

31 MAIU 2013

Xanana still waiting for response from Australia about CMATS

By: Julio da Silva

DILI: Prime-Minister Xanana Gusmão has defended his government's decision to send a letter to the Australian Government that stated it would go to the International Court if a new maritime border agreement could not be reached between the two nations.

The Prime Minister admitted involving the International Court was a last resort to broker a new Certain Maritime Agreement in the Timor Sea (CMATS), and confirmed a reply from Australia had not yet been received by his government.

"Timor-Leste will take Australia to International Tribunal, I am still waiting the response from the government of Australia," Xanana told to reporters this week.

The comments follow Timor-Leste Foreign Minister Alfredo Pires public acknowledgement on Saturday that the government was beginning to lose patience with the drawn out CMATS process and had proceeded in dialogue with a lawyer in order to take the case to the International Court on April 23, 2014, if talks continued to fail.

The international court call comes amidst a growing back and forth political tirade involving Timor-Leste accusing the Australian government of espionage during 2004 CMATS negotiation process.

Reports indicate that Pires has alleged that the Australian Secret Intelligence Service (ASIS) breached international law and Timorese sovereignty



by secretly listening during the negotiations over multi-billion-dollar gas revenues.

It is understood revelations that ASIS broke into and bugged East Timorese cabinet rooms nine years ago were brought to light by an ex-ASIS employee currently unwell in an Australian hospital. It is believed the unidentified spy divulged being involved in espionage in a bid to clear his conscience.

While the espionage calls have some commentators suggesting it could damage trade relations between the two nations, the Australian Foreign Minister Bob Carr was reported on Tuesday saying that he insisted Australia and East Timor remained on good terms.

"Nothing can rupture the bonds between the people of Australia and the people of Timor Leste," he said.

Australian Greens leader, Christine Milne, was less upbeat. In a statement released this week Milne said she did not share Senator Carr's optimism, saying that the Australian Coalition government - in power during the signing of the CMATS agreement, had "some explaining to do."

"I have absolutely no doubt that East Timor is furious," she said. "The Coalition needs to come clean on the motivation and try and persuade anybody that there is any ability to justify it."

"I don't think Australians are going to be very impressed to hear that there was authorised bugging of East Timor," she said.

Alexander Downer, the Australian foreign minister at the time the alleged bugging took place, has been reported saying he could not comment on security matters but suggested the new allegations may be about getting a better deal.

"They want to do even better, that is human nature, but the fact is by getting into this endless dispute with the companies and also with the Australian Government they are denying themselves any revenue at all, because the project is not going ahead," Downer said to Australian media this week.

Meanwhile, Minister Pires's lawyer, Bernard Collaery, has stood firm on the espionage call, saying that the evidence of spying was irrefutable.

"The evidence is irrefutable and Australian authorities are well aware that we are in a position to back that up," Collaery said this week.

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Australian Government
Attorney-General's Department
**International Law & Human
Rights Division**

13/7327-02

1 October 2013

H E Mr Jose Luis Guterres
Minister of State for Foreign Affairs and Cooperation
Ministry of Foreign Affairs and Cooperation
Avenida de Portugal
Dili
Timor-Leste

Dear Minister

Arbitration under the *Timor Sea Treaty*

I refer to the arbitration initiated by Timor-Leste on 23 April 2013 pursuant to the *Timor Sea Treaty between the Government of East Timor and the Government of Australia* (Timor Sea Treaty).

I attach a letter to Australia's party-appointed arbitrator, Professor Michael Reisman, advising that Australia approves the selection of Professor Tullio Treves as the third arbitrator (and Chairman) of the Arbitral Tribunal. The letter has been copied to Timor-Leste's party-appointed arbitrator, Lord Collins of Mapesbury.

The letter also provides contact details for the Agent for Australia, Mr Greg Manning. In addition, I inform you that Australia will be represented in this matter by Counsel: the Solicitor-General of Australia, Mr Justin Gleeson SC, and Professor James Crawford AC SC of Matrix Chambers, London.

Should Timor-Leste also approve Professor Treves' appointment by 4 October 2013, the Arbitral Tribunal will be fully constituted. On that basis, we make the following proposals regarding the organisation and conduct of the arbitration.

Timor-Leste and Australia have previously agreed to accept the administrative facilities of the Permanent Court of Arbitration (PCA), should the Arbitral Tribunal so decide. There are additional procedural and administrative issues on which we propose that the Parties seek to reach agreement. If we can reach such agreement, we will be able to provide joint advice and assistance to the Arbitral Tribunal, and ensure the efficient conduct of the proceedings. In particular, we propose that Timor-Leste and Australia seek to agree on a preferred location for the arbitration, and rules of procedure for the conduct of the arbitration, and advise the Tribunal of these views in advance of its first meeting.

Location for the arbitration

As you are aware, pursuant to the Timor Sea Treaty, the Arbitral Tribunal shall convene 'at such time and place as shall be fixed by the Chairman of the Tribunal' and, thereafter, 'the Arbitral Tribunal shall determine when and where it shall sit'. Nonetheless, it is common practice for an arbitral tribunal to seek the views of the Parties regarding where the arbitration should take place.

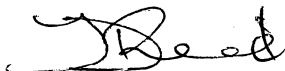
In Australia's view, the balance of convenience would favour a regional location, and we suggest that the best option would be Singapore. In addition to being in the Asia-Pacific region, Singapore is a convenient travel hub that can easily be reached from both Timor-Leste and Australia, as well as by the Arbitral Tribunal and Counsel located in Europe and America. Furthermore, the PCA has a venue in Singapore which is suitably sized and equipped for the conduct of arbitral proceedings, and is available free of charge, making the organisation of the proceedings more straightforward, and reducing the costs to both Parties.

Rules of procedure

As provided in Annex B of the Timor Sea Treaty, subject to any agreement between Australia and Timor-Leste, the Arbitral Tribunal shall determine its own procedure. In this regard, we propose that Timor-Leste and Australia seek to reach agreement on rules of procedure in advance of the first meeting with the Tribunal, to ensure the efficient conduct of the proceedings. To facilitate discussion and agreement, Australia has produced a draft set of rules of procedure for Timor-Leste's consideration (attached).

The draft rules of procedure are based on publicly available rules of procedure adopted for other *ad hoc* inter-state arbitrations facilitated by the PCA, and on the PCA *Optional Rules for Arbitrating Disputes Between Two States*, adapted to reflect the circumstances of an arbitration under the Timor Sea Treaty. Subject to the views of the Government of Timor-Leste, we suggest that it may be convenient for Counsel to meet and discuss the rules of procedure in the first instance.

Yours sincerely



John Reid

Acting Agent for Australia
Assistant Secretary
International Law, Trade and Security Branch
Email: john.reid@ag.gov.au
Phone: +61 2 6141 3554



Australian Government
Attorney-General's Department
**International Law & Human
Rights Division**

13/7334

1 October 2013

Professor Michael Reisman
Yale Law School
PO Box 208215
New Haven CT 06520
United States of America

By email: michael.reisman@yale.edu

Dear Professor Reisman

Approval of Professor Tullio Treves as third arbitrator

I am pleased to advise that the Government of Australia approves the selection of Professor Tullio Treves to act as the third arbitrator (and Chairman) of the Arbitral Tribunal in the proceedings initiated by Timor-Leste on 23 April 2013 under the *Timor Sea Treaty between the Government of East Timor and the Government of Australia* (Timor Sea Treaty). Should Timor-Leste also approve the appointment of Professor Treves by 4 October 2013, the Arbitral Tribunal will be fully constituted. On that basis, we make the following proposals.

Timor-Leste and Australia have both previously indicated their willingness to accept the services of the Permanent Court of Arbitration (PCA) as the administering authority for this arbitration should the Tribunal so agree, and the Notice of Arbitration and Response have both been provided to the PCA. Accordingly, Australia will forward this letter to the PCA for information, and would be happy for the Tribunal to instruct the PCA to make the necessary administrative arrangements concerning the conduct of the arbitration.

I note that, pursuant to Annex B of the Timor Sea Treaty, the Arbitral Tribunal shall convene at such time and place as shall be fixed by the Chairman of the Tribunal, and thereafter, the Arbitral Tribunal shall determine when and where it shall sit. In Australia's view, a regional location would be suitable and appropriate for both parties, and we suggest that the Tribunal consider conducting the arbitration in Singapore, where the PCA has a suitable venue available free of charge. Australia would be pleased to consult with the Chairman and the Tribunal, as appropriate and convenient, on this issue.

I also note the provision in Annex B of the Timor Sea Treaty that, subject to any agreement between Australia and Timor-Leste, the Arbitral Tribunal shall determine its own procedure. In this regard, we will consult with Timor-Leste and seek to reach agreement on rules of procedure in advance of the first meeting with the Tribunal. Of course, we would also be pleased to consult with the Tribunal on this issue.

The Agent for Australia will be Mr Greg Manning, First Assistant Secretary, International Law and Human Rights Division, Attorney-General's Department. Mr Manning's contact details are:

Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600

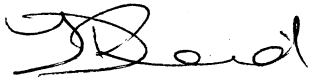
Email: greg.manning@ag.gov.au
Phone: +61 2 6141 4109
Fax: +61 2 6141 3486

Mr Manning will be on leave until 31 October 2013. In his absence, correspondence can be directed to me as acting Agent.

I have copied this letter to Lord Collins and the Government of Timor-Leste.

Please do not hesitate to contact me should you require any further information.

Yours sincerely



John Reid

Acting Agent for Australia
Assistant Secretary
International Law, Trade and Security Branch
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Draft Rules of Procedure

Timor-Leste v Australia

Whereas the Democratic Republic of Timor-Leste ('the Claimant') and the Commonwealth of Australia ('the Respondent') are Parties to the *Timor Sea Treaty between the Government of East Timor and the Government of Australia*, done at Dili on 20 May 2002 ('the Timor Sea Treaty')

Whereas the Claimant has invoked Article 23 of the Timor Sea Treaty to commence proceedings against the Respondent by Notice of Arbitration dated 23 April 2013 ('the arbitration')

Whereas in accordance with Annex B(a)(i) of the Timor Sea Treaty, the Claimant has appointed the Right Honourable Lord Collins of Mapesbury as arbitrator and the Respondent has appointed Professor Michael Reisman as arbitrator, [and the two Party-appointed arbitrators have in turn selected Professor Tullio Treves as chairman of the Arbitral Tribunal]

Whereas pursuant to Annex B(f) of the Timor Sea Treaty, the Arbitral Tribunal shall, subject to any agreement between Australia and Timor-Leste, determine its own procedure

The Claimant and the Respondent (together, 'the Parties') have decided that the arbitration shall be conducted in accordance with the following rules ('the Rules'):

Article 1 **Scope of Application**

1. The arbitration shall be conducted in accordance with Article 23 and Annex B of the Timor Sea Treaty and these Rules.
2. To the extent that any question of procedure is not expressly governed by the Timor Sea Treaty or these Rules and the Parties have not otherwise agreed, that question shall be decided by the Arbitral Tribunal, taking into account, as appropriate, the views of the Parties, the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States, and relevant international arbitral practice.
3. These Rules are entirely without prejudice to the position of the Parties on questions of jurisdiction and competence over the dispute.
4. The International Bureau of the Permanent Court of Arbitration at the Hague ('the International Bureau') shall serve as registry for the arbitration and provide secretariat services.

Article 2 **Notice and Calculation of Periods of Time**

1. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received by the International Bureau or by a Party when it has been delivered to the International Bureau or to the Agent of the Party appointed pursuant to Article 4.
2. For the purposes of paragraph (1), 'delivered' includes delivery by electronic means. If written pleadings are delivered by a Party by electronic means, that Party shall also send a hard copy of the pleadings (including all documents annexed thereto) on the following day by courier to each member of the Arbitral Tribunal, the International Bureau, the Agent of the other Party, and to counsel of the other Party at their respective addresses.
3. For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice is received. If the last day of such a period is an official holiday or a non-work day in the State of the Party or in the Netherlands, the period is extended until the first work day which follows. Official holidays or non-work days occurring during the running of the period of time are included in calculating the period.

