person who, at least by negligence, drives a motor vehicle with more than 1.2 mg of alcohol per liter of blood is punishable with up to 2 years imprisonment or a fine.

EXTRACTS FROM NATIONAL LEGISLATION ESTABLISHING INTELLIGENCE ORGANISATIONS

The following table sets out the provisions establishing intelligence organisations under the national laws of the following States: Australia, Belgium, Brazil, China, Denmark, France, Germany, India, Indonesia, Italy, Mexico, Morocco, New Zealand, Russia, Slovakia, Switzerland, Timor-Leste, Uganda, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

The following extracts have in some cases been translated from the original language in which the law was promulgated. In all such cases, a citation to the official version of the law (in the original language) is provided by way of footnote.

	State	Relevant Legislative Provisions
1.	**Australia**	**Australian Security Intelligence Organisation Act 1979**[1] **Section 6** The Australian Security Intelligence Organisation, being the Organisation that was continued in existence by the Acts repealed by this Act, is continued in existence. **Intelligence Services Act 2001**[2] **Section 16** The organisation known as the Australian Secret Intelligence Service is continued in existence in accordance with this Act.
2.	**Belgium**	**Organic Law on Intelligence and Security, 30 November 1998**[3] **Article 2** [§ 1] This Act applies to State Security, Civil Service Intelligence and Security Service and the General Intelligence and Security Service, Military Intelligence Service and Security, which are the two intelligence and security services of the Kingdom. In the exercise of their duties, these services ensure compliance with and contribute to the protection of individual rights and freedoms, as well as the democratic development of society.

[1] Available at: http://www.comlaw.gov.au/Details/C2013C00437.
[2] Available at: http://www.comlaw.gov.au/Details/C2013C00283.
[3] Available at: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=1998113032.

	State	Relevant Legislative Provisions
		Article 7 The State Security's responsibilities are: (1) to research, analyze and process the intelligence relating to any activity that threatens or could threaten the internal security of the state and the sustainability of democratic and constitutional order, the external security of the State and its foreign relations, the scientific or economic potential defined by the Ministerial Committee, or any other fundamental national interest defined by the King on the advice of the Ministerial Committee; (2) perform security investigations entrusted to it in accordance with directives of the Ministerial Committee; (3) to perform the tasks entrusted to it by the Minister of the Interior to protect people; (4) to perform all other tasks entrusted to it by or under the law. **Article 11** §1. The General Intelligence and Security Service's responsibilities are: (1) to research, analyze and process the intelligence relating to any activity that threatens or could threaten the integrity of the national territory, plans for military defense, scientific and economic potential in relation to the actors, both natural persons and legal persons, who are active in the economic and industrial sectors related to defense and appear on a list approved by the Ministerial Committee of Intelligence and Security, as directed by the Minister of Justice and Minister of Defence the fulfillment of armed forces missions or the security of Belgian nationals abroad or any other fundamental national interest defined by the King on the advice of the Ministerial Committee, and to immediately inform the competent ministers as well as advise the Government, if requested by the latter, on the shaping of its external defense policy; (2) to ensure to maintain the military security of the staff of the Minister of National Defence, and of military installations, weapons, ammunition, equipment, plans, writings, documents, information and communications systems and other military assets and with regard to cyber-attacks on military information and communication systems or those managed by the Minister of National Defence, to neutralize the attack and identify the perpetrators, without prejudice to react immediately with its own cyber-attack in compliance with the law of armed conflict; (3) to protect secrecy which, by virtue of Belgium's international commitments or in order to ensure the integrity of the national territory and the tasks of the Armed Forces, relates to military installations, weapons, ammunition, equipment, plans, papers, documents or other military assets, military intelligence and communications, as well as military information and communication systems or those managed by the Minister of National Defence; (4) to perform security investigations entrusted to it in accordance with directives of the Ministerial Committee…

3.	**Brazil**	**Act that establishes the Brazilian System of Intelligence and creates the Brazilian Agency of Intelligence – ABIN, Law No. 9.883 of 7 December 1999)**[4] **Article 3** Establishment of the Brazilian Intelligence Agency - ABIN, an agency of the Presidency of the Republic that, as a central agency of the Brazilian Intelligence System, has the responsibility for planning, executing, coordinating, overseeing and controlling the intelligence activities of the country, respecting the policies and directives referred to in this law (Amendments were made to the Article by Provisional Measure no 2.216-37 of 2001) Sole paragraph. Within the scope of [ABIN's] role and its use of secret techniques and means, intelligence activities will be undertaken with strict observance of individual rights and guarantees, and with fidelity to the institutions and the ethical principles that govern the interests and security of the State. **Article 4** ABIN's responsibilities, beyond those which are prescribed in the previous article, are: I. To plan and execute actions, including secret ones, related to the gathering and analysis of data for the production of knowledge destined for the provision of advice to the President of the Republic; II. To plan and execute the protection of sensitive knowledge, related to the interests and the security of the State and of society; III. To assess threats, internal and external, to the constitutional order; IV. To promote the development of human resources and the doctrine of intelligence and to carry out studies and research for the practice and improvement of intelligence activities. Sole paragraph: On terms and conditions to be approved through presidential act, and with the aim of integration, the component agencies of the Brazilian Intelligence System shall provide to ABIN data and specific knowledge related to the defence of institutions and of national interests.

[4] Available at: http://www.planalto.gov.br/ccivil_03/Leis/L9883.htm.

4.	**China**	**Criminal Procedure Law of the People's Republic of China**[5] **Article 4** State security organs shall, in accordance with law, handle cases of crimes that endanger State security, performing the same functions and powers as the public security organs.
5.	**Denmark**	The functions and mandate of the Danish Security and Intelligence Service (Politiets Efterretningstjeneste) were set out in an instruction issued by the Ministry of Justice on 24 January 1952. The Service does not appear to have a statutory basis.[6] The Danish Defence Intelligence Service (Forsvarets Efterretningstjeneste) does not appear to have been established pursuant to legislation. According to its official website, it appears to have been separated from the general military intelligence/defence forces on 1 October 1967 when the Intelligence Section of the General Staff of the Military was, by decree of the Ministry of Defence, made an independent agency reporting directly to the Ministry under the name Forsvarets Efterretningstjeneste.[7]
6.	**France**	**Decree No. 2014-443 of 30 April 2014 relating to the functions and structure of the General Directorate of Internal Security**[8] **Article 1** The General Directorate of Internal Security is an active service of the National Police. It is responsible, throughout the territory of the Republic, for obtaining, collating and using intelligence concerning national security or the fundamental interests of the Nation. It contributes, within its areas of competence, to the exercise of the functions of the Judicial Police throughout the territory under the conditions contained in Article 15-1 of the Code of Criminal Procedure. **Article 2** As its functions, the General Directorate of Internal Security:

[5] Available at: http://www.gov.cn/flfg/2012-03/17/content_2094354.htm.
[6] Available at: http://jm.schultzboghandel.dk/upload/microsites/jm/ebooks/pet/pet_bind1/ber/kap04.html.
[7] Available: http://fe-ddis.dk/om-os/Historie/Pages/Historie.aspx.
[8] Available at:
http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=118C3191C7DFE0F1E5054F9C9C1C7465.tpdjo15v_3?cidTexte=JORFTEXT000028887486&dateTexte=29990101.

		a. Prevents and contributes to the suppression of all forms of foreign interference; b. Contributes to the prevention and suppression of terrorist acts or acts undermining the security of the State, the integrity of its territory or the functioning of the institutions of the Republic; c. Participates in the surveillance of individuals and radical groups liable to resort to violence and to undermine national security; d. Contributes to the prevention and suppression of acts undermining national defence secrecy or those undermining the economic, industrial and scientific potential of the country; e. Contributes to the prevention and suppression of acts relating to the acquisition and fabrication of weapons of mass destruction f. Contributes to the surveillance of activities carried out by international criminal organisations liable to affect national security g. Contributes to the prevention and suppression of crime related to information and communications. Solely as required for the functions mentioned in the preceding paragraphs, it contributes to the surveillance of electronic and radio communications. **Defence Code**[9] **Article D3126-1** The Directorate-General for External Security is under the authority of a general manager reporting directly to the defence minister and appointed by decree of the Council of Ministers **Article D3126-2** The Directorate-General for External Security is responsible in close collaboration with other relevant organizations, to find and use information relevant to the safety of France, as well as to detect and prevent on national territory, espionage activities against French interests and prevent their consequences.

[9] Available at: http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071307.

7.	**Germany**	**Act Regulating the Cooperation between the Federation and the Federal States in Matters Relating to the Protection of the Constitution and on the Federal Office for the Protection of the Constitution (Bundesverfassungsschutzgesetz, BVerfSchG)**[10] **Section 2 – The offices for the protection of the constitution** (1) For the cooperation of the Federation with the Federal States, the Federation maintains the Federal office for the protection of the constitution as a higher Federal authority (*Bundesoberbehoerde*). It is subordinated to the Federal Minister of the Interior. The Federal office cannot be incorporated into an office of police. (2) For the cooperation of the Federal States with the Federation and of the Federal States among themselves, each Federal State maintains an office for the handling of matters of the protection of the constitution. **Section 3 – Functions of the offices for the protection of the constitution** (1) The Federal office and the offices of the Federal States for the protection of the constitution shall collect and evaluate information, namely substantive and personal information, messages and documents, concerning 1. Attempts, that are directed against the free democratic basic order, the existence or the security of the Federation or of a Federal state or that aim at an unlawful disturbance of the administration of the constitutional institutions of the Federation or the Federal States or of one of their members 2. Acts committed, within in the territorial scope of this act, for a foreign power that endanger security or that are intelligence services 3. Attempts, within the territorial scope of this act, by using violence or preparing to do so, to endanger the international matters of the Federal Republic of Germany 4. Actions, within the territorial scope of this act, that are directed against the idea of international understanding, especially against the peaceful relations between nations (Art. 26(1) German basic law). (2) The offices for the protection of the constitution of the Federation and the Federal states contribute to 1. the security check of persons who, in the public interest, are given or have access to or can get access to facts, objects or information that need to be kept secret. 2. the security check of persons who work in security-sensitive positions for institutions that are important for life or defence matters or who will work there in the future. 3. technical security measures for the protection of facts, objects or information that need to be kept secret in the public interest from being discovered by unauthorised persons.

[10] Available at: http://www.gesetze-im-internet.de/bverfschg/index.html.

		4. the security check of persons in other legally determined cases. The powers of the Federal office for the protection of the constitution in the cases of Nr. 1, 2 and 4 are governed by the security check act (*Sicherheitsüberpruefungsgesetz*, BGBl. I S. 867). (3) The offices for the protection of the constitution are bound to the general rule of law (Art. 20 German basic law).
8.	**India**	The intelligence agencies in India (the Intelligence Bureau and the Research and Analysis Wing) operate without a specific legislative basis.[11]
9.	**Indonesia**	**Republic of Indonesia Law No. 17 of 2011**[12] **Article 1** Within this Act, the following definitions apply: (1) Intelligence is knowledge, organisations and activities related to policy formulation, national planning and decision-making based on the analysis of information and facts gathered through working methods for detection and early warning for the purpose of preventing, deterring and responding to any threat to national security. (2) The State Intelligence Agency is the administrator of Intelligence, which is an integral part of the state security system, and which has the authority to carry out the functions and activities of the State Intelligence. (3) State Intelligence Personnel are citizens of Indonesia, who have special Intelligence powers and dedicate themselves to the service of State Intelligence… **Article 4** The role of State Intelligence is to conduct early detection and warning efforts, tasks, and activities in order to prevent and deter any threat that may arise and threaten the safety of the nation and national interests. **Article 5** The purpose of State Intelligence is to detect, identify, assess, analyse, interpret, and present intelligence in order to anticipate and give early warning of all possible forms and kinds of threats, both potential and real, to the safety and existence of the nation and the state, as well as risks to national interests and security.

[11] Available at: http://mha.nic.in/.
[12] Available at: http://www.bin.go.id/asset/upload/UU_2011_17.pdf.

		Article 7 The scope of State Intelligence includes: a. domestic and foreign intelligence; b. defence and/or military intelligence; c. police intelligence; d. law enforcement intelligence, and e. ministerial/non-ministerial government intelligence agencies. **Article 9 – National Intelligence Agencies** The administration of State intelligence consists of: a. State Intelligence Agency; b. Indonesian Armed Forces (TNI) Intelligence; c. Indonesian National Police (POLRI) Intelligence; d. Indonesian Attorney-General's Office Intelligence function; e. Intelligence function of ministerial/non-ministerial government agencies. **Article 10** (1) The State Intelligence Agency as referred to in 9a is a state body that undertakes domestic and foreign Intelligence functions. (2) The Intelligence function as referred to in paragraph (1) shall be carried out in accordance with the provisions of legislation. **Article 11** (1) Indonesian Armed Forces Intelligence as referred to in 9b undertakes defence and/or military Intelligence functions. (2) The function of Intelligence as referred to in paragraph (1) shall be carried out in accordance with the provisions of legislation.

10.	**Italy**	**Law No. 124, Intelligence System for the Security of the Republic and new provisions governing secrecy, of 8 March 2007** [13] **Section 6: The External Security and Intelligence Agency** (1) The External Security and Intelligence Agency (AISE) is hereby established. Its functions shall be to gather and process all intelligence falling within its areas of competence that serves to defend the independence, integrity and security of the Republic (including in implementation of international agreements) against threats originating abroad. (2) The AISE shall also be responsible for counter-proliferation activities concerning strategic materials as well as the security intelligence activities that are performed outside the national territory in order to protect Italy's political, military, economic, scientific and industrial interests. (3) The AISE shall also be responsible for identifying and countering outside national territory those espionage activities that are directed against Italy and those activities that are aimed at damaging national interests. (4) The AISE may carry out operations within the national territory only in collaboration with the AISI, where such operations are closely linked to activities that the AISE itself carries out abroad. To such end, the Director General of the DIS shall make provision to ensure the necessary forms of co-ordination and informational linkage, partly so as to avoid functional and territorial overlapping. (5) The AISE shall be directly answerable to the President of the Council of Ministers. (6) The AISE shall keep the Minister of Defence, the Minister of Foreign Affairs and the Minister of the Interior promptly and constantly informed regarding the profiles of their respective competences. (7) The President of the Council of Ministers shall, by way of decree after prior consultation with the CISR, appoint and dismiss the Director of the AISE, who shall be a top-echelon official or equivalent. The office of Director of the AISE shall be for a maximum term of four years and may be renewed only once. (8) The Director of the AISE shall report constantly on his agency's activities to the President of the Council of Ministers (or to the Delegated Authority, where appointed) through the Director General of the DIS. He shall report directly to the President of the Council of Ministers in cases of urgency or when other particular circumstances so require, informing the Director General of the DIS of such fact without delay. He shall submit an annual report on the Agency's operation and organization to the CISR, through the Director General of the DIS. (9) The President of the Council of Ministers shall appoint and dismiss one or more Deputy Directors, after consulting the Director of the AISE. The Director of the AISE shall make the other appointments within the Agency. (10) The organization and operation of the AISE shall be governed by a specific Regulation.

[13] Available at: http://www.sicurezzanazionale.gov.it/sisr.nsf/english/law-no-124-2007.html.

		Section 7: The Internal Security and Intelligence Agency (1) The Internal Security and Intelligence Agency (AISI) is hereby established. Its functions shall be to gather and process all information falling within the areas of its competence that serves to defend the internal security of the Republic and its underlying democratic institutions as established by the Constitution (including in implementation of international agreements) from every threat, subversive activity and form of criminal or terrorist attack. (2) The AISI shall be responsible for the security intelligence activities that are carried out within the national territory in order to protect Italy's political, military, economic, scientific and industrial interests. (3) The AISI shall also be responsible for identifying and countering within the national territory those espionage activities that are directed against Italy and those activities that are aimed at damaging national interests. (4) The AISI may carry out operations abroad only in collaboration with the AISE, where such operations are closely linked to activities that the AISI is itself conducting within the national territory. To such end, the Director General of the DIS shall make provision to ensure the necessary forms of co-ordination and informational linkage, including for the purposes of avoiding functional and territorial overlapping. (5) The AISI shall be directly answerable to the President of the Council of Ministers. (6) The AISI shall keep the Minister of Defence, the Minister of Foreign Affairs and the Minister of the Interior promptly and constantly informed regarding the profiles of their respective competence. (7) The President of the Council of Ministers shall, after prior consultation with the CISR and by way of decree, appoint and dismiss the Director of the AISI, who shall be a top-echelon official or equivalent. The office of Director of the AISI shall be for a maximum term of four years and may be renewed only once. (8) The Director of the AISI shall report constantly on his agency's activities to the President of the Council of Ministers (or to the Delegated Authority, where appointed) through the Director General of the DIS. He shall report directly to the President of the Council of Ministers in cases of urgency or when other particular circumstances so require, informing the Director General of the DIS of such fact without delay. He shall submit an annual report on the Agency's organization and operation to the CISR, through the Director General of DIS. (9) The President of the Council of Ministers shall appoint and dismiss one or more Deputy Directors, after consulting the Director of the AISI. The Director of the AISI shall make the other appointments within the Agency. (10) The organization and operation of the AISI shall be governed by a specific Regulation.

11.	**Mexico**	**National Security Act, 31 January 2005**[14] **Article 18** The National Security and Research Centre is an administrative body, independent from the Ministry of the Interior, with technical, operational and financial autonomy ascribed directly from the head of the aforementioned Secretary. **Article 19: Functions of the Centre** I. Undertake intelligence work as part of the national security system that contributes to the preservation of the integrity, stability and permanency of the State of Mexico, and to give support to governance and strengthening of the rule of law; II. Process the information generated through operations, to determine its relevance, value, meaning or specific interpretation and to formulate conclusions derived from corresponding evaluations, with the aim of safeguarding the security of the nation; III. Prepare political, economic, social and other studies that relate to its functions, as well as those that are necessary to raise awareness of the risks and threats to national security; IV. Devise general guidelines of the strategic plan and the National Agenda of Risks; V. Propose methods of prevention, deterrence, containment and neutralising risks and threats that seek to undermine the territory, sovereignty, national institutions, democratic governance or rule of law; VI. Establish inter-institutional cooperation with the various authorities of the federal public administration, federal authorities, federal entities and municipalities or districts, in relation to their respective competencies with a view to contribute to the preservation of integrity, stability and permanency of the State of Mexico; VII. Propose to the Council the establishment of international cooperation systems, with the aim of identifying possible risks and threats to sovereignty and national security; VIII. Acquire, administer and develop relevant technology for the investigation and safe dispersion of Federal Government national security related communication, as well as for the protection of this communication and the information it contains; IX. Operate relevant communication technology, in achieving the functions it has been entrusted or in support of government agencies as requested by the Council; X. Provide technical assistance to any government agency represented in the Council, in accordance with relevant agreements, and XI. Other powers conferred by other applicable laws that the Council or Executive Secretary deem is in the ambit of its competency.

[14] Available at: http://www.diputados.gob.mx/LeyesBiblio/pdf/LSegNac.pdf.

12.	**Morocco**	**Dahir Sharif Issued in Rabat in 8 Zil Hejja 1393 (2 January 1974), Signed by Prime Minister Ahmad Ossman**[15] **Article 1** The Directorate-General for the Surveillance of the National Territory, renewed by Dahir Sharif number 1.73.10 mentioned above and dated 7 Zil Hejja 1392 (12 January 1973) is hereby changed into a Directorate for the Surveillance of the National Territory and is attached to the Directorate-General of National Security. **Article 2** Assigned to the Directorate for the Surveillance of the National Territory is the task of ensuring the maintenance and protection of the security of the state and its organisations. **Article 3** The Directorate for the Surveillance of the National Territory is placed under the authority of a director appointed by a Dahir Sharif. The director is responsible for organising the affairs of the employees of the Directorate for the Surveillance of the National Territory and he is the delegate in payments of expenditures from appropriations assigned to this directorate. He is also vested with establishing the internal administrative orders for the central departments and local teams and the regulations of operations and specialisations. **Article 4** This dahir sharif is published in the Official Gazette and replaces Dahir Sharif number 1.73.10 mentioned above and dated 7 Zil Hejja 1392 (12 January 1973).
13.	**New Zealand**	**New Zealand Security Intelligence Service Act 1996**[16] **Section 3: New Zealand Security Intelligence Service** (1) Subject to the provisions of this Act, there shall continue to be a New Zealand Security Intelligence Service.

[15] Available at: http://adala.justice.gov.ma/production/html/Ar/liens/..%5C65850.htm.

[16] Available at: http://www.legislation.govt.nz/act/public/1969/0024/latest/whole.html .

		(2) The New Zealand Security Intelligence Service to which this Act applies is hereby declared to be the same Service as the Service known as the New Zealand Security Service which was established on 28 November 1956. **Section 4: Functions of New Zealand Security Intelligence Service** (1) Subject to the control of the Minister, the functions of the New Zealand Security Intelligence Service shall be— (a) to obtain, correlate, and evaluate intelligence relevant to security, and to communicate any such intelligence to such persons, and in such manner, as the Director considers to be in the interests of security: (b) to advise Ministers of the Crown, where the Director is satisfied that it is necessary or desirable to do so, in respect of matters relevant to security, so far as those matters relate to departments or branches of the State services of which they are in charge: (ba) to advise any of the following persons on protective measures that are directly or indirectly relevant to security: (i) Ministers of the Crown or government departments: (ii) public authorities: (iii) any person who, in the opinion of the Director, should receive the advice: (bb) to conduct inquiries into whether particular individuals should be granted security clearances, and to make appropriate recommendations based on those inquiries: (bc) to make recommendations in respect of matters to be decided under the Citizenship Act 1977 or the Immigration Act 2009, to the extent that those matters are relevant to security: (c) to co-operate as far as practicable and necessary with such State services and other public authorities in New Zealand and abroad as are capable of assisting the Security Intelligence Service in the performance of its functions: (d) to inform the Officials Committee for Domestic and External Security Coordination of any new area of potential relevance to security in respect of which the Director has considered it necessary to institute surveillance. (2) It is not a function of the Security Intelligence Service to enforce measures for security.

14.	**Russia**	**Federal Law No. 40-FZ on Organs of the Federal Security Service in the Russian Federation (adopted on 22 February 1995)**[17] **Article 1: The Federal Security Service and its mission (as per Federal Law No. 86-FZ of 30.06.2003)** The Federal Security Service is the unified central system of federal security service organs resolving tasks of safeguarding the security of the Russian Federation within the limits of its competence. (as per Federal Law No. 15-FZ of 07.03.2005) The activity of federal security service organs shall be directed by the President of the Russian Federation. The Federal Security Service shall be administered by the head of the federal executive authority for security through the aforementioned federal executive authority and its territorial organs. The head of the federal executive authority for security shall be appointed and dismissed by the President of the Russian Federation. **Article 2: Federal security service organs *(as per Federal Law No. 86-FZ of 30.06.2003)*** The organs of the Federal Security Service shall include: - the federal executive authority for security; - the directorates/departments of the federal executive authority for security covering the individual regions and constituent entities of the Russian Federation (territorial security organs); - the directorates/departments of the federal executive authority for security in the Armed Forces of the Russian Federation and other troop and military units and also their organs of administration (military security organs); - the directorates/departments/detachments of the federal executive authority for security for border service (border organs); *(as per Federal Law No. 15-FZ of 07.03.2005)* - other directorates/departments of the federal executive authority for security exercising individual powers of that authority or carrying out federal security service authority activity (other security organs); *(as per Federal Law No. 15-FZ of 07.03.2005)* - aviation sub-divisions, special training centres, special-purpose sub-divisions, enterprises, education establishments, scientific research, expert, forensic, military medicine and military engineering sub-divisions and other establishments and sub-divisions assigned to carry out federal security service activity. - Territorial security organs, military security organs, border organs and other security organs are territorial organs of

[17] Available at: http://www.fsb.ru/fsb/npd/more.htm!id=10340801@fsbNpa.html.

		the federal executive authority for security and directly subordinate to it. The federal executive authority for security, territorial security organs, military security organs and border organs may contain sub-divisions directly implementing main areas of activity of federal security service organs and administrative and support functions. - The creation of federal security service organs not provided for in the present federal law shall not be permitted. *(as per Federal Law No. 15-FZ of 07.03.2005)* Within federal security service organs the creation of structural sub-divisions of political parties and activity of political parties or public movements pursuing political aims and also the conducting of political agitation and pre-election campaigning shall be prohibited. *(as per Federal Law No. 15-FZ of 07.03.2005)* **Article 3: Federal executive authority for security *(as per Federal Law No. 86-FZ of 30.06.2003)*** The federal executive authority for security shall create its own territorial organs, organise the activity of those organs, issue regulatory acts within the limits of its competence and directly implement the main areas of activity of federal security service organs. *(as per Federal Law No. 15-FZ of 07.03.2005)* A Russian Federation Academy of Cryptography shall operate under the auspices of the federal executive authority for security. The statute of the Russian Federation Academy of Cryptography shall be ratified by the President of the Russian Federation. **Article 4: Legal basis for the activity of the Federal Security Service *(as per Federal Law No. 86-FZ of 30.06.2003)*** The legal basis for the activity of the Federal Security Service shall comprise the Constitution of the Russian Federation, the present Federal law, other federal laws and other legal and regulatory acts of the Russian Federation. The activity of the Federal Security Service shall also be carried out in accordance with the international treaties of the Russian Federation. **Federal Law No. 5-FZ on Foreign Intelligence, 10 January 1996**[18] **Chapter 2, Article 11** Intelligence activities within the authority of each service comprise: 1) The Foreign Intelligence Service of the Russian Federation – in political, economic, military-strategic, scientific-technical and environmental spheres, in sphere of encrypted, classified and other types of special communication, using radio-electronic means and methods

[18] Available at: http://svr.gov.ru/svr_today/doc02.htm.

		outside the Russian Federation, and also in the sphere of maintaining the security of the institutions of the Russian Federation, outside the territory of the Russian Federation, and those Russian citizens outside the territory of the Russian Federation having in their professional capacity access to information comprising state secrets.
15.	**Slovakia**	**Act of the National Council of the Slovak Republic dated 21 January 1993 on the Slovak Information Service**[19] **Section 1** (1) The Slovak Information Service (hereafter "The Information Service") is hereby established. (2) The Information Service is a state body of the Slovak Republic which shall fulfil tasks in the protection of the constitutional establishment, public order, security of the State and interests of the State concerning the foreign policy and economy to the extent circumscribed by this act. It shall conduct its activities in accordance with the Constitution, Constitutional Laws, regular laws, and other universally binding legal regulations. (3) In the fulfilment of its duties the Information Service is authorized to cooperate with bodies of other countries having similar competencies and scope of action, as well as international organizations. (4) The rights and freedoms of citizens may be limited by the measures of the Information Service only to the extent and manner established by this act. (5) The Information Service is a non-profit organization financed from the State Budget. (6) In the fulfilment of its duties the Information Service is authorized to use technical means and means of transport usually undercover. **Section 2** (1) Within the scope of its functions the Information Service shall collect, accumulate and analyse information on a. activities threatening the constitutional establishment, territorial integrity and sovereignty of the Slovak Republic, b. activities directed against the security of the Slovak Republic, c. activities of foreign intelligence services, d. organized criminal activity and terrorism, e. matters potentially capable of seriously threatening and/or inflicting damage upon the economic interests of the Slovak Republic, f. threat and/or disclosure of information and matters protected according to special regulations1 or international agreements or international protocols.

[19] Available at: http://www.sis.gov.sk/files/zakony/act_46_1993.pdf.

		(2) The Information Service shall collect, accumulate and analyse information on activities arising abroad which are directed against the constitutional establishment and security of the Slovak Republic and information necessary for the implementation of its interests concerning the foreign policy. (3) Should it be necessary for prevention of activities and threats according to Paragraphs 1 and 2 and implementation of the interests of the Slovak Republic concerning the foreign policy, the Information Service carries out adequate security measures. (4) Within the scope of its functions the Information Service shall fulfil other duties in accordance with specific laws and tasks resulting from international agreements and accords to which the Slovak Republic is bound and tasks from agreements on cooperation with bodies and international organizations according to Article 1 Paragraph 3. (5) The Information Service shall provide the National Council of the Slovak Republic, the president of the Slovak Republic and the Government of the Slovak Republic and its members with information significant for their functioning and decision-making. (6) The Information Service provides information on criminal activities to units of the Police Corps and the Office of prosecution, especially on organized criminal activities. Essential information is also provided to other state bodies, if it is required to put a stop to unconstitutional or illegal activity. (7) Collected information shall be provided only in fulfilment of the purpose stated in Paragraphs 4 to 6 and Article 1 Paragraph 3. Information according to Paragraph 6 shall be provided only under the condition that by its provision there will be no threat to fulfilment of a concrete task of the Information Service according to this Act or disclosure of sources and means of the Information Service or disclosure of identity of its members or persons acting to the benefit of the Information Service; this does not apply should the consequence of not providing the information be obviously more significant than the consequence resulting from its provision.
16.	**Switzerland**	**Federal law on civil intelligence, 3 October 2008**[20] **Article 1: Civil intelligence missions** The Federal Council designates the federal agencies responsible for civil intelligence missions. These services: a. seek and evaluate important overseas political and security intelligence for departments and the Federal Council; b. conduct intelligence missions, as set out in art. 2, 5-13 and 14-17 of the Federal Act of 21 March 1997 establishing measures aimed at maintaining internal security.

