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Preparation Paper/Study Guide:

International Court of Justice (ICJ)

“Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)”

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1) The International Court of Justice

The International Court of Justice (ICJ) was established in 1945 as the principle judicial body of the United Nations and mainly serves to settle state-to-state disputes. As a participant in this committee you find yourself sitting in the deliberation room of the ICJ, located in the historical Peace Palace in The Hague. Contrary to other MUN committees you are not representing a country, but form your own opinion as an impartial judge. Your role is to interpret and apply international law in conformity with the principles of the ICJ Statute in order to solve a legal dispute at hand. At the end of the sessions, the committee will deliver a judgment. In reality, the ICJ has not only served as an increasingly important means to settle disputes between states, but also proves to be a driving force in the development of international law. The committee consists of 15 permanent judges, as well as two ad hoc judges, which are appointed by each party to a proceeding before the Court.

Chairing Team: **Peter Tomka** (Slovakia, President / Chair), **Bernardo Sepúlveda-Amor** (Mexico, Vice-President / Co-Chair), **Philippe Coubreux** (Belgium, Registrar / Committee Assistant)

Delegates: **Hisashi Owada** (Japan), **Ronny Abraham** (France), **Kenneth Keith** (New Zealand), **Mohamed Bennouna** (Morocco), **Leonid Skotnikov** (Russian Federation), **Antônio Augusto Cançado Trindade** (Brazil), **Abdulqawi Ahmed Yusuf** (Somalia), **Christopher Greenwood** (United Kingdom), **Xue Hanqin** (China), **Joan E. Donoghue** (United States), **Giorgio Gaja** (Italy), **Julia Sebutinde** (Uganda), **Dalveer Bhandari** (India), **Ian Callinan** (Australia, ad hoc), **Jean-Pierre Cot** (France, ad hoc)

2) Background Information and Facts of the Case

The case present before the Court concerns a dispute between Timor-Leste and Australia. The two countries have long been in negotiations regarding the delimitation of their maritime borders in the Timor Sea. Resulting from these negotiations, several temporary treaties have been concluded regarding the usage of the sea and subsoil between the two countries. It is estimated that oil and gas deposits in the Timor Sea are worth around \$40 billion and the utilization of those deposits is governed by the Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS), which came into force 2007.

In May and June 2013, officials of Timor-Leste and Mr. Bernard Collaery, a legal advisor of Timor-Leste, publicly disclosed that they are in close contact with a former officer of the Australian Secret Intelligence Service (ASIS). They alleged that his testimony evidences that Australia has unlawfully spied on Timor-Leste during the negotiations leading up to the CMATS. As a consequence, Timor-Leste commenced arbitral proceedings against Australia before the Permanent Court of Arbitration.

On 2 December 2013, the Australian Attorney-General, Senator the Honourable George Brandis Q.C., issued a search warrant after a request of the Director-General of Australia's national security service, the Australian Security Intelligence Organisation (ASIO). That warrant authorized the ASIO to conduct a search in the law offices of Mr. Bernard Collaery in Canberra, Australia and to remove unspecified material from his premises.

On 3 December 2013, officers of ASIO and members of the Australian Federal Police executed the search warrant. The officers entered and searched the offices for several hours, seizing various documents and electronic devices, namely an iPhone, a laptop and a USB-stick. These documents and devices are said to include communication between Mr. Collaery and Timor-Leste, as well as the testimony of the former ASIS officer. After the raid, they have been put in the possession of the Australian Attorney-General.

Timor-Leste asserted that the materials seized are in its property and contain information vital to the pending arbitral proceedings. It immediately demanded that the materials should be returned. However, this request has subsequently been denied by Australia, claiming that it acted to protect its national security. Despite that, the Australian Attorney-General issued several undertakings, *inter alia* pledging that the material will only be revised for national security purposes and will not be used for any purpose relating to the exploitation of resources in the Timor Sea or for any negotiations or for the arbitral proceedings.