Article 3 Representation and Assistance

1. Each Party shall be represented by an Agent and, if it so decides, one or more co-Agents who may be appointed by written notification at any time. The Parties may also be assisted by counsel and other persons of their choice.
2. The Agents of the Parties are:
For the Claimant: [to be advised]
For the Respondent: Mr Greg Manning (First Assistant Secretary, International Law and Human Rights Division, Attorney-General's Department)

Article 4 Arbitral Tribunal

The Arbitral Tribunal consists of the following members:

- [Professor Tullio Treves] (approved by the Parties and appointed as Chairman)
- Professor W. Michael Reisman (appointed by the Respondent)
- Lord Collins of Mapesbury (appointed by the Claimant)

Article 5 General

1. Subject to the Timor Sea Treaty and these Rules, the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the Parties are treated with equality and that at each stage of the proceedings each Party is given a full opportunity of presenting its case. The Arbitral Tribunal, in exercising its discretion, shall conduct the arbitration so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the Parties' dispute.
2. All communications to the Arbitral Tribunal by one Party shall be communicated by that Party to the other Party and the International Bureau.

Article 6 Place and language of arbitration

1. The place where the arbitration is to be held shall be [to be determined by the Arbitral Tribunal].
2. The language of the arbitration is English.

Article 7 Phases of the Arbitration

1. There shall be a single round of written proceedings consisting of a Statement of Claim by the Claimant and a Defence to the Statement of Claim by the Respondent.
2. The Statement of Claim shall include the following particulars: a statement of the facts supporting the claim; submissions on the law; and the relief or remedy sought. The Defence shall reply to the particulars in the Statement of Claim and any submissions by the Respondent in answer thereto.
3. The written proceedings shall have annexed to them certified copies of all documents on which the Party filing them seeks to rely and a signed written statement by each witness whose evidence on questions of fact or expert opinion is relied on. Parties need not annex or certify copies of documents which have been published and are readily available to the Arbitral Tribunal and the other Party in English. When a document or statement is not in English, it shall be accompanied by a certified translation.
4. Unless the Arbitral Tribunal otherwise decides, no further document or witness may be tendered by a Party after the close of the written proceedings.

Article 8 Evidence

Each Party shall have the burden of proving the facts relied on to support its claim or defence. The Arbitral Tribunal shall determine the admissibility, relevance and weight of the evidence offered.

Article 9 Witnesses

1. At least [four weeks] before the oral hearing, each Party shall provide notification of the names and addresses of the witnesses (including expert witnesses) it intends to present, the subject upon and the languages in which such witnesses will give their testimony.
2. No expert or witness of fact may be heard unless he or she has provided a signed written expert report or statement, which shall form part of the written pleadings as set out in Article 7(3).
3. At least [two weeks] before the commencement of oral hearings, each Party shall provide notification of the witnesses, including experts, tendered by the other Party which it wishes to question. Failure to question a particular witness or expert shall not be deemed an admission of the truth or relevance of the statement of that witness or expert.
4. If a witness or expert is not tendered for questioning, despite a request under paragraph (1), then the evidence of that witness or expert shall be deemed to have been withdrawn.
5. Before testifying, witnesses (other than expert witnesses) shall not be in attendance at the hearing.
6. Subject to these Rules, the Arbitral Tribunal may determine the manner in which witnesses and experts are examined. Witnesses and experts may be examined, cross-examined and re-examined, and subject to questioning by members of the Arbitral Tribunal.

Article 10 Conduct of hearings

1. Having regard to Annex B, paragraph (i) of the Timor Sea Treaty, the Arbitral Tribunal, after consultation with the Parties, shall establish a timetable for the hearings, which shall be directed to exploring the remaining issues in dispute.
 - a. Issues of jurisdiction, admissibility and merits will be dealt with in a single hearing.
2. Subject to these Rules, the order in which the Parties will be heard, the method of handling the evidence and examining any witnesses and experts, and the time allotted for oral presentations on behalf of each Party shall be settled by the Arbitral Tribunal after consultation with the Parties.
3. The International Bureau shall make arrangements for the translation into English of oral statements not given in English made at the hearings and for a record of the hearings in English.

Article 11 Confidentiality

1. All written and oral pleadings, documents and evidence submitted in the arbitration, verbatim transcripts of meetings and hearings, and the deliberations of the Arbitral Tribunal, shall remain confidential unless otherwise agreed by the Parties.
2. The hearings shall not be open to the public, unless otherwise agreed by the Parties.
3. The award may be made public subject to such redactions as are approved by the Arbitral Tribunal after hearing from the Parties.



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.



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.

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."

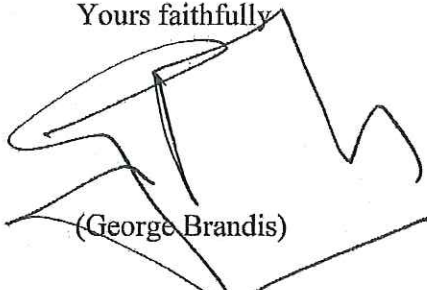
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Redacted to maintain legal professional privilege

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.

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

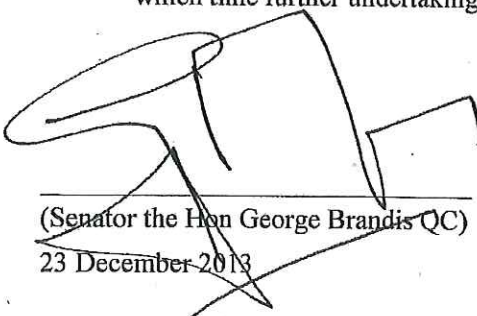
- A. I am the Attorney-General of the Commonwealth of Australia, having responsibility, *inter alia*, for the administration of the *Australian Security Intelligence Organisation Act 1979* and for the conduct of these proceedings; and
- B. I am aware that the Australian Security Intelligence Organisation ('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



GOVERNO

REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

23 December 2013

Mr John Reid
Agent for Australia
First Assistant Secretary
International Law and Human Rights Division
Attorney-General's Department

By email: john.reid@ag.gov.au

Dear Mr Reid,

***Arbitration under the Timor Sea Treaty
Democratic republic of Timor-Leste v the Commonwealth of Australia***

1. Thank you for the copy of your letter dated 19 December 2013, addressed to Mr Garth Schofield, Legal Counsel at the Permanent Court of Arbitration, concerning the Arbitration under the Timor Sea Treaty ('the Arbitration'), and for the copy of the Written Undertaking dated 19 December 2013 by Senator the Hon George Brandis QC, Attorney-General of the Commonwealth of Australia, which accompanied it.
2. Timor-Leste's concerns as to possible conflicts of interest arises from the fact, confirmed in paragraph A of the Attorney-General's Written Undertaking, that the Attorney-General has responsibility both for the administration of the Australian Security Intelligence Organisation Act 1979 and for the conduct of the proceedings in the Arbitration.
3. Timor-Leste understands that the warrants executed at the premises occupied by the law firm of Mr Bernard Collaery ('the Warrants') were issued by the Attorney-General. It has neither seen a copy of the Warrants, nor is aware of the information that allegedly satisfied the statutory basis upon which the Attorney-General issued the Warrants. The documents and data that were seized appear, however, to be listed on the Property Seizure Notices handed to Mr Collaery's clerk; and Timor-Leste observes that almost all of those documents relate specifically to the Timor Sea and to the legal instruments that are in issue in the Arbitration.

A handwritten signature in black ink, consisting of a stylized 'A' with a horizontal line extending to the right.

4. Timor-Leste notes that the Attorney-General has declared and undertaken to the Tribunal that he has not and will not become aware of, or seek to inform himself of the content of, or any information derived from, certain material ('the Material') taken into possession by the Australian Security Intelligence Organization ('ASIO') in the execution of the Warrants, and that the Material will not be used by any part of the Australian Government for any purpose related to the Arbitration.
5. Timor-Leste wishes to ensure that Timor-Leste, the Tribunal, and Australia share a common understanding of the scope and meaning of the Attorney-General's Written Undertaking.
6. Timor-Leste understands 'the Material' to include the contents of, and all information derived from, not only those documents and data that were taken into possession by ASIO but also from any of the documents and data that were inspected but not seized, and whether or not the documents and data were copied. 'Data' includes electronic data.
7. Timor-Leste considers that the position that Australia takes or should take (whether in the course of the Arbitration proceedings themselves, or otherwise) in relation to (i) the legal instruments that are in issue in the Arbitration under the Timor Sea Treaty, and (ii) the exploitation of the resources of the Timor Sea, and (iii) Australia's relationship with Timor-Leste more generally, are all matters that are related to the Arbitration.
8. Further, Timor-Leste considers that informing any person with responsibility for the conduct of the Arbitration under the Timor Sea Treaty, and / or any person in a position to influence the policy of Australia in relation to the matters described in paragraph 7, above, of the contents of, and / or any information derived from, any of the documents and data seized or inspected under the Warrants, would constitute 'use' of the Material for a purpose related to the Arbitration, whether or not there is any consequent change in the conduct of the Arbitration or in Australian policy.
9. Timor-Leste requests that Australia indicate at the earliest opportunity if it does not share the understandings indicated in the paragraphs above; and if it does not share the understandings, how Australia's understanding differs from that of Timor-Leste.
10. Further, Timor-Leste asks Australia to confirm that, as of the date of Australia's response to this request, no information has already been communicated in the circumstances described in paragraph 8, above.
11. Finally, Timor-Leste requests that Australia give an assurance that communications between Timor-Leste and any or all of the legal advisors who are acting for Timor-Leste in the Arbitration, and among those legal advisors *inter se*, will not be intercepted or monitored. If Australia is unable to give such an assurance, Timor-Leste requests that Australia give a clear indication of the extent to which Australia reserves its position in

relation to the interception and / or monitoring of communications between Timor-Leste and any or all of the legal advisors who are acting for Timor-Leste in the Arbitration, and among those legal advisors *inter se*.

12. A copy of this letter has been sent to the Tribunal.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Joaquim A.M.L. da Fonseca', with a long horizontal stroke extending to the right.

Joaquim A.M.L. da Fonseca
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Australian Security Intelligence Organisation Act 1979

No. 113, 1979 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 *Australian Security Intelligence Organisation Act 1979* 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 26 July 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.

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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

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- (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.

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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

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- (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:

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- (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.

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5A Copies of certain notices to be given to Inspector-General

Where the Minister gives a notice in writing to the Director-General for the purposes of subparagraph (d)(ii) of the definition of *politically motivated violence* in section 4, the Minister shall give a copy of the notice to the Inspector-General of Intelligence and Security.

Part II—The Organisation and the Director-General

6 Continuance of Organisation

The Australian Security Intelligence Organisation, being the Organisation that was continued in existence by the Acts repealed by this Act, is continued in existence.

7 Director-General

- (1) There shall be a Director-General of Security, who shall be appointed by the Governor-General and shall hold office, subject to this Act, on such terms and conditions as the Governor-General determines.
- (2) Before a recommendation is made to the Governor-General for the appointment of a person as Director-General, the Prime Minister shall consult with the Leader of the Opposition in the House of Representatives.

8 Control of Organisation

- (1) The Organisation shall be under the control of the Director-General.
- (2) Subject to subsections (4) and (5), in the performance of the Director-General's functions under this Act, the Director-General is subject to the directions of the Minister.
- (3) If the Director-General requests that a direction of the Minister be put in writing, the Minister shall comply with the request.
- (4) The Minister is not empowered to override the opinion of the Director-General concerning the nature of the advice that should be given by the Organisation.

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- (5) The Minister is not empowered to override the opinion of the Director-General:
- (a) on the question whether the collection of intelligence by the Organisation concerning a particular individual would, or would not, be justified by reason of its relevance to security; or
 - (b) on the question whether a communication of intelligence concerning a particular individual would be for a purpose relevant to security;
- except by a direction contained in an instrument in writing that sets out the Minister's reasons for overriding the opinion of the Director-General.
- (6) The Minister shall, as soon as practicable after giving a direction in writing to the Director-General, cause a copy of the direction to be given to the Inspector-General of Intelligence and Security and, if the direction relates to a question referred to in subsection (5), to the Prime Minister.
- (7) Where intelligence is collected or communicated pursuant to a direction referred to in subsection (5), the Director-General shall cause a record in writing to be kept of the intelligence so collected or communicated.

8A Guidelines

- (1) The Minister may, from time to time, by written notice given to the Director-General, give to the Director-General guidelines to be observed:
- (a) in the performance by the Organisation of its functions or the exercise of its powers; or
 - (b) in the exercise by the Director-General of his or her powers under sections 85 and 86.
- (2) The Minister shall, as soon as practicable after the commencement of this section, by notice in writing given to the Director-General, give to the Director-General guidelines to be observed in relation to the performance of that part of the Organisation's functions that relates to politically motivated violence, and may, from time to time, vary or replace guidelines so given.