[20] Available at: http://www.admin.ch/opc/fr/classified-compilation/20080697/index.html.

		Article 2: Organisation of the Civil Intelligence The Federal Council regulates the organisation of civil intelligence. It places the services that carry out civil intelligence missions under the same department. **Article 3: Collaboration and information sharing between the intelligence services** (1) Civil intelligence services carry out joint and comprehensive threat analyses, and provide each other with all intelligence concerning their respective areas defined by law. (2) They provide the military intelligence service with all intelligence of a nature that would interest the military. (3) The military intelligence service is obliged to provide intelligence to the civil intelligence services, and immediately communicate intelligence when it detects specific threats to internal or external security. (4) The Federal Council regulates, in accordance with legal provisions: a. collaboration and information exchange between civil intelligence services, in particular concerning joint and comprehensive threat analyses; b. collaboration and information exchange between civil intelligence services and the military intelligence service; c. collaboration between civil intelligence services and foreign intelligence services; The Federal Council sets out in particular principles governing the use of information received from foreign services for civil intelligence missions. **Federal law instituting measures aimed at maintaining the internal security, 21 March 1997**[21] **Article 2: Mandates** (1) The Confederation will take preventive measures within the meaning of this Act for the early detection and combat of dangers linked terrorism, prohibited intelligence services, violent extremism and violence during sporting events. Intelligence obtained should allow competent authorities of the Confederation and the Cantons to intervene in time according to the law. (2) Preventive measures also include preparatory acts relating to illegal trade in arms and radioactive substances and the illegal transfer of technology. (3) The Confederation supports competent police and law enforcement authorities by providing them with intelligence on organized crime, particularly where such intelligence is received through collaboration with foreign security authorities . (4) Preventive measures means: a. Periodic evaluations of threat statuses by political authorities and of the mandates given to the agencies

[21] Available at: http://www.admin.ch/opc/fr/classified-compilation/19970117/index.html.

		entrusted with internal security (security agencies); b. Processing of information relating to internal and external security; c. Security controls relating to persons; d. Measures aimed at protecting federal authorities, persons enjoying special protection under international law, as well as permanent diplomatic missions, consular posts and international organisations; e. Seizure, isolation and confiscation of propaganda material inciting violence; f. the measures provided for in article 24a and 24c, which are aimed at preventing violence at sporting events. **Article 4: Principle** (1) Each canton is primarily responsible for internal security on its territory. (2) Insofar as under the Constitution and the law, the Confederation is responsible for internal security, the Cantons assist in terms of administration and enforcement. **Article 5: Tasks performed by the Confederation** (1) To assume leadership on internal security, the Federal Council : a. periodically evaluates threats, establishes rights and obligations on intelligence and adapts mandates; b. Establishes an action plan of measures aimed at protecting federal authorities, persons enjoying protection under international public law, as well as beneficiaries of privileges, immunities and facilities covered in Article 2 of the Act of 22 June 2007 on the host State. c. Orders specific measures in case of particular threats. (2) It regulates the distribution of tasks between the Intelligence Service of the Confederation and the Federal Office of Police as well as between these two units and agencies of the military security during general or active service. SRC and Fedpol perform federal duties under this Act, insofar as they are not assigned to another body.
17.	**Timor-Leste**	**Decree Law No. 03/2009 (National Intelligence Service)**[22] **Article 1 - Establishment** The Organic of the National Intelligence Service, hereinafter referred to as SNI, is hereby established. **Article 2 – Nature** (1) The National Intelligence Service (SNI) is a personalised service of the State falling under the direct responsibility of the

[22] Available at: http://www.jornal.gov.tl/lawsTL/RDTL-Law/index-e.htm.

		Prime Minister and enjoys administrative and financial autonomy. (2) SNI is exclusively at the service of the State and exercises its functions in compliance with the Constitution of the Democratic Republic of Timor-Leste and the laws, and in accordance with the provisions of the present law. **Article 3 – Functions** SNI is the sole organism entrusted with the responsibility to produce intelligence that contributes towards the safeguarding of national independence, national interests and external security, including the guarantee of internal security in preventing sabotage, terrorism, espionage, organised crime and actions that, by their nature, may alter or destroy the constitutionally established State based on the rule of law. **Article 13 - Central Services:** (1) The following shall be central services of SNI: a. The Department of Internal Intelligence; b. The Department of External Intelligence; c. The Administrative Service. (2) The internal organisation of each service or department shall be determined by instruction of the Prime Minister following a proposal by the Director-General.
18.	**Uganda**	**Security Organisations Act 1987**[23] 2. Establishment of security organisations. 1. There are established security organisations to be known as the Internal Security Organisation and the External Security Organisation. 2. The organisations shall be Government departments. 3. Functions of the organisations. The functions of the organisations shall be— a. to collect, receive and process internal and external intelligence data on the security of Uganda; b. to advise and recommend to the President or any other authority as the President may direct on what action should be taken in connection with that intelligence data.

[23] Available at: http://www.opm.go.ug/resource-center/legislation.html.

19.	**United Kingdom of Great Britain and Northern Ireland**	**Security Services Act 1989**[24] **Section 1** (1) There shall continue to be a Security Service…under the authority of the Secretary of State. (2) The function of the Service shall be the protection of national security… **Intelligence Services Act 1994**[25] **Section 1** (1) There shall continue to be a Secret Intelligence Service (in this The Secret Act referred to as "the Intelligence Service") under the authority of the Intelligence Secretary of State; and, subject to subsection (2) below, its functions shall be- a. to obtain and provide information relating to the actions or intentions of persons outside the British Islands; and b. to perform other tasks relating to the actions or intentions of such persons. (2) The functions of the Intelligence Service shall be exercisable only— a. in the interests of national security, with particular reference to the defence and foreign policies of Her Majesty's Government in the United Kingdom; or b. in the interests of the economic well-being of the United Kingdom; or c. in support of the prevention or detection of serious crime.
20.	**United States of America**	**28 USC (Judiciary and Judicial Procedure), Chapter 33 (Federal Bureau of Investigation)**[26] **Section 531: The Federal Bureau of Investigation is in the Department of Justice.** **Executive Order 12333 United States Intelligence Activities**[27] Part 1.7(g): Intelligence Elements of the Federal Bureau of Investigation. Under the supervision of the Attorney General and pursuant to such regulations as the Attorney General may establish, the intelligence elements of the Federal Bureau of Investigation shall:

[24] Available at: http://www.legislation.gov.uk/ukpga/1989/5/contents.
[25] Available at: http://www.legislation.gov.uk/ukpga/1994/13/contents.
[26] Available at: http://www.gpo.gov/fdsys/granule/USCODE-2011-title28/USCODE-2011-title28-partII-chap33/content-detail.html.
[27] Available at: https://www.cia.gov/about-cia/eo12333.html.

		(1) Collect (including through clandestine means), analyze, produce, and disseminate foreign intelligence and counterintelligence to support national and departmental missions, in accordance with procedural guidelines approved by the Attorney General, after consultation with the Director; (2) Conduct counterintelligence activities; and (3) Conduct foreign intelligence and counterintelligence liaison relationships with intelligence, security, and law enforcement services of foreign governments or international organizations in accordance with sections 1.3(b)(4) and 1.7(a)(6) of this order. **National Security Act of 1947 (P.L. 80-235, 61 Stat 496)**[28] **Section 102(b): Principal Responsibility** Subject to the authority, direction, and control of the President, the Director of National Intelligence shall— (1) serve as head of the intelligence community; (2) act as the principal adviser to the President, to the National Security Council, and the Homeland Security Council for intelligence matters related to the national security; and (3) consistent with section 1018 of the National Security Intelligence Reform Act of 2004, oversee and direct the implementation of the National Intelligence Program.

[28] Available at: http://www.intelligence.senate.gov/nsaact1947.pdf.

NATIONAL OFFENCES FOR THE UNAUTHORISED DISCLOSURE OF CLASSIFIED INFORMATION

The following table extracts legislation criminalising the unauthorised disclosure of classified information of the following States: Albania, Armenia, Australia, Bangladesh, Belgium, Brazil, Bulgaria, China, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, India, Italy, Japan, Latvia, Lithuania, Malaysia, Mexico, Morocco, New Zealand, Philippines, Poland, Russia, Singapore, Slovakia, Slovenia, Switzerland, Timor-Leste, Uganda, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Zimbabwe.

The following extracts have in some cases been translated from the original language in which the law was promulgated. The citations are either in the official language or translated into English from the official language in which the law was promulgated.

	State	Offences for the Unauthorised Disclosure of Intelligence Information
1.	**Albania**	**Law No. 8457, dated 11.02.1999 on Information Classified "State Secret"**[1] **Article 2 – Definitions** "State secret" according to this law, means classified information, its unauthorized exposure can threaten the national security. **Article 30 – The breaches** The breaches of the handling, retaining, issuing, destruction and administration regulations of information classified "State Secret" is punished by law.
2.	**Armenia**	**Criminal Code of the Republic of Armenia**[2] **Article 306 – Divulging a state secret** (1) Willful publicizing of a state secret by the person who was entitled to access to state secrets and who was entrusted with secrets, or learnt due to service, if elements of high treason are absent, is punished with arrest for the term of 2-3 months, or with imprisonment for the term of up to 4 years, with or without deprivation of the right to hold certain posts or practice certain activities for up to 3 years. (2) The same action committed negligently, is punished with arrest for up to 2 months, imprisonment for the term of up to 2 years, with deprivation of the right to hold certain posts or practice certain activities for up to 3 years. (3) The acts envisaged in part 1 or 2 of this Article, that negligently caused grave consequences, are punished with imprisonment for 3-7 years, with deprivation of the right to hold certain posts or practice certain activities for up to 3 years.

[1] Available at: http://www.nsa.gov.al/anglisht/law.html.
[2] Available at: http://www.parliament.am/legislation.php?sel=show&ID=1349&lang=arm&enc=utf8.

		Article 307 – Breach of rules for handling documents containing state secrets or computer data. (1) Breach of rules for handling documents containing state secrets or computer data, as well as, other items containing state secrets, by the person who must observe these rules, if this negligently caused the loss of these documents or items or computer data, is punished with correctional labor for the term of up to 1 year, or with arrest for the term of up to 2 months, or imprisonment for the term of up to 1 year, with or without deprivation of the right to hold certain posts or practice certain activities for up to 2 years. (2) The same act which negligently caused grave consequences, is punished with correctional labor for the term of up to 2 years, or with arrest for 2-3 months, or imprisonment for the term of up to 3 years, with deprivation of the right to hold certain posts or practice certain activities for up to 3 years.
3.	**Australia**	**Intelligence Services Act 2001 (Commonwealth)**[3] **Section 39 – Communication of certain information—ASIS** (1) A person is guilty of an offence if: (a) the person communicates any information or matter that was prepared by or behalf of ASIS in connection with its functions or relates to the performance by ASIS of its functions; and (b) the information or matter has come to the knowledge or into the possession of the person by reason of: (i) his or her being, or having been, a staff member of agent of ASIS; […] and (c) the communication was not made: (i) to the Director-General or a staff member by the person in the course of the person's duties as a staff member; or […] (iii) by the person in the course of the person's duties as a staff member or agent, within the limits of authority conferred on the person by the Director-General; or (iv) with the approval of the Director-General or of a staff member having the authority of the Director-General to give such an approval. **Section 41 – Publication of identity of staff** (1) A person is guilty of an offence: (a) if: (i) the person identifies a person as being, or having been, an agent or staff member of ASIS; and (ii) the identification is not of the Director-General or such other persons as the Director-General determines; or (b) if: (i) the person makes public any information from which the identity of such a person could reasonably be inferred, or any information that could reasonably lead to the identity of such a person being established; and (ii) the Minister or Director-General has not consented in writing to the information being made public; and (iii) the information has not been made

[3] Available at: http://www.comlaw.gov.au/Details/C2011C00145.

		public by means of broadcasting or reporting proceedings of the Parliament (other than proceedings of the Committee) as authorised by the Parliament. Penalty: Imprisonment for 1 year or 60 penalty units, or both. Note: For *staff member* see section 3. (2) A prosecution for an offence against subsection (1) may be instituted only by the Attorney-General or with the Attorney-General's consent. **Crimes Act 1914 (Commonwealth)**[4] **Section 70** A person who, being a Commonwealth officer, publishes or communicates, except to some person to whom he or she is authorised to publish or communicate it, any fact or document which comes to his or her knowledge, or into his or her possession, by virtue of being a Commonwealth officer, and which it is his or her duty not to disclose, shall be guilty of an offence. **Criminal Code Act 1995 (Commonwealth)** [5] **Section 91.1 of Schedule 1** (1) A person commits an offence if: (a) the person communicates, or makes available: (i) information concerning the Commonwealth's security or defence; or (ii) information concerning the security or defence of another country, being information that the person acquired (whether directly or indirectly) from the Commonwealth; and (b) the person does so intending to prejudice the Commonwealth's security or defence; and (c) the person's act results in, or is likely to result in, the information being communicated or made available to another country or a foreign organisation, or to a person acting on behalf of such a country or organisation. Penalty: Imprisonment for 25 years. (2) A person commits an offence if: (a) the person communicates, or makes available: (i) information concerning the Commonwealth's security or defence; or (ii) information concerning the security or defence of another country, being information that the person acquired (whether directly or indirectly) from the Commonwealth; and

[4] Available at: http://www.comlaw.gov.au/Details/C2013C00369.
[5] Available at: http://www.comlaw.gov.au/Details/C2014C00011.

		(b) the person does so: (i) without lawful authority; and (ii) intending to give an advantage to another country's security or defence; and (c) the person's act results in, or is likely to result in, the information being communicated or made available to another country or a foreign organisation, or to a person acting on behalf of such a country or organisation. Penalty: Imprisonment for 25 years. (3) A person commits an offence if: (a) the person makes, obtains or copies a record (in any form) of: (i) information concerning the Commonwealth's security or defence; or (ii) information concerning the security or defence of another country, being information that the person acquired (whether directly or indirectly) from the Commonwealth; and (b) the person does so: (i) intending that the record will, or may, be delivered to another country or a foreign organisation, or to a person acting on behalf of such a country or organisation; and (ii) intending to prejudice the Commonwealth's security or defence. Penalty: Imprisonment for 25 years. (4) A person commits an offence if: (a) the person makes, obtains or copies a record (in any form) of: (i) information concerning the Commonwealth's security or defence; or (ii) information concerning the security or defence of another country, being information that the person acquired (whether directly or indirectly) from the Commonwealth; and (b) the person does so: (i) without lawful authority; and (ii) intending that the record will, or may, be delivered to another country or a foreign organisation, or to a person acting on behalf of such a country or organisation; and (iii) intending to give an advantage to another country's security or defence. Penalty: Imprisonment for 25 years. (5) For the purposes of subparagraphs (3)(b)(i) and (4)(b)(ii), the person concerned does not need to have a particular country, foreign organisation or person in mind at the time when the person makes, obtains or copies the record.…

4.	**Bangladesh**	**The Official Secrets Act 1923**[6] **Section 3 – Penalties for spying** (1) If any person for any purpose prejudicial to the safety or interests of the State- (a) approaches, inspects, passes over or is in the vicinity of, or enters, any prohibited place; or (b) makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy; or (c) obtains, collects, records or publishes or communicates to any other person any secret official code or pass word, or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy; he shall be guilty of an offence under this section. (2) On a prosecution for an offence punishable under this section with imprisonment for a term which may extend to fourteen years, it shall not be necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the State, and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case or his conduct or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the State; and if any sketch, plan, model, article, note, document, or information relating to or used in any prohibited place, or relating to anything in such a place, or any secret official code or pass word is made, obtained, collected, recorded, published or communicated by any person other than a person acting under lawful authority, and from the circumstances of the case or his conduct or his known character as proved it appears that his purpose was a purpose prejudicial to the safety or interests of the State, such sketch, plan, model, article, note, document or information shall be presumed to have been made, obtained, collected, recorded, published or communicated for a purpose prejudicial to the safety or interests of the State. (3) A person guilty of an offence under this section shall be punishable,- (a) where the offence committed is intended or calculated to be, directly or indirectly, in the interest or for the benefit of a foreign power, or is in relation to any work of defence, arsenal, naval, military or air-force establishment or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Bangladesh or in relation to any secret official code, with death, or with imprisonment for a term which may extend to fourteen years; and (b) in any other case, with imprisonment for a term which may extend to three years.

[6] Available at: http://bdlaws.minlaw.gov.bd/pdf_part.php?act_name=&vol=&id=132.

		Section 5 – Wrongful communication, etc, of information (1) If any person having in his possession or control any secret official code or pass word or any sketch, plan, model, article, note, document or information which relates to or is used in a prohibited place or relates to anything in such a place, or which has been made or obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding office under Government, or which he has obtained or to which he has had access owing to his position as a person who holds or has held office under Government, or as a person who holds or has held a contract made on behalf of Government, or as a person who is or has been employed under a person who holds or has held such an office or contract- (a) wilfully communicates the code or pass word, sketch, plan, model, article, note, document or information to any person other than a person to whom he is authorized to communicate it, or a Court of Justice or a person to whom it is, in the interests of the State, his duty to communicate it; or (b) uses the information in his possession for the benefit of any foreign power or in any other manner prejudicial to the safety of the State; or (c) retains the sketch, plan, model, article, note or document in his possession or control when he has no right to retain it, or when it is contrary to his duty to retain it, or wilfully fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof; or (d) fails to take reasonable care of, or so conducts himself as to endanger the safety of, the sketch, plan, model, article, note, document, secret official code or pass word or information; (e) he shall be guilty of an offence under this section. (2) If any person voluntarily receives any secret official code or pass word or any sketch, plan, model, article, note, document or information knowing or having reasonable ground to believe, at the time when he receives it, that the code, pass word, sketch, plan, model, article, note, document or information is communicated in contravention of this Act, he shall be guilty of an offence under this section. (3) A person guilty of an offence under this section shall be punishable,- (a) where the offence committed is a contravention of clause (a) of sub-section (1) and intended or calculated to be, directly or indirectly, in the interest or for the benefit of a foreign power, or is in relation to any work of defence, arsenal, naval, military or air force establishment or station mine, mine field, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Bangladesh or in relation to any secret official code, with death, or with imprisonment of a term which may extend to fourteen years; and (b) in any other case, with imprisonment for a term which may extend to two years, or with fine, or with both.

5.	**Belgium**	**Penal Code, 8 June 1867**[7] **Article 116** Whomsoever has knowingly delivered or communicated in whole or in part, in original form or as a reproduction, to an enemy power or to any person acting in the interests of an enemy power, objects, plans, written materials, documents or information of which the secret, in respect of the enemy, concerns the defence of the State's territory or the safety of the State, will be punished (with detention for life). **Article 118** Whomsoever has knowingly delivered or communicated in whole or in part, in original form or as a reproduction, to an enemy power or to any person acting in the interests of an enemy power, objects, plans, written materials, documents or information of which the secret, in respect of the enemy, concerns the defence of the State's territory or the safety outside of the State, will be punished (with detention of ten to fifteen years). If the guilty person held a public function or mandate where they were fulfilling a mission or accomplishing a task conferred on them by the Government, they will be punished with (detention of fifteen to twenty years). **Article 119** Whomsoever has knowingly delivered or communicated in whole or in part, in original form or as a reproduction, to any person not qualified to take delivery or have knowledge, of objects, plans, written materials, documents or information covered by article 118, will be punished with imprisonment of six months to five years and a fine of 500 to 5 000 euros. Whomsoever, without authorisation of the competent authority, has reproduced, published, or disclosed, in whole or in part, by whatever method objects, plans, written materials, documents or information covered by article 118, will be punished with the same penalties.
6.	**Brazil**	**Act that establishes the Brazilian System of Intelligence and Creates the Brazilian Agency of Intelligence – ABIN, Law No 9.883/1999, 7 December 1999**[8] **Article 9A** Any information or documents about intelligence activities and matters produced in the course of [ABIN carrying out its activities] or in ABIN's possession can only be provided by the head of the Office of Institutional Security of the President of the Republic to authorities which have legal competence to request them, taking into account the respective level of secrecy conferred by the legislation in force, excluding those [information or documents] whose secrecy is indispensable to the security of society and of the State. (Amendments

[7] Available at: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=1867060801
[8] Available at: http://www.planalto.gov.br/ccivil_03/Leis/L9883.htm

		were made to the Article by Provisionary Measure no 2.216-37 of 2001). **Penal Code, Decree Law No 2.848, 7 December 1940**[9] **Article 153 (Divulging of secrets)** Divulging to anyone, without just cause, the contents of a particular document or confidential correspondence of which he/she is the recipient or the holder, and the divulgence of which could bring harm to others: Penalty- detention from one to six months, or a fine….(1)(a) Divulging, without just cause, secret or private information defined that way in law, whether or not it is stored on the information systems or databases of the Public Administration: Penalty – detention from one to four years, and a fine… **Article 154 (Violation of professional secrets)** Revealing to anyone, without just cause, a secret of which he/she has knowledge by reason of his/her position, ministry, office or profession, and the revelation of which could bring harm to others: Penalty- detention from three months to one year, or a fine **Article 325 (Violation of secrecy in respect of a public servant's position)** Revealing to anyone a fact of which a person has knowledge of by reason of his/her position and that should have remained secret, or facilitating its revelation: Penalty- detention from six months to two years. or a fine if the fact did not constitute a more serious crime. (1) The same penalties that apply to this article apply to those who: (i) permit or facilitate, through the assignment, supply or loan of a password or any other means, the access of unauthorised people to the information systems or databases of the Public Administration. (ii) improperly take advantage of their restricted access. (2) If the action or omission results in harm to the Public Administration or to others: Penalty- imprisonment from 2 to 6 years, and a fine.
7.	**Bulgaria**	**Classified Information Protection Act**[10] **Article 17** The organisational units shall have a duty to: (1) apply the requirements relating to the protection of classified information and control compliance therewith; (2) be responsible for the protection of information;

[9] Available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/del2848.htm
[10] Available at: http://www.dksi.bg/en/Regulatory+Framework/Law+and+Regulation/CIPA_25032008.htm.

		(3) in the event of unauthorised access to classified information, advise immediately SISC and take action to limit the harmful consequences; (4) provide the information under Article 10(1), subparagraph 2, Article 11(4), subparagraph 6, and Article 16(1), subparagraph 5. **Article 18** (1) The officers of organisational units cleared for access to a particularlevel of classified information shall have a duty to: 1. protect such classified information from unauthorised access; 2. advise immediately the information security officer in the event of unauthorised access to classified information; 3. advise the information security officer of all modifications to classified materials and documents where unauthorised access is not the case; 4. undergo medical examinations from time to time, but not less frequently than once in every two years, and psychological tests under the conditions and procedure laid down in Article 42(3). (2) Every person cleared for access to information classified as "Top Secret" shall have a duty to notify the information security officer of every intended private foreign travel prior to the date of departure, except where such travel is to any State with which the Republic of Bulgaria has concluded a treaty on the reciprocal protection of classified information. (3) The provisions of paragraph 2 shall not apply to the persons under Article 39(1). (4) The officers of the security services and the public order services shall notify in writing their superiors of every intended foreign travel. (5) (Amended, SG No. 109/2007, SG No. 36/2008, SG No. 35/2009, effective 12.05.2009, repealed, SG No. 16/2010, effective 26.02.2010). **Article 19** Every person cleared for access to classified information in connection with a special assignment shall have a duty to comply with the conditions and procedure for the protection of classified information. **Article 117** (1) Whoever commits an offence under Article 17 shall be liable to a fine from BGN 2,000 to 20,000. (2) Where an offence under Article 17 has been committed by a legal person, such person shall be liable to pay damages from BGN 2,000 to 20,000. (3) For failure to prevent an offence under paragraph 2, a legal person's chief executive shall be liable to a fine from BGN 1,000 to 5,000, unless the offence is a criminal one.

		Article 118 (1) Whoever commits an offence under Articles 18 and 19 shall be liable to a fine from BGN 50 to 300. (2) The fine under paragraph 1 shall be imposed also on any head of organisational unit or any information security officer who fails to prevent an offence under Articles 18 and 19.
8.	**China**	**Law of the People's Republic of China on Guarding State Secrets 1988**[11] **Article 31** Persons who, in violation of the provisions of this Law, divulge State secrets intentionally or through negligence, if the consequences are serious, shall be investigated for criminal responsibility in accordance with the provisions of Article 186 of the Criminal Law. Persons who, in violation of the provisions of this Law, divulge State secrets, if the consequences are not serious enough for criminal punishment, may be given disciplinary sanction in light of the specific circumstances of each case. **Article 32** Persons who steal, spy on, buy or illegally provide State secrets for institutions, organisations and people outside the country shall be investigated for criminal responsibility in accordance with law. **State Security Law 1993**[12] **Article 19** Any citizen or organisation shall keep confidential the State secrets that have come to his knowledge or its possession regarding State security. **Article 20** No individual or organisation may unlawfully hold any document, material or other articles classified as State secrets.

[11] Available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383925.htm.
[12] Available at: http://www.gov.cn/ziliao/flfg/2005-08/05/content_20927.htm.

		Article 28 Whoever intentionally or negligently divulges State secrets concerning State security shall be given a detention of not more than 15 days by the State security organ; in case the offence constitutes a crime, the offender shall be investigated for criminal responsibility according to law. **Article 29** A State security organ may search the body, articles, residence and other related places of anyone who unlawfully holds documents, materials or other articles classified as State secrets, or who unlawfully holds or uses equipment and materials specially for espionage purposes, and may confiscate such documents, materials and other articles, as well as such equipment and materials. Anyone, who unlawfully holds documents, materials or other articles classified as State secrets, if the case constitutes the crime of divulging State secrets, shall be investigated for criminal responsibility according to law. **Criminal Law of the People's Republic of China 1979**[13] **Article 111** Whoever steals, spies on, buys or illegally provides state secrets or intelligence for an agency or organisation or people outside China shall be sentenced to fixed-term imprisonment of not less than five years and not more than ten years; if the circumstances are especially serious, the offender shall be sentenced to fixed-term imprisonment of not less than ten years or life imprisonment; if the circumstances are relatively minor, the offender shall be sentenced to fixed-term imprisonment of not more than five years, criminal detention, public surveillance or deprivation of political rights.
9.	**Croatia**	**Data Secrecy Act 2007**[14] **Article 26** State officials and employees, local and regional self-government bodies, legal persons with public authority as well as legal and natural persons who gain access or handle classified and unclassified information shall keep the classified information secret during the time and after the cease of their duty or work until the information is classified or until by the decision of the originator they are free from the duty of keeping the secrecy thereof.

[13] Available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384075.htm.
[14] Available at: http://www.uvns.hr/UserDocsImages/Inf_Sig/ENG/Data%20Secrecy%20Act.pdf.

10.	**Czech Republic**	**Czech Act N. 412 of 21 September 2005 on the Protection of Classified Information**[15] **Section 65 - Common obligations** (1) Each individual shall forward immediately any classified information found or obtained contrary to this Act, or a PSC, FSC, PSC for a foreign power or FSC for a foreign power (hereinafter "the Document Found") to the Authority, Police or to the Embassy of the Czech Republic. (2) Each individual who had or has access to classified information shall hold it in confidence and shall not grant access to it to any unauthorised person. (3) Each individual who submitted application according to S. 94 shall report to the Authority immediately all changes to the data set out in it. (4) In performance of the state control by the Authority each individual shall fulfil instructions of the control officer in implementing urgent measures according to S. 144 par. 1. **Section 66 - Obligations of the natural person who has access to classified information and obligations of the natural person who is a holder of the personnel security clearance** (1) The natural person who has access to classified information, shall (a) comply with obligations in the protection of classified information; (b) hand over, within five days, to the issuing authority of the PSC, his/her PSC, the validity of which has been terminated according to S. 56 par. 1(b) and (f)-(i); (c) report immediately in writing to the issuing authority of the PSC or PSC for the foreign power, loss or theft of his/her PSC or PSC for the foreign power; (d) report immediately to the Authority changes to data set out in his/her application of the natural person according to S. 94 par. 2 (a), (c) and (d); (e) report immediately to the person who made his/her briefing according to S. 9 par. 1 or S. 11 par. 2 all breaches of obligations determined herein; (f) take part in trainings according to S. 67 par. 1 (b). (2) The natural person who is a holder of PSC but has not access to classified information will be only under the duties according to paragraph 1 (b) to (d).