On 3 March 2014, upon a request of Timor-Leste, the ICJ has granted provisional measures. The Court ordered Australia to (1) ensure that the documents are not used to the disadvantage of Timor-Leste [twelve votes in favour, four (Keith, Greenwood, Donoghue, Callinan) against], (2) keep the documents under seal until a further decision of the Court [twelve votes in favour, four (Keith, Greenwood, Donoghue, Callinan)

against] and (3) refrain from interfering with the communication between Timor-Leste and its legal advisers [fifteen votes in favour, one (Callinan) against]. Those provisional measures are without prejudice to the judgment on the merits. Timor-Leste's initial request for the documents to be returned to it was declined, yet the documents are now sealed and for the moment cannot be accessed by Australian authorities.

3) **Application of Timor-Leste and Jurisdiction of the Court**

On 17 December 2013 Timor-Leste has filed an application to the Court. Regarding the ICJ's jurisdiction, Timor-Leste relies on Article 36(2) of the ICJ Statute, as both parties made declarations recognizing the compulsory jurisdiction of the Court. As no counter-claims were raised by Australia, the ICJ may only adjudicate over the issues raised in the application. It is important to note that Timor-Leste does not request the Court to address the maritime delimitation or the alleged espionage during the CMATS treaty, but rather seeks a judgment regarding the seizure of its documents during the raid on 3 December 2013. The application reads as follows:

FIRST: That the seizure by Australia of the documents and data violated (i) the sovereignty of Timor-Leste and (ii) its property and other rights under international law and any relevant domestic law;

SECOND: That continuing detention by Australia of the documents and data violates (i) the sovereignty of Timor-Leste and (ii) its property and other rights under international law and any relevant domestic law;

THIRD: That Australia must immediately return to the nominated representative of Timor-Leste any and all of the aforesaid documents and data, and destroy beyond recovery every copy of such documents and data that is in Australia's possession or control, and ensure the destruction of every such copy that Australia has directly or indirectly passed to a third person or third State;

FOURTH: That Australia should afford satisfaction to Timor-Leste in respect of the above-mentioned violations of its rights under international law and any relevant domestic law, in the form of a formal apology as well as the costs incurred by Timor-Leste in preparing and presenting the present Application.

4) **The Sources of International Law**

The most authoritative list of sources of international law can be found in Article 38 of the ICJ Statute, listing international treaties, customary international law and general principles of law. In addition, it names judicial decisions and scholarly work as subsidiary means to determine the law.

Treaties or international conventions are written agreements between states that are only binding upon its parties, thus upon states which have signed and subsequently ratified the relevant treaty. International law relating to treaties, such as their conclusion and interpretation, is largely codified in the Vienna Convention on the Law of Treaties (VCLT).

Customary international law arises, if states follow a practice in an extensive and virtually uniform manner and this practice is followed with the conviction that it is obligatory to do so under international law (*opinion iuris*). However, opposition of individual states does not necessarily hinder the development of a customary rule, as long as state practice in general is widespread. Also the possibility of regional or even bilateral custom has been accepted.

General principles of law are principles that are recognized in national jurisdictions, and include concepts such as good faith, estoppel or equity. Usually general principles are referred to in order to supplement treaty or customary law or to prevent a *non-liquet* situation.

In addition to the three aforementioned sources of law, Article 38 of the ICJ Statute also mentions judicial decision and scholarly works as subsidiary means for the determination of law. Thus those instruments are not legally binding by themselves, but can be referred to in order to evidence the existence of a treaty, customary rule or general principle. In particular, there is no case-law system, as the ICJ is not bound by its previous decision, pursuant to Article 59 of the ICJ Statute. With regard to scholarly works, only the "most highly qualified publicists" should be considered. This also includes the work of the International Law Commission (ILC). The ILC is a subsidiary organ of the UN General Assembly, composed of 34 experts in international law. It is tasked with the codification and progressive development of international law, and the (draft) articles and commentaries published by the ILC are generally highly regarded.

However, Article 38 of the ICJ Statute is not an exhaustive list. In particular, decisions of international organizations and unilateral acts of state might as well constitute sources of international law.