- (3) Subject to subsection (4), the Minister shall cause a copy of any guidelines given under subsection (1) or (2) to be laid before each House of the Parliament within 15 sitting days of that House after the guidelines were given.
- (4) Where the laying of a copy of guidelines before the Parliament in accordance with subsection (3) would result in the disclosure of information that would, in the opinion of the Minister, be contrary to the public interest by reason that it would prejudice security, the defence of the Commonwealth, the conduct of the Commonwealth's international affairs or the privacy of individuals, the Minister may cause a copy of the guidelines to be laid before each House of the Parliament with such deletions as the Minister thinks necessary to avoid that result or decline to cause a copy to be laid before each House of the Parliament.
- (5) The Minister shall, in accordance with arrangements made between the Minister and the Leader of the Opposition in the House of Representatives, make available to the Leader of the Opposition a copy of any guidelines given under subsection (1) or (2), but it is the duty of the Leader of the Opposition to treat as secret any part of those guidelines that has not been laid before a House of the Parliament.
- (6) The Minister shall, as soon as practicable after guidelines under subsection (1) or (2) are given to the Director-General, give a copy of the guidelines to the Inspector-General of Intelligence and Security and, unless the Minister considers it inappropriate to do so, to the Committee on Intelligence and Security.

9 Term of office of Director-General

- (1) Subject to sections 12 and 13, the Director-General holds office for such period, not exceeding 7 years, as is specified in his or her instrument of appointment, but is eligible for re-appointment.

10 Remuneration and allowances of Director-General

- (1) The Director-General shall be paid such remuneration as is determined by the Remuneration Tribunal but, if no determination

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of that remuneration by the Tribunal is in operation, he or she shall be paid such remuneration as is prescribed.

- (2) The Director-General shall be paid such allowances as are prescribed.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973* and to section 15.

11 Leave of absence

- (1) The Director-General has such recreation leave entitlements as are determined by the Remuneration Tribunal.
- (2) The Minister may grant the Director-General leave of absence, other than recreation leave, on such terms and conditions as to remuneration or otherwise as the Minister determines.

12 Resignation

The Director-General may resign from office by writing signed by the Director-General and delivered to the Governor-General.

13 Termination of appointment

- (1) The Governor-General may terminate the appointment of the Director-General by reason of physical or mental incapacity, misbehaviour or failure to comply with a provision of this Act.
- (2) If the Director-General:
 - (a) is absent from duty, except with leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
 - (b) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit;the Governor-General shall terminate his or her appointment.

14 Acting Director-General

- (1) The Minister may appoint a person to act as Director-General:
-

- (a) during a vacancy in the office of Director-General; or
 - (b) during any period, or during all periods, when the Director-General is absent from duty or from Australia or is, for any reason, unable to perform the functions of his or her office;
- but a person appointed to act during a vacancy shall not continue so to act for more than 12 months.
- (2) Before a recommendation is made to the Minister for the appointment of a person, under subsection (1), to act as Director-General, the Prime Minister shall consult with the Leader of the Opposition in the House of Representatives, unless it is impracticable to do so.
 - (3) An appointment of a person under subsection (1) may be expressed to have effect only in such circumstances as are specified in the instrument of appointment.
 - (4) The Minister may:
 - (a) determine the terms and conditions of appointment, including remuneration and allowances, of a person acting as Director-General; and
 - (b) at any time terminate such an appointment.
 - (5) Where a person is acting as Director-General in accordance with paragraph (1)(b) and the office of Director-General becomes vacant while that person is so acting, that person may continue so to act until the Minister otherwise directs, the vacancy is filled or a period of 12 months from the date on which the vacancy occurred expires, whichever first happens.
 - (6) The appointment of a person to act as Director-General ceases to have effect if the person resigns the appointment by writing signed by the person and delivered to the Minister.
 - (7) While a person is acting as Director-General, he or she has, and may exercise, all the powers and shall perform all the functions of the Director-General.
-

Section 15

15 Appointment of a Judge as Director-General

- (1) The appointment of a Judge as Director-General, or service of a Judge as Director-General, does not affect the tenure of his or her office as a Judge or his or her rank, title, status, precedence, salary, annual or other allowances or other rights or privileges as the holder of his or her office as a Judge and, for all purposes, his or her service as Director-General shall be taken to be service as the holder of his or her office as a Judge.
- (2) Subject to subsection (3), if the Director-General is a Judge, he or she shall be paid salary at such rate (if any), and an annual allowance at such rate (if any), as are fixed from time to time by the Parliament.
- (3) If the Director-General is a Judge, he or she is not, while he or she receives salary or annual allowance as a Judge, entitled to salary or annual allowance, as the case may be, under this Act, except to the extent (if any) that the salary or annual allowance that would be payable to him or her under this Act apart from this subsection exceeds the salary or annual allowance payable to him or her as a Judge.

16 Delegation

- (1) The Director-General may, either generally or as otherwise provided by the instrument of delegation, by writing signed by the Director-General, delegate to an officer of the Organisation all or any of the powers of the Director-General that relate to the management of the staff of the Organisation or the financial management of the Organisation.
- (2) A power so delegated, when exercised by the delegate, shall, for the purposes of this Act and the regulations, be deemed to have been exercised by the Director-General.
- (3) A delegation under this section does not prevent the exercise of a power by the Director-General.

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.

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Section 17AA

17AA Fees for advice and other services

- (1) The Director-General may determine in writing that fees are payable by persons for the giving of advice or the provision of services by the Organisation to the persons at their request.
- (2) Unless the Director-General determines otherwise, the Organisation may refuse to give the advice, or provide the service, to a person until the fee is paid in whole or part. If the whole or part of the fee is not paid before the advice is given or the service is provided, the amount concerned is a debt due to the Commonwealth and may be recovered by the Commonwealth in a court of competent jurisdiction.
- (3) The amount of the fee must not exceed the reasonable costs to the Organisation of giving the advice or providing the service.
- (4) The Director-General may, on application in writing by a person who is or will be required to pay a fee, if the Director-General considers it appropriate in the circumstances:
 - (a) not require the person to pay any of the fee; or
 - (b) require the person to pay only a specified part of the fee.

17A Act not concerned with lawful dissent etc.

This Act shall not limit the right of persons to engage in lawful advocacy, protest or dissent and the exercise of that right shall not, by itself, be regarded as prejudicial to security, and the functions of the Organisation shall be construed accordingly.

18 Communication of intelligence etc.

Who may communicate intelligence

- (1) The communication of intelligence on behalf of the Organisation shall be made only by the Director-General or by a person acting within the limits of authority conferred on the person by the Director-General.

Offence for unauthorised communication of information

- (2) If a person makes a communication of any information or matter that has come to the knowledge or into the possession of the person by reason of his or her being, or having been, an officer or employee of the Organisation or his or her having entered into any contract, agreement or arrangement with the Organisation, being information or matter that was acquired or prepared by or on behalf of the Organisation in connection with its functions or relates to the performance by the Organisation of its functions, other than a communication made:
- (a) to the Director-General or an officer or employee of the Organisation:
 - (i) by an officer or employee of the Organisation—in the course of the duties of the officer or employee; or
 - (ii) by a person who has entered into any such contract, agreement or arrangement—in accordance with the contract, agreement or arrangement;
 - (b) by a person acting within the limits of authority conferred on the person by the Director-General; or
 - (c) with the approval of the Director-General or of an officer of the Organisation having the authority of the Director-General to give such an approval;

the first-mentioned person is guilty of an offence.

Penalty: Imprisonment for 2 years.

Communicating information to appropriate authorities of the Commonwealth or a State

- (3) A person referred to in subsection (1) may communicate information to a person referred to in subsection (4) if:
- (a) the information has come into the possession of the Organisation in the course of performing the Organisation's functions under section 17; and
 - (b) either:
 - (i) the information relates, or appears to relate, to the commission, or intended commission, of a serious crime; or

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Section 18

- (ii) the Director-General, or a person authorised for the purpose by the Director-General, is satisfied that the national interest requires the communication; and
- (c) the information relates, or appears to relate, to the performance of the functions, responsibilities or duties of the person referred to in subsection (4).

Note: There are additional restrictions, in the *Telecommunications (Interception and Access) Act 1979*, on communicating telecommunications information.

- (4) The persons to whom information may be communicated under subsection (3) are the following:
 - (a) a Minister;
 - (b) a staff member of an authority of the Commonwealth;
 - (c) a staff member of an authority of a State.

Communicating information to ASIS, DSD and DIGO

- (4A) A person referred to in subsection (1) may communicate information to a staff member of ASIS, DSD or DIGO if:
 - (a) the information has come into the possession of the Organisation in the course of performing the Organisation's functions under section 17; and
 - (b) the information relates, or appears to relate, to the performance of ASIS, DSD or DIGO's functions (as the case requires).

Communicating information in relation to emergency declarations

- (4B) A person referred to in subsection (1) may communicate information, in accordance with Part VIA of the *Privacy Act 1988*, if:
 - (a) the information has come into the possession of the Organisation in the course of performing its functions under section 17; and
 - (b) an emergency declaration (within the meaning of section 80G of that Act) is in force.

Attorney-General's consent required for prosecution of offence

- (5) A prosecution for an offence against subsection (2) shall be instituted only by or with the consent of the Attorney-General.

19 Co-operation with other authorities in connection with performance of Organisation's functions

- (1) So far as necessary for, or conducive to, the performance of the Organisation's functions, the Organisation may, subject to any arrangements made or directions given by the Minister, co-operate with:
- (a) authorities of the Commonwealth;
 - (b) Departments, Police Forces and authorities of the States; and
 - (c) authorities of other countries approved by the Minister as being capable of assisting the Organisation in the performance of its functions.
- (2) A person referred to in subsection 18(1) may, where the Organisation is co-operating with an authority of another country in accordance with paragraph (1)(c), communicate to an officer of that authority information that has come into the possession of the Organisation in the course of performing its functions under section 17, being information that is relevant to the security of that other country and that could not, apart from this subsection, be communicated to that officer.

Note: There are additional restrictions, in the *Telecommunications (Interception and Access) Act 1979*, on communicating telecommunications information.

19A Co-operation with intelligence and law enforcement agencies etc. in connection with performance of their functions

- (1) The Organisation may co-operate with and assist the following bodies in the performance of their functions:
- (a) ASIS;
 - (b) DSD;
 - (c) DIGO;
 - (d) a law enforcement agency;

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- (e) an authority of the Commonwealth, or an authority of a State, that is prescribed by the regulations for the purposes of this paragraph.
- (2) However, the Organisation may only do so:
 - (a) subject to any arrangements made or directions given by the Minister; and
 - (b) on request by the head (however described) of the body referred to in subsection (1).
- (3) Without limiting subsection (1), in co-operating with and assisting a body in accordance with this section, the Organisation may make the services of officers and employees, and other resources, of the Organisation available to the body.

Communicating information

- (4) A person referred to in subsection 18(1) may communicate information to a staff member of a body referred to in paragraph (1)(d) or (e) if:
 - (a) the information has come into the possession of the Organisation in the course of performing the Organisation's functions under section 17; and
 - (b) the information is communicated for the purposes of co-operating with or assisting the body under this section.

Note 1: For communication of information to ASIS, DSD and DIGO, see subsection 18(4A).

Note 2: There are additional restrictions, in the *Telecommunications (Interception and Access) Act 1979*, on communicating telecommunications information.

20 Special responsibility of Director-General in relation to functions of Organisation

The Director-General shall take all reasonable steps to ensure that:

- (a) the work of the Organisation is limited to what is necessary for the purposes of the discharge of its functions; and
- (b) the Organisation is kept free from any influences or considerations not relevant to its functions and nothing is done that might lend colour to any suggestion that it is

concerned to further or protect the interests of any particular section of the community, or with any matters other than the discharge of its functions.

21 Leader of Opposition to be kept informed on security matters

The Director-General shall consult regularly with the Leader of the Opposition in the House of Representatives for the purpose of keeping him or her informed on matters relating to security.

Section 22

Division 2—Special powers

22 Interpretation

In this Division, unless the contrary intention appears:

carrier means:

- (a) a carrier within the meaning of the *Telecommunications Act 1997*; or
- (b) a carriage service provider within the meaning of that Act.

communicate includes cause to be communicated.

computer means a computer, a computer system or part of a computer system.

data includes information, a computer program or part of a computer program.

examination includes any act or process for the purpose of producing sounds, images or information from a record, and *examine* has a corresponding meaning.

listening device means any instrument, device or equipment capable of being used, whether alone or in conjunction with any other instrument, device or equipment, to record or listen to words, images, sounds or signals.

premises includes any land, place, vehicle, vessel or aircraft.

record when used as a noun, means:

- (a) a document (including any written or printed material); or
- (b) an object (including a sound recording, magnetic tape or disc, microform, photograph or film) by which words, images, sounds or signals are recorded or stored or from which information can be obtained.

signals includes light emissions and electromagnetic emissions.

telecommunications facility means a facility within the meaning of section 7 of the *Telecommunications Act 1997*.