[15] Available at: http://www.nbu.cz/download/nodeid-1814/

11.	**Denmark**	**Penal Code Consolidation Act No 607, 6 September 1986**[16] **Section 107** A person who, in the service of a foreign power or organization, or for the use by persons working for them, explores or communicates matters that must be kept secret in the Danish state or public interest will be punished for espionage, whether or not the matter communicated is correct, by a term of imprisonment of up to 16 years. Stk. 2 If it concerns the matters named in § 109, or it takes place during a war or occupation the penalty may be increased up to a term of imprisonment for life. **Section 108** A person who, excluding the matters falling under § 107, does something by which a foreign intelligence service is made capable or helped directly or indirectly to operate within the territory of the Danish State may be punished by a term of imprisonment of up to 6 years. Stk. 2 If it concerns intelligence related to military matters, or it takes place during war or occupation, the penalty may increase up to a term of imprisonment for 12 years. **Section 109** A person who divulges or passes on communications about the State's secret operations, deliberations or decisions in cases on which the state's security or rights in relation to foreign states depend or which concern significant state socio-economic interests in relation to foreign countries may be punished by a term of imprisonment of up to 12 years. Stk. 2 If these acts are done negligently, the penalty may be a fine or imprisonment for up to 3 years.
12.	**Estonia**	**State Secrets Act (1999 as amended 2004)**[17] **Section 13 – Duty to maintain state secrets** (1) Persons who do not have the right to access state secrets but to whom a state secret becomes known are required to maintain the confidentiality thereof. (2) Persons who do not have the right to access state secrets but who come into possession of a classified medium are required to give the classified medium promptly to the Security Police Board. **Section 14 – Duties of persons with right of access to state secrets** (1) A person with the right of access to state secrets is required to:

[16] Available at: https://www.retsinformation.dk/Forms/R0710.aspx?id=152827
[17] Available at: http://www.legaltext.ee/en/andmebaas/tekst.asp?loc=text&dok=X30057K7&pg=1&tyyp=X&query=State+Secrets+Act&ptyyp=RT&keel=et.

		5. maintain the confidentiality of state secrets which become known to him or her; 6. protect classified media in his or her possession from disclosure and access by unauthorised persons; 7. notify immediately the head of an agency or legal person or a person authorised by the head to organise the protection of state secrets, and the corresponding agency which performs security checks of any person attempting in any way to obtain unlawful access to state secrets; 8. notify immediately the head of an agency or legal person or a person authorised by the head to organise the protection of state secrets, and the corresponding agency which performs security checks of each violation of the requirements of this Act or legislation issued on the basis thereof which becomes known to him or her; 9. notify immediately the corresponding agency which performs security checks of any change in his or her name, residence, seat or postal address. (2) In addition to the provisions of subsection (1) of this section, a legal person is required to immediately notify an agency which performs security checks of the following changes: 1. merger, division or transformation; 2. changes in the membership of the management board or the supervisory board; 3. bankruptcy or liquidation proceedings commenced with respect to the legal person; 4. changes in the ownership if the holding of a new owner forms at least 5 per cent; 5. proprietary obligations which have arisen and which exceed the average one month's turnover during the preceding financial year. (05.12.2001 entered into force 06.01.2002 - RT I 2001, 100, 643)
13.	**Finland**	**Act on the Openness of Government Activities (621/1999; amendments up to 1060/2002 included)**[18] **Section 22 — Document secrecy** (1) An official document shall be secret if it has been so provided in this Act or another Act, or if it has been declared secret by an authority by virtue of an Act, or if it contains information covered by the duty of non-disclosure, as provided in an Act. (2) A secret official document, a copy or a printout thereof shall not be shown or given to a third party or made available to a third party by means of a technical interface or otherwise. **Section 23 — Non-disclosure and prohibition of use** (1) A person in the service of an authority and an elected official shall not disclose the secret content of a document, nor information which would be secret if contained in the document, nor any other information obtained in the service of the authority, where covered by a duty of non-disclosure provided in an Act. The provision on non-disclosure shall apply also after the service or the performance of the task on behalf of the authority has ceased.

[18] Available at: http://www.finlex.fi/en/laki/kaannokset/1999/en19990621.pdf.

		(2) The provision in paragraph (1) applies also where trainees or other temporary personnel, persons commissioned by the authority or persons in the service of such persons have acquired secret information by virtue of an Act or a permission based on an Act, unless otherwise provided in the Act or laid down in the permission. A party, his/her representative or counsel shall not disclose to third parties secret information obtained by virtue of party status and concerning other persons than the party himself. (3) A person referred to above in paragraph (1) or (2) shall not use secret information for personal benefit or the benefit of another, nor for the detriment of another. However, a party, his/her representative and counsel may use information concerning a person other than the party himself/herself, where the matter concerns the right, interest or obligation on which the access of the party to the information is based. **Criminal Code of the Republic of Finland**[19] **Section 1 - Secrecy offence (578/1995)** A person who in violation of a secrecy duty provided by an Act or Decree or specifically ordered by an authority pursuant to an Act (1) discloses information which should be kept secret and which he or she has learnt by virtue of his or her position or task or in the performance of a duty, or (2) makes use of such a secret for the gain of himself or herself or another shall be sentenced, unless the act is punishable under chapter 40, section 5, for a secrecy offence to a fine or to imprisonment for at most one year. **Section 2 - Secrecy violation (578/1995)** (1) If the secrecy offence, in view of the significance of the act as concerns the protection of privacy or confidentiality, or the other relevant circumstances, is petty when assessed as a whole, the offender shall be sentenced for a secrecy violation to a fine. (2) Also a person who has violated a secrecy duty referred to in section 1 and it is specifically provided that such violation is punishable as a secrecy violation, shall also be sentenced for a secrecy violation. **Section 5 - Breach and negligent breach of official secrecy (604/2002)** (1) If a public official intentionally, while in service or thereafter, unlawfully 1. discloses a document or information which pursuant to the Act on the Openness of Government Activities (621/1999) or another Act is to be kept secret of not disclosed, or 2. makes use of the document or information referred to in paragraph (1) to the benefit of himself or herself or to the loss of another, he or she shall be sentenced, unless a more severe penalty for the act has been laid down elsewhere, for *breach of official secrecy* to a fine or to imprisonment for at most two years. A public official may also be sentenced to dismissal if the offence demonstrates that he or

[19] Available at: http://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf.

		she is manifestly unfit for his or her duties. (2) If a public official commits the offence referred to in subsection 1 through negligence, and the act, in view of its harmful and damaging effects and the other relevant circumstances, is not of minor significance, he or she shall be sentenced, unless a more severe penalty for the act is provided elsewhere in the law, for *negligent breach of official secrecy* to a fine or to imprisonment for at most six months.
14.	**France**	**Penal Code of the French Republic**[20] **Article 411-6** The fact of delivering or rendering accessible to a foreign power, a foreign company or organisation or a company or organisation under foreign control, or to their agents, information, devices, objects, documents, electronic data or files where the use, disclosure or collection is of a nature to damage fundamental interests of the Nation is punished with fifteen years of criminal detention and with a fine of 225 000 euros. **Article 411-7** The fact of collating or gathering, in view of delivering them to a foreign power, a foreign company or organisation or a company or organisation under foreign control, or to their agents, information, devices, objects, documents, electronic data or files where the use, disclosure or collection is of a nature to damage fundamental interests of the Nation is punished with ten years of criminal detention and with a fine of 150 000 euros. **Article 411-8** The fact of conducting, for the benefit of a foreign power, a foreign company or organisation or a company or organisation under foreign control, or their agents, an activity aimed at obtaining or delivering systems, information, devices, objects, documents, electronic data or files where the use, disclosure or collection is of a nature to damage fundamental interests of the Nation is punished with ten years of criminal detention and with a fine of 150 000 euros.

[20] Available at: http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719.

15.	**Georgia**	**Law of Georgia on State Secrets**[21] **Article 32 – The Obligations of the Person having Access to the State Secret to keep the State Secret** The person who was granted access to the state secret shall be bound: (1) Not to disclose the state secret which was entrusted to him or which was made known to him when performing his official duties; (2) To observe the requirements of the secrecy regime prescribed in accordance with Article 25 of this Law. (3) To notify the official who granted him access to the state secret of the circumstances that obstruct the person from keeping the state secret entrusted to him. **Article 38 – Liability for Violation of the Law of Georgia on State Secrets** (1) A person who violates the obligation to keep the state secret referred to in Article 32 of this Law or who fails to observe the restrictions on handing over the state secret to another state shall be liable according to the Georgian legislation. (2) An official or a state employee who: (a) Classifies as secret the information referred to in Article 8 of this Law; (b) Classifies the information as secret without justification; (c) Attaches a secrecy label to the medium of information which does not constitute or no longer constitutes a state secret; (d) Violates the requirements of Article 26 of this Law with respect to granting access to a state secret; (e) Violates the requirements of Article 19 of this Law; (f) Breaches the obligation to keep the state secret; (g) Fails to observe the restrictions on handing over the state secret to another state; or (h) Fails to exercise control over protection of state secrets, shall be liable according to the Georgian legislation. (3) If a person has disclosed the information defined as a state secret which, according to this Law, should not have been defined as a state secret, then the question of his liability may be considered only after the validity of imposing secrecy on this information is established; and if it is found that the secrecy had been imposed illegally, then the person shall not be held liable. (4) Disclosure of a state secret by the person who did not know and reasonably should not have known that the information was secret shall not be deemed to constitute an offense. (5) If a medium of mass information made public a state secret and thereby caused a significant damage to the state security or to the international relations of Georgia, or thereby put in danger the lives of the individuals, then the editor on duty (the person responsible for the broadcast) shall be liable according to the Georgian legislation. (6) Publication by the media of mass information of such information containing a state secret publication of which is important for protection of the public safety or which was already published earlier shall not be deemed to constitute an offense.

[21] Available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=209009.

16.	**Germany**	**Criminal Code of 13 November 1998**[22] **Section 93 (Definition of state secret)** (1) State secrets are facts, objects or knowledge which are only accessible to a limited category of persons and must be kept secret from foreign powers in order to avert a danger of serious prejudice to the external security of the Federal Republic of Germany. (2) Facts which constitute violations of the independent, democratic constitutional order or of international arms control agreements, kept secret from the treaty partners of the Federal Republic of Germany, are not state secrets. **Section 94 (Treason)** (1) Whosoever 1. communicates a state secret to a foreign power or one of its intermediaries; or 2. otherwise allows a state secret to come to the attention of an unauthorised person or to become known to the public in order to prejudice the Federal Republic of Germany or benefit a foreign power and thereby creates a danger of serious prejudice to the external security of the Federal Republic of Germany, shall be liable to imprisonment of not less than one year. (2) In especially serious cases the penalty shall be imprisonment for life or of not less than five years. An especially serious case will typically occur if the offender 1. abuses a position of responsibility which especially obliges him to safeguard state secrets; or 2. through the offence creates the danger of an especially serious prejudice to the external security of the Federal Republic of Germany. **Section 95 (Disclosure of state secrets with intent to cause damage)** (1) Whosoever allows a state secret which has been kept secret by an official authority or at its behest to come to the attention of an unauthorised person or become known to the public, and thereby creates the danger of serious prejudice to the external security of the Federal Republic of Germany, shall be liable to imprisonment from six months to five years unless the offence is punishable under section 94. (2) The attempt shall be punishable. (3) In especially serious cases the penalty shall be imprisonment from one to ten years. Section 94(2) shall apply. **Section 96 (Treasonous espionage; spying on state secrets)** (1) Whosoever obtains a state secret in order to disclose it (section 94) shall be liable to imprisonment from one to ten years. (2) Whosoever obtains a state secret which has been kept secret by an official agency or at its behest in order to disclose it (section 95) shall be liable to imprisonment from six months to five years. The attempt shall be punishable.

[22] Available at: http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf.

		Section 97 (Disclosure of state secrets and negligently causing danger) (1) Whosoever allows a state secret which has been kept secret by an official agency or at its behest to come to the attention of an unauthorised person or become known to the public, and thereby negligently causes the danger of serious prejudice to the external security of the Federal Republic of Germany, shall be liable to imprisonment not exceeding five years or a fine. (2) Whosoever by gross negligence allows a state secret which has been kept secret by an official agency or at its behest and which was accessible to him by reason of his public office, government position or assignment given by an official authority, to come to the attention of an unauthorised person, and thereby negligently causes the danger of serious prejudice to the external security of the Federal Republic of Germany, shall be liable to imprisonment not exceeding three years or a fine. (3) The offence may only be prosecuted upon the authorisation of the Federal Government. **Section 97a (Disclosure of illegal secrets)** Whosoever communicates a secret, which is not a state secret because of one of the violations indicated in section 93(2), to a foreign power or one of its intermediaries and thereby creates the danger of serious prejudice to the external security of the Federal Republic of Germany, shall be punished as if he had committed treason (section 94). Section 96(1), in conjunction with section 94(1) No 1 shall apply mutatis mutandis to secrets of the kind indicated in the 1st sentence above. **Section 98 (Treasonous activity as an agent)** (1) Whosoever 1. engages in activity for a foreign power which is directed towards the acquisition or communication of state secrets; or 2. declares to a foreign power or one of its intermediaries his willingness to engage in such activity, shall be liable to imprisonment not exceeding five years or a fine unless the offence is punishable pursuant to section 94 or section 96(1). In especially serious cases the penalty shall be imprisonment from one to ten years; section 94(2) 2nd sentence No 1 shall apply mutatis mutandis. (2) The court in its discretion may mitigate the sentence (section 49(2)) or order a discharge under these provisions if the offender voluntarily gives up his activity and discloses his knowledge to a government authority. If the offender in cases under subsection (2) 1st sentence above has been forced into the activity by the foreign power or its intermediaries, he shall not be liable under this provision if he voluntarily gives up his activity and discloses his knowledge to a government authority without unnecessary delay.
17.	**India**	**Official Secrets Act 1923**[23] **Section 3 – Penalties for spying** (1) If any person for any purpose prejudicial to the safety or interests of the State- (a) approaches, inspects, passes over or is in the vicinity of, or enters, any prohibited place; or

[23] Available at: www.archive.india.gov.in/allimpfrms/allacts/3314.pdf.

		(b) makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be, directly; or indirectly, useful to an enemy or (c) obtains collects, records or publishes or communicates to any other person any secret official code or pass word, or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy or which relates to a matter the disclosure of which is likely to affect the sovereignty and integrity of India, the security of the State or friendly relations with foreign States; he shall be punishable with imprisonment for a term which may extend, where the offence is committed in relation to any work of defence, arsenal, naval, military or air force establishment or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Government or in relation to any secret official code, to fourteen years and in other case to three years. (2) On a prosecution for an offence punishable under this section, it shall not be necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the State, and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case or his conduct or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the State; and if any sketch, plan, model, article, note, document, or information relating to or used in any prohibited place, or relating to anything in such a place, or any secret official code or pass word is made, obtained, collected, recorded, published or communicated by any person other than a person acting under lawful authority, and from the circumstances of the case or his conduct or his known character as proved it appears that his purpose was a purpose prejudicial to the safety or interests of the State, such sketch, plan, model, article, note, document, information, code or pass word shall be presumed to have been made, obtained, collected, recorded, published or communicated for a purpose prejudicial to the safety or interests of the State.
18.	**Italy**	**Intelligence System for the Security of the Republic and new Provisions Governing Secrecy, Law no 124 of 8 March 2007**[24] **Section 41 – Prohibition against relating facts having State-secret status** (1) Public officials, public employees and public service providers are forbidden to relate facts having State-secret status. If State-secret status has been invoked at any stage of criminal proceedings then, without prejudice to the provisions contained in article 202 of the Code of Criminal Procedure (as substituted by section 40 of this Act), the judicial authority shall inform the President of the Council of Ministers (in his/her capacity as National Security Authority), so that the necessary decisions falling within his/her competence may be taken. (2) If the judicial authority considers that knowledge of the matters having State-secret status is essential for the conclusion of the proceedings, he/she shall suspend every initiative directed at acquiring the information having State-secret status and ask the President of the Council of Ministers to confirm the existence of State-secret status. (3) Should State-secret status be confirmed and should knowledge of the matters having State-secret status be shown to be essential for

[24] Available at: http://www.sicurezzanazionale.gov.it/sisr.nsf/english/law-no-124-2007.html.

		the conclusion of the proceedings, the judge shall state that he/she cannot proceed on account of the existence of a State secret. (4) If the President of the Council of Ministers fails to confirm State-secret status within thirty days of receiving notification of the request, the judicial authority shall acquire the information and make provision for the proceedings to continue. (5) An invocation of State-secret status that is confirmed by the President of the Council of Ministers in a document stating reasons shall bar the judicial authority from acquiring or using the information having State-secret status even indirectly. (6) It shall, in any case, remain open to the judicial authority to proceed on the basis of elements existing separately and independently of the records, documents or matters having State-secret status. (7) Where a conflict of competence issue is raised against the President of the Council of Ministers, should the conflict result in a finding that no State secret exists, the President of the Council of Ministers shall not have the power to invoke State-secret status again in relation to the same material. Should the conflict result in a finding that a State secret does exist, the judicial authority shall have no power either to acquire or to use (whether directly or indirectly) records or documents in relation to which State-secret status has been invoked. (8) In no circumstances may State-secret status be invoked against the Constitutional Court. The Court shall adopt the necessary measures to guarantee the secrecy of its proceedings. (9) The President of the Council of Ministers shall be bound both to communicate to the Parliamentary Committee referred to under section 30 every case where an invocation of State-secret status is confirmed pursuant to this section, and to give the essential reasons for such confirmation. At the request of the Parliamentary Oversight Committee, the President of the Council of Ministers shall provide, in a secret ad hoc session, the information necessary to review the merits of the confirmation of the invocation of State-secret status. If the Parliamentary Committee considers the invocation of State-secret status to be groundless, it shall report the matter to both Houses of Parliament for their assessment of the situation.
19.	**Japan**	**Act on the Protection of Specially Designated Secrets**[25] **Article 1** In view of the fact that, under the situation where the increasingly complex international situation has enhanced the importance of information related to securing the safety of Japan and its citizens and where the development of an advanced information and telecommunications network society has given rise to concern over the risk of unauthorized disclosure of such information, it is important to establish a system for properly protecting information, among information concerning Japan's National Security (meaning assuring the safety of the nation and its citizens from any invasion from outside, etc. which might affect the nation's existence; the same shall apply hereinafter), which is particularly required to be kept secret, and then to gather, sort out and utilize said information, this Act is aimed at preventing unauthorized disclosure of such information by providing for the designation of specially designated secrets, restriction on the persons who handle them, and other necessary matters with regard to the protection of such information, and thereby contribute to securing the safety of Japan and its citizens.

[25] Available at: http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=02&dn=1&co=01&ia=03&x=39&y=9&ky=secrets&page=37

		Article 23 (1) If a person who is engaged in the duty of handling a specially designated secret discloses, without authorization, the specially designated secret which he/she has come to know in the course of performing the duty, such person shall be punished by imprisonment with work for not more than ten years, or in light of the circumstances, shall be punished by imprisonment with work for not more than ten years and a fine of not more than ten million yen. The same shall apply when such person is no longer engaged in the duty of handling a specially designated secret. (2) With regard to the specially designated secret provided pursuant to Article 4, paragraph (5), Article 9, Article 10 or the second sentence of Article 18, paragraph (4), if, a person has come to know said specially designated secret in the course of performing the duty for which the secret was provided, and then discloses it without authorization, such person shall be punished by imprisonment with work for not more than five years, or in light of the circumstances, shall be punished by imprisonment with work for not more than five years and a fine of not more than five million yen. The same shall apply when, with regard to a specially designated secret presented in the case provided in Article 10, paragraph (1), item (i), (b), a person to whom the specially designated secret has been presented discloses it without authorization. (3) An attempt of the crimes prescribed under the preceding two paragraphs shall be punished. (4) A person who commits the crime prescribed under paragraph (1) by negligence shall be punished by imprisonment without work for not more than two years or by a fine of not more than 500,000 yen. (5) person who commits the crime prescribed under paragraph (2) by negligence shall be punished by imprisonment without work for not more than one year or a fine of not more than 300,000 yen.
20.	**Latvia**	**Law on Official Secrets**[26] **Section 14 – Duties of a Person in Respect of Official Secrets** (1) A person who is entitled to carry out work which is related to official secrets or the protection thereof shall be personally liable for the performance of the requirements for the protection of official secrets provided for in the law and Cabinet regulations, and compliance with the specified secrecy regime and special record-keeping regulations. (2) If the circumstances referred to in Section 9, Paragraph three of this Law have arisen which prevent the person from access to official secrets, the person has a duty to notify the institution which issued the special permit thereof without delay. (3) An official secret subject shall without delay notify the relevant State security institution of the cases of loss of official secret objects and in co-operation with this institution carry out a search for the lost objects, as well as take the necessary measures to prevent or diminish harm which may arise as a result of disclosure of the official secret.

[26] Available at: http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/On_Official_Secrets.doc

		Section 15 – Liability for Violation of Regulations for Utilisation or Protection of Official Secrets (1) A person who by his or her action or failure to act has violated the regulations for the utilisation or protection of official secrets shall be held disciplinary or criminally liable in accordance with the procedures set out by law. (2) Procedures for the internal investigation of such matters shall be determined by the Cabinet.
21.	**Lithuania**	**Law on State Secrets and Official Secrets 2012**[27] **Article 19. Duties of a Person Holding an Authorisation to Handle or Familiarise with Classified Information or a Security Clearance** A person holding an authorisation to handle or familiarise with classified information or a security clearance shall be under an obligation: 1. to know requirements of the legal acts regulating the protection of classified information and carry them out; 2. not to disclose, lose and release the classified information entrusted to or obtained by him to unauthorised persons as well as to the persons who, although having the right to handle classified information, are not authorised to familiarise with it; 3. to protect the classified information entrusted to him or obtained during the period of service for the entire time period for classification of this information; 4. to act on a need-to-know basis; 5. to prevent the unlawful actions of third parties which may result in a disclosure, loss, seizure or other unauthorised acquisition of classified information and to immediately notify of these facts and other circumstances of a disclosure or loss of classified information a responsible person or the head of an entity of secrets; 6. to immediately notify a responsible person of a loss or disclosure of the classified information entrusted to him as well as of breaches of requirements for the protection of classified information; 7. to return all the classified information entrusted to him to a responsible person when terminating employment (service) relations, being transferred to a position not involving to the use of classified information; 8. to provide information, oral or written clarifications to the persons authorised to exercise control of the protection of classified information; 9. to notify a responsible person of changes in the questionnaire data submitted to the institutions which have screened his candidacy; 10. six months prior to the expiry of validity of an authorisation to handle or familiarise with classified information or a security clearance as well as in the course of additional screening carried out by authorised institutions, to submit to a responsible person the documents required for the carrying out of the screening.

[27] Available at: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_e?p_id=435662.

		Article 46 – Liability for Unauthorised Holding of Classified Information, Compromise, Loss, Seizure or Other Unauthorised Acquisition of Classified Information A person shall be held liable for an unauthorised holding of classified information, the compromise, loss, seizure or other unauthorised acquisition of classified information or for other breaches of the requirements set for the protection of classified information in accordance with the procedure laid down by legal acts.
22.	**Malaysia**	**Official Secrets Act 1972**[28] **Article 3 – Penalties for spying** If any person for any purpose prejudicial to the safety or interest of Malaysia— (a) approaches, inspects, passes over or is in the neighbourhood of, or enters any prohibited place; (b) makes any document which is calculated to be or might be or is intended to be directly or indirectly useful to a foreign country; (c) obtains, collects, records, publishes or communicates to any other person any secret official code word, countersign, password or any article, document or information which is calculated to be or might be or is intended to be directly or indirectly useful to a foreign country, he shall be guilty of an offence punishable with imprisonment for life. **Article 8 – Wrongful communication, etc., of official secret** (1) If any person having in his possession or control any official secret or any secret official code word, countersign or password which— (a) relates to or is used in a prohibited place or relates to anything in such a place; (b) relates to munitions of war and to other apparatus, equipment and machinery which are used in the maintenance of the safety and security of Malaysia; (c) has been made or obtained in contravention of this Act; (d) has been entrusted in confidence to him by any public officer; or (e) he has made or obtained, or to which he has had access, owing to his position as a person who holds or has held office in the public service, or as a person who holds, or has held a contract made on behalf of the Government, or as a person who is or has been employed by or under a person who holds or has held such an office or contract, does any of the following: (i) communicates directly or indirectly any such information or thing to any foreign country other than any foreign country to which he is duly authorized to communicate it, or any person other than a person to whom he is duly authorized to communicate it or to whom it is his duty to communicate it;

[28] Available at: http://www.agc.gov.my/Akta/Vol.%202/Akta%2088.pdf. See also: http://www.agc.gov.my/Akta/Vol.%202/Act%2088.pdf.

		(ii) uses any such official secret or thing as aforesaid for the benefit of any foreign country other than any foreign country for whose benefit he is duly authorized to use it, or in any other manner prejudicial to the safety or interests of Malaysia; (iii) retains in his possession or control any such thing as aforesaid when he has no right to retain it, or when it is contrary to his duty to retain it, or fails to comply with all lawful directions issued by lawful authority with regard to the return or disposal thereof; or (iv) fails to take reasonable care of, or so conducts himself as to endanger the safety or secrecy of, any such official secret or thing, he shall be guilty of an offence punishable with imprisonment for a term not less than one year but not exceeding seven years. (2) If any person receives any official secret or any secret official code word, countersign or password knowing or having reasonable ground to believe at the time when he receives it, that the official secret, code word, countersign or password is communicated to him in contravention of this Act, he shall, unless he proves that the communication to him of the official secret, code word, countersign or password was contrary to his desire, be guilty of an offence punishable with imprisonment for a term not less than one year but not exceeding seven years.
23.	**Mexico**	**National Security Act, 31 January 2005**[29] **Article 54** A person who for any reason participates or has knowledge of the products, sources, methods, means, intelligence operations, records or information derived from planned actions under the current law, should not disclose it, by any means and take the necessary measures to avoid it becoming public. **Federal Penal Code, 14 August 1931**[30] **Article 210** A person who reveals any secret or confidential communication known or received through the course of employment, without just cause, to the detriment of someone, without consent in a manner which could result in harm shall receive thirty to two hundred days of community service.

[29] Available at: http://www.diputados.gob.mx/LeyesBiblio/pdf/LSegNac.pdf.
[30] Available at: http://www.edomex.gob.mx/legistelfon/doc/pdf/cod/vig/codvig006.pdf.

		Article 211 When the punishable disclosure is made by a person who performs professional or technical services or is a public official or employee or when the secret that is revealed or published has an industrial character, the penalty is one to five years, a fine of fifty to five hundred pesos and suspension from employment, if applicable, of two months to one year.
24.	**Morocco**	**General Civil Service Regulation Act, Dahir No. 1-58-008 of 4 Shaban 1377, 24 February 1958**[31] **Chapter 18** Notwithstanding the enacted criminal law regulation relating to information security, every employee in the Moroccan public service is required to protect classified information relating to tasks or information that the employee learns during the performance or exercise of their duties. It is also forbidden to embezzle work papers and documents or to reveal their content to others in an unauthorised way. Except in circumstances specified in current regulations, only the authority of the Minister to whom the employee reports can authorise this employee to reveal any professional secrets or to remove the requirement of the regulation above. **Penal Code, Dahir No. 1-59-413, 26 November 1962**[32] **Article 181** Whether in time of peace or war, any Moroccan is guilty of treason and punishable with death if they commit the following acts…4 delivering to a foreign authority or its agents, under whatever form and by whatever means, a national defence secret, or who has, by whatever means whatsoever, possession of a secret of this nature with the intention of delivering it to a foreign authority or its agents is, in times of peace or in times of war, guilty of treason and punished with death. **Article 187** [Things that] Are considered national defence secrets for the application of the present code : 1. Military, diplomatic, economic or industrial information that, by its nature, must only be known by people qualified to utilise or maintain it, and must, in the interest of national defence, be held secret from to all other persons. 2. Objects, materials, written information, drawings, plans, maps, field maps, photographs or any other reproductions, and all other documents whatsoever which, by their nature, must only be known by people qualified utilise or maintain it, and must, in the

[31] Available at: http://www.mmsp.gov.ma/ar/documents.aspx?t=3.
[32] Available at: http://adala.justice.gov.ma/production/legislation/fr/penal/Code%20Penal.htm and http://www.mmsp.gov.ma/ar/documents.aspx?t=3.

		interests of national defence, be held secret from to all other persons for the reason they are capable of leading to the discovery of information belonging to the categories referred to in the preceding paragraph. 3. military information of whatever nature, not previously published by the government, and not listed in the categories above, and whose publication, broadcast, disclosure or copying was prohibited by decree or a ministerial cabinet decree. … When the offenses in the preceding paragraphs are committed in times of war, the penalty is imprisonment from five to thirty years. When committed in time of peace, the penalty is imprisonment of one to five years and a fine from 1 000 to 10 000 dirhams. **Article 193** Is guilty of an offense against the external security of the State: any Moroccan or foreigner who commits the following: …. 2° organising any means of correspondence or transmission which can harm national defence, in a clandestine manner and regardless of whether they used a disguise, or concealed their names, positions or nationalities.… If the offenses in the preceding paragraphs are committed in times of war, the penalty is imprisonment from five to thirty years. If committed in times of peace, the penalty is imprisonment of one to five years and a fine from 1000 to 10000 dirhams.
25.	**New Zealand**	**New Zealand Security Intelligence Service Act 1996**[33] **Article 12A – Prohibition on unauthorised disclosure of information** (1) An officer or employee of the Security Intelligence Service, or a former officer or employee of the Service, shall not disclose or use any information gained by or conveyed to him through his connection with the Service otherwise than in the strict course of his official duties or as authorised by the Minister. (2) A person who, by any intelligence warrant, is authorised to intercept or seize any communication or to undertake electronic tracking, or is requested to give any assistance in making any such interception or seizure or electronic tracking, or to make the services of other persons available to the Security Intelligence Service, shall not disclose the existence of the warrant, or disclose or use any information gained by or conveyed to him when acting pursuant to the warrant, otherwise than as authorised by the warrant or by the Minister or the Director. (3) A person who acquires knowledge of any information knowing that it was gained as a result of any interception or seizure, or electronic tracking, in accordance with an intelligence warrant shall not knowingly disclose that information otherwise than in the course of his duty. (4) Every person commits an offence and is liable on conviction to imprisonment for a term not exceeding 2 years or a fine not exceeding $2,000 who fails to comply with or acts in contravention of the foregoing provisions of this section.