Relevant decisions of an international organization include UN Security Council resolutions, as they bind all member states and thus constitute a source of law. In contrast, resolutions of the UN General Assembly are not legally binding by themselves. Nevertheless, the ICJ has found that such resolutions might foster the development of customary international law, as *opinion iuris* might be derived from the surrounding circumstances of their adoption and application. The practice of other international organizations is generally seen similar as UN General Assembly resolutions.

Unilateral acts also constitute a source of law, if there is a clear intention to be bound on behalf of the state and a certain publicity or notoriety of the act is given. However, where such an act might limit the freedom of action by a state, the ICJ stresses the need for a restrictive view. Such unilateral acts might include recognition or protest.

Apart from the subsidiary function of judicial decisions and writings, Article 38 of the ICJ Statute mentions no formal hierarchy between the sources of international law. In practice, however, general principles are usually only used to complement custom and treaty law. More generally, a preemptory norm (*ius cogens*) will always prevail over a regular norm. Otherwise, the norm which is later in time has priority over the former (*lex posterior derogate legi priori*) and the special rule will prevail over the general rule (*lex specialis derogate legi generali*).

5) **Relevant fields of law**

- *Sovereignty of States*

State sovereignty is one of the founding principles of international law. In essence, it entails two concepts. Internal or domestic sovereignty means the supreme authority of one state within its territory, in which it is considered the ultimate power. This includes the exclusivity of jurisdiction, thus no other state may interfere in internal affairs and extend its jurisdiction into the territory of that state. Jurisdiction can take the form of the power to regulate, adjudicate or enforce a legal norm. External sovereignty means the concept of sovereign equality of states, thus that every state enjoys the same legal status.

- *Inviolability and Immunity*

Derived from the sovereign equality of states are the rules of inviolability and immunity. Those fields of law specify under which circumstances the property of a state is entitled to special protection under international law, even if it is situated within the territory of another state. While inviolability denotes this notion of protection on a rather general level, this is ensured by the concept of immunity. Immunity is a procedural bar, prohibiting other states from exercising jurisdiction over the property and has to be considered ex officio. With regard to the protection of embassies, diplomats and other official representatives, several conventions have been adopted, namely the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations or the New York Convention on Special Mission. The broader issue of immunity from jurisdiction is dealt by the UN Convention on Jurisdictional Immunities of States and their Property. However this convention, which has been prepared by the ILC, is not yet in force.

- *Legal Professional Privilege*

Within various states lawyers enjoy a legal professional privilege, thus it has been asserted to constitute a general principle of law and already was referred to as such by arbitral tribunals. This principle entails that communication between a client and his counsel is protected from outside interference and might not be disturbed by the state. The relevant issue is whether or not this principle is absolute, or rather qualified, thus including exceptions. Such might allow interfering with privileged communication, if it concerns the commission of a crime or fraud or constitute a threat to national security.

- *The Law of State Responsibility*

The primary – or substantive – rules in international law set forth the particular obligations of state. In contrast to that, the law of state responsibility, as “secondary” rules, is concerned with defining when and how a state is held responsible for a breach of an international obligation. It determines, in general, when the noncompliance of an obligation constitute a breach of international law and the legal consequences of that violation. The law of state responsibility has been dealt with comprehensively in the 2001 ILC’s Articles on State Responsibility.

In short, a breach of international law occurs if there is (1) a internationally wrongful act that (2) is attributable to a state. The breach entails two types of legal consequences. Firstly, it creates new obligations for the

breaching state, principally, duties of cessation and non-repetition, and, secondly, a duty to make full reparation. If illegal actions are continuing, the state has a duty to cease. More importantly, the injuring state also has the duty to make full reparation, which can involve restitution, compensation, or satisfaction. The reparation should make good all wrong suffered by the injured state, and can include all three forms.

Primarily, restitution is owed, obliging a state to restore the situation before the internationally wrongful act, as far as possible and feasible. Should restitution be impossible or not feasible, the injured state may claim compensation for financially assessable damages that have been caused by the wrongful act. Insofar as neither restitution nor compensation is possible, satisfaction is owed, which can take the form of a declaration of wrongfulness by the ICJ or similar gestures.