23 Requesting information or documents from operators of aircraft or vessels

- (1) For the purposes of carrying out the Organisation's functions, an authorised officer or employee may:
- (a) ask an operator of an aircraft or vessel questions relating to the aircraft or vessel, or its cargo, crew, passengers, stores or voyage; or
 - (b) request an operator of an aircraft or vessel to produce documents relating to the aircraft or vessel, or its cargo, crew, passengers, stores or voyage, that are in the possession or under the control of the operator.
- (2) A person who is asked a question or requested to produce a document under subsection (1) must answer the question or produce the document as soon as practicable.

Offence

- (3) A person commits an offence if:
- (a) the person is an operator of an aircraft or vessel; and
 - (b) the person is asked a question or requested to produce a document under subsection (1); and
 - (c) the person fails to answer the question or produce the document.

Penalty: 60 penalty units.

- (4) Subsection (3) is an offence of strict liability.
- Note: For strict liability, see section 6.1 of the *Criminal Code*.
- (5) It is a defence to a prosecution for an offence against subsection (3) if the person charged had a reasonable excuse for:
- (a) failing to answer the question; or
 - (b) failing to produce the document.
- (6) The Director-General, or a senior officer of the Organisation appointed by the Director-General in writing to be an authorising officer for the purposes of this subsection, may authorise, in

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writing, an officer or employee of the Organisation, or a class of such officers or employees, for the purposes of this section.

(7) In this section:

authorised officer or employee means an officer or employee who is authorised under subsection (6) for the purposes of this section.

operator has the meaning given by section 4 of the *Customs Act 1901*.

senior officer of the Organisation means an officer of the Organisation who holds or performs the duties of an office that is:

- (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.

24 Exercise of authority under warrants etc.

(1) The Director-General, or a senior officer of the Organisation appointed by the Director-General in writing to be an authorising officer for the purposes of this subsection, may, by signed writing, approve officers and employees of the Organisation, and other people, as people authorised to exercise, on behalf of the Organisation, the authority conferred by relevant warrants or relevant device recovery provisions.

(2) The authority conferred by a relevant warrant or relevant device recovery provision may be exercised on behalf of the Organisation only by the Director-General or an officer, employee or other person approved under subsection (1).

(3) In this section:

relevant device recovery provision means subsection 26(6A), 26B(7), 26C(7), 27A(3A) or (3B).

relevant warrant means a warrant issued under section 25, 25A, 26, 26B, 26C, 27, 27A, 27AA or 29 or under Division 3:

senior officer of the Organisation means an officer of the Organisation who holds or performs the duties of an office that is:

- (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

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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.

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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.

25AA Conduct of ordinary or frisk search under search warrant

An ordinary search or frisk search of a person that is authorised under paragraph 25(4A)(a) must, if practicable, be conducted by a person of the same sex as the person being searched.

25A Computer access warrant

Issue of computer access 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 data held in a particular computer (the *target computer*) 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 target computer, which must also be specified in the warrant.

Things that may be authorised in warrant

- (4) The things that may be specified are any of the following that the Minister considers appropriate in the circumstances:
 - (aa) entering specified premises for the purposes of doing the things mentioned in this subsection;
 - (a) using:
 - (i) a computer; or
 - (ii) a telecommunications facility operated or provided by the Commonwealth or a carrier; or

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- (iii) any other electronic equipment; or
- (iv) a data storage device;

for the purpose of obtaining access to data that is relevant to the security matter and is held in the target computer at any time while the warrant is in force and, if necessary to achieve that purpose, adding, deleting or altering other data in the target computer;

- (b) 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;
- (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.

Note: As a result of the warrant, an ASIO officer who, by means of a telecommunications facility, obtains access to data stored in the target computer etc. will not commit an offence under Part 10-7 of the *Criminal Code* or equivalent State or Territory laws (provided that the ASIO officer acts within the authority of the warrant).

Certain acts not authorised

- (5) Subsection (4) 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 of the target computer by other persons, or that causes any loss or damage to other persons lawfully using the target computer.

Authorisation of entry measures

- (5A) 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.

Duration of warrant

- (6) The warrant must specify the period during which it is to remain in force. The period must not be more than 6 months, although the Minister may revoke the warrant before the period has expired.

Issue of further warrants not prevented.

- (7) Subsection (6) does not prevent the issue of any further warrant.

26 Use of listening devices

- (1) It is unlawful for an officer, employee or agent of the Organisation, for the purposes of the Organisation, to use a listening device for the purpose of listening to or recording words, images, sounds or signals being communicated by another person (in this subsection referred to as the *communicator*) unless:
- (a) the communicator intends, or should reasonably expect, those words, images, sounds or signals to be communicated to the first-mentioned person or to a class or group of persons in which the first-mentioned person is included;
 - (b) the first-mentioned person does so with the consent of the communicator; or
 - (c) the first-mentioned person does so in accordance with a warrant issued under this Division;
- and it is the duty of the Director-General to take all reasonable steps to ensure that this subsection is not contravened.
- (2) Notwithstanding any law of a State or Territory, an officer, employee or agent of the Organisation, acting on behalf of the Organisation, does not act unlawfully by reason only of using a listening device as referred to in subsection (1) in circumstances in which paragraph (a), (b) or (c) of that subsection is applicable.
- (3) Where, upon receipt by the Minister of a request by the Director-General for the issue of a warrant under this section authorizing the use of a listening device in relation to a particular person, the Minister is satisfied that:
- (a) that person is engaged in, or is reasonably suspected by the Director-General of being engaged in, or of being likely to engage in, activities prejudicial to security; and
 - (b) the use by the Organisation of a listening device to listen to or record words, images, sounds or signals communicated by or to that person will, or is likely to, assist the Organisation in carrying out its function of obtaining intelligence relevant to security;

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the Minister may, by warrant signed by the Minister, authorize the Organisation, subject to any conditions or restrictions that are specified in the warrant, to use a listening device for the purpose of listening to or recording words, images, sounds or signals communicated by or to that person and such a warrant may authorize the Organisation to enter any premises in which that person is, or is likely to be, or any other premises specified in the warrant from which words, images, sounds or signals communicated by or to that person while that person is in those first-mentioned premises can be listened to or recorded with the use of a listening device, for the purpose of installing, maintaining or using a listening device.

- (4) Where, upon receipt by the Minister of a request by the Director-General for the issue of a warrant under this section authorizing the use of a listening device to listen to or record words, images, sounds or signals communicated from or to particular premises, the Minister is satisfied that:
- (a) those premises are used, likely to be used or frequented by a person engaged in, or reasonably suspected by the Director-General of being engaged in or of being likely to engage in, activities prejudicial to security; and
 - (b) the use on behalf of the Organisation of a listening device to listen to or record words, images, sounds or signals communicated by or to persons in those premises will, or is likely to, assist the Organisation in carrying out its function of obtaining intelligence relevant to security;

the Minister may, by warrant signed by the Minister, authorize the Organisation, subject to any conditions or restrictions that are specified in the warrant, to use a listening device for the purpose of listening to or recording words, images, sounds or signals communicated by or to any person while the person is in those premises and such a warrant may authorize the Organisation to enter those premises, or any other premises specified in the warrant from which words, images, sounds or signals communicated by or to any person while the person is in those first-mentioned premises can be listened to or recorded with the use of a listening device, for the purpose of installing, maintaining or using a listening device.

- (5) The warrant must:
-

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- (a) authorise the use of any force that is necessary and reasonable to do the things mentioned in subsections (3) and (4); 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.
- (6) A warrant under this section shall specify the period for which it is to remain in force, being a period not exceeding 6 months, but may be revoked by the Minister at any time before the expiration of the period so specified.
- (6A) If a listening device is installed in accordance with the warrant, the Organisation is authorised to do any of the following:
- (a) enter any premises for the purpose of recovering the listening device;
 - (b) recover the listening device;
 - (c) use any force that is necessary and reasonable to do either of the above;
- at the following time:
- (d) at any time while the warrant is in force or within 28 days after it ceases to be in force;
 - (e) if the listening device is not recovered at a time mentioned in paragraph (d)—at the earliest time, after the 28 days mentioned in that paragraph, at which it is reasonably practicable to do the things concerned.
- (7) Subsection (6) shall not be construed as preventing the issue of any further warrant.
- (8) Nothing in this section, or in a warrant under this section, applies to or in relation to the use of a listening device for a purpose that would, for the purposes of the *Telecommunications (Interception and Access) Act 1979*, constitute the interception of a communication passing over a telecommunications system operated by a carrier or a carriage service provider.

Section 26A

26A Unlawful and lawful uses of tracking devices

Unlawful use of tracking devices

- (1) Subject to subsection (2), it is unlawful for an officer, employee or agent of the Organisation to use a tracking device for the purpose of tracking a person or an object. It is the duty of the Director-General to take all reasonable steps to ensure that this subsection is not contravened.

Note: *Tracking device*, *track* and *object* are defined in subsection (3).

Lawful use of tracking device

- (2) Despite any law of a State or Territory, an officer, employee or agent of the Organisation does not act unlawfully, by using, for the purposes of the Organisation, a tracking device for the purpose of tracking a person or an object if:
- (a) the person, or the person using the object, consents to it being done; or
 - (b) the officer, employee or agent of the Organisation does so in accordance with a warrant issued under section 26B or 26C.

Definitions

- (3) In this section:

apply includes attach to or place on or in.

object means:

- (a) a vehicle, aircraft, vessel or other means of transportation; or
- (b) clothing or any other thing worn; or
- (c) any other thing.

track an object or person means be aware of the movement of the object or person from place to place.

tracking device means a device or substance that, when applied to an object, enables a person to track the object or a person using or wearing the object.

26B Tracking device warrants relating to persons

Issue of 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:
- (a) a person (the *subject*) is engaged in, or reasonably suspected by the Director-General of being engaged in or of being likely to engage in, activities prejudicial to security; and
 - (b) the use by the Organisation of a tracking device applied to any object (a *target object*) used or worn, or likely to be used or worn, by the subject to enable the Organisation to track the subject will, or is likely to, assist the Organisation in carrying out its function of obtaining intelligence relevant to security.

Note: *Tracking device, track, object* and *apply* are defined in subsection 26A(3).

Authorisation in warrant

- (3) The warrant:
- (a) must be signed by the Minister; and
 - (b) must authorise the Organisation, subject to any restrictions or conditions specified in the warrant, to use a tracking device applied to a target object for the purpose of tracking the subject, who must be specified in the warrant; and
 - (c) may authorise the Organisation to:
 - (i) enter any premises in which a target object is or is likely to be found, for the purpose of applying a tracking device to the target object, or using or maintaining a tracking device so applied; and
 - (ii) enter or alter a target object, for the purpose of applying, using or maintaining a tracking device; and
 - (iii) apply a tracking device to a target object; and

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- (iv) maintain a tracking device applied to a target object;
and
- (v) any other thing reasonably incidental to any of the
above.

Authorisation of entry measures

- (4) 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.

Duration of warrant

- (5) The warrant must specify the period during which it is to remain in
force. The period must not be more than 6 months, although the
Minister may revoke the warrant before the period has expired.

Issue of further warrants not prevented

- (6) Subsection (5) does not prevent the issue of any further warrant.

Tracking device may be recovered

- (7) If a tracking device is applied to a target object in accordance with
the warrant, the Organisation is authorised to do any of the
following:
 - (a) enter any premises in which the target object is or is likely to
be found, for the purpose of recovering the tracking device;
 - (b) enter or alter the target object for the purpose of recovering
the tracking device;
 - (c) recover the tracking device;
 - (d) use any force that is necessary and reasonable to do any of
the above;at the following time:
 - (e) at any time while the warrant is in force or within 28 days
after it ceases to be in force;
 - (f) if the tracking device is not recovered at a time mentioned in
paragraph (e)—at the earliest time, after the 28 days

mentioned in that paragraph, at which it is reasonably practicable to do the things concerned.

Interpretation

- (8) Expressions used in this section that are also used in section 26A have the same meanings as in that section.