[33] Available at: http://www.legislation.govt.nz/act/public/1969/0024/latest/whole.html.

		Crimes Act 1961[34] **Section 78A – Wrongful Communication, Retention, or Copying of Official Information** (1) Every one is liable to imprisonment for a term not exceeding 3 years who, being a person who owes allegiance to the Sovereign in right of New Zealand, within or outside New Zealand,— (a) knowingly or recklessly, and with knowledge that he or she is acting without proper authority, communicates any official information or delivers any object to any other person knowing that such communication or delivery is likely to prejudice the security or defence of New Zealand; or (b) with intent to prejudice the security or defence of New Zealand, retains or copies any official document— (i) which he or she knows he or she does not have proper authority to retain or copy; and (ii) which he or she knows relates to the security or defence of New Zealand; and (iii) which would, by its unauthorised disclosure, be likely to prejudice the security or defence of New Zealand; or (c) knowingly fails to comply with any directions issued by a lawful authority for the return of an official document— (i) which is in his or her possession or under his or her control; and (ii) which he or she knows relates to the security or defence of New Zealand; and (iii) which would, by its unauthorised disclosure, be likely to prejudice seriously the security or defence of New Zealand. (2) In this section,— department means a government department named in Part 1 of Schedule 1 of the Ombudsmen Act 1975 object means any object which— (a) a department; or (b) a Minister of the Crown in his or her official capacity; or (c) an organisation; or (d) an officer or employee of any department or organisation in his or her capacity as such an officer or employee or in his or her capacity as a statutory officer; or (e) an independent contractor engaged by any department or Minister of the Crown or organisation in his or her capacity as such contractor; or (f) a branch or post, outside New Zealand, of a department or organisation; or (g) an unincorporated body (being a board, council, committee, subcommittee, or other body)— (i) which is established for the purpose of assisting or advising, or performing functions connected with, any department or Minister of the Crown or organisation; and (ii) which is so established in accordance with the provisions of any enactment or by any department or Minister of

[34] Available at: http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM327382.html.

		the Crown or organisation,— is entitled to have in its or his or her possession by virtue of its or his or her rights as the owner, hirer, lessee, bailee, or custodian of that object official information— (a) means any information held by— (i) a department; or (ii) a Minister of the Crown in his or her official capacity; or (iii) an organisation; or (iv) an officer or employee of any department or organisation in his or her capacity as such an officer or employee or in his or her capacity as a statutory officer; or (v) an independent contractor engaged by any department or Minister of the Crown or organisation in his or her capacity as such contractor; and (b) includes any information held outside New Zealand by any branch or post of— (i) a department; or (ii) an organisation; and (c) includes any information held by an unincorporated body (being a board, council, committee, subcommittee, or other body)— (i) which is established for the purpose of assisting or advising, or performing functions connected with, any department or Minister of the Crown or organisation; and (ii) which is so established in accordance with the provisions of any enactment or by any department or Minister of the Crown or organisation organisation means— (a) an organisation named in Part 2 of Schedule 1 of the Ombudsmen Act 1975: (b) an organisation named in Schedule 1 of the Official Information Act 1982 statutory officer means a person— (a) holding or performing the duties of an office established by an enactment; or (b) performing duties expressly conferred on him or her by virtue of his or her office by an enactment **Summary Offences Act 1981**[35] **Section 20A – Unauthorised disclosure of certain official information** (1) Every person commits an offence and is liable to imprisonment for a term not exceeding 3 months or to a fine not exceeding $2,000

[35] Available at: http://www.legislation.govt.nz/act/public/1981/0113/latest/DLM53348.html.

		who knowingly communicates to any other person any official information as defined in section 78A(2) of the Crimes Act 1961 (not being official information that is publicly available) or delivers to any other person any object as defined in section 78A(2) of the Crimes Act 1961 knowing that he does not have proper authority to effect the communication or delivery and that the communication of that information or the delivery of that object is likely— (a) to endanger the safety of any person: (b) to prejudice the maintenance of confidential sources of information in relation to the prevention, investigation, or detection of offences; or (c) to prejudice the effectiveness of operational plans for the prevention, investigation, or detection of offences or the maintenance of public order, either generally or in a particular case; or (d) to prejudice the safeguarding of life or property in a disaster or emergency; or (e) to prejudice the safe custody of offenders or of persons charged with offences; or (f) to damage seriously the economy of New Zealand by disclosing prematurely decisions to change or continue Government economic or financial policies relating to— (i) exchange rates or the control of overseas exchange transactions: (ii) the regulation of banking or credit: (iii) taxation: (iv) the stability, control, and adjustment of prices of goods and services, rents, and other costs, and rates of wages, salaries, and other incomes: (v) the borrowing of money by the Government of New Zealand: (vi) the entering into of overseas trade agreements. (2) No charging document may be filed against any person for— (a) an offence against this section; or (b) the offence of conspiring to commit an offence against this section; or (c) the offence of attempting to commit an offence against this section,— except with the consent of the Attorney-General: provided that a person alleged to have committed any offence mentioned in this subsection may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody or on bail, notwithstanding that the consent of the Attorney-General to the filing of a charging document for the offence has not been obtained, but no further or other proceedings shall be taken until that consent has been obtained. (3) The Attorney-General may, before deciding whether or not to give his consent under subsection (2), make such inquiries as he thinks fit.

26.	**Philippines**	**Human Security Act of 2007**[36] **Section 46 – Penalty for Unauthorised Revelation of Classified Materials** The penalty of ten (10) years and one day to twelve (12) years of imprisonment shall be imposed upon any person, police or law enforcement agent, judicial officer or civil servant who, not being authorized by the Court of Appeals to do so, reveals in any manner or form any classified information under this Act.
27.	**Poland**	**The Classified Information Protection Act of 22 January 1999 (Part 1)**[37] **Article 3** Classified information shall be disclosed to none other than those fit and proper to keep secrets and solely to the extent required by the recipient to perform his or her work, discharge official duties, or provide a product under a job contract.
28.	**Russia**	**Criminal Code of the Russian Federation**[38] **Article 283 – Disclosure of a State Secret** (1) Disclosure of information comprising a state secret, by a person to whom it has been entrusted or to whom it has become known through his office or work, if this information has become the property of other persons, in the absence of the characteristic features of high treason, Shall be punishable by arrest for a term of four to six months, or by deprivation of liberty for up to four years, with disqualification from holding specific offices or engaging in specified activities for a term of up to three years, or without such disqualification. (2) The same deed, which involved through negligence grave consequences, Shall be punishable by deprivation of liberty for a term of three to seven years, with disqualification from holding specific offices or engaging in specified activities for a term of up to three years.

[36] Available at: http://www.senate.gov.ph/republic_acts/ra%209372.pdf
[37] Available at: http://www.legislationline.org/download/action/download/id/1254/file/92abd02072999b6e26ee4748741c.pdf
[38] Available at: http://www.genproc.gov.ru/documents/legal-base/document-597/.

		Russian Federation Federal Law No 5 on Foreign Intelligence, 8 December 1995[39] **Article 8 – Protection of information about the Russian Federation foreign intelligence organs** Any person to be given access to information about the Russian Federation foreign intelligence organs undergoes the procedure for permitting access to information constituting state secrets, unless a different procedure is prescribed by federal laws. This procedure includes the signing of a written pledge not to disseminate this information. Any breach of the aforementioned pledge results in liability as prescribed by federal law. Documents from the archives of Russian Federation foreign intelligence organs, which are of historical and scientific value and are declassified according to the federal law, are transferred for permanent storage at Russia's State Archive Service. Documents of the Russian Federation foreign intelligence organs which contain information about their staff members, about individuals who are (have been) rendering confidential assistance to Russian Federation foreign intelligence organs, or about the methods and means used by these organs are stored in the archives of the Russian Federation foreign intelligence organs. **Article 18 – Staff of the Russian Federation foreign intelligence organs** Information about specific individuals being on the staff of Russian Federation foreign intelligence organs, including former staffers of these organs, constitutes a state secret and can be disseminated only with permission from the leader of the Russian Federation foreign intelligence organ and, in cases not involving any official necessity, subject to mandatory written consent by the individuals in question...
29.	**Singapore**	**Official Secrets Act** [40] **Article 3 – Penalties for spying** (1) If any person for any purpose prejudicial to the safety or interests of Singapore — (a) approaches, inspects, passes over or is in the neighbourhood of, or enters any prohibited place within the meaning of this Act; (b) makes any photograph, drawing, plan, model or note which is calculated to be or might be or is intended to be directly or indirectly useful to a foreign Power or to an enemy; or (c) obtains, collects, records, publishes or communicates to any other person any secret official code word, countersign or password, or any photograph, drawing, plan, model, article or note, or other document or information which is calculated to be or might be or is intended to be directly or indirectly useful to a foreign Power or to an enemy, he shall be guilty of an offence. [7/97]

[39] Available at: http://svr.gov.ru/svr_today/doc02.htm.
[40] Available at: http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=DocId%3A%223bc8b443-65c7-4c42-a4c3-49b650267c16%22%20Status%3Ainforce%20Depth%3A0;rec=0.

		Article 5 – Wrongful communication, etc., of information (1) If any person having in his possession or control any secret official code word, countersign or password, or any photograph, drawing, plan, model, article, note, document or information which — (a) relates to or is used in a prohibited place or anything in such a place; (b) relates to munitions of war; (c) has been made or obtained in contravention of this Act; (d) has been entrusted in confidence to him by any person holding office under the Government; or (e) he has obtained, or to which he has had access, owing to his position as a person who holds or has held office under the Government, or as a person who holds, or has held a contract made on behalf of the Government or any specified organisation, or as a person who is or has been employed under a person who holds or has held such an office or contract, does any of the following: (i) communicates directly or indirectly any such information or thing as aforesaid to any foreign Power other than a foreign Power to whom he is duly authorised to communicate it, or to any person other than a person to whom he is authorised to communicate it or to whom it is his duty to communicate it; (ii) uses any such information or thing as aforesaid for the benefit of any foreign Power other than a foreign Power for whose benefit he is authorised to use it, or in any manner prejudicial to the safety or interests of Singapore; (iii) retains in his possession or control any such thing as aforesaid when he has no right to retain it, or when it is contrary to his duty to retain it, or fails to comply with all lawful directions issued by lawful authority with regard to the return or disposal thereof; (iv) fails to take reasonable care of, or so conducts himself as to endanger the safety or secrecy of, any such information or thing as aforesaid, that person shall be guilty of an offence. [27/2001] (2) If any person receives any secret official code word, countersign, password, or any photograph, drawing, plan, model, article, note, document or information knowing, or having reasonable ground to believe, at the time when he receives it, that the code word, countersign, password, photograph, drawing, plan, model, article, note, document or information is communicated to him in contravention of this Act, he shall be guilty of an offence unless he proves that the communication to him of the code word, countersign, password, photograph, drawing, plan, model, article, note, document or information was contrary to his desire. (3) In any proceedings against a person for an offence under this section, where it is proved that that person is or has been in the employment or service of any foreign Power or government in breach of any undertaking which he has made with the Government or any specified organisation, he shall be deemed to be in possession or control of such information or thing as is referred to in subsection (1) and to have unlawfully communicated that information to a foreign Power or to have used that information or thing in a manner prejudicial to the safety or interests of Singapore. [27/2001]

		(4) In subsection (3), "undertaking" means any undertaking in writing which a public officer or any other person has made with the Government or any specified organisation whereby the officer or person undertakes not to serve or be employed by any foreign Power or government within a specified period after his retirement or resignation from the public service or that specified organisation or otherwise unless he has obtained the prior approval of the Government or that specified organisation.
30.	**Slovakia**	**Protection of Classified Information, Act of 11 March 2004**[41] **Article 38 – Obligations of authorised persons** An authorised person is obliged to (a) keep secret on information and objects containing classified information, while they are classified, before unauthorised persons and foreign powers, including after the lapsing of the authorisation to be acquainted with classified information, (b) comply with generally binding legal regulations governing the protection of classified information, (c) notify the head without delay of any unauthorised handling of classified information and any interest of unauthorised persons in classified information, and to cooperate with the Authority as regards clarifying the causes of the unauthorised handling of the classified information; authorised persons having special status shall notify the Authority of any unauthorised handling of classified information and any interest of unauthorised persons in classified information, (d) notify the head without delay of a change of name and surname, marital status, residence, state nationality and integrity, (e) notify the head without delay of any fact potentially influencing his/her authorisation to be acquainted with classified information, and of any fact potentially influencing such authorisation of another authorised person. **Article 78 – Transgressions** (1) An authorised person violating an obligation specified in Article 38 commits a transgression in the field of the protection of classified information. (2) In addition, a person who as an unauthorised person (a) fails to maintain confidentiality on classified information of which he/she has learnt, (b) fails to comply with the obligation to give notice of information that has become known to him/her, or the obligation to surrender a object found containing classified information, (c) breaches the prohibition of photographing, filming or making other records of buildings, premises or facilities, (c) uses technical devices at variance with the provisions of this Act, (d) Performs unauthorised aerial photographing of the territory of the Slovak Republic, commits a transgression in the field of the protection of classified information. (3) A fine may be imposed for a transgression

[41] Available at: http://www.nbusr.sk/ipublisher/files/nbusr.sk/english/215_2004_eng.pdf.

		(a) pursuant to paragraph 1, of up to SKK 50 000 or the prohibition to conduct activities, (b) pursuant to paragraph 2(a) and (b), of up to SKK 15 000, (c) pursuant to paragraph 2(c), (d) and (e), of up to SKK 50 000. (4) Transgressions in the field of the protection of classified information shall be dealt with by the Authority. (5) Transgressions and their resolution shall be governed by a specific regulation.
31.	**Slovenia**	**Classified Information Act**[42] **Article 1** This Act lays down the basic principles of a common system for the determination and safeguarding of and access to classified information in the sphere of activity of government agencies of the Republic of Slovenia relating to public security, defence, foreign affairs and the intelligence and security activities of the country, and for the declassification of such information. This Act shall be binding on government agencies, local community agencies, holders of public authorisations and other agencies, and commercial companies and organisations which, in carrying out their statutory responsibilities, obtain or have at their disposal information referred to in the preceding paragraph (hereinafter: agencies), as well as on individuals in such agencies. This Act shall also be binding on suppliers, contractors and service providers (hereinafter: organisations) to whom the classified information referred to in the first paragraph of this Article is imparted for the purpose of implementing procurement contracts for agencies. Responsibility for the protection of classified information and the preservation of its confidentiality shall apply to all those to whom such information has been entrusted or who have become acquainted with the contents thereof. **Article 8** Officials and employees of agencies shall be bound to safeguard classified information no matter how such information has come to their knowledge. The obligation for the persons referred to in the preceding paragraph to safeguard classified information shall not terminate with the termination of their function or employment at the agency.

[42] Available at: https://www.ip-rs.si/index.php?id=505.

		Article 44 A legal person or a sole proprietor shall be fined between SIT 1,000,000 and 3,000,000: • if he allows a person who has not signed a statement (second paragraph of Article 3, second paragraph of Article 31.a) to access classified information; • if he transfers authority for the classification of information to a third person (third paragraph of Article 10); • if in determining the level of classification, he does not assess the possible adverse effects of the disclosure of information to an unauthorised person on the security of the country or on its political or economic interests (Article 11); • if he acts in contravention of Article 12 of this Act; • if he acts in contravention of Article 14 of this Act; • if he changes the level of classification of a document in contravention of Article 16 of this Act; • if he does not give a classified document the prescribed markings (Article 17); • if the declassification of information or document is not specified in accordance with Article 18 of this Act; • if he changes the manner specified for declassification without any justified reason in contravention of Article 18 of this Act; • if he does not notify the National Security Authority of the issue or revocation of a permission to access classified information (Article 22, second paragraph of Article 26). • if he does not propose intermediate clearance of a person (second and third paragraph of Article 25.b, second paragraph of Article 25.c); • if he does not render access to classified information temporarily impossible to a person for whom the intermediate clearance procedure has not been completed yet (fourth paragraph of Article 25c); • if he does not keep the permission and statement In the personnel file (Article 28); • if he does not keep a record of permissions to access classified information (Article 29); • if he allows access to classified information in contravention of the first paragraph of Article 31 of this Act; • if he relieves a person of the obligation to keep information secret in contravention of Article 33; • if he allows the transmission of classified information to an organisation in contravention of Article 35 of this Act; • if he does not notify the National Security Authority of the issue of a permission to an organisation (second paragraph of Article 35); • if he does not propose intermediate clearance of an organisation (first and second paragraph of Article 35.d); • if he allows persons to access classified information in contravention of point 3 of the first paragraph of Article 35.b of this Act; • if he does not designate a person referred to in point 4 of the first paragraph of Article 35.b of this Act; • if he acts in contravention of Article 36 of this Act; • if he acts in contravention of Article 37 of this Act; • if he does not issue an act referred to in Article 38 of this Act; • if he does not provide training of persons in the field of classified information treatment in accordance with the first paragraph of Article 25, second paragraph of Article 31a and third paragraph of Article 38 of this Act;

		• if he acts in contravention of the first, second and forth paragraph of Article 39 of this Act; • if he acts in contravention of the second and third paragraph of Article 40 of this Act; • if he does not organise internal control of classified information treatment (Article 41); • if he acts in contravention of the second paragraph of Article 43c of this Act; • if he acts in contravention of the forth paragraph of Article 43d of this Act; A fine between SIT 200,000 and 500,000 shall be imposed also on a responsible person of a state authority, an authority of a self-governing community, a legal person or a sole proprietor committing a breach referred to in the preceding paragraph. **Article 44a** A legal person or a sole proprietor shall be fined between SIT 500,000 and 1,000,000: • if he acts in contravention of the first and second paragraph of Article 15 of this Act; • if he, in determining the level of classification, exceeds the competencies within the authority for the classification of information; • if he does not act in accordance with the third paragraph of Article 18 of this Act; • if he refrains from an obligation referred to in the second paragraph of Article 25d of this Act; • if he does not propose at least three months prior to the expiry of the permission's validity the initiation of a process for issuing a new permission to a person who will need this permission even after the expiry of the permission's validity (first paragraph of Article 26); • if he acts in contravention of the second paragraph of Article 28 of this Act; • if he allows a person access to classified information in contravention of Article 30 of this Act; • if he allows a person access to classified information of a higher level than indicated in the permission or allows the person to obtain classified information before it is needed and to a larger scope than needed for the exercise of tasks and performance of functions (second paragraph of Article 31). A fine between SIT 100,000 and 300,000 shall be imposed also on a responsible person of a state authority, an authority of a self-governing community, a legal person or a sole proprietor committing a breach referred to in the preceding paragraph. **Article 45** An individual shall be fined between SIT 100,000 and 200,000: • if he acts in contravention of Article 8 of this Act; • if he assigns a classification level to a piece of information or a document without being authorised to do so (Article 10); • if he refrains from an obligation referred to in the first paragraph of Article 25.d of this Act;

		• if he accesses classified information in contravention of the first paragraph of Article 31 of this Act; • if he uses classified information for purposes other than the exercise of certain working tasks or performance of functions (Article 33); • if he transmits classified information in contravention of Article 34 of this Act; • if he transmits classified information to an organisation that is not in possession of a security permission (PSC) (first paragraph of Article 35); • if he allows a person to access classified information in contravention of point 3 of the first paragraph of Article 35.b of this Act; • if he does not carry out procedures and measures relating to the treatment of classified information as prescribed in this Act and the regulations based thereon; • if he does not notify an authorised person of the loss or unauthorised disclosure of classified information or provision of classified information to an unauthorised person (Article 40).
32.	**Switzerland**	**Swiss Criminal Code, 12 December 1937**[43] **Article 267 – Diplomatic Treason** (1) Any person who wilfully makes known or makes accessible to a foreign state or its agents or to the general public a secret, the preservation of which is necessary in the interests of the Confederation, any person who falsifies, destroys, disposes of or steals documents or evidence relating to legal relations between the confederation or a canton and a foreign state and thus endangers the interests of the Confederation or the canton, or any person who, as the authorised representative of the Confederation, conducts negotiations with a foreign government which are intended to be detrimental to the Confederation, is liable to a custodial sentence of not less than one year. (2) Any person who wilfully makes known or makes accessible to the general public a secret, the preservation of which is necessary in the interests of the confederation is liable to a custodial sentence not exceeding five years or to a monetary penalty. (3) If the person concerned acts through negligence, the penalty is a custodial sentence not exceeding three years or a monetary penalty. **Article 320 – Breach of official secrecy** (1) Any person who discloses secret information that has been confided to him in his capacity as a member of an authority or as a public official or which has come to his knowledge in the execution of his official duties is liable to a custodial sentence not exceeding three years or to a monetary penalty. A breach of official secrecy remains an offence following termination of employment as a member of an authority or as a public official. (2) The offender is not liable to any penalty if he has disclosed the secret information with the written consent of his superior authority.

[43] Available at: http://www.admin.ch/ch/e/rs/3/311.0.en.pdf

33.	**Timor-Leste**	**Penal Code, Decree Law No 19/2009**[44] **Article 200 - Breach of State secrets** (1) Any person who, jeopardizing interests of the Timorese State concerning its foreign security or conduct of its foreign policy, conveys or renders accessible to an unauthorized person or makes public any fact, document, plan, object, knowledge or any other information that should, due to said interest, have been maintained in secret, is punishable with 3 to 10 years imprisonment. (2) Any person who collaborates with a foreign government or group with intent to commit any of the acts referred to in the previous subarticle or to enlist or aid another person charged with committing the same, is punishable with the same penalty provided for in the previous subarticle. (3) If the perpetrator of any of the acts described in the previous subarticles holds any political, public or military office who should have, due to the nature thereof, refrained said person from committing such an act more than any ordinary citizen, the same is punishable with 5 to 15 years imprisonment. **National Intelligence Service, Decree Law No 3/2009**[45] **Article 21 - Disciplinary offences** (1) Disciplinary offence shall mean the violation, by SNI functionaries or agents, of their respective functional duties, namely: (a) The commission of an act that is outside of the functions and competences of SNI; (b) The access to, use, or communication of data or intelligence in violation of rules relating to such activities. (c) Attempt and negligence are punishable. **Article 29 - Security rules** (1) Activities of SNI shall for all purposes be considered classified and of interest for national security. (2) All documents relating to matters referred to in article 3 shall be covered by the State Secrecy. (3) The activity of research, collection, analysis, interpretation, classification and storage of intelligence relating to the competences of SNI, including the respective results, shall be subject to the duty of secrecy.

[44] Available at: http://www.jornal.gov.tl/lawsTL/RDTL-Law/index-e.htm.
[45] Available at: http://www.jornal.gov.tl/lawsTL/RDTL-Law/index-e.htm.

		Article 30 - Depositions or statements (1) No member of SNI summoned to depose or to make statements before judicial authorities may disclose facts covered by the State Secrecy or be subjected to enquiries on the same matters. (2) Where the judicial authority considers that the refusal to depose or make statements pursuant to the preceding paragraph is unjustified, it may request confirmation with the Prime Minister.
34.	**Uganda**	**Official Secrets Act 1964**[46] **Section 4 – Wrongful communication, etc. of information** (1) Any person who, having in his or her possession or control, any secret official code word, or password, or any sketch, plan, model, article, note, document or information that relates to or is used in a prohibited place or anything in such a place, or that has been made or obtained in contravention of this Act, or that has been entrusted in confidence to him or her by any person holding office under the Government or owing to his or her position as a person who holds or has held office under the Government, or as a person who holds or has held a contract made on behalf of the Government, or a contract the performance of which in whole or in part is carried out in a prohibited place, or as a person who is or has been employed under a person who holds or has held such an office or contract— 1. communicates the code word, password, sketch, plan, model, article, note, document or information to any person, other than a person to whom he or she is authorised to communicate with, or a person to whom it is in the interests of Uganda his or her duty to communicate it; 2. uses the information in his or her possession for the benefit of any foreign power or in any other manner; 3. retains the sketch, plan, model, article, note or document in his or her possession or control when he or she has no right to retain it; or when it is contrary to his or her duty to retain it or fails to comply with all directions issued by lawful authority with regard to its return or disposal; or fails to take reasonable care of, or so conducts himself or herself as to endanger the safety of, the sketch, plan, model, article, note, document, secret official code word or password or information, commits an offence under this Act. (2) Any person who, having in his or her possession or control any sketch, plan, model, article, note, document or information that relates to munitions of war, communicates it directly or indirectly, to any foreign power, or in any other manner prejudicial to the safety or interests of Uganda, commits an offence under this Act. (3) Any person who receives any secret official code word, or password, or sketch, plan, model, article, note, document or information, knowing or having reasonable grounds to believe, at the time when he or she receives it, that the code word, password, sketch, plan, model, article, note, document or information is communicated to him or her in contravention of this Act, commits an offence under this Act, unless he or she proves that the communication to him or her of the code word, password, sketch, plan, model, article, note,

[46] Available at: http://www.opm.go.ug/resource-center/legislation.html

		document or information was contrary to his or her desire. (4) Any person who— 1. retains for any purpose prejudicial to the safety or interests of Uganda any official document, whether or not completed or issued for use, when he or she has no right to retain it, or when it is contrary to his or her duty to retain it, or fails to comply with any directions issued by any Government department or any person authorised by such department with regard to the return or disposal of the official document; or 2. allows any other person to have possession of any official document issued for his or her use alone, or communicates any secret official code word or password so issued, or, without lawful authority or excuse, has in his or her possession any official document or secret official code word or password issued for the use of some person other than himself or herself, or on obtaining possession of any official document by finding or otherwise, neglects or fails to restore it to the person or authority by whom or for whose use it was issued, or to a police officer, commits an offence under this Act.
35.	**United Kingdom of Great Britain and Northern Ireland**	**Official Secrets Act 1989**[47] **Section 1 – Security and Intelligence** (1) A person who is or has been – (a) a member of the security and intelligence services; or (b) a person notified that he is subject to the provisions of this subsection, is guilty of an offence if without lawful authority he discloses any information, document or other article relating to security or intelligence which is or has been in his possession by virtue of his position as a member of any of those services or in the course of his work while the notification is or was in force. (2) The reference in subsection (1) above to disclosing information relating to security or intelligence includes a reference to making any statement which purports to be a disclosure of such information or is intended to be taken by those to whom it is addressed as being such a disclosure (3) A person who is or has been a Crown servant or government contractor is guilty of an offence if without lawful authority he makes a damaging disclosure of any information, document or other article relating to security or intelligence which is or has been in his possession by virtue of his position as such but otherwise than as mentioned in subsection (1) above. (4) For the purposes of subsection (3) above a disclosure is damaging if – (a) it causes damage to the work of, or of any part of, the security and intelligence services; or (b) it is of information or a document or other article which is such that its unauthorised disclosure would be likely to cause damage or which falls within a class or description of information, documents or articles the unauthorised disclosure of which would be likely to have that effect…

[47] Available at: http://www.legislation.gov.uk/ukpga/1989/6/contents.

36.	**United States of America**	**18 USC (Crimes and Criminal Procedure)**[48] **Section 793 – Gathering, Transmitting or Losing Defense Information** (a) Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, fueling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, research laboratory or station or other place connected with the national defense owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers, departments, or agencies, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, stored, or are the subject of research or development, under any contract or agreement with the United States, or any department or agency thereof, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place so designated by the President by proclamation in time of war or in case of national emergency in which anything for the use of the Army, Navy, or Air Force is being prepared or constructed or stored, information as to which prohibited place the President has determined would be prejudicial to the national defense; or (b) Whoever, for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts to copy, take, make, or obtain, any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or (c) Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter; or (d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or (e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the

[48] Available at: http://www.gpo.gov/fdsys/pkg/USCODE-2009-title18/html/USCODE-2009-title18.htm.

national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it; or

(f) Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information, relating to the national defense,

(i) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, or

(ii) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of its trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer—

Shall be fined under this title or imprisoned not more than ten years, or both.

(g) If **two** or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.