6) **Positions of the Parties**

Timor-Leste claims the actions have violated its ownership and property rights which it holds over the seized material, entailing the rights to inviolability and immunity of this property (in particular, documents and data), to which it is entitled as a sovereign state, and its right to the confidentiality of communications with its legal advisers. Moreover, Timor-Leste holds that confidentiality of communications between legal counsel and client is covered by legal professional privilege, which it states is a general principle of law.

Australia, for its part, contends that, even when assuming that the material removed does belong to Timor-Leste, there is no general principle of immunity or inviolability of State papers and property, and therefore the rights asserted by Timor-Leste are not plausible. It also contends that, if there is a principle in international law whereby any state is entitled to the confidentiality of all communications with its legal advisers, that principle (akin to legal professional privilege) is not absolute and does not apply when the communication in question concerns the commission of a crime or fraud, constitutes a threat to national security or to the higher public interests of a State, or undermines the proper administration of justice.

7) **How to prepare for the committee**

Judges are strongly advised to familiarize themselves with the facts of the case, as well as the relevant legal areas and case law, as indicated in the study guide. In particular, it is recommended to study the ICJ's and dissenting judges' reasoning, as well as the parties' oral presentations in the provisional measures proceedings. Furthermore, judges are encouraged to go beyond the issues outlined in the study guide.

In addition, judges are expected to write preliminary opinions up to one page, which should reflect their objective personal opinion, based on the law and facts of the case. The structure of the preliminary opinion should address the legal issues one by one, stating the relevant facts, the relevant legal rule, a subsumption of the facts under the law and finally a conclusion. The quality of the preliminary opinion will be taken into account when selecting awards. Deadline for submission is 29 July.

8) **Writing the Judgment**

The judgment of the ICJ will consist of the following parts:

Introduction

- a) Names of the participating judges
- b) Summary of the proceedings
- c) The parties' claims and submissions

Arguments

- a) Facts relevant for the Court's decision
- b) Legal arguments raised by the parties
- c) Relevant law and the Court's conclusion

Judgment/Operative paragraphs

- a) Begins with the words "For these reasons"
- b) The Court's actual findings

Any judge whose findings are in conformity with the majorities' judgment may attach a Separate Opinion, explaining his or her legal reasoning, enhancing on the findings of the Court or addressing issues that were not mentioned in the main judgment.

Any judge whose findings are not in conformity with the majorities' judgment may attach a Dissenting Opinion, explaining the reasons for coming to a different conclusion.

9) **Further reading**

General:

Malcolm N. Shaw, *International Law* (2008)

James Crawford, *Brownlie's Principles of Public International Law* (2012)

Robert Jennings and Arthur Watts, *Oppenheim's International Law* (1996/2008)

Case concerning the Seizure of Certain documents (Timor-Leste v Australia):

<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=tla&case=156&k=17>

<http://www.icj-cij.org/docket/files/156/18090.pdf> (Summary of the Order of 3 March 2014)

<http://www.smh.com.au/federal-politics/political-news/australia-ordered-to-cease-spying-on-east-timor-by-international-court-of-justice-20140304-hvfya.html>

<http://www.abc.net.au/news/2014-01-21/australia-responds-to-east-timor-case-at-the-hague/5211912>

Immunity:

UN Convention on Jurisdictional Immunities of States and their Property:

https://treaties.un.org/doc/source/RecentTexts/English_3_13.pdf

Draft Articles on Jurisdictional Immunities of States and their Property, with commentaries:

http://legal.un.org/ilc/texts/instruments/english/commentaries/4_1_1991.pdf

Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) [2012] ICJ Rep 99:

<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=143&p3=4>

Legal Professional Principle:

Libanoco Holdings Co. Limited v. Republic of Turkey, ICSID Case no. ARB/06/8, Decisions on Preliminary Issues, 23 June 2008: <http://italaw.com/documents/Libanoco-Decision.pdf>

Bank for International Settlements case (PCA), Procedural Order No. 6, 11 June 2002: http://www.pca-cpa.org/showpage.asp?pag_id=1157

Commissioner of Australian Federal Police v. Propend Finance Pty Ltd (1997) 188 CLR 501

State Responsibility:

ILC Articles on State Responsibility:

http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf

James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002)