26C Tracking device warrants relating to objects

Issue of 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:
- (a) an object (the *target object*) is used or worn, or likely to be used or worn by a person (whether or not his or her identity is known) engaged in or reasonably suspected by the Director-General of being engaged in or of being likely to engage in, activities prejudicial to security; and
 - (b) the use by the Organisation of a tracking device applied to the target object to enable the Organisation to track the target object will, or is likely to, assist the Organisation in carrying out its function of obtaining intelligence relevant to security.

Note: *Tracking device, track, object* and *apply* are defined in subsection 26A(3).

Authorisation in warrant

- (3) The warrant:
- (a) must be signed by the Minister; and
 - (b) must authorise the Organisation, subject to any restrictions or conditions specified in the warrant, to use a tracking device applied to the target object for the purpose of tracking the target object which must be specified in the warrant; and

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- (c) may authorise the Organisation to:
 - (i) enter any premises specified in the warrant in which the target object is, or is likely to be, found, for the purpose of applying a tracking device to the target object, or maintaining or using a tracking device so applied; and
 - (ii) enter or alter the target object, for the purpose of applying, maintaining or using a tracking device; and
 - (iii) apply a tracking device to the target object; and
 - (iv) maintain a tracking device applied to the target object; and
 - (v) any other thing reasonably incidental to any of the above.

Authorisation of entry measures

- (4) 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.

Duration of warrant

- (5) The warrant must specify the period during which it is to remain in force. The period must not be more than 6 months, although the Minister may revoke the warrant before the period has expired.

Issue of further warrants not prevented

- (6) Subsection (5) does not prevent the issue of any further warrant.

Tracking device may be recovered

- (7) If a tracking device is applied to a target object in accordance with the warrant, the Organisation is authorised to do any of the following:
 - (a) enter any premises in which the target object is or is likely to be found, for the purpose of recovering the tracking device;
 - (b) enter or alter the target object for the purpose of recovering the tracking device;

- (c) recover the tracking device;
- (d) use any force that is necessary and reasonable to do any of the above;

at the following time:

- (e) at any time while the warrant is in force or within 28 days after it ceases to be in force;
- (f) if the tracking device is not recovered at a time mentioned in paragraph (e)—at the earliest time, after the 28 days mentioned in that paragraph, at which it is reasonably practicable to do the things concerned.

Interpretation

- (8) Expressions used in this section that are also used in section 26A have the same meanings as in that section.

27 Inspection of postal articles

- (1) It is unlawful:
 - (a) for a person, being an officer, employee or agent of the Organisation acting in his or her capacity as such, to seek from the Australian Postal Corporation or from an employee or agent of that Corporation; or
 - (b) for that Corporation or an employee or agent of that Corporation to provide to such a person;

access to a postal article that is in the course of the post or information concerning the contents or cover of any postal article except in pursuance of, or for the purposes of, a warrant under this section or section 27A, and it is the duty of the Director-General to take all reasonable steps to ensure that this subsection is not contravened.

- (2) Where, upon receipt by the Minister of a request by the Director-General for the issue of a warrant under this section in relation to a person, the Minister is satisfied that:
 - (a) that person is engaged in or is reasonably suspected by the Director-General of being engaged in, or of being likely to engage in, activities prejudicial to security; and

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(b) access by the Organisation to postal articles posted by or on behalf of, addressed to or intended to be received by, that person, while the articles are in the course of the post, will, or is likely to, assist the Organisation in carrying out its function of obtaining intelligence relevant to security;

the Minister may, by warrant under his or her hand, authorize the Organisation to do such of the following acts and things as the Minister considers appropriate in the circumstances, namely, with respect to postal articles in the course of the post that were posted by or on behalf of, or are addressed to, that person or are reasonably suspected by a person authorized to exercise the authority of the Organisation under the warrant to be intended to be received by that person, to inspect, and make copies of, or of the covers of, the articles, and to open the articles and inspect and make copies of the contents of any such article.

(3) Where, upon receipt by the Minister of a request by the Director-General for the issue of a warrant under this section in relation to an address, the Minister is satisfied that:

(a) some or all of the postal articles that are being, or are likely to be, sent by post to that address are or will be intended to be received by a person (whether of known identity or not) engaged in, or reasonably suspected by the Director-General of being engaged in, or of being likely to engage in, activities prejudicial to security; and

(b) access by the Organisation to postal articles posted to that address and intended to be received by the person referred to in paragraph (a) will, or is likely to, assist the Organisation in carrying out its function of obtaining intelligence relevant to security;

the Minister may, by warrant under his or her hand, authorize the Organisation to do such of the following acts and things as the Minister considers appropriate in the circumstances, namely, with respect to postal articles in the course of the post that are addressed to that address and appear on their face to be, or are reasonably suspected by a person authorized to exercise the authority of the Organisation under the warrant to be, intended to be received by the person referred to in paragraph (a), to inspect, and make copies

- of, or of the covers of, the articles and to open the articles and inspect and make copies of the contents of any such article.
- (4) A warrant under this section shall specify the period for which it is to remain in force, being a period not exceeding 6 months, but may be revoked by the Minister at any time before the expiration of the period so specified.
- (5) Subsection (4) shall not be construed as preventing the issue of any further warrant.
- (6) Where the Director-General is informed under section 32 of the issue of a warrant under this section, the Director-General must:
- (a) cause the Australian Postal Corporation to be informed of the issue of the warrant without delay; and
 - (b) where, under section 32, the Director-General receives the warrant—cause a certified copy of the warrant to be given to the Australian Postal Corporation as soon as practicable.
- (6A) Where:
- (a) the Director-General has been informed under section 32 of the issue of a warrant under this section; and
 - (b) the Director-General is informed under that section that the warrant has been revoked;
- the Director-General must:
- (c) cause the Australian Postal Corporation to be informed of the revocation without delay; and
 - (d) where, under section 32, the Director-General receives the instrument of revocation—cause a certified copy of the instrument of revocation to be given to the Australian Postal Corporation as soon as practicable.
- (7) The Australian Postal Corporation shall give to a person acting in pursuance of a warrant under this section all reasonable assistance.

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- (8) Nothing in Part VIIA of the *Crimes Act 1914* or the *Australian Postal Corporation Act 1989* shall be taken to prohibit the doing of anything in pursuance of, or for the purposes of, a warrant under this section.
- (9) Nothing in subsection (1) applies in relation to a postal article addressed to, or appearing to be intended to be received by or on behalf of, the Organisation.
- (10) In this section:
- address* means any premises or place (including a post office box or bag service) to which postal articles may be addressed.
- agent*, in relation to the Australian Postal Corporation, includes any person performing services for that Corporation otherwise than under a contract of service and an employee of such a person.

27AA Inspection of delivery service articles

Unlawful access to delivery service articles

- (1) It is unlawful for:
- (a) an officer, employee or agent of the Organisation, for the purposes of the Organisation, to seek from a delivery service provider or from an employee or agent of a delivery service provider; or
- (b) a delivery service provider or an employee or agent of a delivery service provider to give an officer, employee or agent of the Organisation, for the purposes of the Organisation;
- access to:
- (c) an article that is being delivered by the delivery service provider; or
- (d) information concerning the contents or cover of any such article;

except in accordance with, or for the purposes of, a warrant under this Division. It is the duty of the Director-General to take all reasonable steps to ensure that this subsection is not contravened.

Note: *Delivery service provider, agent and article* are defined in subsection (12).

Issue of delivery services warrant

- (2) If the Director-General requests the Minister to do so, and the Minister is satisfied as mentioned in subsection (3) or (6), the Minister may issue a warrant in accordance with this section.

Test 1 for issue of warrant

- (3) The Minister may issue a warrant if he or she is satisfied that:
- (a) a person (the *subject*) is engaged in or is reasonably suspected by the Director-General of being engaged in, or of being likely to engage in, activities prejudicial to security; and
 - (b) access by the Organisation to articles sent by or on behalf of, addressed to or intended to be received by, the subject while the articles are being delivered by a delivery service provider, will, or is likely to, assist the Organisation in carrying out its function of obtaining intelligence relevant to security.

Authorisation in warrant

- (4) 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 articles that:
- (a) are being delivered by the delivery service provider; and
 - (b) in respect of which any of the following are satisfied:
 - (i) the articles have been sent by or on behalf of the subject, who must be specified in the warrant, or addressed to the subject; or
 - (ii) the articles are reasonably suspected, by a person authorised to exercise the authority of the Organisation under the warrant, of having been so sent or addressed; or
 - (iii) the articles are intended to be received by the subject, who must be specified in the warrant, or are reasonably suspected, by a person authorised to exercise the

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authority of the Organisation under the warrant, of being intended to be received by the subject.

Things that may be specified for a warrant issued under subsection (3)

- (5) The things that may be specified are any of the following that the Minister considers appropriate in the circumstances:
- (a) inspecting or making copies of the articles or the covers of the articles;
 - (b) opening the articles;
 - (c) inspecting and making copies of the contents of the articles;
 - (d) any other thing reasonably incidental to any of the above.

Test 2 for issue of warrant

- (6) The Minister may issue a warrant if he or she is satisfied that:
- (a) some or all of the articles that are being, or are likely to be, sent by a delivery service provider to an address (the *subject address*) are, or will be intended to be, received by a person (the *subject*) (whether of known identity or not) engaged in, or reasonably suspected by the Director-General of being engaged in, or of being likely to engage in, activities prejudicial to security; and
 - (b) access by the Organisation to articles sent to, or intended to be received by, the subject while the articles are being delivered by a delivery service provider will, or is likely to, assist the Organisation in carrying out its function of obtaining intelligence relevant to security.

Authorisation in warrant

- (7) 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 articles that:
- (a) are being delivered by the delivery service provider; and
 - (b) are addressed to the subject address, which must be specified in the warrant; and

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- (c) appear on their face to be, or are reasonably suspected by a person authorised to exercise the authority of the Organisation under the warrant to be, intended to be received by the subject.

Things that may be specified for warrant issued under subsection (6)

- (8) The things that may be specified are any of the following that the Minister considers appropriate in the circumstances:
 - (a) inspecting or making copies of any of the articles or the covers of the articles;
 - (b) opening any of the articles;
 - (c) inspecting and making copies of the contents of any of the articles;
 - (d) any other thing reasonably incidental to any of the above.

Duration of warrant

- (9) A warrant issued under this section must specify the period during which it is to remain in force. The period must not be more than 6 months, although the Minister may revoke the warrant before the period has expired.

Issue of further warrants not prevented

- (10) Subsection (9) does not prevent the issue of any further warrant.

Definitions

- (11) To avoid doubt, the expression *deliver* an article includes any thing done by the deliverer, for the purpose of delivering the article, from the time when the article is given to the deliverer by the sender until it is given by the deliverer to the recipient.
- (12) In this section:
 - agent*, in relation to a delivery service provider, includes:
 - (a) any person performing services for the delivery service provider otherwise than under a contract of service; and
 - (b) an employee of the person mentioned in paragraph (a).

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article means any object reasonably capable of being sent through the post.

delivery service provider means a person whose business is or includes delivering articles.

27A Warrants for the performance of functions under paragraph 17(1)(e)

(1) Where:

- (a) the Director-General gives a notice in writing to the Minister (the *issuing Minister*) requesting the issuing Minister to issue a warrant under this section in relation to premises, a person, a computer or a thing identified in the notice authorising the Organisation to do acts or things referred to in whichever of subsections 25(4) or (5), 25A(4), 26(3) or (4), 26B(3), 26C(3), 27(2) or (3) or 27AA(5) or (8) is or are specified in the notice for the purpose of obtaining foreign intelligence relating to a matter specified in the notice; and
- (b) the issuing Minister is satisfied, on the basis of advice received from the Defence Minister or the Foreign Affairs Minister, that the collection of foreign intelligence relating to that matter is in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being;

the issuing Minister may, by warrant under his or her hand, authorise the Organisation, subject to any conditions or restrictions that are specified in the warrant, to do such of those acts or things in relation to those premises, that person, that computer or those things as the issuing Minister considers appropriate in the circumstances and are specified in the warrant for the purpose of obtaining that intelligence.

(2) The warrant must:

- (a) authorise the use of any force that is necessary and reasonable to do the things mentioned in subsection (1); 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.