(1) Any person convicted of a violation of this section shall forfeit to the United States, irrespective of any provision of State law, any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, from any foreign government, or any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, as the result of such violation. For the purposes of this subsection, the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(2) The court, in imposing sentence on a defendant for a conviction of a violation of this section, shall order that the defendant forfeit to the United States all property described in paragraph (1) of this subsection…

Section 794 – Gathering or Delivering Defense Information to Aid Foreign Government

(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life, except that the sentence of death shall not be imposed unless the jury or, if there is no jury, the court, further finds that the offense resulted in the identification by a foreign power (as defined in section

		101(a) of the Foreign Intelligence Surveillance Act of 1978) of an individual acting as an agent of the United States and consequently in the death of that individual, or directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy. (b) Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates, or attempts to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the Armed Forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for any term of years or for life. (c) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy. (d) (1) Any person convicted of a violation of this section shall forfeit to the United States irrespective of any provision of State law— A. any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation, and B. any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation. For the purposes of this subsection, the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States. (2) The court, in imposing sentence on a defendant for a conviction of a violation of this section, shall order that the defendant forfeit to the United States all property described in paragraph (1) of this subsection… **Section 1030 – Fraud and Related Activity in Connection with Computers** (a) (1) having knowingly accessed a computer without authorization or exceeding authorized access, and by means of such conduct having obtained information that has been determined by the United States Government pursuant to an Executive order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, or any restricted data, as defined in paragraph y. of section 11 of the Atomic Energy Act of 1954, with reason to believe that such information so obtained could be used to the injury of the United States, or to the advantage of any foreign nation willfully communicates, delivers, transmits, or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive

		it… **Section 1924 – Unauthorized Removal and Retention of Classified Documents or Material** (a) Whoever, being an officer, employee, contractor, or consultant of the United States, and, by virtue of his office, employment, position, or contract, becomes possessed of documents or materials containing classified information of the United States, knowingly removes such documents or materials without authority and with the intent to retain such documents or materials at an unauthorized location shall be fined under this title or imprisoned for not more than one year, or both. (b) For purposes of this section, the provision of documents and materials to the Congress shall not constitute an offense under subsection (a). (c) In this section, the term "classified information of the United States" means information originated, owned, or possessed by the United States Government concerning the national defense or foreign relations of the United States that has been determined pursuant to law or Executive order to require protection against unauthorized disclosure in the interests of national security **50 USC (War and National Defense)**[49] **Section 783 – Offenses** (a) Communication of classified information by Government officer or employee It shall be unlawful for any officer or employee of the United States or of any department or agency thereof, or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, to communicate in any manner or by any means, to any other person whom such officer or employee knows or has reason to believe to be an agent or representative of any foreign government, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, knowing or having reason to know that such information has been so classified, unless such officer or employee shall have been specifically authorized by the President, or by the head of the department, agency, or corporation by which this officer or employee is employed, to make such disclosure of such information. (b) Receipt of, or attempt to receive, by foreign agent or member of Communist organization, classified information It shall be unlawful for any agent or representative of any foreign government knowingly to obtain or receive, or attempt to obtain or receive, directly or indirectly, from any officer or employee of the United States or of any department or agency thereof or of any corporation the stock of which is owned in whole or in major part by the United States or any department or

[49] Available at: http://www.gpo.gov/fdsys/granule/USCODE-2011-title50/USCODE-2011-title50-chap23/content-detail.html.

		agency thereof, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, unless special authorization for such communication shall first have been obtained from the head of the department, agency, or corporation having custody of or control over such information. (c) Penalties for violation Any person who violates any provision of this section shall, upon conviction thereof, be punished by a fine of not more than $10,000, or imprisonment for not more than ten years, or by both such fine and such imprisonment, and shall, moreover, be thereafter ineligible to hold any office, or place of honor, profit, or trust created by the Constitution or laws of the United States. … (e) Forfeiture of property (1) Any person convicted of a violation of this section shall forfeit to the United States irrespective of any provision of State law— A. any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation; and B. any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation. (2) The court, in imposing sentence on a defendant for a conviction of a violation of this section, shall order that the defendant forfeit to the United States all property described in paragraph (1)… (5) As used in this subsection, the term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.
37.	**Zimbabwe**	**Official Secrets Act [Chapter 11:09]**[50] **Section 3 – Espionage** Any person who, for any purpose prejudicial to the safety or interests of Zimbabwe – (1) approaches, inspects, passes over or is in the vicinity of or enters any prohibited place; or (2) makes any model or document which is calculated to be or which might or is intended to be useful, directly or indirectly, to an enemy; or (3) obtains, collects, records, publishes or communicates to any person- (i) any secret official code or password; or

[50] Available at: http://www.parlzim.gov.zw/attachments/article/97/OFFICIAL_SECRETS_ACT_11_09.pdf.

		(ii) any model, article, document or other information which is calculated to be or which might or is intended to be useful, directly or indirectly, to an enemy; shall be guilty of an offence and liable to imprisonment for a period not exceeding twenty-five years. **Section 4 – Prohibition of communication of certain information** (1) Any person who has in his possession or under his control any secret official code or password or any model, article, document or information which- (a) relates to or is used in a prohibited place or relates to any thing in a prohibited place; or (b) has been made or obtained in contravention of this Act; or (c) has been entrusted in confidence to him by a person holding an office in the service of the State; or (d) he has obtained or to which he has had access owing to his position as a person who holds or has held office in the service of the State or as a person who holds or has held a contract made on behalf of the State or a contract the performance of which in whole or in part is carried out in a prohibited place or as a person who is or has been employed under a person who holds or has held such an office or contract; and who— (i) communicates such code, password, model, article, document or information to any person, other than a person to whom he is authorized to communicate it or a person to whom it is in the interests of Zimbabwe his duty to communicate it; or (ii) uses such information in any manner or for any purpose prejudicial to the safety or interests of Zimbabwe; or (iii) retains such model, article or document in his possession or under his control when he has no right to retain it or when it is contrary to his duty to retain it, or fails to comply with any directions issued by lawful authority with regard to the return or disposal thereof; or (iv) fails to take proper care of or so conducts himself as to endanger the safety of such model, article, document, code, password or information; shall be guilty of an offence and liable to a fine not exceeding level fourteen or to imprisonment for a period not exceeding twenty years or to both such fine and such imprisonment. [amended by Act 22 of 2001, with effect from the 10th September,2002] (1a) For the avoidance of doubt it is declared that subsection (1) shall not apply to the disclosure in accordance with the Access to Information and Protection of Privacy Act [Chapter 10:27] (Act No. 5 of 2002) of any document or information by a person who, being the head of a public body as defined in that Act, has lawful access to that document or information. [Inserted by section 92 of Act 5/2002 with effect from 15th March, 2002.] (2) Any person who— (a) has in his possession or under his control any model, article, document or information which relates to— (v) munitions of war or any military matter; or

		(vi) the preservation of the security of Zimbabwe or the maintenance of law and order by the Police Force or any other body or organization appointed or established by the Government for the purpose of assisting in the preservation of the security of Zimbabwe; and (b) publishes or communicates such model, article, document or information to any person in any manner or for any purpose prejudicial to the safety or interests of Zimbabwe; shall be guilty of an offence and liable to a fine not exceeding level fourteen or to imprisonment for a period not exceeding twenty years or to both such fine and such imprisonment. [amended by Act 22 of 2001, with effect from the 10th September,2002] (3) Any person who receives any secret official code or password or any model, article, document or information, knowing or having reasonable grounds to believe, at the time when he receives it, that the code, password, model, article, document or information is communicated to him in contravention of this Act, shall, unless he proves that the communication thereof to him was against his wish, be guilty of an offence and liable to a fine not exceeding level fourteen dollars or to imprisonment for a period not exceeding twenty years or to both such fine and such imprisonment. [amended by Act 22 of 2001, with effect from the 10th September,2002]

SUMMARY OF NATIONAL LAWS ON LEGAL PROFESSIONAL PRIVILEGE/CONFIDENTIALITY: SCOPE AND EXCEPTIONS

The following table sets out in summary form the legal professional privilege or confidentiality obligations applicable under the municipal laws of the following States: Australia, Belgium, Denmark, France, Germany, India, Indonesia, Mexico, Morocco, New Zealand, Russia, Slovakia, Switzerland, Timor-Leste, Uganda, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

	State	Scope of privilege	Exceptions
1.	**Australia**	Confidential communications between clients and lawyers made for the dominant purpose of giving and receiving legal advice, or for use in existing or anticipated litigation are protected from disclosure by privilege.[1]	A communication will not be privileged if made or prepared in furtherance of a fraud, an offence, an act attracting a penalty, or a deliberate abuse of a power conferred by an Australian law.[2]
2.	**Belgium**	Persons cannot disclose secrets entrusted to them by reason of their position or profession.[3]	The rule of professional secrecy yields when necessity requires it, or when a value considered superior is in conflict with it.[4] The waiver of privilege must, however, be compatible with the fundamental principles of Belgian law, be justified by an overriding purpose, and be strictly proportionate.[5]
3.	**Denmark**	Lawyers cannot be required to disclose matters which have come to their knowledge through the practise of their profession without the consent of their client.[6]	The court can require that lawyers, other than defence attorneys in criminal proceedings, give evidence when it is considered crucial to the outcome of a case and the nature of the case and its importance to a party to the case or to society justify that the evidence be required. In civil cases, this exception does not extend to information the lawyer has been provided with in order to conduct the proceedings on

[1] This privilege is a right subject to abrogation by statute where a contrary intention exists. Esso Australia Resources Ltd v Commissioner of Taxation (1999) 201 CLR 49; Evidence Act 1995 (Cth), ss118 and 119 (available at: http://www.comlaw.gov.au/Details/C2012C00518).
[2] Evidence Act 1995 (Cth), s125 (available at: http://www.comlaw.gov.au/Details/C2012C00518); R v Bell; Ex parte Lees (1980) 146 CLR 141 at 156 (Stephen J); Attorney-General (NT) v Kearney (1985) 158 CLR 500 at 515 (Gibbs CJ).
[3] Criminal Code 1867, Article 458 (available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=262695).
[4] Constitutional Court, 23 January 2008, JLMB 2008, B.7.2.
[5] Constitutional Court, 23 January 2008, JLMB 2008, B.7.2.
[6] Administration of Justice Act (Code of Procedure), s170(1) (available at: https://www.retsinformation.dk/Forms/r0710.aspx?id=157953).

	State	Scope of privilege	Exceptions
			behalf of their client, or to information in respect of which the lawyer's advice has been sought.[7]
4.	**France**	Correspondence exchanged between the client and lawyer and amongst lawyers, notes of interviews and all items on file are covered by professional secrecy.[8] The disclosure of such secrets is a criminal offence (except where the law authorises the disclosure of the secret).[9]	Both the *Conseil d'Etat* and European Court of Human Rights have upheld regulations abrogating these confidentiality obligations in order to enable lawyers to report suspicious transactions (pertaining to money laundering).[10] In so doing, the *Conseil d'Etat* observed that the rule of professional confidentiality can be derogated from when necessary in the interests of public safety or for the prevention of disorder or crime.[11]
5.	**Germany**	Lawyers are under an obligation not to disclose information learnt in the exercise of their profession.[12] The lawyer may rely upon this obligation to decline to give evidence in civil or criminal proceedings.[13] The disclosure of secret information without authorisation constitutes a criminal offence.[14]	The obligation, and attendant immunity from testimony, will not apply where the person entitled to refuse to testify participated in the criminal offence, or as an accessory after the fact, in cases of obstruction of justice or handling stolen goods, or where the objects concerned have been obtained by means of a criminal offence or have been used or are intended for use in perpetrating a criminal offence, or where they emanate from a criminal offence.[15]

[7] Administration of Justice Act (Code of Procedure), s170(2) (available at: https://www.retsinformation.dk/Forms/r0710.aspx?id=157953).
[8] Loi no 71-1130, Article 66-5 (available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068396).
[9] Penal Code, Article 226-13 (available at: http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719&dateTexte=20140107).
[10] Conseil d'Etat 10 April 2008 (available at: http://legifrance.com/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000018624326&fastReqId=811689189&fastPos=1); Michaud v France, ECHR, 6 December 2012, Request Number 12323/11
[11] Conseil d'Etat 10 April 2008.
[12] Criminal Code of 13 November 1998, Article 203 (available at : http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf).
[13] Code of Civil Procedure, ss383 and 385 (available at: http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html); Code of Criminal Procedure, s53 (available at: http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html).
[14] Criminal Code of 13 November 1998, Article 203 (available at: http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf).
[15] Code of Criminal Procedure, s97 (available at: http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html).

6.	**India**	Attorneys are not permitted, except with the client's express consent, to disclose any communication made to them in the course and for the purpose of their employment, by or on behalf of their client, or to state the contents or condition of any document with which they have become acquainted in the course and for the purpose of their employment, or to disclose any advice given by them to their client in the course and for the purpose of such employment.[16]	The privilege does not protect from disclosure any such communication made in furtherance of any illegal purpose.[17]
7.	**Indonesia**	Lawyers are under an obligation not to disclose information learnt in the exercise of their profession, and can rely upon this obligation to resist compulsory disclosure of that information.[18]	The obligation pertains unless it is regulated otherwise by law.[19] Context-specific exceptions appear in a number of other statutes.[20]
8.	**Mexico**	Persons who receive confidential information in the course of their employment are obliged to maintain confidentiality regarding the subjects entrusted to them by their client.[21] The disclosure of such information without just cause is a criminal offence.[22]	The lawyer is only prohibited from making disclosures where such disclosure is without just cause.[23]

[16] Evidence Act 1872, s126 (available at: http://daman.nic.in/acts-rules/Police-department/documents/Indian%20Evidence%20Act%201872.pdf).
[17] Evidence Act 1872, s126 (available at: http://daman.nic.in/acts-rules/Police-department/documents/Indian%20Evidence%20Act%201872.pdf).
[18] Advocates Law, No 18 of 2003, Article 19 (available at: http://www.bpkp.go.id/uu/file/2/40.bpkp).
[19] Advocate Law, No 18 of 2003, Article 19 (available at: http://www.bpkp.go.id/uu/file/2/40.bpkp).
[20] See, for example: Corruption Law, No 31 of 1999, Article 36 (available at: http://riau.kemenag.go.id/file/file/produkhukum/lgkf1360853450.pdf); Anti-Money Laundering Law, No 8 of 2010 (available at: http://www.bi.go.id/id/perbankan/prinsip-mengenal-nasabah/Documents/UU_RI_Nomor_8_Tahun_2010.PDF)
[21] Federal Penal Code, Articles 210-211 (available at: http://www.diputados.gob.mx/LeyesBiblio/pdf/9_030614.pdf).
[22] Federal Penal Code, Articles 210-211 (available at: http://www.diputados.gob.mx/LeyesBiblio/pdf/9_030614.pdf).
[23] Federal Penal Code, Articles 210-211 (available at: http://www.diputados.gob.mx/LeyesBiblio/pdf/9_030614.pdf).

9.	**Morocco**	Lawyers are not permitted to reveal any matter which touches upon professional secrecy in any case and must not, in particular, disclose information from their client's file or disclose papers, documents or letters relating to a current investigation.[24] The disclosure of such information is a punishable offence.[25]	The lawyer is permitted to make such disclosures to provide evidence as to abortions, abuse or neglect perpetrated against minors or by one spouse against another or against a woman.[26]
10.	**New Zealand**	New Zealand law provides for a privilege akin to that recognised under Australian law.[27]	Privilege will not apply to information compiled or prepared for a dishonest purpose or to enable or aid anyone to commit or plan to commit what the person claiming the privilege knew, or reasonably should have known, to be an offence.[28]
11.	**Russia**	Any information relating to the provision of legal services by a client to their lawyer is legally privileged.[29] The lawyer cannot be questioned or required to produce evidence in respect of these matters.[30]	Weapons used in the commission of a crime or substances banned or controlled in accordance with Russian law will not be protected by the privilege.[31]
12.	**Slovakia**	Lawyers are obliged not to reveal any information learnt in connection with the practice of law and must treat such information as strictly confidential.[32]	The duty of confidentiality does not apply to any cases of lawful disclosure that would prevent a crime.[33]

[24] Law No 1-93-162, Article 36 (available at: http://adala.justice.gov.ma/AR/Legislation/TextesJuridiques.aspx).
[25] Penal Code, Dahir No. 1-59-413, Article 446 (available at: http://adala.justice.gov.ma/production/legislation/fr/penal/Code%20Penal.htm and http://www.mmsp.gov.ma/ar/documents.aspx?t=3).
[26] Penal Code, Dahir No. 1-59-413, 26 November 1962, Article 446(2) (available at: http://adala.justice.gov.ma/production/legislation/fr/penal/Code%20Penal.htm and http://www.mmsp.gov.ma/ar/documents.aspx?t=3).
[27] Evidence Act 2006, ss53-56 (available at: http://www.legislation.govt.nz/act/public/2006/0069/latest/DLM393463.html).
[28] Evidence Act 2006, s67 (available at: http://www.legislation.govt.nz/act/public/2006/0069/latest/DLM393463.html).
[29] Federal Law on Advocatory Activity and Advocacy in the Russian Federation (available at: http://www.akdi.ru/gd/proekt/088160GD.SHTM), Article 8(1).
[30] Federal Law on Advocatory Activity and Advocacy in the Russian Federation (available at: http://www.akdi.ru/gd/proekt/088160GD.SHTM), Article 8(2).
[31] Federal Law on Advocatory Activity and Advocacy in the Russian Federation (available at: http://www.akdi.ru/gd/proekt/088160GD.SHTM), Article 8(3).
[32] Act No 586/2003 Coll on Advocates, Collection of Laws (Zbierka zákonov), Vol. 239 (2003) Section 23(1) (available at: http://www.ccbe.org/fileadmin/user_upload/NTCdocument/en_slovak_rep_parlia1_1188889665.pdf and http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/SK_transposition_slo21_1202123946.pdf).

13.	**Switzerland**	Lawyers are under an obligation not to disclose information learnt in the exercise of their profession.[34] Lawyers may rely upon this obligation to decline to give evidence in civil or criminal proceedings.[35] Disclosure of such information without consent is a criminal offence.[36]	The obligation (and ability to rely on that obligation to decline to testify or provide evidence) will not apply where there is a statutory duty to disclose.[37] Cantonal law provides a number of exceptions, a number of Cantons appearing to recognise an exception where higher public or private interests warrant disclosure.[38]
14.	**Timor-Leste**	Lawyers are permitted to refuse to give a deposition on facts covered by their professional secrecy obligations.[39] The provisions imposing specific confidentiality requirements for lawyers are contained in a number of practice-specific laws, including those pertaining to public defenders and to lawyers in the civil service.[40]	Courts are able to require that a deposition be given by breaking professional secrecy where this proves to be justifiable in the face of the applicable provisions and principles of the criminal law, particularly in view of the principle of prevalence of the predominant interest.[41]
15.	**Uganda**	Advocates are not permitted to disclose any communication made to them in the course and for the purpose of their employment as an advocate by or on behalf of their client, or to state the contents or condition of any document with which they have become acquainted in the course and for the purpose of their professional employment, or to disclose any	Communications made in furtherance of any illegal purpose are excepted from protection, as is any fact observed by any advocate in the course of their employment showing that any crime or fraud has been committed since the

[33] Act No 586/2003 Coll on Advocates, Collection of Laws (Zbierka zákonov), Vol. 239 (2003), Section 23(1) (available at: http://www.ccbe.org/fileadmin/user_upload/NTCdocument/en_slovak_rep_parlia1_1188889665.pdf and http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/SK_transposition_slo21_1202123946.pdf).
[34] Penal Code, Article 321 (available at: http://www.admin.ch/opc/fr/classified-compilation/19370083/index.html).
[35] Federal Law on Civil Procedure, Article 163 (available at: http://www.admin.ch/opc/fr/classified-compilation/20061121/index.html); Federal Law on Criminal Procedure, Article 171 (available at: http://www.admin.ch/opc/fr/classified-compilation/20052319/index.html).
[36] Penal Code, Article 321 (available at: http://www.admin.ch/opc/fr/classified-compilation/19370083/index.html).
[37] See, for example, Federal Law on Criminal Procedure, Article 171 (available at: http://www.admin.ch/opc/fr/classified-compilation/20052319/index.html).
[38] See, for example: Caton of Zurich, Anwaltsgesetz of 17 November 2003 (OS Zurich Bd 59 S 144), s34(3) (available at: http://www2.zhlex.zh.ch/appl/zhlex_r.nsf/0/562DA3E5A0EEF989C12577E10047DF30/$file/215.1_17.11.03_71.pdf; Canton of Geneva, Loi sur la profession d'avocat of 26 April 2002 (RSG E 6 10) , s12 (available at: http://www.geneve.ch/legislation/rsg/f/s/rsg_E6_10.html).
[39] Criminal Procedure Code, Article 126(1) (available at: http://www.jornal.gov.tl/lawsTL/RDTL-Law/index-e.htm).
[40] See, for example, Public Defender's Office Statute, Articles 46 and 48; Statute of the Civil Service, Article 5 (both available at: http://www.jornal.gov.tl/lawsTL/RDTL-Law/index-e.htm).
[41] Criminal Procedure Code, Article 126(2)-(3) (available at: http://www.jornal.gov.tl/lawsTL/RDTL-Law/index-e.htm).

		advice given by them to their client in the course and for the purpose of that employment.[42]	commencement of their employment.[43]
16.	**United Kingdom of Great Britain and Northern Ireland**	A privilege akin to that recognised under Australian law is recognised under the common law.[44]	Privilege cannot be claimed if the communication is made or prepared in furtherance of a crime or fraud.[45] 'Fraud' in this context has been interpreted broadly, such that communications will not be privileged where they are sufficiently iniquitous for public policy to require that the confidentiality no longer apply.[46]
17.	**United States of America**	A privilege akin to that recognised under Australian law is recognised under Federal and State statutory and common law.[47]	At the State and Federal level, many jurisdictions recognise an exception to privilege where the communication in question was made in furtherance of a future crime or fraud.[48]

[42] Evidence Act 1909, s125. (available at: http://www.opm.go.ug/resource-center/legislation.html)
[43] Evidence Act 1909, s125. (available at: http://www.opm.go.ug/resource-center/legislation.html)
[44] R v Derby Magistrates' Court, ex p B [1996] 1 AC 487; R v Special Commissioner of Income Tax, [2003] 1 AC 563.
[45] R v Cox and Railton [1884] 14 QBD 153; R v Derby Magistrates' Court, ex p B [1996] 1 AC 487.
[46] Barclays Bank v Eustace [1995] 4 All ER 511, CA.
[47] See, for example: Federal Rules of Evidence, Rules 501 and 502 (available at: http://www.gpo.gov/fdsys/pkg/CPRT-112HPRT70817/html/CPRT-112HPRT70817.htm); American Bar Association, Model Rules of Professional Conduct, Rule 1.6 (available at: http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html); Hickman v Taylor, 329 US 495 (1947).
[48] See, for example: Federal Rules of Evidence, Rules 501 and US v Zolin (1989) 491 US 554, 562-563 (at the Federal level); American Bar Association, Model Rules of Professional Conduct, Rule 1.6 (where the criminal conduct or fraud is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services).

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

SENATOR THE HON GEORGE BRANDIS QC

ATTORNEY-GENERAL

MINISTERIAL STATEMENT

Execution of ASIO Search Warrants

4 December 2013

Yesterday, search warrants were executed at premises in Canberra by officers of the Australian Security Intelligence Organisation (ASIO) and, in the course of the execution of those warrants, documents and electronic data was taken into possession. The premises were those of Mr Bernard Collaery and a former ASIS officer. The names of ASIS officers – whether serving or past – may not be disclosed.

The warrants were issued by me, at the request of ASIO, on the grounds that the documents and electronic data in question contained intelligence relating to security matters.

By section 39 of the *Intelligence Services Act 2001,* it is a criminal offence for a current or former officer of ASIS to communicate "any information or matter that was prepared by or on behalf of ASIS in connection with its functions or relates to the performance by ASIS of its functions", where the information has come into his possession by reason of his being or having been an officer of ASIS.

As Honourable Senators are aware, it has been the practice of successive Australian Governments not to comment on security matters. I intend to observe that convention. However, in view of the publicity which has surrounded the matter since yesterday, I consider that it would be appropriate for me to make a short statement about the matter which does not trespass beyond the convention, and which will also provide an opportunity to correct some misleading statements that have been made in the Chamber this morning, and by others.

I listened to the debate in the Senate earlier in the day on Senator Milne's procedural motion. I listened, in particular, with great respect to Senator Faulkner's contribution. I agree with what Senator Faulkner had to say and – if I may say so – consider it to be an accurate and judicious statement of the applicable principles. While a national security Minister should never be compelled by the Parliament to make a statement concerning intelligence matters, it may, as Senator Faulkner rightly said, be appropriate on particular occasions for him to prevail upon the courtesy of the Parliament to do so.

Warrants of the kind executed yesterday are issued under section 25 of the *Australian Security Intelligence Organisation Act 1979* (the Act). They are only issued by the Attorney-General at the request of the Director-General of ASIO, and only if the Attorney-General is satisfied as to certain matters. It is important to make that point, since it was asserted by Senator Ludlam, in apparent ignorance of the *Act*, that I had "set ASIO onto" these individuals. The Attorney-General never initiates a search warrant; the request must come from ASIO itself.

When the Director-General makes such a request, a search warrant may only be issued by the Attorney-General if the conditions set out in section 25(2) are fulfilled. That provision requires that the Attorney be 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 the *Act* in respect to a matter that is important in relation to security. Security is defined by section 4 to mean the protection of the Commonwealth and its people from espionage, sabotage, politically motivated violence, attacks on Australia's defence system, or acts of foreign interference; and the protection of Australia's territorial and border integrity from serious threats.

On the basis of the intelligence put before me by ASIO, I was satisfied that the documents and electronic media identified did satisfy the statutory tests, and therefore I issued the warrants. Of course, honourable Senators would not expect me to disclose the specific nature of the security matter concerned.

I am, of course, aware that Australia is currently in dispute with Timor Leste over matters relating to the Timor Sea. That dispute is the subject of arbitration proceedings in The Hague, which are due to commence tomorrow. The case is being heard by an Arbitral Tribunal established under Article 23 of the Timor Sea Treaty. In those proceedings, Timor Leste makes certain allegations against Australia. The Australian Government is defending the proceedings and contesting the jurisdiction of the Tribunal. I am aware that Mr Collaery is one of Timor Leste's counsel in the proceedings.

Australia, of course, respects the proceedings and respects the Arbitral Tribunal. We will be represented by the Solicitor-General, Mr Gleeson SC, and by Professor James Crawford AC SC, who is the Whewell Professor of Public International Law at the University of Cambridge.

Last night, rather wild and injudicious claims were made by Mr Collaery and, disappointingly, Father Frank Brennan, that the purpose for which the search warrants were issued was to somehow impede or subvert the arbitration. Those claims are wrong. The search warrants were issued, on the advice and at the request of ASIO, to protect Australia's national security.

I do not know what particular material was identified from the documents and electronic media taken into possession in the execution of the warrants. That will be a matter for ASIO to analyse in coming days. However, given Mr Collaery's role in the arbitration, and in order to protect Australia from groundless allegations of the kind to which I have referred, 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.

Might I finally make the observation that, merely because Mr Collaery is a lawyer, that fact alone does not excuse him from the ordinary law of the land. In particular, no lawyer can invoke the principles of lawyer-client privilege to excuse participation, whether as principal or accessory, in offences against the Commonwealth.

I understand that the Opposition was briefed by ASIO on this matter earlier today.

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

ATTORNEY-GENERAL

CANBERRA

23 December 2013

Mr David Irvine AO
Director-General of Security
Australian Security Intelligence Organization
CANBERRA ACT 2600

Dear Director-General

I refer to our telephone conversation earlier today, and to the execution by ASIO on December 3 of a search warrant issued under s. 25 of the *Australian Security Intelligence Organization Act* at premises in Canberra occupied by the law firm of Mr Bernard Collarey, during the course of which certain material was taken into possession.

Mr Collarey appears as a legal representative of the Democratic Republic of Timor Leste in proceedings currently being conducted by an Arbitral Tribunal established under Article 23 of the Timor Sea Treaty, in which Timor Leste makes certain allegations against Australia. Australia is defending the proceedings and contesting the jurisdiction of the Tribunal. Of course, Australia respects the proceedings and respects the Tribunal.

As you know, at the time of authorizing the issue of the search warrants, I gave an instruction that the content of material taken in execution of the warrant, or any information derived from the material, was not under any circumstances to be communicated to those conducting the arbitration on behalf of Australia. I gave that instruction to ensure that the execution of the warrant would not in any way interfere with the proper conduct of the arbitration and, in particular, with the capacity of Timor Leste to present its case in the arbitration. That instruction is recorded in an undertaking which I have given on behalf of the Commonwealth in the arbitration, a copy of which is attached to this letter.

Timor L'Este has now, by proceedings commenced in the International Court of Justice on 17 December, sought orders from the ICJ against Australia in relation to the same material. Those proceedings will be defended.

It seems appropriate in the circumstances that I give a direction to ASIO in similar terms to the direction which I gave in relation to the arbitration. Accordingly, I direct that the content of the material taken by ASIO on December 3 in execution of the warrant from premises occupied by the law firm of Mr Collarey, or information derived from the material, is not under any circumstances to be communicated to those conducting the proceedings in the International Court of Justice on behalf of the Australia. It is my intention to offer an undertaking in terms similar to that offered to the Arbitral Tribunal, to the ICJ.

The effect of the undertakings will be that the material will not be made available or otherwise communicated to the legal representatives of Australia in both the arbitration and the ICJ proceedings.

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7300 Facsimile: (02) 6273 4102

In the case of both the arbitration and the ICJ proceedings, there should be an exception to the extent necessary to enable Australia to comply with any orders of the Arbitral Tribunal or the Court. This would enable ASIO to prepare a list of the material, and to provide the list to those conducting the proceedings on behalf of Australia, in a form which does not disclose the content of the material.

In the ICJ proceedings, Timor Leste seeks, *inter alia*, provisional measures in relation to the use and handling of the material. The hearing of the provisional measures application has been set down for 20-22 January 2014.

On 18 December, the President of the ICJ wrote to the Prime Minister notifying the Australian Government of the hearing. The President's letter specified:

> "As President of the International Court of Justice acting in conformity with Article 74, paragraph 4, of the Rules of Court, I hereby draw the attention of Your Government to the need to act in such a way as to enable any Order of the Court will make on the request for provisional measures to have its appropriate effects, in particular to refrain from any act which might cause prejudice to the rights claimed by the Democratic Republic of Timor-Leste in the present proceedings."

[redacted] it would be desirable and appropriate for Australia to satisfy the President's request by ensuring that, from now until the conclusion of the hearing on 20-22 January, the material is sealed, that it is not accessed by any officer of ASIO, and that ASIO ensure that it is not accessed by any other person.

Redacted to maintain legal professional privilege

You have indicated to me that you do not consider that that course of action, at least until the disposal of the proceedings in January, would be problematic from a national security point of view. In those circumstances, I ask you to immediately take such steps as are necessary to seal the material and prevent access to it, either by your officers or by any other person. Unless you have an objection, I intend to instruct the Solicitor-General that he may communicate the fact that those arrangements have been made to the ICJ, and to the legal representatives of Timor Leste.

Yours faithfully

(George Brandis)

Encl.

ATTORNEY-GENERAL

CANBERRA

Arbitration under the Timor Sea Treaty

Democratic Republic of Timor-Leste v Commonwealth of Australia

Written undertaking by Senator the Hon George Brandis QC, Attorney-General of the Commonwealth of Australia

WHEREAS

A. I am the Attorney-General of the Commonwealth of Australia, having responsibility, *inter alia*, for the administration of the *Australian Security Intelligence Organisation Act 1979* and for the conduct of these proceedings; and

B. I am aware that the Australian Security Intelligence Organisation ('ASIO') executed a warrant at premises occupied by the law firm of Mr Bernard Collaery and that in execution of that warrant, certain material ('the Material') was taken into possession by ASIO; and

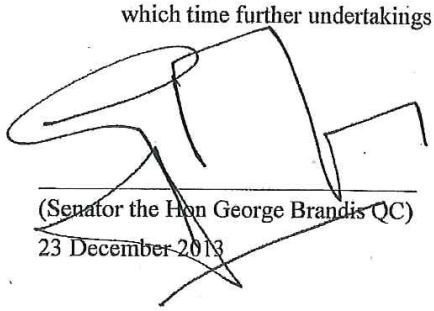
C. The Government of Timor-Leste has raised in these proceedings the possibility of a conflict of interest arising from these roles in these circumstances.

I DECLARE to the Tribunal that:

1. 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; and
2. I have not become aware or sought to inform myself of the content of the Material or any information derived from the Material; and
3. I am not aware of any circumstances which may make it necessary for me to inform myself of the content of the Material or any information derived from the Material.

I UNDERTAKE to the Tribunal that:

1. The Material will not be used by any part of the Australian Government for any purpose related to this arbitration;
2. I will not make myself aware or otherwise seek to inform myself of content of the Material or any information derived from the Material; and
3. 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.



(Senator the Hon George Brandis QC)
23 December 2013

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7300 Facsimile: (02) 6273 4102

Annex 54: 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.

ATTORNEY-GENERAL

CANBERRA

International Court of Justice

Timor-Leste v. Australia

Written undertaking by Senator the Hon George Brandis QC, Attorney-General of the Commonwealth of Australia

WHEREAS

A. I am the Attorney-General of the Commonwealth of Australia, having responsibility, *inter alia*, for the administration of the *Australian Security Intelligence Organisation Act 1979* and for the conduct of these proceedings; and

B. I am aware that the Australian Security Intelligence Organisation ('ASIO') executed a warrant at premises occupied by the law firm of Mr Bernard Collaery and that in execution of that warrant, certain material ('the Material') was taken into possession by ASIO; and

C. On 19 December 2013, I made a written undertaking to an Arbitral Tribunal constituted under the 2002 Timor Sea Treaty relating to restrictions on the use of the Material; and

D. On 20 January 2014, the Government of Timor-Leste raised before the International Court of Justice ('the Court') concerns relating to the use of the Material in contexts unrelated to the arbitration.

I DECLARE to the Court that:

1. I have not become aware or sought to inform myself of the content of the Material or any information derived from the Material; and

2. I am not aware of any circumstance which would make it necessary for me to inform myself of the content of the Material or any information derived from the Material; and

3. I have given a Direction to ASIO that the content of the Material and any information derived from the Material, is not under any circumstances to be communicated to any person for any purpose other than national security purposes (which include potential law enforcement referrals and prosecutions) until final judgment in this proceeding or until further or earlier order from the Court.

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7300 Facsimile: (02) 6273 4102

I UNDERTAKE to the Court that until final judgment in this proceeding or until further or earlier order of the Court:

1. 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

2. Should I become aware of any circumstance which would make it necessary for me to inform myself of the Material, I will first bring that fact to the attention of the Court, at which time further undertakings will be offered; and

3. The Material will not be used by any part of the Australian Government for any purpose other than national security purposes (which include potential law enforcement referrals and prosecutions); and

4. Without limiting the above, the Material, or any information derived from the material, will not be made available to any part of the Australian Government for any purpose relating to the exploitation of resources in the Timor Sea or related negotiations, or relating to the conduct of:

   (a) these proceedings; and
   (b) the proceedings in the Arbitral Tribunal referred to in Recital C.

(Senator the Hon George Brandis QC)

21 January 2014

Annex 55: Letter from the Australian Government Solicitor to DLA Piper, 16 December 2013.

the leading lawyers to government

Our ref. 13209380

16 December 2013

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4 National Circuit Barton ACT 2600
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T 02 6253 7000 DX 5678 Canberra
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Canberra
Sydney
Melbourne
Brisbane
Perth
Adelaide
Hobart
Darwin

Mr Scott McDonald
Partner
DLA Piper
Level 38
201 Elizabeth Street
Sydney NSW 2000

Email: scott.mcdonald@dlapiper.com

Dear Mr McDonald

Execution of ASIO search warrants

1. We act for the Commonwealth of Australia. We are instructed to respond to your letter of 10 December 2013 to the Attorney-General, also copied to the Director-General of Security.

The Seized Material

2. Your letter relates to intelligence collection warrants issued under s 25 of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) and executed last week at the offices of Mr Bernard Collaery and the premises of another person. Pursuant to the warrants, material was seized from both premises. Certain items have since been returned to the owners/occupiers. The remainder is held by the Australian Security Intelligence Organisation (ASIO). This material is referred to below as the Seized Material.

Your requests

3. Your client seeks the return of the Seized Material. The material was not seized from your client and your client has pointed to no legal entitlement which would warrant such return. ASIO considers that the Seized Material is likely to be relevant to the intelligence issues in respect of which it was seized. In the circumstances, our client does not agree to return the Seized Material to the occupiers of the premises or to deliver it to your office.

4. Your client seeks a schedule of the Seized Material. Such schedules were prepared in the form of property seizure records completed at the time of execution of the warrants. Copies of those property seizure records were provided for the occupiers of the premises. Your client may request copies from those occupiers (if it has not already done so). In view of your advice that the occupiers were your client's legal representative and a witness, they may be happy to provide those records to your office (again, if they have not already done so). In the circumstances the

Commonwealth will not separately provide you with a schedule of material seized from premises not occupied by your client.

5. Finally, your client seeks copies of the search warrants. The warrants were available to, and inspected by, persons present at the premises at the time of each search. Section 25 of the ASIO Act does not require that copies be provided and it is not ASIO's practice to do so. Again, your client is free to communicate with the occupiers of the premises regarding the warrants.

Next steps

6. Your letter suggests that your client wishes to consider its position in relation to legal professional privilege. No such claim has been made to date. The Commonwealth does not accept that such privilege is available in relation to the Seized Material.

7. Nonetheless, our client is prepared to take no steps now in relation to the Seized Material for a short period to enable your client to take action to enforce any relevant legal rights it believes it may have.

8. If your client wishes to make a claim in respect of any of the Seized Material, by no later than 5:30pm on Thursday 19 December 2013, provide us with:

   a. details of the material over which each such a claim is made;

   b. details of the basis for each such claim; and

   c. any draft proposed application or pleading.

9. Failing this, our client will take such steps as it considers appropriate in relation to the Seized Material without further notice.

10. It would be inappropriate in the circumstances for any proceedings to be commenced on an ex parte basis.

11. We are instructed to advise that the Seized Material has not been, and will not be, inspected by any Commonwealth officers who are to be involved in the proceedings brought by your client in The Hague.

12. Please don't hesitate to contact the writer in relation to the matter.

Yours sincerely

Irene Sekler
Senior Executive Lawyer
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irene.sekler@ags.gov.au

Annex 56: Letter from the Australian Government Solicitor to DLA Piper, 19 December 2013.

the leading lawyers to government

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Sydney
Melbourne
Brisbane
Perth
Adelaide
Hobart
Darwin

Our ref. 13209380

19 December 2013

Mr Scott McDonald
Partner
DLA Piper
Level 38
201 Elizabeth Street
Sydney NSW 2000

Email: scott.mcdonald@dlapiper.com

Dear Mr McDonald

Execution of ASIO search warrants

1. We refer to your letter of 18 December 2013 in which you provided, as a courtesy, a copy of documents submitted to the International Court of Justice on 17 December 2013.
2. We are instructed that the President of the International Court of Justice has since indicated that your client's request for the indication of provisional measures will be heard in the period 20-22 January 2014.
3. Our client is considering its position in relation to the Seized Material in light of the proceedings in the International Court of Justice and will take no steps in relation to the Seized Material whilst that consideration is taking place.
4. If your client proposes to make any claim under domestic law with respect to any of the Seized Material it should do so in the manner set out in paragraph 8 of our letter of 16 December 2013, but by no later than 5:30pm on Friday, 20 December 2013. You should not expect that our client will extend further opportunity to make any claim.
5. Please do not hesitate to contact the writer in relation to the matter.

Yours sincerely

Irene Sekler
Senior Executive Lawyer
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A2711227

Annex 57: Letter from the Australian Government Solicitor to DLA Piper, 24 December 2013.

the leading lawyers to government

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Canberra
Sydney
Melbourne
Brisbane
Perth
Adelaide
Hobart
Darwin

Our ref. 13209380

24 December 2013

Mr Scott McDonald
Partner
DLA Piper
Level 38
201 Elizabeth Street
Sydney NSW 2000

Email: scott.mcdonald@dlapiper.com

Dear Mr McDonald

Execution of ASIO search warrants

No steps to be taken in relation to the material seized from the premises of Mr Collaery

1. We refer to the request of the President of the International Court of Justice made on 18 December 2013 that the Commonwealth refrain from any act which might cause prejudice to the rights claimed by the Democratic Republic of Timor-Leste in the proceedings it has commenced before the International Court of Justice.

2. The Commonwealth will take no steps in relation to the material which is the subject of those proceedings, (namely, the material seized from Mr Collaery's premises on 3 December 2013) until the International Court of Justice has heard the request for provisional measures on 20-22 January 2014. Specifically, unless necessary to comply with the requirements of the International Court of Justice, the material seized from Mr Collaery's premises will not be accessed, used or inspected by ASIO prior to 22 January 2013. ASIO will also ensure that it is not communicated to, inspected or accessed by any other person prior to that time.

3. In addition, as we have previously noted, the material seized from Mr Collaery's premises has not been and will not be communicated in any way to any person conducting the Arbitration under the Timor Sea Treaty on behalf of the Commonwealth. The Attorney-General has given directions to ASIO and an undertaking to the Arbitral Tribunal to this effect.

Any domestic law claim in relation to the material seized from Mr Collaery's premises

4. We refer to your letter dated 21 December 2013. The material seized from Mr Collaery's premises was explicitly identified in the property seizure record provided to his staff for him. He was the appropriate recipient of that record as he, not the Government of Timor-Leste, was the occupier of the premises. Given his knowledge of both the property seizure record and his knowledge of contents of the

information held by him, he would be in a position to make informed judgments about the content of anything seized. The Government of Timor-Leste has therefore been well placed to obtain from its legal representatives information and advice to identify any claim it may have. You have not suggested any reason why your client has been unable to inform itself in this way. In the circumstances, our client rejects the complaint that it has not provided you with particular information or opportunities.

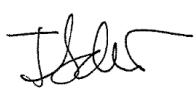
5. The Government of Timor-Leste has had ample opportunity to commence domestic proceedings to make any claims it wishes to make and has not done so despite 20 days having passed since the execution of the warrant on 3 December 2013. If it does intend to make any claim under domestic law it should do so well prior to 22 January 2014.

Material seized from the premises of the other person

6. Your client has had ample opportunity to make any claim it wished over material seized from the premises of the other person on 3 December 2013. Your client was asked to make any such claim by 5:30pm on 19 December 2013, extended to 5:30pm on 20 December 2013. As no claim has been made, our client will from 28 December 2013 take such steps as it considers appropriate in relation to materials seized from that person's premises (as was foreshadowed in our letter of 16 December 2013).

7. Please do not hesitate to contact the writer in relation to the matter.

Yours sincerely



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Annex 58: Government of Timor-Leste, Secretary of State for Vocational Training Policy and Employment, Seasonal Workers Program 2012-2014, 30 April 2014 (with English translation).

REPUBLICA DEMOCRATICA TIMOR LESTE
SECRETARIA DE ESTADO PARA POLITICA DA FORMAÇÃO PROFESIONAL E EMPREGO
DIRECÇÃO NACIONAL DE EMPREGO
Rua: Caicoli, (Ex-UNDP) Dili, Timor Leste

DADOS TRABALHADORES SERVISU
IHA AUSTRALIA,(SEOSONAL WORKER PROGRAME) 2012-2014

GRUPO	DATA TAMA AUSTRALIA	AREA SERVISU				Naran Companhia	TOTAL	Observasaun
		HOSPITALITY		HORTICULTURE				
		MANE	FETO	MANE	FETO			
1	9/3/2012	4	2			Cable Beach	6	fila ona
2	8/4/2012	1	1			Eco Beach	2	fila ona
3	12/4/2012	2	2			Mercure Hotel	5	fila ona
4	14/01/2013				2	Connect Group	2	fila ona
5	2/3/2013	8	6			Cable Beach	14	fila ona
6	18/05/2013	3	2			Mercure Hotel	5	fila ona
7	4/9/2013			12		Connect Group	12	fila ona
8	2/10/2013	2				Hamilton Island	2	fila ona
9	27/02/2014	5	1			Cable Beach	6	Sei Existe
10	14/03/2014	3	2			Cable Beach	5	Sei Existe
11	19/03/2014	2	2			Lombadina	4	Sei Existe
12	4/4/2014	6	2			Cable Beach	8	Sei Existe
13	5/4/2014	1	5			Kimberley Accommodation	6	Sei Existe
14	9/4/2014			4		IronBark, Citrus	4	Sei Existe
15	12/4/2014	1				Kimberley Accommodation	1	Sei Existe
16	17/04/2014				2	Connect Group	2	sei Existe
TOTAL		38	25	16	4		84	

TOTAL TRABALHADORES : 84
TRABALHADORES NEBE FILA : 48
TRABALHADORES NEBE EXISTE : 36

Dili, 30/04/2014
Chefe Departamento DEO
Valentio Aires de Jesus

Democratic Republic of Timor-Leste
Secretariat of State for Vocational Training Policy and Employment
National Directorate of Employment
Street: Caicoli, (Ex-UNDP) Dili, Timor-Leste

Details of workers working
in Australia, (Seasonal Worker Program) 2012-14

Group	Date of entry to Australia	Work Sector				Company Name	Total	Observation
		Hospitality		Horticulture				
		Male	Female	Male	Female			
1	9/3/2012	4	2			Cable Beach	6	Returned
2	8/4/2012	1	1			Eco Beach	2	Returned
3	12/4/2012	2	2			Mercure Hotel	5*	Returned
4	14/01/2013				2	Connect Group	2	Returned
5	2/3/2013	8	6			Cable Beach	14	Returned
6	18/05/2013	3	2			Mercure Hotel	5	Returned
7	4/9/2013			12		Connect Group	12	Returned
8	2/10/2013	2				Hamilton Island	2	Returned
9	27/02/2014	5	1			Cable Beach	6	Current
10	14/03/2014	3	2			Cable Beach	5	Current
11	19/03/2014	2	2			Lombadina	4	Current
12	4/4/2014	6	2			Cable Beach	8	Current
13	5/4/2014	1	5			Kimberley Accommodation	6	Current
14	9/4/2014			4		IronBark, Citrus	4	Current
15	12/4/2014	1				Kimberley Accommodation	1	Current
16	17/04/2014				2	Connect Group	2	Current
Total		38	25	16	4		84	

Total workers : 84
Returned workers : 48
Current workers : 36

Dili, 30/04/2014
Department Chief, OEO (Overseas Employment Office)

Valencio Anes de Jesus

* Translator's note – the original document records the number "5" in the total column, though only 2 male and 2 female workers are recorded in the columns to the left.

Annex 59: 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).

The Australian Embassy
Dili, Timor-Leste

Komunikadu ba imprensa

(30/4/2014)

'Seasonal Workers' husi Timor-Leste ba Northern Territory

Ohin marka despedida ba grupu trabalhadór foun Timoroan nain 20 ne'ebé atu aranka ba Australia atu partisipa iha programa governu Austrália-nian ho naran 'Seasonal Worker Program'. Sira sei servisu iha industria hanesan hortikultura iha fatin oin-oin iha Austrália. Despedida ne'e signifikante tebes tanba iha grupu foun ne'ebé primeira vés sei servisu iha Northern Territory.

Seremonia ohin ne'e hetan partisipasaun husi Xefi Ministru ba Northern Territory, Adam Giles MLA, Sekretariu Estadu ba Politika Formasaun Profesional no Empregu (SEPFOPE), Ilidio Ximenes da Costa, Embaixadór Australia ba Timor-Leste, Peter Doyle.

Sr. Doyle hato'o parabens ba trabaliador sira ne'ebé sei aranka no dehan programa ne'e iha benefisiu boot ba partisipante Timor-oan no mos emprezariu Austrália sira.

"Programa ne'e ezemplu diak ida husi servisu oin-oin ne'ebé Timor-Leste no Australia halo hamutuk. Programa ne'e ezemplu ida husi programa barak no aktividade ne'ebé hatudu ita nia amizade ne'ebé metin no forte," dehan Sr. Doyle.

"Timor-Leste no Northern Territory Austrália mos iha ligasaun metin no kleur no ami senti kontenti tebes atu halo despedida ba ekipa trabalhadór sira ne'ebé primeira vés sei halo servisu iha ne'eba.

"Programa ne'e fó kontribuisaun ba dezenvolvimentu ekonomia Timor-Leste liu-husi formasaun no rendimentu ho partisipante sira, no fó oportunidade hodi haruka osan ba sira nia familia.

"Importante mos, programa ne'e responde ba nesisidade ho vaga merkadu de traballu iha Austrália ne'ebé akontese tanba iha variasaun tempu ba tempu i programa ne'e mos fó empregador sira konfiansa kona ba fornesimentu trabalhadór.

"Liu husi formasaun iha servisu fatin, partisipante sira mos bele aprende lian Ingles, asesu formasaun primeiru sokuru no komputadór iha Austrália.

"Hau espera partisipante sira iha viajen diak iha sira nia esperensia iha Austrália," dehan Sr. Doyle.

Trabaladór nain 80 liu hola parte ona iha programa SWP, ne'ebé dezenu ho maneira atu trabalhadór sira bele fila fali ba Austrália iha tempu tuir mai. Informasaun hetan husi empresariu iha Austrália kona-ba trabalhadór sira uluk ne'e mesak positivu hotu.

Partisipante sira servisu uluk iha fatin oin-oin hanesan Broome iha Norte-oeste Australia, area rurais iha Victoria no New South Wales, Ila Hamilton iha Queensland, no mos agora iha Northern Territory.

REMATA - Ho informasaun liu-tan: Arlindo dos Santos Soares iha 7726 6222 ou Greg Haraldson iha 7723 0366

The Australian Embassy
Dili, Timor-Leste

Media Release

(30/04/14)

Timor-Leste Seasonal Workers depart for the Northern Territory

The latest group of 20 participants from Timor-Leste in the Australian Government's Seasonal Worker Program were farewelled today as they depart to work in the horticulture industry in Australia's Northern Territory (NT), the first group to work in the NT under the program.

The ceremony was attended by the Chief Minister of the Northern Territory, the Hon. Adam Giles MLA, Timor-Leste Secretary of State for Vocational Training Policy and Employment (SEPFOPE), Ilidio Ximenes da Costa, Australian Ambassador to Timor-Leste, Peter Doyle, and participants' families.

Mr Doyle congratulated the departing individuals and said the Seasonal Worker Program had great potential benefits for both Timorese participants and Australian employers.

"The Seasonal Worker Program is an excellent example of the diverse range of work Timor-Leste and Australia do together. It is one of the many programs and activities that show the depth and strength of our friendship," said Mr Doyle.

"Timor-Leste and Australia's Northern Territory also share strong and enduring ties and we are thrilled to be farewelling our first group of seasonal workers to take up employment there.

"The Seasonal Worker Program contributes to the economic development of Timor-Leste by providing skills training and income for participants, and the chance to send remittances to their families. Importantly, the program also helps fill gaps in Australia's labour market which arise due to seasonal fluctuations and provides employers with a reliable workforce.

"In addition to on-the-job training, participants can also access English, first aid and basic computer training while in Australia. They will meet new friends and work colleagues - building people to people links between Timor-Leste and Australia.

"I wish participants all the best for their upcoming experience in Australia," Mr Doyle said.

More than 80 Timor-Leste workers have taken part in the program, which is designed so they can return to Australia in subsequent seasons. Feedback from Australian employers which hosted workers from Timor-Leste in 2012 and 2013 was extremely positive.

Participants have worked in various places from Broome in North West Australia, to rural Victoria and New South Wales, to Hamilton Island in Queensland and now the Northern Territory.

ENDS

For more information: Arlindo dos Santos Soares on 7726 6222 or Greg Haraldson on 7723 0366

Annex 60: M Wilkinson and P Cronau, 'Drawing the Line', Four Corners, Australian Broadcasting Corporation, 17 March 2014, (transcript).

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Drawing the Line

By Marian Wilkinson and Peter Cronau

Updated March 24, 2014 14:21:00

Monday 17th March 2014

Late last year the office of Canberra lawyer Bernard Collaery was raided by agents from ASIO and the Federal Police.

They were looking for documents that linked his client, a former top Australian spy, to disclosures that Australia had bugged East Timor's Prime Minister and his advisors during crucial treaty talks a decade ago.
Those talks resulted in a treaty that carved up billions of dollars worth of oil and gas reserves in the Timor Sea.

VIDEO: Interview with George Brandis, Attorney-General (Four Corners)

VIDEO: Interview with Alfredo Pires, Minister for Petroleum, Timor-Leste (Four Corners)

VIDEO: Interview with Alexander Downer, Foreign Affairs Minister, 1996-2007 (Four Corners)

Now both the lawyer and former spy are threatened with criminal charges for breaching national security laws.

Next on *Four Corners*, reporter Marian Wilkinson investigates the events leading up to the ASIO raids on Bernard Collaery and the former spy and reveals the growing friction between Dili and Canberra over the row.

Attorney-General George Brandis defends the head of ASIO, David Irvine, for his advice on the warrants and tells *Four Corners*: "*the intelligence case that ASIO put before me was a very strong case.*"

But East Timor's lawyer, Bernard Collaery, says he is concerned the Government is trying to stop the former spy, codenamed 'Witness K', giving evidence about the espionage operation in legal proceedings launched by East Timor.

East Timor's advisors are now arguing Australia spied for commercial reasons. Former treaty negotiator Peter Galbraith tells *Four Corners*: "*the Australian Government was shockingly close to the oil companies.*"

The stakes are high. East Timor wants to invalidate the treaty it signed with Australia in 2006 and has taken its case to the Permanent Court of Arbitration in The Hague.

The tiny nation is calling on Australia to finally negotiate permanent and fair maritime boundaries that will give it more control over the oil and gas wealth in the Timor Sea.

'Drawing the Line' is a revealing insight into national security in the post-Cold War environment. Do governments too freely use espionage for economic advantage? And is it in the national interest?

'Drawing the Line', reported by Marian Wilkinson and presented by Kerry O'Brien, goes to air on Monday 17th March at 8.30pm on ABC1. *It is replayed on Tuesday 18th March at 11.00am and 11.35pm.* It can also be seen on ABC News 24 on Saturday at 8.00pm, ABC iview and at *abc.net.au/4corners*.

Hide transcript

Transcript

DRAWING THE LINE - Monday 17 March 2014

KERRY O'BRIEN: Another spy saga involving another near neighbour, welcome to *Four Corners*.

Australia and East Timor have a chequered history, many Australian soldiers who fought the Japanese soldiers there in World War Two say they owe their lives to the Timorese. But then Australia essentially ran dead when Indonesia invaded the small island nation just north of Darwin, only to put its Indonesian relationship when it strongly backed East Timor after it voted for independence in 1999.

So would Australia then choose to bug the offices of East Timor's Prime Minister and his team as has been alleged? When the two friendly countries were sitting down to negotiate a new deal over the immensely rich Timor sea oil and gas deposits, the poverty stricken island nation is desperate for what it says is a fairer share of the commercial spoils. And after learning of the espionage and Australia refused to come back to the table, East Timor sought international arbitration at The Hague on the grounds that Australia had not negotiated that deal in good faith by spying on East Timor's negotiators. Then, last December, ASIO agents and Australian Federal Police raided the home of a former Australian intelligence agent, whose evidence is central to East Timor's case and a Canberra lawyer acting for both.

This story from Marian Wilkinson.

MARIAN WILKINSON, REPORTER: It's a chilly winter morning in London.

But Bernard Collaery isn't troubled by the cold. He's worried about being under surveillance.

Collaery is not a terrorist. He's an Australian lawyer, one of his clients is a former veteran Australian spy.

BERNARD COLLAERY: I had someone come to me with a work place grievance. That person came to me with full authority.

MARIAN WILKINSON: What the former spy told Collaery has huge legal ramifications.

BERNARD COLLAERY: What I heard was just simply shocking and I was most concerned about it and of course it took a long time before the issue matured into the decisions that now have the ramifications that you speak of.

MARIAN WILKINSON: Collaery and his client are now threatened with criminal charges for breaching Australia's national security laws.

MARIAN WILKINSON: So you don't fear being charged?

BERNARD COLLAERY: I don't like being threatened and I'm from Wollongong and I don't intimidate easily.

(Reconstruction of officers conducting a raid)

MARIAN WILKINSON: Collaery is lucky he's bold. Because late last year, ASIO officers and federal police descended on his home office in Canberra - startling his legal assistant who was there alone.

CHLOE PRESTON, LEGAL ASSISTANT, COLLAERY LAWYERS: They told me as soon as I opened the door that they had a warrant. There were parts that were blacked out on it, which I couldn't read. And I was denied a copy due to national security reasons.

MARIAN WILKINSON: What was the clearest statement they made to you as to why they were doing this raid ah on your employer?

CHLOE PRESTON: The only, the only statement that I got was national security. I was given no further information.

MARIAN WILKINSON: Chloe Preston watched as the ASIO officers systematically searched every room, taking confidential legal files.

CHLOE PRESTON: They were placed into a plastic bag and then placed into an envelope, they were sealed with an AFP sticker.

MARIAN WILKINSON: The raid dragged on for six hours before Preston could contact Collaery.

As ASIO no doubt knew, Collaery was in The Hague acting for his other client, East Timor. He was preparing for the first stage of legal proceedings.

BERNARD COLLAERY: I was in my hotel room at The Hague when I received a telephone call, this was an extraordinary event. I mean they went straight to my East Timor binders and and spent hours going through ring binder after ring binder.

MARIAN WILKINSON: The ASIO officers took one document in particular - a draft statement from the former Australian spy. Codenamed Witness K, he was set to be a witness in the East Timor proceedings in The Hague.

Did they manage to get the statement of Witness K?

BERNARD COLLAERY: Yes. They managed to get a statement that may have formed, been a draft, but they certainly have been informed from the word go that there are no names mentioned in it that relate to serving ASIO or ASIS personnel and certainly nothing of any technique that's not in a John le Carre novel. I mean, the Australian Government has known that there is no risk to national security.

MARIAN WILKINSON: Witness K is a former senior officer with Australia's Secret Intelligence Service, ASIS. We can't tell you who he is, or indeed where he lives without risking prosecution.

But what we can tell you is that both Witness K and his lawyer, Bernard Collaery, face the real possibility of criminal charges.

What suspected breech of national security laws did you think had occurred?