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- (3) A warrant under this section shall specify the period for which it is to remain in force, being a period not exceeding:
- (a) in a case where the warrant authorises the doing of acts or things referred to in subsection 25(4) or (5)—90 days;
 - (b) in a case where the warrant authorises the doing of acts or things referred to in subsection 25A(4), 26(3) or (4), 26B(3), 26C(3), 27(2) or (3) or 27AA(5) or (8)—6 months;
- but may be revoked by the issuing Minister at any time before the end of the period so specified.
- (3A) If a listening device is installed in accordance with a warrant under this section authorising the doing of acts referred to in subsection 26(3) or (4), the Organisation is authorised to do any of the following:
- (a) enter any premises for the purpose of recovering the listening device;
 - (b) recover the listening device;
 - (c) use any force that is necessary and reasonable to do either of the above;
- at the following time:
- (d) at any time while the warrant is in force or within 28 days after it ceases to be in force;
 - (e) if the listening device is not recovered at a time mentioned in paragraph (d)—at the earliest time, after the 28 days mentioned in that paragraph, at which it is reasonably practicable to do the things concerned.
- (3B) If a tracking device is applied to a target object in accordance with a warrant under this section authorising the doing of acts referred to in subsection 26B(3) or 26C(3), the Organisation is authorised to do any of the following:
- (a) enter any premises in which the target object is or is likely to be found, for the purpose of recovering the tracking device;
 - (b) enter or alter the target object for the purpose of recovering the tracking device;
 - (c) recover the tracking device;
 - (d) use any force that is necessary and reasonable to do any of the above;

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at the following time:

- (e) at any time while the warrant is in force or within 28 days after it ceases to be in force;
 - (f) if the tracking device is not recovered at a time mentioned in paragraph (e)—at the earliest time, after the 28 days mentioned in that paragraph, at which it is reasonably practicable to do the things concerned.
- (4) Subsection (3) shall not be construed as preventing the issue of any further warrant.
- (5) Nothing in this section, or in a warrant under this section, applies to or in relation to the use of a listening device for a purpose that would, for the purposes of the *Telecommunications (Interception and Access) Act 1979*, constitute the interception of a communication passing over a telecommunications system operated by a carrier or a carriage service provider.
- (6) Where the Director-General is informed under section 32 of the issue of a warrant under this section authorising the doing of acts or things referred to in subsection 27(2) or (3), the Director-General must:
- (a) cause the Australian Postal Corporation to be informed of the issue of the warrant without delay; and
 - (b) where, under section 32, the Director-General receives the warrant—cause a certified copy of the warrant to be given to the Australian Postal Corporation as soon as practicable.
- (6A) Where:
- (a) the Director-General has been informed under section 32 of the issue of a warrant under this section authorising the doing of acts or things referred to in subsection 27(2) or (3); and
 - (b) the Director-General is informed under section 32 that the warrant has been revoked;
- the Director-General must:
- (c) cause the Australian Postal Corporation to be informed of the revocation without delay; and
 - (d) where, under section 32, the Director-General receives the instrument of revocation—cause a certified copy of the

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instrument of revocation to be given to the Australian Postal Corporation as soon as practicable.

- (7) The Australian Postal Corporation shall give to a person acting pursuant to a warrant under this section authorising the doing of acts or things referred to in subsection 27(2) or (3) all reasonable assistance.
- (8) Nothing in Part VIIA of the *Crimes Act 1914* or the *Australian Postal Corporation Act 1989* shall be taken to prohibit the doing of anything pursuant to, or for the purposes of, a warrant under this section.
- (9) The Director-General shall not request the issue of a warrant under this section for the purpose of collecting information concerning an Australian citizen or a permanent resident.
- (10) The reference in subsection (1) to conditions or restrictions includes a reference to conditions or restrictions designed to minimise the obtaining by the Organisation, pursuant to a warrant issued under that subsection, of information that is not publicly available concerning Australian citizens or permanent residents, or to minimise the retention of information of that kind.

27B Performance of other functions under paragraph 17(1)(e)

If:

- (a) the Director-General gives a notice in writing to the Minister (the *authorising Minister*) requesting the authorising Minister to authorise the Organisation to obtain foreign intelligence in relation to a matter specified in the notice; and
- (b) the authorising Minister is satisfied, on the basis of advice received from the Defence Minister or the Foreign Affairs Minister, that the collection of foreign intelligence relating to that matter is in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being;

the authorising Minister may, by writing signed by the authorising Minister, authorise the Organisation to obtain the intelligence in relation to the matter.

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28 Request for warrant to specify grounds

A request by the Director-General for the issue of a warrant under this Division shall specify the facts and other grounds on which the Director-General considers it necessary that the warrant should be issued and (where appropriate) the grounds on which the Director-General suspects a person of being engaged in, or of being likely to engage in, activities prejudicial to security.

29 Issue of certain warrants by Director-General in emergency

(1) Where:

- (a) the Director-General has forwarded or made a request to the Minister for the issue of a warrant under section 25, 25A, 26, 26B, 26C, 27 or 27AA;
- (b) the Minister has not, to the knowledge of the Director-General, issued, or refused to issue, a warrant as a result of the request and has not, within the preceding period of 3 months, refused to issue a substantially similar warrant;
- (c) the Director-General has not, within the preceding period of 3 months, issued a substantially similar warrant; and
- (d) the Director-General is satisfied:
 - (i) that the facts of the case would justify the issue of a warrant by the Minister; and
 - (ii) that, if the action to be authorized by the warrant does not commence before a warrant can be issued and made available by the Minister, security will be, or is likely to be, seriously prejudiced;

the Director-General may issue a warrant signed by the Director-General of the kind that could be issued by the Minister in pursuance of the request.

- (2) A warrant under this section shall specify the period for which it is to remain in force, being a period that does not exceed 48 hours, but may be revoked by the Minister at any time before the expiration of the period so specified.
- (3) Where the Director-General issues a warrant under this section, the Director-General shall forthwith furnish to the Minister:

- (a) a copy of the warrant; and
 - (b) a statement of the grounds on which the Director-General is satisfied as to the matter referred to in subparagraph (1)(d)(ii).
- (4) The Director-General must, within 3 working days after issuing a warrant under this section, give a copy of the warrant to the Inspector-General of Intelligence and Security.

30 Discontinuance of action before expiration of warrant

Where, before a warrant under this Division ceases to be in force, the Director-General is satisfied that the grounds on which the warrant was issued have ceased to exist, the Director-General shall forthwith inform the Minister accordingly and take such steps as are necessary to ensure that action in pursuance of the warrant (other than the recovery of a listening device or tracking device) is discontinued.

31 Certain records obtained under a warrant to be destroyed

Where:

- (a) by virtue of a warrant under this Division, a record or copy has been made;
- (b) the record or copy is in the possession or custody, or under the control, of the Organisation; and
- (c) the Director-General is satisfied that the record or copy is not required for the purposes of the performance of functions or exercise of powers under this Act;

the Director-General shall cause the record or copy to be destroyed.

32 Certain action in relation to requests and warrants

- (1) Where the Director-General makes a request, otherwise than in writing, for the issue of a warrant under this Division, the Director-General shall forthwith forward to the Minister a request in writing for the issue of a warrant.

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- (2) Where the Minister issues or revokes a warrant under this Division, the Minister shall:
 - (a) cause the Director-General to be informed forthwith of the issue of the warrant or of the revocation, as the case may be; and
 - (b) cause the warrant or the instrument of revocation, as the case may be, to be forwarded as soon as practicable to the Director-General.
- (3) The Minister shall record on each request in writing for the issue of a warrant under this Division received by the Minister from the Director-General the Minister's decision with respect to the request and shall cause the request to be returned to the Director-General.
- (4) The Director-General shall cause to be retained in the records of the Organisation all warrants issued by the Director-General under this Division and all warrants and instruments of revocation received by the Director-General from, and all requests and other documents returned to the Director-General by, the Minister under this Division.

34 Director-General to report to Minister

The Director-General shall furnish to the Minister in respect of each warrant issued under this Division a report in writing on the extent to which the action taken under the warrant has assisted the Organisation in carrying out its functions.



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but may be revoked by the Attorney-General at any time before the expiration of the period so specified.

- (4) Where the Director-General of Security issues a warrant under this section, he or she shall forthwith furnish to the Attorney-General:
 - (a) a copy of the warrant; and
 - (b) a statement of the grounds on which he or she is satisfied as to the matters referred to in subparagraph (1)(d)(ii).
- (5) The Director-General must, within 3 working days after issuing a warrant under this section, give a copy of the warrant to the Inspector-General of Intelligence and Security.

11A Telecommunications service warrant for collection of foreign intelligence

- (1) Where:
 - (a) the Director-General of Security gives a notice in writing to the Attorney-General requesting the Attorney-General to issue a warrant under this section authorising persons approved under section 12 in respect of the warrant to do acts or things referred to in subsection 9(1) in relation to a particular telecommunications service for the purpose of obtaining foreign intelligence relating to a matter specified in the notice; and
 - (b) the Attorney-General is satisfied, on the basis of advice received from the Minister for Defence or the Minister for Foreign Affairs, that the collection of foreign intelligence relating to that matter is in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being;

the Attorney-General may, by warrant under his or her hand, authorise persons approved under section 12 in respect of the warrant, subject to any conditions or restrictions that are specified in the warrant, to do such of those acts or things in relation to that telecommunications service as the Attorney-General considers appropriate in the circumstances and are specified in the warrant, for the purpose of obtaining that intelligence.

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- (2) A request by the Director-General of Security for the issue of a warrant under this section:
- (a) shall include a description of the service sufficient to identify it, including:
 - (i) the name, address and occupation of the subscriber (if any) to the service; and
 - (ii) the number (if any) allotted to the service by a carrier; and
 - (b) shall specify the facts and other grounds on which the Director-General of Security considers it necessary that the warrant should be issued.

Note: Warrants are obtained under this section for the purpose of performing the function set out in paragraph 17(1)(e) of the *Australian Security Intelligence Organisation Act 1979*.

11B Named person warrant for collection of foreign intelligence

- (1) The Attorney-General may, under his or her hand, issue a warrant in respect of a person if:
- (a) the Director-General of Security gives a notice in writing to the Attorney-General requesting the Attorney-General to issue a warrant under this section authorising persons approved under section 12 in respect of the warrant to do acts or things referred to in subsection 9A(1A) in relation to:
 - (i) communications that are being made to or from any telecommunications service that a person or foreign organisation is using, or is likely to use; or
 - (ii) communications that are being made by means of a particular telecommunications device or particular telecommunications devices that a person or foreign organisation is using, or is likely to use;for the purpose of obtaining foreign intelligence relating to a matter specified in the notice; and
 - (b) the Attorney-General is satisfied, on the basis of advice received from the Minister for Defence or the Minister for Foreign Affairs, that:
 - (i) the obtaining of foreign intelligence relating to that matter is in the interests of Australia's national security,

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Australia's foreign relations or Australia's national economic well-being; and

- (ii) it is necessary to intercept the communications of the person or foreign organisation in order to obtain the intelligence referred to in paragraph (a); and
 - (iii) relying on a telecommunications service warrant to obtain the intelligence would be ineffective.
- (1A) The warrant authorises persons approved under section 12 in respect of the warrant to intercept, subject to any conditions or restrictions that are specified in the warrant:
- (a) communications that are being made to or from any telecommunications service that the person or foreign organisation is using, or is likely to use; or
 - (b) communications that are being made by means of a telecommunications device or telecommunications devices, identified in the warrant, that the person or foreign organisation is using, or is likely to use.
- Note: Subsection (3) restricts the issuing of a warrant authorising interception of communications made by means of a telecommunications device or telecommunications devices identified in the warrant.
- (1B) The warrant may authorise entry on any premises specified in the warrant for the purpose of installing, maintaining, using or recovering any equipment used to intercept such communications.
- (2) A request by the Director-General of Security for the issue of a warrant in respect of a person or foreign organisation:
- (a) must include the name or names by which the person or organisation is known; and
 - (b) must include details (to the extent these are known to the Director-General of Security) sufficient to identify the telecommunications services the person or foreign organisation is using, or is likely to use; and
 - (ba) if the warrant would authorise interception of communications made by means of a telecommunications device or telecommunications devices identified in the warrant—must include details (to the extent these are known to the Director-General of Security) sufficient to identify the

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Part 2-2 Warrants authorising the Organisation to intercept telecommunications

Section 11C

telecommunications device or telecommunications devices that the person is using, or is likely to use; and

- (c) must specify the facts and other grounds on which the Director-General of Security considers it necessary that the warrant should be issued.

- (3) The Attorney-General must not issue a warrant that authorises interception of communications made by means of a telecommunications device or telecommunications devices identified in the warrant unless he or she is satisfied that:
- (a) there are no other practicable methods available to the Organisation at the time of making the application to identify the telecommunications services used, or likely to be used, by the person or foreign organisation in respect of whom or which the warrant would be issued; or
 - (b) interception of communications made to or from a telecommunications service used, or likely to be used, by that person or foreign organisation would not otherwise be practicable.