GEORGE BRANDIS, ATTORNEY-GENERAL: Well, I'm of course not at liberty to go into the details of the particular case, but might I just make the point that this was, the intelligence case that ASIO put before me was a very strong case.

MARIAN WILKINSON: Federal Attorney-General George Brandis authorised the ASIO raids.

GEORGE BRANDIS: It was a clear case that the national security interest, which ASIO is responsible for safeguarding, was served by me authorising the execution of this search.

MARIAN WILKINSON: The legal proceeding with the Permanent Court of Arbitration in The Hague triggered the intense security response over Witness K.

(Bernard Collaery arriving at The Hague)

REPORTER: What are you expecting today?

BERNARD COLLAERY: More justice.

MARIAN WILKINSON: Last year, East Timor's lawyers, including Collaery, approached the Court saying an eight year old maritime treaty with Australia should be torn up. The reason - Australia had spied on East Timor's negotiators at the time the deal was done.

At stake is billions of dollars worth of oil and gas deposits in the Timor Sea.

BERNARD COLLAERY: Why undertake the getting of a treaty in such unfair terms that when one party walks away from the card table, it knows it's done a bad deal, it doesn't know it's been cheated, but when it finds out it's been cheated it, it knows full well what happened.

MARIAN WILKINSON: Witness K knew firsthand about the spying operation on East Timor's treaty negotiations.

ASIO believes if this evidence was passed to the Timorese, Witness K and Collaery could have breached Australia's national security.

(Collaery and Wilkinson walking London streets)

So have there been breaches of the national security laws?

BERNARD COLLAERY: Not in the least. I mean since when has cheating been a State secret? There've been no revelations that could in any way reveal the identity of any serving ASIS Officials. There's been no...

MARIAN WILKINSON: You're clear about that?

BERNARD COLLAERY: Oh absolutely, absolutely. The Australian Government's put no evidence forward to suggest it has...

MARIAN WILKINSON: The Abbott Government is now trying to legally block Witness K's evidence being admissible in the dispute.

[Talking to Collaery] How crucial is he to East Timor's case?

BERNARD COLLAERY: Very important.

We're investigating further as to whether the raid on my house and these other issues are obstructing the course of justice. I won't put it any higher than that, but I think it's important that I make clear that that at the end of the day, we will see whether the raid on my office and the potential intimidation of our witness is itself a part of a pattern of conduct that we need to have examined properly by a proper judicial process.

MARIAN WILKINSON: ASIO raided Witness K's home the same morning as Collaery's. Witness K's passport was seized which would prevent him travelling to The Hague to give evidence.

In East Timor, even the Prime Minister's wife, was stunned.

KIRSTY SWORD GUSMAO: I felt that the raids were not only an act of aggression and hostility towards Timor-Leste's legal representative, but given that the documents are the possession of the Timor-Leste Government, it was also quite a direct act of hostility towards Timor-Leste itself.

ALFREDO PIRES, MINISTER, PETROLEUM AND MINERAL RESOURCES, TIMOR-LESTE: I was quite shocked. But it gives a sign of the new government. We're upset that a raid did take place and documents were seized.

MARIAN WILKINSON: East Timor took Australia to the International Court of Justice, the ICJ, over the ASIO raids in January.

(International Court of Justice)

JUDGE: Good morning, please be seated.

MARIAN WILKINSON: They wanted their legal files seized by ASIO, returned. And they accused Australia of threatening to silence Witness K.

SIR ELI LAUTERPACHT: It hardly needs saying that these are matter of the highest importance to Timor-Leste.

JUDGE: Mr Gleeson is going to open the argument for Australia, you have the floor sir.

MARIAN WILKINSON: But Australia's top legal advisor, Solicitor General Justin Gleeson, used the Court to launch an attack on Collaery and Witness K.

JUSTIN GLEESON: The first proposition is that Mr Collaery, as agent for Timor-Leste, has received into his possession a witness statement and an affidavit from a former ASIS officer.

MARIAN WILKINSON: Gleeson argued the two may have committed a crime in Australia.

JUSTIN GLEESON: It is a crime if a present or former officer of ASIS communicates information concerning the performance of the functions of ASIS acquired as an officer.

MARIAN WILKINSON: He also argued the identity of ASIS officers could be at risk.

JUSTIN GLEESON: The second key provision makes it a separate crime to make public the identity of officers of ASIS, or information from which identity can be inferred...

MARIAN WILKINSON: Gleeson's argument came on instructions from Brandis.

GEORGE BRANDIS: All propositions or arguments advanced by Australia in the ICJ proceedings were advanced by the Solicitor General on the instructions of the Australian Government and those instructions came immediately through me.

MARIAN WILKINSON: Therefore that seemed to imply strongly that that operation did take place in East Timor.

GEORGE BRANDIS: Well, look those are inferences that, that you can draw. I'm not a commentator on these proceedings and I don't propose to be a commentator on these proceedings but in answer to the direct question you've asked me, the Minister in the Government who instructed the Solicitor General was me.

JUSTIN GLEESON: Any breach of Australian law...

MARIAN WILKINSON: Collaery was furious.

BERNARD COLLAERY: I can tell you on my father's grave that neither Witness K nor myself have revealed the name of any serving ASIS Officer. And I'm not going to use cute words, the short answer is the proposition was nonsense and it was a low act and it was something I won't forget and I expect an apology for in due course.

MARIAN WILKINSON: Two weeks ago the International Court of Justice made a provisional order that Australia did not have to return the legal documents seized in the ASIO raids. But Australia could not use them against East Timor.

The judges also made another extraordinary order.

JUDGE: By 15 votes to one, Australia shall not interfere in any way in communications between Timor-Leste and its legal advisors...

MARIAN WILKINSON: In effect they told Australia not to spy on East Timor and its lawyers in any maritime negotiations between the two countries.

JUDGE: I declare this sitting closed.

MARIAN WILKINSON: It was a victory for the East Timorese, because fighting the maritime boundary dispute with Australia is their main game.

ALFREDO PIRES: We basically asked the question, what is ours? If it's ours then it's ours. And who should determine what is ours? And for us, it's very simple, international law.

MARIAN WILKINSON: Looming large over Dili harbour, a giant statue of Jesus stares out to sea - a gift from Indonesia's president Suharto during the brutal occupation of East Timor by his troops.

Timor's seas were carved up for their oil and gas reserves during that bloody occupation.

(Sound of archival footage of the Santa Cruz massacre on November 1991)

MARIAN WILKINSON: Despite massacres like that at the Santa Cruz cemetery in Dili, Australia accepted Indonesia's occupation.

(Sound of gunfire and sirens)

MARIAN WILKINSON: Two years earlier, in 1989, then foreign minister, Gareth Evans, signed The Timor Gap Treaty with his Indonesian counterpart; dividing the oil and gas wealth in the Timor Sea between Australia and Indonesia.

(Sound of clapping)

GARETH EVANS: Now where's the champagne?

(Gareth Evans and ministers drink champagne)

MARIAN WILKINSON: Under the treaty, East Timor was left without maritime boundaries, the Timor gap. Instead Australia and Indonesia created an oil and gas zone of cooperation to share the wealth.

It ignored East Timorese calls for the maritime boundary to be at the halfway or median line with Australia.

The Treaty was condemned internationally.

PETER GALBRAITH, FORMER NEGOTIATOR FOR TIMOR-LESTE: It was the view of the UN mission ah that the treaty was illegal because Indonesia did not have title to East Timor. Its occupation was illegal, therefore it had no capability to dispose of the oil and gas resources of the, that did not belong to Indonesia.

(Sound of helicopters)

MARIAN WILKINSON: In 1999 Australia was forced to re-think the Treaty when the East Timorese achieved their independence.

Australian troops led the UN intervention force into a grateful East Timor as Indonesia withdrew amidst violence and chaos.

(Archival footage from Four Corners story, 'Rich Man, Poor Man', 2004)

PETER GALBRAITH: East Timor is the legal owner of this territory.

MARIAN WILKINSON: Former American diplomat, Peter Galbraith, was chosen by the UN to lead new negotiations with Australia over the Timor Gap Treaty.

PETER GALBRAITH: Australia did not want to have a maritime border at all, because ah they were concerned if they accepted what was by 2000 absolutely bright line international law - which is the border should be halfway between the two countries - that this could undermine their border with Indonesia. So what Australia wanted to do with regard to the Timor Gap was to set aside the border issue and to have an arrangement about the management of the oil resource.

MARIAN WILKINSON: Alexander Downer was foreign minister in the Howard government, directing the negotiations with the UN.

ALEXANDER DOWNER, FOREIGN AFFAIRS MINISTER, 1996-2007: And if we had made special provisions for East Timor, then naturally enough the Indonesians would've come back to us and said, well, in that case why should we adhere to these earlier treaties? And then in that context all of our maritime boundaries and seabed agreements would unravel, and that would be diplomatic folly for Australia.

MARIAN WILKINSON: But Peter Galbraith also remembers Australia was strongly pushing the case of the oil and gas companies.

PETER GALBRAITH: The Australian government was shockingly close to the oil companies and this I, I saw most dramatically at the beginning in, when I went down and I saw foreign minister Downer and I presented the East Timor position.

ALEXANDER DOWNER: We were close to all stakeholders and we would've been derelict in our duty had we not been. Galbraith was working for the United Nations, that's a different thing; the United Nations doesn't have an oil company. But of course when we're involved in negotiations we maintain contact with Australian companies. The Australian government isn't against Australian companies, or if it is it's derelict in its duty. The Australian government supports Australian business and Australian industry. The Australian government unashamedly should be trying to advance the interests of Australian companies.

(Sound of singing and dancing in East Timor Independence celebrations 2002)

MARIAN WILKINSON: In May 2002 officially celebrated its independence.

(Sound of fireworks)

JOSE RAMOS HORTA: John Howard, you are a friend of East Timor. Your support to our small nation is invaluable.

MARIAN WILKINSON: Desperate for income, East Timor signed a new Timor Sea Treaty with Australia 'to get the gas money flowing'. But the tough arguments over a maritime boundary and who owned what were put on hold.

In 2004, East Timor's first prime minister, Mari Alkatiri, made a fresh attempt to negotiate the maritime boundary with Australia.

He hired Peter Galbraith as East Timor's lead negotiator.

Despite a show of ceremonial friendship, the talks between Australia and East Timor were hostile. Alkatiri bluntly accused Australia of plundering the oil and gas in the Timor Sea.

DR MARI ALKATARI, FORMER PRIME MINISTER OF TIMOR-LESTE (ADDRESSING CONFERENCE): Timor-Leste loses $1 million a day due to Australia's unlawful exploitation of resources in the disputed area. Timor-Leste cannot be deprived of its rights or territory because of a crime. Thank you.

MARIAN WILKINSON: The response from Australia, at the time, was indignation.

ALEXANDER DOWNER (ARCHIVAL INTERVIEW): I think they've made a very big mistake thinking that the best way to handle this negotiation is trying to shame Australia, is mounting abuse on our country...accusing us of being bullying and rich and so on when you consider all we're done for East Timor.

PETER GALBRAITH: The Australians were faced with a dilemma, which is that they were obliged under international law to negotiate in good faith for a maritime boundary, but they didn't actually want to have one.

ALEXANDER DOWNER: Our argument has been the more traditional argument in relation to international maritime law, that you take into consideration the continental shelf and ah a whole range of other factors by the way. So it isn't simple, it's a fairly complex formulation that had been used, had been agreed to by Indonesia and we didn't want to change um that formulation.

MARIAN WILKINSON: At stake in the 2004 maritime boundary talks was the biggest oil and gas field ever discovered in the Timor Sea. It's called Greater Sunrise.

(Minister Pires showing Marian o map of area)

ALFREDO PIRES: So Greater Sunrise here and we have expert opinion that ah there's a pretty good chance that all of Sunrise would fall under Timor-Leste's jurisdictions.

MARIAN WILKINSON: Petroleum minister, Alfredo Pires, was advising East Timor's government back in 2004. The arguments were the same as they are today. Who owns the estimated $40 billion Greater Sunrise field - East Timor or Australia?

[Talking to Pires] And the critical boundary that everyone talks about in this is what's called the eastern boundary. Is that right?

ALFREDO PIRES: That's right, that's a part because it involves the big field.

MARIAN WILKINSON: A joint petroleum development area was in place in 2004 shared between East Timor and Australia. Greater Sunrise lay 20% in that area and 80% in Australian waters.

East Timor argued a fair reading of international law would not only put the maritime boundary south to the median line with Australia, it would also, critically, push the boundary east, putting most, if not all, of Greater Sunrise into its territory.

[Talking to Pires] And what's your view on Greater Sunrise?

ALFREDO PIRES: It belongs to Timor-Leste, all of it.

(Four Corners archival, 2004)

PETER GALBRAITH: So from the top of the agenda...

MARIAN WILKINSON: Back in April 2004 Peter Galbraith and the East Timorese negotiators pushed their case hard.

PETER GALBRAITH: Nuno will outline the legal case...

MARIAN WILKINSON: Within weeks their talks with Australia were bogged down in acrimony.

Four Corners now understands this is when the Australian government decided to launch the top secret bugging of East Timor's prime minister and his negotiating team.

PETER GALBRAITH: It's like a burglar; it's like the Watergate and the famous case in the US that brought down Richard Nixon. You know when you when you actually break in to somebody's office and you plant a bug, that's a

kind of a true intrusion that is, it feels different certainly than if you're listening to somebody's cell phone or intercepting their, their email.

(Marian in Dili outside the Government Palace)

MARIAN WILKINSON: The operation to bug the inner sanctum of the government offices here in Dili directly involved Witness K and a team of ASIS operatives. East Timor's negotiators now believe that spying operation gave the Australian side in the talks a big advantage.

Four Corners understands Australian intelligence agents were able to install the bugs in the Palace of Government, right inside the Prime Minister's conference room while it was being renovated under an Australian aid project.

PETER GALBRAITH: What would be the most valuable thing for Australia to learn is what our bottom line is, what we were prepared to settle for. There's another thing that gives you an advantage, you know what the instructions the prime minister has given to the lead negotiator.

And finally, if you're able to eavesdrop you'll know about the divisions within the East Timor delegation and there certainly were divisions, different advice being given, so you might be able to lean on one way or another in the course of the negotiations.

MARIAN WILKINSON: It's believed the four ASIS agents stayed at this floating hotel moored Dili Harbour after they entered East Timor with false identities. And the prime minister's meetings were monitored when negotiations resumed in Dili in October 2004.

We also understand Australia's embassy in Dili was directly involved in the operation; feeding the product of the bugging to the Australian side.

PETER GALBRAITH: It is the sort of thing that you would expect from the Soviet Union. I you know, it's hard to imagine that would really be done by a friendly government and especially for what were essentially commercial negotiations. That, that really seems- there wasn't a national security issue here for Australia. It wasn't as if you know the Timorese were posing some kind of military threat or hatching some kind of plot. This was really bugging for commercial advantage.

(Archival footage from March 2002, John Howard greeting people)

JOHN HOWARD, FORMER AUST. PRIME MINISTER: Hello how are you?.

MARIAN WILKINSON: The ASIS chief who oversaw the bugging was David Irvine, handpicked to head the spy agency after a successful stint as ambassador in China.

JOHN HOWARD: We have a very good relationship...

MARIAN WILKINSON: Irvine had spearheaded the Howard government's efforts to seal a $25 billion gas deal with China for a group of companies led by Woodside Petroleum.

When Irvine took over ASIS, Woodside was had at lot at stake in the Timor Sea. It headed a consortium with huge oil and gas leases at Greater Sunrise.

Woodside's then chief executive Don Voelte, was determined to get it developed.

ALEXANDER DOWNER: Woodside is a huge Australian company and they were proposing to invest billions of dollars in Greater Sunrise to create wealth, which would inter alia have been wealth for Australians, but obviously substantially for the East Timorese as well. So I was all in favour of that. I was all in favour of it.

MARIAN WILKINSON: Woodside's Chairman, Charles Goode, was close to the Howard government. He also sat on the boards of top Liberal Party fundraising vehicles that generated millions of dollars in political donations.

ALEXANDER DOWNER: I know Charles Goode. I don't remember talking to Charles Goode about this issue because it was Don Voelte, the CEO, who came to see me.

MARIAN WILKINSON: Woodside executives led by Voelte lobbied the government strongly during the 2004 negotiations.

ALEXANDER DOWNER: Me, for my part, I reckon, I don't know, I mean I haven't checked, but I would've had certainly more than one, I should think three or four meetings with the CEO of Woodside and no doubt he had a couple of other people there and I would talk to them about how the negotiations were progressing. Well, of

course I did. But I mean like there's some . . .

MARIAN WILKINSON: I guess . . .

ALEXANDER DOWNER: ...additional secret, I can't think what there would've been...

MARIAN WILKINSON: Okay specifically . . .

ALEXANDER DOWNER: ...I mean they wanted...I can tell you what they wanted. They wanted a stable investment regime if they were to exploit the Greater Sunrise field. That's essentially what they wanted, so that's what they were lobbying us for, and we were happy to talk to them about that.

MARIAN WILKINSON: A key issue in East Timor's legal case today is whether the 2004 bugging here at the Palace of Government was done for Australia's national security interests, or for commercial interests.

The lawyer for Witness K and East Timor argues it was not done in Australia's national interests.

BERNARD COLLAERY: Our security services must operate within the legislation establishing them and in particular national interest objectives that are set by Parliament must be met and clearly it behoves the current Government to examine the national interest imperatives that drove this affair.

MARIAN WILKINSON: The Attorney-General rejects Collaery's argument.

GEORGE BRANDIS: I was not the minister at the time. I wasn't a minister in the government in 2004, but might I remind you that Australia disputes what is alleged against it in the arbitration and in the ICJ proceedings by Mr Collaery and his client.

MARIAN WILKINSON: Alexander Downer was the minister authorising ASIS at the time and responsible for the negotiations. He won't confirm the spying but says he did act in Australia's national interests.

ALEXANDER DOWNER: You don't need to ask me about the intelligence operation allegations because you know no Australian government, past or present, will ever get into any discussion about intelligence operations. But suffice it to say the um Australian government was on Australia's side in the negotiations and we did our best to make sure that we were ah able to achieve our objective, which was particularly an objective in relation to the delineation of the maritime boundaries.

(Howard and Downer signing treaty and laughing)

MARIAN WILKINSON: How much the bugging advantaged Australia is unclear. But in January 2006, both sides agreed to a new treaty covering Greater Sunrise.

(Sound of clapping as Downer shakes hand with East Timorese official)

JOHN HOWARD: Well done, Alexander...well done. Well very significant moment, we might say something to the media about it.

MARIAN WILKINSON: The CMATS Treaty came after both made big concessions.

In a major backdown, East Timor put on hold negotiations over its maritime boundaries for fifty years, agreeing to leave 80% of Greater Sunrise in Australian territory. In exchange, Australia agreed to split government revenues from Sunrise 50-50 with East Timor, a big jump from the 20% first offered.

ALEXANDER DOWNER: In the end we settled on giving them much more money than they were, under the Timor Sea Treaty, entitled to, which was fine by us.

MARIAN WILKINSON: But the Greater Sunrise deal had problems below the surface. Each side could terminate the treaty if there was no agreement to develop the gas field by 2013.

The East Timorese wanted the gas to be piped from Greater Sunrise to their south coast for processing - bringing jobs and development to one of the poorest parts of the country.

But Woodside's chief executive, Don Voelte, had other ideas.

DONE VOELTE: It's the beginning of next week when we deliver to the regulator the very thick and very detailed field development plan for the consideration with the governments of Timor-Leste and Australia.

MARIAN WILKINSON: Woodside and its partners, including Shell, argued it was cheaper to build a floating

platform to process the gas offshore in the Timor Sea.

ALEXANDER DOWNER: The most expensive proposal was to build a pipeline into East Timor, and the problem with that over and above the cost is that the sovereign risk would be higher for the investor in East Timor. And of course by threatening to abrogate this treaty, they're just underlining the sovereign risk involved with any investment with East Timor.

AGIO PEREIRA, PRESIDENT OF COUNCIL OF MINSITERS, TIMOR-LESTE: For Timor-Leste the pipeline to Timor-Leste is very viable. All the arguments be technical or security have been proven to be wrong and Timor-Leste invested a lot in proving it.

(Sound up of cheering from rally)

MARIAN WILKINSON: After East Timor's one time resistance leader, Xanana Gusmao, became prime minister he led the campaign to build the pipeline. By 2011, he was willing to take on both Australia and Woodside to do it.

With billions at stake, Woodside hired a high profile lobbyist - former foreign minister, Alexander Downer.

Australia's Ambassador in Dili set up a meeting with Gusmao, saying Downer wanted a courtesy visit.

ALEXANDER DOWNER: I mean I wasn't lobbying them. I just asked them where their thinking was.

MARIAN WILKINSON: Downer had a message from Woodside's CEO saying the company would offer lots of development money if East Timor dropped the pipeline. But Gusmao was unmoveable.

ALEXANDER DOWNER, LOBBYIST, BESPOKE APPROACH: I could see that politically he was really wedded to this idea and he wasn't too interested in the floating LNG plant or the pipeline to Australia. So I mean I think basically, by the way, I think it's because of this that the East Timorese have started to get into changing their whole approach to the CMATS Treaty.

MARTIN FERGUSON, MINISTER FOR RESOURCES AND ENERGY, 2007-2013: Everyone knows it and it's freely admitted to by representatives of the Timor-Leste Government. It's known in the private sector, it's no secret. This is a particular campaign solely driven by Prime Minister Gusmão.

KIRSTY SWORD GUSMAO: Timor-Leste's leaders not only feel that it's within their rights, but that they have a duty actually to look again at that deal and see whether or not um it couldn't benefit more significantly.

MARIAN WILKINSON: Bernard Collaery as East Timor's legal advisor, sought out new ways to challenge the CMATS Treaty.

He consulted prominent UK barristers, including Sir Elihu Lauterpacht.

They told him Australia's bugging of Timor's negotiators back in 2004 could invalidate the CMATS Treaty by proving Australia had not acted in 'good faith' at the time.

AGIO PEREIRA: The whole legal case is based on the bugging of the government palace in Dili, of the negotiating team. It's entirely the Witness K's statement, no other statement, or names are included.

MARIAN WILKINSON: East Timor's secretly launched its own investigation into the bugging. It found the ASIS officers had left behind evidence in 2004 that could identify them. It convinced Dili the spying had taken place.

MARIAN WILKINSON: So you initiated an investigation to try and protect your side of this dispute?

ALFREDO PIRES: Yes. 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.

MARIAN WILKINSON: In December 2012, East Timor dropped its legal bombshell on Canberra.

In a confidential letter to Prime Minister Julia Gillard, Xanana Gusmao said the CMATS treaty was "invalid" because Australia had secretly eavesdropped on the private discussions of his predecessor and his advisers in 2004.

MARTIN FERGUSON: I went to Timor-Leste early in 2013 to try and kick-start negotiations again to get it back on an even playing field.

MARIAN WILKINSON: Martin Ferguson was Gillard's resources minister at the time.

MARTIN FERGUSON: I said to the representatives of the government at the time that if you're not careful, that opportunity is going to pass you by, Sunrise will be stranded. And I must say, unfortunately, that's my view as to where it's at.

(Sound of clapping at Abbott's election victory night, 7 Sept 2013)

TONY ABBOTT, PRIME MINISTER: My friends, my friends, thank you, thank you so much. I can inform you that the Government of Australia has changed for just the...

MARIAN WILKINSON: When Labor was swept from office by Tony Abbott last year, the deepening dispute with East Timor was handed over to the new Attorney-General.

(24 February 2014)

SCOTT LUDLAM: We had a rather senseless intervention then from the attorney-general.

GEORGE BRANDIS: No, no you put a proposition to Mr Irvine that was false.

MARIAN WILKINSON: George Brandis was briefed on the crisis by David Irvine, the former head of ASIS who signed off on the East Timor bugging operation in 2004.

Irvine is now the head of ASIO, the domestic spy agency. He advised Brandis to issue the warrants for the raids on Collaery and Witness K.

DAVID IRVINE: The object of the warrant was to obtain material that didn't specify specific documents in relation to security matter being investigated.

MARIAN WILKINSON: But Brandis insists Irvine had no conflict of interest when he gave his advice.

GEORGE BRANDIS: I'm entirely satisfied, in fact, I never had any doubt at all that Mr Irvine was exercising his powers and discretions in seeking this warrant to protect the interests that he was required um by his office and by the act to protect.

MARIAN WILKINSON: But under administrative law, if he had a conflict of interest shouldn't he have stood aside?

GEORGE BRANDIS: Well, you've suggested to me that he has a conflict of interest and I don't agree with you.

(Brandis speaking in Senate)

GEORGE BRANDIS: More generally you should know...

MARIAN WILKINSON: Neither Brandis nor Irvine would explain what was behind the warrants at a recent Senate hearing.

GEORGE BRANDIS: Neither confirm or deny...

MARIAN WILKINSON: But in its legal response to East Timor, the Government is alleging Witness K and Collaery may have disclosed highly classified secrets.

(Marian speaking to Brandis)

MARIAN WILKINSON: Did it go to the issue of disclosing operational matters and potential names of agents or former agents?

GEORGE BRANDIS: Well, again I just can't...disclose what the particular grounds were. But let me make this point: it has been said that this was to do with the Australia East Timor dispute over the ah oil and gas field in the Timor Sea. That was not the purpose or the ground on which the warrant was sought

MARIAN WILKINSON: Collaery rejects the notion Witness K, a decorated veteran, is a whistleblower at large.

BERNARD COLLAERY: This is no Snowden affair. There are no revelations to come beyond the fact that this eavesdropping operation took place. It's been properly controlled and there is a coherence of interests by both parties in having this conduct ah found to be unlawful.

MARIAN WILKINSON: And in saying that, Witness K is completely comfortable with how you have acted in this?

BERNARD COLLAERY: I must not discuss Witness K's issues in this interview. I can't, I can't do that.

MARIAN WILKINSON: East Timor's senior minister says no Australian agent has been put at risk.

AGIO PEREIRA: No, no. The government is, all government is conscious of the legitimate concern of Australia about national security and protection of its agents, and the government of Timor-Leste wouldn't do anything to jeopardise that.

MARIAN WILKINSON: The ASIO raids have clearly taken a toll on Bernard Collaery.

BERNARD COLLAERY: I'm getting grey. I've seen a lot of things...

MARIAN WILKINSON: He's relieved the International Court of Justice has provisionally ordered Australia to stop interfering with his legal communications with East Timor.

But for Collaery this is not enough.

BERNARD COLLAERY: There has to be a proper judicial inquiry into this affair.

ALFREDO PIRES: We look back at those who have fought for the onshore sovereignty of Timor-Leste and hundreds and thousands have died for our sovereignty back then, and now we still have an issue of sovereignty that needs to be solved.

MARIAN WILKINSON: The East Timorese have learnt how to fight for what they want over decades. But drawing the line on their maritime boundaries may be an elusive goal.

Its powerful neighbour to the south has a history of being a formidable opponent when it comes to deciding who controls the wealth beneath the water.

KERRY O'BRIEN: The international arbitration between East Timor and Australia and the maritime boundaries is due to begin in The Hague in September, but already according to one well placed source Australia has sent a blunt diplomatic message to East Timor, that the relationship will suffer as a result of their actions.

Next week on Four Corners the scandal that's engulfing the National Gallery of Australia and the international trade in looted antiquities.

Until then, good night.

END

Show background information

Tags: oil-and-gas, security-intelligence, government-and-politics, world-politics, courts-and-trials, australia, east-timor

First posted March 17, 2014 17:43:00

Annex 61: Y Katz, 'Iran hangs two spies for spying for Israel, US', *The Jerusalem Post*, 19 May 2013.

THE JERUSALEM POST
JPOST.com
Israel's best-selling English daily and most-read English website

Photo by: Channel 10

Iran hangs two spies for spying for Israel, US

By REUTERS, JPOST.COM STAFF
19/05/2013

Mohammad Heydari was convicted of receiving payment from the Mossad to provide intelligence on various security issues.

Iranian authorities executed two men on Sunday convicted of working for Israeli and US spy agencies, Iran's Fars news agency reported.

Mohammad Heidari, accused of passing security-related information and secrets to Israeli Mossad agents in exchange for money, and Kourosh Ahmadi, accused of gathering information for the US Central Intelligence Agency, were hanged at dawn, it said.

The sentence for their execution was handed down by Tehran's Revolutionary Court and confirmed by the country's Supreme Court. The report did not say when the pair were arrested nor when their trial took place.

Iran has blamed the US and Israel for infiltrating the Islamic Republic, and targeting its nuclear scientists.

In 2011, Iranian intelligence services announced they arrested a network of Mossad spies linked to the assassination of the country's top nuclear scientists in 2010, and that the spies had revealed information on additional anti-Iran Israeli plots.

In 2012, Iran gave a death sentence to Amir Mirza Hekmati "for cooperating with the hostile government of America and spying for the CIA."

Both the US and Israel have denied the espionage charges.

Yaakov Katz contributed to this report.

Annex 62: 'Italy finds cocaine in Ecuador diplomatic pouch: Quito', *Agence France Presse*, 10 February 2012.