Note: Warrants are obtained under this section for the purpose of performing the function set out in paragraph 17(1)(e) of the *Australian Security Intelligence Organisation Act 1979*.

11C Foreign communications warrant for collection of foreign intelligence

- (1) Where:
- (a) the Director-General of Security gives a notice in writing to the Attorney-General requesting the Attorney-General to issue a warrant under this section authorising persons approved under section 12 in respect of the warrant to intercept foreign communications for the purpose of obtaining foreign intelligence relating to a matter specified in the notice; and
 - (b) the Attorney-General is satisfied, on the basis of advice received from the Minister for Defence or the Minister for Foreign Affairs, that:
 - (i) the collection of foreign intelligence relating to that matter is in the interests of Australia's national security,

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Australia's foreign relations or Australia's national economic well-being; and

- (ii) it is necessary to intercept foreign communications in order to collect the intelligence referred to in paragraph (a); and
- (iii) relying on a telecommunications service warrant or a named person warrant to obtain the intelligence would be ineffective;

the Attorney-General may, by warrant under his or her hand, authorise persons approved under section 12 in respect of the warrant, subject to any conditions or restrictions that are specified in the warrant, to intercept foreign communications for the purpose of obtaining that intelligence.

- (2) A warrant under subsection (1) must not authorise the interception of any communications except foreign communications.
- (3) A request by the Director-General of Security for the issue of a warrant under this section must:
 - (a) include a description that is sufficient to identify the part of the telecommunications system that is likely to carry the foreign communications whose interception is sought; and
 - (b) specify the facts and other grounds on which the Director-General of Security considers it necessary that the warrant should be issued, including the reasons the information cannot be collected by other means.
- (4) A warrant under this section must include:
 - (a) a notice addressed to the carrier who operates the relevant telecommunications system, giving a description that is sufficient to identify the part of the telecommunications system that is covered by the warrant; and
 - (b) a notice addressed to the Director-General of Security stating that the warrant authorises the obtaining of foreign intelligence only for purposes relating to the matter specified in the notice requesting the issue of the warrant.
- (5) Where:
 - (a) a communication is intercepted under a warrant under this section; and

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- (b) the Director-General of Security is satisfied that the communication is not relevant to the purposes specified in the warrant;

the Director-General of Security must cause any record or copy of the communication to be destroyed.

Note: Warrants are obtained under this section for the purpose of performing the function set out in paragraph 17(1)(e) of the *Australian Security Intelligence Organisation Act 1979*.

11D Provisions applying to foreign intelligence warrants

Warrants authorising entry

- (1) Where a warrant under section 11A or 11B authorises entry on premises, the warrant:
 - (a) must state whether entry is authorised to be made at any time of the day or night or only during specified hours; and
 - (b) may, if the Attorney-General thinks fit—provide that entry may be made without permission first being sought or demand first being made, and may authorise measures that he or she is satisfied are necessary for that purpose.

Length of time warrant remains in force

- (2) A warrant under section 11A, 11B or 11C must specify the period for which it is to remain in force. The period must not exceed 6 months, and the warrant may be revoked by the Attorney-General at any time before the end of the specified period.

Issue of further warrant

- (3) Subsection (2) does not prevent the issue of a further warrant in respect of a telecommunications service, a person or a part of a telecommunications system (as the case may be) in relation to which or whom a warrant has, or warrants have, previously been issued.

Part 10.6 of the Criminal Code

- (4) Nothing in Part 10.6 of the *Criminal Code* is to be taken to prohibit the doing of anything under, or for the purposes of, a warrant under section 11A, 11B or 11C.

Note: Part 10.6 of the *Criminal Code* deals with offences relating to telecommunications.

Information about Australian citizens or permanent residents

- (5) The Director-General must not request the issue of a warrant under section 11A, 11B or 11C for the purpose of collecting information concerning an Australian citizen or permanent resident.
- (6) The reference in subsection 11A(1), 11B(1) and 11C(1) to **conditions or restrictions** includes a reference to conditions or restrictions designed to minimise:
- (a) the obtaining by the Organisation, pursuant to a warrant issued under section 11A, 11B or 11C (as the case may be), of information that is not publicly available concerning Australian citizens or permanent residents; or
 - (b) the retention of information of that kind.

12 Persons authorised to intercept communications for Organisation

The Director-General of Security, or an officer of the Organisation appointed by the Director-General of Security, in writing, to be an authorizing officer for the purposes of this subsection, may, by writing under his or her hand, approve officers and employees of the Organisation and other persons as persons authorized to exercise, on behalf of the Organisation, the authority conferred by Part 2-2 warrants.

13 Discontinuance of interception before expiration of warrant

Where, before a Part 2-2 warrant ceases to be in force, the Director-General of Security is satisfied that the grounds on which the warrant was issued have ceased to exist, he or she shall forthwith inform the Attorney-General accordingly and take such steps that are necessary to ensure that the interception of communications under the warrant is discontinued.

Attorney-General's Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its function of obtaining, correlating, evaluating and communicating intelligence relevant to security (including politically motivated violence)

1 Authority for Guidelines

1.1 These guidelines are given by the Attorney-General to the Director-General of Security (the Director-General) under subsections 8A(1) and 8A(2) of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act) and are to be observed by ASIO in the performance of its functions relating to:

- (a) the obtaining, correlating, evaluating and communicating of intelligence relevant to security; and
- (b) politically motivated violence.

2 ASIO's functions

2.1 ASIO's functions are specified in the ASIO Act (section 17). These are:

- (a) to obtain, correlate and evaluate intelligence relevant to security;
- (b) for purposes relevant to security and not otherwise, 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 the ASIO Act or section 11A, 11B or 11C of the *Telecommunications (Interception and Access) Act 1979*, and to communicate any such intelligence in accordance with the ASIO Act or the *Telecommunications (Interception and Access) Act 1979*.

2.2 "Security" is defined as:

(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

(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).

2.3 Other important statutory provisions include section 17A and section 20 of the ASIO Act:

Section 17A:

This Act shall not limit the right of persons to engage in lawful advocacy, protest or dissent, and the exercise of that right shall not by itself, be regarded as prejudicial to security, and the functions of the Organisation shall be construed accordingly.

Section 20:

The Director-General shall take all reasonable steps to ensure that:

(a) the work of the Organisation is limited to what is necessary for the purposes of the discharge of its functions; and

(b) the Organisation is kept free from any influences or considerations not relevant to its functions and nothing is done that might lend colour to any suggestion that it is concerned to further or protect the interests of any particular section of the community, or with any matters other than the discharge of its functions.

3 Governing Principles

3.1 ASIO works to provide timely advice on threats to the security of Australia, the Australian people, and Australian interests, whether in or outside Australia.

3.2 ASIO's security functions are concerned with protection and are anticipatory in nature. ASIO therefore investigates known threats to security, and endeavours to identify persons, groups or entities that may present a risk to security that previously have not been identified.

3.3 ASIO implements measures or arrangements, as far as is reasonably possible, to ensure that the information it relies upon is reliable and accurate.

4 Interpretation

4.1 In these guidelines:

(a) "activities relevant to security" means not only physical acts of the sort specified in the definition of security, but also includes the acts of conspiring, planning, organising, counselling, advising, financing, or otherwise advocating or encouraging the doing of those things;

(b) "activities prejudicial to security" means activities that are relevant to security and which can reasonably be considered capable of causing damage or harm to Australia, the Australian people, or Australian interests, or to foreign countries to which Australia has responsibilities;

(c) "subject" means a person, group or other entity;

(d) "inquiry" means action taken to obtain information:

(i) for the purpose of identifying a subject and/or determining whether the activities of a subject could be relevant to security; or

(ii) as part of an investigation; and

(e) "investigation" means a concerted series of inquiries in relation to a subject where it has been determined that the activities of the subject could be relevant to security.

5 Security Assessments

5.1 The furnishing by ASIO of security assessments to Commonwealth agencies is governed by Part IV of the ASIO Act. Where it is necessary to conduct an investigation to obtain new information relevant to a security assessment, such an investigation shall be conducted in accordance with these guidelines.

6 Obtaining Intelligence Relevant to Security

6.1 ASIO's functions require it:

(a) to undertake inquiries to determine whether a particular subject or activity is relevant to security;

(b) to investigate subjects and activities relevant to security;

(c) to develop and maintain a broad understanding of the security environment; and

(d) to analyse and assess information obtained, and to provide intelligence and advice to relevant authorities.

6.2 In performing its functions ASIO may:

(a) collect, maintain, analyse and assess information related to inquiries and investigations;

(b) collect and maintain a comprehensive body of reference material to contextualise intelligence derived from inquiries and investigations; and

(c) maintain a broad database, based on the above, against which information obtained in relation to a specific inquiry or investigation can be checked and assessed.

6.3 The Director-General is responsible for deciding ASIO's intelligence collection, analysis and assessment priorities (subject to section 8 of the ASIO Act).

7 Investigations

7.1 The Director-General is responsible for determining ASIO's subjects for investigation (subject to section 8 of the ASIO Act).

7.2 ASIO is not required to investigate every instance of activities relevant to security. Decisions to initiate investigations shall be based on a consideration of the extent to which the activities of a subject will, or are likely to, cause harm or damage, ASIO's overall priorities, and the availability of appropriate resources.

8 Authorisation of Inquiries and Investigations

8.1 Subject to paragraph 10.4(c), the initiation and continuation of investigations shall be authorised only by the Director-General, or an officer at or above Executive Level 2 authorised by the Director-General for that purpose.

8.2 The Director-General will establish processes to ensure that all requests for information from external agencies are authorised at an appropriate level.

9 Bases for Investigations

9.1 In deciding whether to conduct an investigation, and the investigative methods to be used, ASIO shall consider:

- (a) what is already known about the subject's activities, associations and beliefs, and the extent to which those activities, associations and beliefs are, or are likely to be, relevant or prejudicial to security;
- (b) the immediacy and severity of the threat to security;
- (c) the reliability of the sources of the relevant information; and
- (d) subject to paragraph 10.4, the investigative techniques that are likely to be most effective.

10 Conduct of Inquiries and Investigations

10.1 Information obtained by ASIO is "relevant to security" where it may assist in determining whether:

- (a) there is a connection or possible connection between a subject and activities relevant to security, irrespective of when such activities have occurred or may occur;
- (b) the activities of a subject are not relevant to security; or
- (c) a person, group or entity other than the subject has a connection or possible connection to activities relevant to security.

10.2 The purpose of an ASIO inquiry or investigation should generally be to obtain information concerning the nature of any activities of a person or group which may be relevant to security, including their intentions and capabilities.

10.3 Information collected may include:

- (a) the identity and relevant activities of individuals and groups of interest, including persons associated with the group of interest and of other persons likely to be knowingly concerned in furtherance of its plans or activities; and
- (b) the finances, the geographic dimensions, and the past, present and prospective activities of the individuals or groups.

10.4 Information is to be obtained by ASIO in a lawful, timely and efficient way, and in accordance with the following:

- (a) any means used for obtaining information must be proportionate to the gravity of the threat posed and the probability of its occurrence;
- (b) inquiries and investigations into individuals and groups should be undertaken:
 - (i) using as little intrusion into individual privacy as is possible, consistent with the performance of ASIO's functions; and
 - (ii) with due regard for the cultural values, mores and sensitivities of individuals of particular cultural or racial backgrounds, consistent with the national interest;
- (c) the more intrusive the investigative technique, the higher the level of officer that should be required to approve its use;
- (d) wherever possible, the least intrusive techniques of information collection should be used before more intrusive techniques; and
- (e) where a threat is assessed as likely to develop quickly, a greater degree of intrusion may be justified.

11 Review of Investigations

11.1 Investigations are to be reviewed no less than annually.

11.2 Where an inquiry or investigation concludes that a subject's activities are not, or are no longer, relevant to security, the records of that inquiry or investigation shall be destroyed under disposal schedules agreed to between ASIO and the National Archives of Australia.

12 Advice to the Attorney-General

12.1 The Director-General shall keep the Attorney-General advised, in general terms, of ASIO's investigations and priorities through:

- (a) regular briefings to the Attorney-General on ASIO's investigations, significant developments in relation to important subjects, and the emergence of new subjects; and
- (b) other means as necessary.