Italy finds cocaine in Ecuador diplomatic pouch: Quito

234 words
10 February 2012
12:24
Agence France Presse
AFPR
English

Italian police discovered 40 kilos (88 pounds) of cocaine in a diplomatic pouch that Ecuador made available to an theatrical artist, Foreign Minister Ricardo Patino told reporters on Thursday.

Authorities said two people have been detained, including the artist in question, Christian Loor.

"We were surprised and enormously upset" by the incident, Patino said, adding that the second detainee was not an Ecuadoran diplomat.

A diplomatic pouch allows envoys to transport goods and correspondence between countries without being subjected to a search.

The pouch, typically containing correspondence or objects for official use that a country sends its missions abroad, is protected by the Vienna Convention on Diplomatic Relations of 1961, which states they "cannot be opened or detained."

Patino did not say how Italian authorities detected the contraband drugs, but did say the pouch had been inspected by Quito's drug enforcement agency before leaving the country.

He speculated that the suspects had slipped the illicit drugs into the pouch, perhaps during a stopover in their travel, and said that an internal investigation had been launched.

Ecuador, situated between the world's two biggest cocaine producers, Peru and Colombia, often is used as a transit point for traffickers seeking to transport drugs in the region.

The government was helping Loor's theater show in an effort to promote tourism to Ecuador, Patino said.

axm/sg/ch

Document AFPR000020120210e82a000gs

Search Summary

Text	"Italy finds cocaine in Ecuador diplomatic pouch"
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Annex 63: J Bargent, 'Ecuador tightens controls on diplomatic mail after cocaine scandal', *Insight Crime*, 14 January 2013.

InSightCrime
Organized Crime in the Americas

Ecuador's Foreign Minister Ricardo Patiño

The Ecuadorean government is implementing reforms to the diplomatic bag service in response to the discovery last year of 40 kilos of cocaine sent to Italy in diplomatic cargo.

The Diplomatic Bag Service bylaw introduces 11 new security measures, including CCTV monitoring and digital alert systems, to prevent tampering while shipments are in storage or en route.

Under the terms of the new law, anti-narcotics police will control and monitor diplomatic shipments.

The law comes a year after a diplomatic bag of art materials for an Ecuadorean cultural event in Italy was found to contain jars holding 40 kilos of liquid cocaine.

Five Ecuadorean citizens were arrested in connection with the case. One of the accused, Jorge Luis Redroban Quevedo, allegedly has links to Central Bank President Pedro Delgado (who is also President Rafael Correa's cousin), Correa's sister, and to the Ecuadorean Consulate in Milan.

Three of the five are currently serving four to eight-year sentences, while the cases of the other two are being processed, according to Foreign Minister Ricardo Patiño.

InSight Crime Analysis

According to Ecuador's prosecutor general, the Italian shipment is an isolated case, and there is no indication that drug trafficking organizations had used diplomatic bags for moving drugs previously.

Even if this is true, other countries such as Venezuela have seen allegations of systematic abuse of the diplomatic bag service. This could also be a risk

in Ecuador, which is an increasingly popular staging point for the international drug trade.

However, it could also be argued that the new law is primarily a response to the raft of unwelcome publicity Ecuador saw as a result of the original case, and leaves the transnational drug trafficking groups moving large shipments through the country to expand unchecked.

What are your thoughts? Click here to send InSight Crime your comments.

Annex 64: R Tagg, 'Cocaine found in diplomats baggage', *The Sunday Times*, 26 October 2003.

From The Sunday Times

October 26, 2003

Cocaine found in diplomats baggage

Robert Tagg

"A DIPLOMATIC bag containing 1m worth of cocaine has been intercepted on its way to the Sierra Leone high commission in London.

The drugs were found during an investigation by United Nations officers who opened the bag before it left the West African state en route for Gatwick airport last Friday.

The UN gained special permission from Sierra Leone's president, Ahmad Tejan Kabbah, to open the baggage, which would normally be protected from customs officers by diplomatic convention. Investigations are being carried out by the Sierra Leone government and at the embassy in London's Oxford Street.

The cocaine find will deal a blow to British relations with the war-torn West African state. Britain has retained close ties since Tony Blair sent in troops including the SAS three years ago to help pacify it after a long civil war.

Blair personally helped get UN sanctions against the country lifted and redirected millions of pounds of aid for its reconstruction.

The incident was made more awkward because Kabbah arrived in London on Friday, the day of the drug find, for a private visit. A spokesman for the president said this weekend: This is a matter of considerable embarrassment for our government and our people."

http://www.thesundaytimes.co.uk/sto/news/uk_news/article26597.ece#

Annex 65: J Witherow, 'Embassy official jailed for drug smuggling', *The Times*, 16 October 1980.

Embassy official jailed for drug smuggling

By John Witherow

A Moroccan Embassy employee smuggled £635,000 of cannabis resin into Britain inside a diplomatic bag in June, it was alleged at Ipswich Crown Court, Suffolk, yesterday.

Queen Uddin Chishti, aged 47, a Pakistani, who was employed as personal secretary to the Moroccan Ambassador in Islamabad, Pakistan, was jailed for nine years after pleading guilty to illegally attempting to import the drug into Britain.

The drug, weighing about one third of a ton, was found when the diplomatic bag, in that case a large crate, fell from a fork-lift truck and smashed open at Harwich docks, Essex.

Customs officers found 15 hold-alls and two suitcases containing the drug known as "Pakistani black". That has been scarce because of the fighting in Afghanistan and would have had a street value of £635,140, the court was told.

Mr Chishti said he had been promised £25,000 by an international drugs dealer in Pakistan to hide the cannabis in the crate, which was addressed to the Moroccan Embassy in London. He added that the man, known as Omar Khan, had organized drug smuggling on a large scale through diplomatic channels.

A customs offical said that was probably the largest consignment of drugs that had been smuggled into Britain inside a diplomatic bag.

Diplomatic bags, which can vary in size from an envelope to a 10-ton crate, may not, under the 1961 Vienna Convention on Diplomatic Relations, be opened or examined by X-ray. They have been used to smuggle everything from arms and drugs to works of art and, in one case, a live man.

A Mexican and a Uruguayan ambassador were once imprisoned in the United States for smuggling $13.5m of heroin into that country.

Most cases involving abuse of diplomatic privilege are never made public because the diplomats are immune from prosecution.

Annex 66: 'Gagged man in diplomatic trunk', *The Times*, 18 November 1964.

GAGGED MAN IN DIPLOMATIC TRUNK

POLICE PURSUIT AT AIRPORT

ROME, Nov. 17.—Italian police said tonight that they had foiled an attempt by two men allegedly from the Egyptian Embassy in Rome, to smuggle to Cairo by air a man bound and gagged in a diplomatic trunk.

The white trunk, bearing labels from the embassy and addressed to the Foreign Ministry in Cairo, had been specially fitted out for a human body. It was lined with leather, had a tiny chair, a helmet for the head and metal clamps for ankles and neck.

The police had no immediate comment on what was behind the incident, but gave these details.

The box, accompanied by a man, was being cleared as diplomatic baggage at a Rome airport for loading on board an Egyptian Airlines aircraft when whimpering noises from inside were heard. The man said the noise was caused by musical instruments.

ABDUCTED FROM CAFÉ

After an argument with customs officials he and another man bundled the crate on to a truck with diplomatic licence plates and drove off. They were chased, caught and taken to police headquarters.

The crate was forced open. The bound and gagged man was discovered.

Police named him as Moroccan-born Josef Dahan, aged about 25. They said he had apparently been drugged. They quoted him as saying he had been abducted last night from the Café de Paris in Rome's Via Veneto.

A spokesman at the Egyptian Embassy in Rome denied any knowledge of the incident. "We know nothing, nothing", he declared.

Two men were later taken into custody but released under diplomatic immunity. Police identified them as officials at the Egyptian Embassy.—*Associated Press.*

Annex 67: 'Italy charges U.A.R Embassy Men', *The Times*, 23 November 1964.

ITALY CHARGES U.A.R. EMBASSY MEN

FROM OUR OWN CORRESPONDENT

ROME, Nov. 22

Mr. Ahmed Naguib Hashim, the United Arab Republic Ambassador here, was called to the Foreign Ministry today to be given in the sharpest terms the Italian deprecation of his Embassy's behaviour in the affair of the man in the trunk.

The Italian authorities are taking legal proceedings against four members of the Embassy involved in the kidnapping and attempted transporting of the Israeli Mordecai Louk by air last week for Cairo bound and drugged inside a trunk. Louk, who first told the police that his name was Dahan, was discovered in the trunk by an Italian Customs guard at Fiumicino airport.

The proceedings are against the two first secretaries of the Embassy—Selim Osman el Said and Muhammad Abdel Moneim el Newklay—who were expelled as *personae non gratae* on the day after the abduction attempt. It was they who tried to load the trunk with Louk inside it on to an aircraft of the United Arab Airlines and they were detained after a chase by the police. As they are now back in Cairo the charges of kidnapping, causing bodily harm, possession and use of drugs, presumably cannot be brought against them.

The other two are apparently still in Italy. They are stated to be employees of the Embassy, not members of the diplomatic staff. One of them is thought to have taken refuge in the Embassy and the other to have left Rome without so far having been traced by the police.

Louk is still being questioned. It is thought that he may be taken off Italian hands by a request from the Israelis for his extradition.

Annex 68: 'Trunk man remanded in Israel', *The Times*, 27 November 1964.

TRUNK MAN REMANDED IN ISRAEL

FROM OUR CORRESPONDENT

TEL AVIV, Nov. 26

Mordecai Louk, the Israeli who was rescued last week at a Rome airport from a trunk about to be flown to Cairo, was remanded here today for 15 days on suspicion of "contact with enemy agents" and "passing information of security value to the enemy".

He was also alleged to have illegally crossed the border in June, 1961, to Gaza. Mr. Shmuel Tamir, Louk's counsel, said it was more comfortable to be detained in Israel than in an Egyptian trunk.

COCKTAIL BECOMES GOOD FRENCH

FROM OUR OWN CORRESPONDENT

PARIS, Nov. 26

The Académie Française, defenders of the French language, today admitted the word "cocktail" to their dictionary. The word is taken to mean not only a mixed drink, but, as in French usage, a party at which these drinks are served.

Annex 69: D Welch, 'Australian's passport seized in Jordan', *The Sydney Morning Herald*, 14 November 2011.

smh.com.au
The Sydney Morning Herald

Australian's passport seized in Jordan

Dylan Welch
Published: November 14, 2011 - 5:08PM

Jordanian authorities have confiscated the passport of an Australian citizen who is a member of a Muslim group that advocates a global Islamic caliphate.

Ismail al-Wahwah, from Bankstown, is a member of the global organisation Hizb ut-Tahrir (Liberation Party).

His passport was confiscated on Thursday when he arrived at Amman airport.

He had been on the Haj pilgrimage in Saudi Arabia and had returned to Jordan to visit family before returning to Australia.

He was not arrested but is unable to leave the country and is staying with family.

The Australian spokesman for Hizb ut-Tahrir, Uthman Badar, criticised the confiscation in a statement this afternoon and alleged Jordan's main spy agency, the General Intelligence Directorate, was involved.

"The corrupt and illegitimate ruling systems, which represent neither Islam nor Muslims, need to be uprooted entirely and replaced with the system of Islam which safeguards the rights and dignity of all citizens," he said.

A spokesperson from the Department of Foreign Affairs and Trade said: "We are aware of media reports that an Australian has had his passport confiscated upon arrival in Jordan last week. The Australian embassy in Amman has not received any requests for assistance."

It is not the first time Sheik al-Wahwah has encountered immigration problems.

In 2007 he was one of a number of Hizb ut-Tahrir members who were denied entry to Indonesia after landing in Jakarta.

They had been planning to speak at an international Hizb ut-Tahrir conference, which was attended by as many as 100,000 supporters.

The group is banned in numerous Middle Eastern countries including Jordan.

Dylan Welch is the National Security Correspondent.

Annex 70: J Preston, 'Guatemala protests arrest of 3 in Florida over passports', *The New York Times*, 19 January 2010.

January 19, 2010

Guatemala Protests Arrest of 3 in Florida Over Passports

By JULIA PRESTON

The Guatemalan government has issued a public protest after three Guatemalans were arrested this month by immigration agents at a FedEx office in Florida, when one of the immigrants went to pick up a package containing his newly issued Guatemalan passport.

Suspecting that the passport was fraudulent, FedEx officials called Immigration and Customs Enforcement agents to alert them when the Guatemalans arrived to collect the package, officials of the immigration agency said. Two of the Guatemalans were illegal immigrants who have been deported, and one is in deportation proceedings.

Guatemalan diplomats said that FedEx and American officials had examined and seized legitimate passports without notifying them and had improperly disrupted their dealings with Guatemalan citizens living in this country. Felipe Alejos, the Guatemalan consul in Miami, said the events appeared to violate basic diplomatic protocols.

"They seized official documents, and they did not let us know," Mr. Alejos said. "There was coordination between FedEx and ICE to detain people."

FedEx officials said they had followed routine company procedures when they contacted immigration authorities after detecting packages that suggested organized document fraud. Officials from the immigration agency, known as ICE, said they arrested the Guatemalans only after two of them tried to flee from the FedEx office. Both the company and the immigration agency denied that they had collaborated to lure the immigrants to the office.

The arrests started a rumor mill of fears in communities along the Florida coast, where many immigrants, both legal and illegal, have settled.

"When people in the community perceive that FedEx acted as an agent for immigration, it undermines their belief that they can collect their mail and trust in their government," said John De León, a lawyer for the Guatemalan consulate in Miami.

The now disputed chain of events began in November when Guatemalan consular officials based in Miami held a daylong session in Jupiter, Fla., to help Guatemalans in the area resolve problems with birth certificates, passports and other documents. Dozens of Guatemalans signed up for new or renewed passports, which are useful as a form of identification in this country.

The Guatemalan government prints and distributes passports for its citizens living in the United States through a private company, De La Luz, in Metairie, La. In December, the company sent the new passports in FedEx Ground packages to the Guatemalans who had applied for them.

At least 30 packages could not be delivered to the addresses listed, said a FedEx spokeswoman, Allison Sobczak, and the shipper in Louisiana did not respond to telephone calls. FedEx employees opened several packages searching for better address information, she said.

"This was a normal routine for us to open a package and inspect it to try to get a correct shipping address," Ms. Sobczak said. Since the passports included no paperwork indicating they were official, FedEx contacted ICE "to make sure the documents were legitimate," she said.

Damaris Roxana Vasquez, 21, a Guatemalan living in Jupiter, said that on Jan. 6, she and three Guatemalan men drove to a FedEx office in Riviera Beach to pick up a new passport for one of the men. When they arrived, she said in an interview, FedEx employees told them to wait because they could not locate the package.

FedEx employees called ICE agents, who were already on their way to the office, to advise them that customers had come to pick up a suspect package, ICE officials said. When the agents arrived, two of the men tried to flee, said an ICE spokeswoman, Nicole Navas. One escaped; the other two men and Ms. Vasquez were detained, and the men later deported. Ms. Vasquez has been released while her deportation case proceeds. Her 5-year-old son, who was with her, was not detained because he is a United States citizen.

ICE seized the undelivered passports, agency officials said. After an investigation showed they were legitimate, ICE officials returned them to the Guatemalan consulate last week.

"Document fraud poses a severe threat to national security and public safety," Ms. Navas said.

This article has been revised to reflect the following correction:

Correction: February 2, 2010

An article on Jan. 19 about a public protest by the Guatemalan government over the arrest of three Guatemalan men at a Florida office of a shipping company gave an outdated name for the company. It is FedEx, not Federal Express. The article also misstated the name of the FedEx division that shipped a package containing a Guatemalan passport for one of the men arrested. It is FedEx Ground, not Federal Express.

Annex 71: 'Pak may protest seizure of Shoaib's passport', *The Indian Express*, 5 April 2010.

The Indian EXPRESS
JOURNALISM OF COURAGE

Pak may protest seizure of Shoaib's passport

Agencies Posted online: Mon Apr 05 2010, 11:01 hrs

New Delhi : The Pakistan High Commission in New Delhi may submit a diplomatic note to the Indian Ministry of External Affairs (MEA) protesting against the seizure (or surrender) of cricketer Shoaib Malik's passport by Hyderabad Police and against registration of a case against him, sources at the high commission said.

Speaking on condition of anonymity, the sources said that Malik was a Pakistani citizen, and a case of cruelty, negligence, cheating and desertion could not be filed against him. They said that he would be provided with legal and consular assistance if an approach was made.

Malik has appeared before the city police and claimed that his reported marriage to Ayesha Siddique was a forgery, and that his signature on the nikahnama had also been forged.

Malik's deposition came as a Pakistan-based lawyer was hired by Ayesha Siddiqui, the Indian girl claiming to be Pakistan cricketer Shoaib Malik's wife, and he confirmed that he would be filing a case against the cricketer, on charges of dumping her without a formal divorce.

Farooq Hassan said that Ayesha's father Mohammed Siddiqui had contacted him from India over the telephone and asked him to file a case against Shoaib.

According to reports, Ayesha's family had sent a legal notice to Shoaib, but Hassan said that he was not aware of this.

"I don't know anything about this, but all I can say is in next few days I will be deciding on what to do in Ayesha's case," 'The Daily Times' quoted Hassan, as saying.

The Siddiquis claim that Malik married their daughter Ayesha in 2002, but has not divorced her till date.

The Hyderabad based family had also produced pictures of Shoaib-Ayesha's Nikahnama (marriage certificate) that states that their marriage was solemnised on June 3, 2002.

Malik, on the other hand, has denied being married to Ayesha. He, however, admitted to talking to a girl named Ayesha over the telephone, but said he has never seen or met the girl.

Earlier on Sunday, Shoaib said that his wedding to Indian tennis star Sania Mirza would take place as scheduled on April 15, and claimed that he was "emotionally forced" to do a "telephone Nikah" (wedding on telephone) with Ayesha.

Addressing the media outside Sania's house in Hyderabad, India, Shoaib said: "I am here till April 15 for my marriage. We are getting married, Inshaallah, on April 15. We are preparing for the function, the atmosphere here is very good, are very happy."

"Sania is very happy and knows the truth," he added.

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

Timor-Leste eProcurement Portal

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Home > Awards by Vendor > Vendor Detail

Vendor Detail

General Information

Vendor ID:	VC0459
Vendor Name:	BERNARD COLLAERY
Business Type:	Consultancy Services; Others;
Perfomance Rating:	
Country of Origin:	TL
Addresses:	8B Beauchamp Road London SW11 1PQ Inited Kingdom ,
Contacts:	WORK PHONE: 61410 511 224
Status:	Active

Summary of Received Awards

Year	Quantity of Awards	Awarded Amounts
2010	1	$1,000,000.00
2011	1	$455,709.33
2012	1	$509,570.60
2013	1	$289,365.61
		Total $2,254,645.54

Annex 73: Charge Sheet, Manning, Bradley, E.

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. SSN	3. GRADE OR RANK	4. PAY GRADE
MANNING, Bradley E.	[redacted]	PFC	E-3

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
Headquarters and Headquarters Company, U.S. Army Garrison, Joint Base Myer-Henderson Hall Fort Myer, Virginia 22211	[redacted]	4 years

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$1,950.00	None	$1,950.00	Pre-Trial Confinement	29 May 10 -

II. CHARGES AND SPECIFICATIONS

10. ADDITIONAL CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 104.

THE SPECIFICATION: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 1 November 2009 and on or about 27 May 2010, without proper authority, knowingly give intelligence to the enemy, through indirect means.

ADDITIONAL CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 134.

SPECIFICATION 1: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 1 November 2009 and on or about 27 May 2010, wrongfully and wantonly cause to be published on the internet intelligence belonging to the United States government, having knowledge that intelligence published on the internet is accessible to the enemy, such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

(See Continuation Sheet)

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
[redacted]	[redacted]	HQ CMD BN, USA

d. SIGNATURE OF ACCUSER	e. DATE
[redacted]	1 MAR 2011

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 1st day of March, 2011, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

[redacted]	MDW, OSJA
Typed Name of Officer	*Organization of Officer*
[redacted]	Trial Counsel
Grade	*Official Capacity to Administer Oath (See R.C.M. 307(b) – must be a commissioned officer)*
[redacted]	
Signature	

DD FORM 458, MAY 2000 PREVIOUS EDITION IS OBSOLETE.

12.
On _____, 2011, the accused was informed of the charges against him/her and of the name(s) of The accuser(s) known to me *(See R.C.M. 308 (a)). (See R.C.M. 308 if notification cannot be made.)*

[redacted] — *Typed Name of Immediate Commander*

HQ CMD BN, USA — *Organization of Immediate Commander*

[redacted] — *Grade*

Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13.
The sworn charges were received at _____ hours, _____ 2011 at HQ CMD BN, USA — *Designation of Command or*

Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

~~*FOR THE*~~[1] _____

[redacted] — *Typed Name of Officer*

Commanding — *Official Capacity of Officer Signing*

[redacted] — *Grade*

Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE

Referred for trial to the _____ Court-martial convened by _____

_____

_____, _____ 2011 _____, subject to the following instructions:[2] _____

_____

_____ By _____ Of _____

Command or Order

_____ — *Typed Name of Officer*

_____ — *Official Capacity of Officer Signing*

_____ — *Grade*

_____ — *Signature*

15.
On _____, 2011 _____, I (caused to be) served a copy hereof on (each of) the above named accused.

_____ — *Typed Name of Trial Counsel*

_____ — *Grade or Rank of Trial Counsel*

_____ — *Signature*

FOOTNOTES: 1 — When an appropriate commander signs personally, inapplicable words are stricken.
2 — See R.C.M. 601(e) concerning instructions. If none, so state.

DD FORM 458 (BACK), MAY 2000

CONTINUATION SHEET, DA FORM 458, MANNING, Bradley E., [redacted]
Headquarters and Headquarters Company, U.S. Army Garrison, Joint Base Myer-Henderson Hall, Fort Myer, Virginia 22211

Item 10 (Cont'd):

SPECIFICATION 2: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 15 February 2010 and on or about 5 April 2010, having unauthorized possession of information relating to the national defense, to wit: a video file named "12 JUL 07 CZ ENGAGEMENT ZONE 30 GC Anyone.avi", with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it, in violation of 18 U.S. Code Section 793(e), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 3: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 22 March 2010 and on or about 26 March 2010, having unauthorized possession of information relating to the national defense, to wit: more than one classified memorandum produced by a United States government intelligence agency, with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it, in violation of 18 U.S. Code Section 793(e), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 4: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 31 December 2009 and on or about 5 January 2010, steal, purloin, or knowingly convert to his use or the use of another, a record or thing of value of the United States or of a department or agency thereof, to wit: the Combined Information Data Network Exchange Iraq database containing more than 380,000 records belonging to the United States government, of a value of more than $1,000, in violation of 18 U.S. Code Section 641, such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

CONTINUATION SHEET, DA FORM 458, MANNING, Bradley E., [redacted], Headquarters and Headquarters Company, U.S. Army Garrison, Joint Base Myer-Henderson Hall, Fort Myer, Virginia 22211

SPECIFICATION 5: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 31 December 2009 and on or about 9 February 2010, having unauthorized possession of information relating to the national defense, to wit: more than twenty classified records from the Combined Information Data Network Exchange Iraq database, with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it, in violation of 18 U.S. Code Section 793(e), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 6: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 31 December 2009 and on or about 8 January 2010, steal, purloin, or knowingly convert to his use or the use of another, a record or thing of value of the United States or of a department or agency thereof, to wit: the Combined Information Data Network Exchange Afghanistan database containing more than 90,000 records belonging to the United States government, of a value of more than $1,000, in violation of 18 U.S. Code Section 641, such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 7: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 31 December 2009 and on or about 9 February 2010, having unauthorized possession of information relating to the national defense, to wit: more than twenty classified records from the Combined Information Data Network Exchange Afghanistan database, with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it, in violation of 18 U.S. Code Section 793(e), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

CONTINUATION SHEET, DA FORM 458, MANNING, Bradley E., [redacted], Headquarters and Headquarters Company, U.S. Army Garrison, Joint Base Myer-Henderson Hall, Fort Myer, Virginia 22211

SPECIFICATION 8: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, on or about 8 March 2010, steal, purloin, or knowingly convert to his use or the use of another, a record or thing of value of the United States or of a department or agency thereof, to wit: a United States Southern Command database containing more than 700 records belonging to the United States government, of a value of more than $1,000, in violation of 18 U.S. Code Section 641, such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 9: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 8 March 2010 and on or about 27 May 2010, having unauthorized possession of information relating to the national defense, to wit: more than three classified records from a United States Southern Command database, with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it, in violation of 18 U.S. Code Section 793(e), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 10: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 11 April 2010 and on or about 27 May 2010, having unauthorized possession of information relating to the national defense, to wit: more than five classified records relating to a military operation in Farah Province, Afghanistan occurring on or about 4 May 2009, with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it, in violation of 18 U.S. Code Section 793(e), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

CONTINUATION SHEET, DA FORM 458, MANNING, Bradley E., [redacted]
Headquarters and Headquarters Company, U.S. Army Garrison, Joint Base Myer-Henderson Hall, Fort Myer, Virginia 22211

SPECIFICATION 11: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 1 November 2009 and on or about 8 January 2010, having unauthorized possession of information relating to the national defense, to wit: a file named "BE22 PAX.zip" containing a video named "BE22 PAX.wmv", with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it, in violation of 18 U.S. Code Section 793(e), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 12: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 28 March 2010 and on or about 4 May 2010, steal, purloin, or knowingly convert to his use or the use of another, a record or thing of value of the United States or of a department or agency thereof, to wit: the Department of State Net-Centric Diplomacy database containing more than 250,000 records belonging to the United States government, of a value of more than $1,000, in violation of 18 U.S. Code Section 641, such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 13: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 28 March 2010 and on or about 27 May 2010, having knowingly exceeded authorized access on a Secret Internet Protocol Router Network computer, and by means of such conduct having obtained information that has been determined by the United States government pursuant to an Executive Order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, to wit: more than seventy-five classified United States Department of State cables, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted the said information, to a person not entitled to receive it, with reason to believe that such information so obtained could be used to the injury of the United States, or to the advantage of any foreign nation, in violation of 18 U.S. Code Section 1030(a)(1), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

CONTINUATION SHEET, DA FORM 458, MANNING, Bradley E., [redacted]
Headquarters and Headquarters Company, U.S. Army Garrison, Joint Base Myer-Henderson Hall, Fort Myer, Virginia 22211

SPECIFICATION 14: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 15 February 2010 and on or about 18 February 2010, having knowingly exceeded authorized access on a Secret Internet Protocol Router Network computer, and by means of such conduct having obtained information that has been determined by the United States government pursuant to an Executive Order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, to wit: a classified Department of State cable titled "Reykjavik-13", willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted the said information, to a person not entitled to receive it, with reason to believe that such information so obtained could be used to the injury of the United States, or to the advantage of any foreign nation, in violation of 18 U.S. Code Section 1030(a)(1), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 15: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 15 February 2010 and on or about 15 March 2010, having unauthorized possession of information relating to the national defense, to wit: a classified record produced by a United States Army intelligence organization, dated 18 March 2008, with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted, the said information, to a person not entitled to receive it, in violation of 18 U.S. Code Section 793(e), such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

SPECIFICATION 16: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 11 May 2010 and on or about 27 May 2010, steal, purloin, or knowingly convert to his use or the use of another, a record or thing of value of the United States or of a department or agency thereof, to wit: the United States Forces - Iraq Microsoft Outlook / SharePoint Exchange Server global address list belonging to the United States government, of a value of more than $1,000, in violation of 18 U.S. Code Section 641, such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces.

CONTINUATION SHEET, DA FORM 458, MANNING, Bradley E., [redacted]
Headquarters and Headquarters Company, U.S. Army Garrison, Joint Base Myer-Henderson Hall, Fort Myer, Virginia 22211

ADDITIONAL CHARGE III: VIOLATION OF THE UCMJ, ARTICLE 92.

SPECIFICATION 1: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 1 November 2009 and on or about 8 March 2010, violate a lawful general regulation, to wit: paragraph 4-5(a)(4), Army Regulation 25-2, dated 24 October 2007, by attempting to bypass network or information system security mechanisms.

SPECIFICATION 2: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 11 February 2010 and on or about 3 April 2010, violate a lawful general regulation, to wit: paragraph 4-5(a)(3), Army Regulation 25-2, dated 24 October 2007, by adding unauthorized software to a Secret Internet Protocol Router Network computer.

SPECIFICATION 3: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, on or about 4 May 2010, violate a lawful general regulation, to wit: paragraph 4-5(a)(3), Army Regulation 25-2, dated 24 October 2007, by adding unauthorized software to a Secret Internet Protocol Router Network computer.

SPECIFICATION 4: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, between on or about 11 May 2010 and on or about 27 May 2010, violate a lawful general regulation, to wit: paragraph 4-5(a)(3), Army Regulation 25-2, dated 24 October 2007, by using an information system in a manner other than its intended purpose.

SPECIFICATION 5: In that Private First Class Bradley E. Manning, U.S. Army, did, at or near Contingency Operating Station Hammer, Iraq, on divers occasions between on or about 1 November 2009 and on or about 27 May 2010, violate a lawful general regulation, to wit: paragraph 7-4, Army Regulation 380-5, dated 29 September 2000, by wrongfully storing classified information.