Note 1: Under the ASIO Act, and the *Telecommunications (Interception and Access) Act 1979* (the T(I&A) Act), all ASIO warrants (other than questioning warrants issued under Part III, Division 3 of the ASIO Act) are issued by the Attorney-General, and ASIO is required to report to the Attorney-General on the extent to which the action taken under every warrant has assisted the

Organisation in carrying out its functions (section 34 of the ASIO Act and section 17 of the T(I&A) Act).

Note 2: Section 21 of the ASIO Act requires the Director-General to consult regularly with the Leader of the Opposition in the House of Representatives for the purpose of keeping him or her informed on matters relating to security.

13 Treatment of Personal Information

13.1 ASIO shall only collect, use, handle or disclose personal information for purposes connected with its statutory functions.

13.2 The Director-General shall take all reasonable steps to ensure that personal information shall not be collected, used, handled or disclosed by ASIO unless that collection, use, handling or disclosure is reasonably necessary for the performance of its statutory functions (or as otherwise authorised, or required, by law).

13.3 The Director-General shall ensure that all reasonable steps are taken to ensure that personal information held, used or disclosed by ASIO is accurate and not misleading.

13.4 Appropriate records shall be kept of all requests made by ASIO for access to personal information and all personal information received in response to such requests. Such records shall be open to inspection by the Inspector-General of Intelligence and Security.

13.5 Appropriate records shall be kept of all communication by ASIO of personal information for purposes relevant to security or as otherwise authorised. Such records shall be open to inspection by the Inspector-General of Intelligence and Security.

13.6 The Director-General shall ensure that all personal information collected or held by ASIO is protected by reasonable security measures against loss and unauthorised access, use or modification.

14 Politically Motivated Violence (PMV) - legislative definitions

14.1 Key legislative provisions relating to PMV are:

(a) the definition of "politically motivated violence" in section 4 of the ASIO Act; and

(b) section 17A which provides that the ASIO Act is not concerned with lawful advocacy, protest, or dissent (paragraph 2.3 above).

14.2 "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.

15 Interpreting PMV

Sub-paragraph (a) of the definition of PMV

15.1 The activity comprehended by sub-paragraph (a) of the definition of PMV includes terrorism, and violent protest that has a political objective. In performing its functions in relation to sub-paragraph (a) of the definition of PMV, ASIO should give priority to persons or groups likely to be involved in:

(a) acts or threats of serious violence or unlawful harm designed to create fear or to incite or provoke violent reaction; or

(b) the use of tactics that can reasonably be assessed as likely to result in violence;

in order to achieve a political objective.

15.2 The above considerations apply whether the object of the violence or threat is the government of the Commonwealth, a State or Territory, or the government of a foreign country with which Australia has responsibilities in relation to security matters, or the people of Australia or Australian interests within Australia and overseas. Where acts or threats occur within a State or Territory and appear wholly designed to influence the policy or acts of the State or Territory government, ASIO is to inform the Attorney-General of any decision taken to investigate such acts or threats.

Sub-paragraph (b) of the definition of PMV

15.3 In performing its functions in relation to sub-paragraph (b) of the definition of PMV, ASIO is to investigate whether a person or a group actively holds to, advocates or encourages a doctrine, or pursues political objectives in which advocacy of the use of violence is accepted for the purpose of overthrowing, destroying or assisting in the overthrow or destruction of a government or the constitutional system of government of the Commonwealth, or a State or Territory.

15.4 Whether it is probable that the activity will succeed in its purpose, and whether the intent is for imminent or future activity are matters which ASIO should take into account in setting its priorities. However, these considerations of probability of success or imminence of violence are not factors which of themselves determine whether the act is PMV.

15.5 A person or group need not intend to initiate violence in the process of overthrowing constitutional government for their activities to be assessed as PMV under sub-paragraph (b). It is sufficient if the activities could lead to violence. All that is required is there is a reasonable likelihood that the activity will produce violence from others.

15.6 Advocacy of violence may come within sub-paragraph (b) of the definition of PMV even though it is not itself unlawful, or the advocacy is not public. Of their very nature, preparations directed at the overthrow of government are likely to be clandestine and their early manifestations are deceptive.

15.7 If apparently non-violent activities directed at destabilising or undermining constitutional government are associated with what purports to be no more than contemplation of the prospect of the violent overthrow of government, ASIO may investigate those activities to the extent necessary to establish (with some confidence) whether the activities involve a real risk or danger that violence will flow from those activities.

Sub-paragraphs (ba) and (c) of the definition of PMV

15.8 These sub-paragraphs refer to activities that are criminal offences. Any activity which constitutes a criminal offence under the legislation specified is an act of PMV.

Sub-paragraph (d) of the definition of PMV

15.9 Sub-paragraph (d) of the definition of PMV refers to attacks on the persons, official premises and private accommodation of certain defined persons and provides for the Attorney-General to add to those defined persons by notice in writing to the Director-General.

15.10 The categories of persons defined by sub-paragraph (d) of the definition of PMV include internationally protected persons as defined by the *Crimes (Internationally Protected Persons) Act 1976*. Any activity which constitutes a criminal offence under this legislation is an act of PMV.

15.11 Sub-paragraph (d) also provides for the Attorney-General to add other defined persons by notice in writing to the Director-General. That latter category will vary from time to time, but could include:

- (a) Ministers of the Commonwealth Government;
- (b) the Leader of the Opposition in the Commonwealth Parliament;
- (c) Members of the Commonwealth Parliament when travelling as a Parliamentary delegation; and
- (d) the Premiers or Chief Ministers of the States and Territories.

15.12 Investigations into activities that might threaten persons in the categories identified in sub-paragraph (d) of the definition of PMV may require a higher degree of intrusion into the privacy of persons suspected of involvement than would normally be appropriate when based only on information of low reliability. The period of such intrusion should be limited so far as practicable to the period of possible threat.

16 Investigations into Demonstrations and other forms of Protest

16.1 Further to clause 7 above, the following guidance relates specifically to ASIO's investigation of demonstrations and other forms of protest.

16.2 ASIO is not to undertake investigations where the only basis for the investigation is the exercise of a person's right of lawful advocacy, protest or dissent (section 17A of the ASIO Act).

16.3 ASIO is not to investigate demonstrations or other protest activity unless:

(a) there is a risk of pre-meditated use of violence against persons or property for the purposes of achieving a political objective, or pre-mediated use of tactics that can be reasonably assessed as likely to result in violence; or

(b) it suspects there is a link between the demonstration or other protest activity and conduct coming otherwise within the definition of security.

16.4 An exception to the above is demonstrations or other protest activity against internationally protected persons or other persons specified by the Attorney-General under sub-paragraph (d) of the definition of PMV.

16.5 Minor acts of violence, such as jostling or defacing or damaging property, are properly matters for investigation by a police force, as are incidental acts of violence or property damage which occur in the course of a demonstration. Where, however, such acts are or are intended to be part of a pattern, and where there is reason to believe that the acts are intended to influence the policy or acts of a government, ASIO may investigate to determine whether there is a potential for the violence to escalate or become more strongly directed at a person or group associated with the policy or acts at issue.

17 Assessment of PMV

17.1 ASIO's threat assessment function is an integral part of national arrangements for the protection of high office holders, internationally protected persons, sites of national significance and critical infrastructure. ASIO may prepare threat assessments in relation to any demonstration or protest activity on the basis of information it already has or which is passed to it by other agencies, for the purpose of advising authorities responsible for law enforcement and the protection of designated persons.

17.2 ASIO is not required to provide an assessment for every event, place, person or instance, that is actually or potentially at threat from PMV. The Director-General shall consider the potential seriousness of any matter or information, the Organisation's priorities, and the availability of appropriate resources.

EXTRACTS FROM MUNICIPAL LEGISLATION ESTABLISHING INTELLIGENCE ORGANISATIONS

The following table sets out the provisions establishing intelligence organisations under the municipal laws of the following States: Australia, the Kingdom of Belgium, the Federative Republic of Brazil, the People’s Republic of China, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Republic of India, the Republic of Indonesia, the Italian Republic, the United Mexican States, the Kingdom of Morocco, New Zealand, the Russian Federation, the Slovak Republic, the Swiss Confederation, the Democratic Republic of Timor-Leste, the Republic of 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. <u>Australia</u>	<p>Australian Security Intelligence Organisation Act 1979¹ 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.</p> <p>Intelligence Services Act 2001² Section 16: The organisation known as the Australian Secret Intelligence Service is continued in existence in accordance with this Act.</p>
2. <u>Kingdom of Belgium</u>	<p>Organic Law on Intelligence and Security, 30 November 1998³ 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.</p> <p>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</p>

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
		<p>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;</p> <ol style="list-style-type: none"> 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. <p>Article 11</p> <p>§1. The General Intelligence and Security Service's responsibilities are:</p> <ol style="list-style-type: none"> 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.	<u>Federative Republic of Brazil</u>	<p>Act that establishes the Brazilian System of Intelligence and creates the Brazilian Agency of Intelligence – ABIN, Law No. 9.883 of 7 December 1999⁴</p> <p>Article 3: Establishment of the Brazilian Intelligence Agency - ABIN, an agency of the Presidency of the Republic that, as a</p>

⁴ Available at: http://www.planalto.gov.br/ccivil_03/Leis/L9883.htm.

	State	Relevant Legislative Provisions
		<p>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)</p> <p>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.</p> <p>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.</p> <p>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.</p>
4.	<u>People's Republic of China</u>	<p>Criminal Procedure Law of the People's Republic of China⁵</p> <p>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.</p>
5.	<u>Kingdom of Denmark</u>	<p>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</p> <p>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</p>

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.

	State	Relevant Legislative Provisions
		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.	<u>French Republic</u>	<p>Decree 2008-609 of 27 June 2008 relating to the role and organisation of the Central Directorate of Homeland Intelligence⁸</p> <p>Article 1</p> <p>The Central Directorate of Homeland Intelligence has jurisdiction to fight, on the territory of the Republic, against all activities susceptible of constituting an infringement on the fundamental interests of the nation.</p> <p>In this regard:</p> <ul style="list-style-type: none"> a) It is responsible for having advance knowledge of activities inspired, committed or supported by foreign powers or organisations that threaten the security of the country, and for contributing to their suppression; b) It participates in the prevention and suppression of terrorist acts or acts aimed at infringing the authority of the State, national defence secrets or the economy of the country; c) It contributes to the monitoring of electronic and radio-electric communications that may infringe the security of the State and fight, in this area, against crime linked to information technology and communications; d) It also participates in surveillance of individuals, groups, organisations and the analysis of social phenomena susceptible, by their radical nature, their inspiration or their modes of action, to infringe national security. <p>Defence Code,⁹</p> <p>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</p> <p>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.</p>

⁷ See: <http://fe-ddis.dk/om-os/Historie/Pages/Historie.aspx>.

⁸ Available at: http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=4013BE9633CDA29EB2F3BD06F254C234.tpdjo15v_3?cidTexte=JORFTEXT000019078545&idArticle=&dateTexte=20140109

⁹ Available at: http://www.legifrance.gouv.fr/affichCode.do;jsessionid=29995C27D35448C5F35501D68C16C640.tpdjo05v_2?idSectionTA=LEGISCTA000019840911&cidTexte=LEGITEXT000006071307&dateTexte=20140109.

	State	Relevant Legislative Provisions
7.	<u>Federal Republic of Germany</u>	<p>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</p> <p>Section 2: The offices for the protection of the constitution</p> <ol style="list-style-type: none"> 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 (<i>Bundesoberbehoerde</i>). 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. <p>Section 3: Functions of the offices for the protection of the constitution</p> <ol style="list-style-type: none"> 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 <ol style="list-style-type: none"> 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 <ol style="list-style-type: none"> 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

¹⁰ Available at: <http://www.gesetze-im-internet.de/bverfschg/index.html>.

	State	Relevant Legislative Provisions
		<p>public interest from being discovered by unauthorised persons.</p> <p>4. the security check of persons in other legally determined cases.</p> <p>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 (<i>Sicherheitsüberprüfungsgesetz</i>, BGBl. I S. 867).</p> <p>3. The offices for the protection of the constitution are bound to the general rule of law (Art. 20 German basic law).</p>
8.	<u>Republic of India</u>	The intelligence agencies in India (the Intelligence Bureau and the Research and Analysis Wing) operate without a specific legislative basis. ¹¹
9.	<u>Republic of Indonesia</u>	<p>Republic of Indonesia Law No. 17 of 2011¹²</p> <p>Article 1: Within this Act, the following definitions apply:</p> <p>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.</p> <p>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.</p> <p>3. State Intelligence Personnel are citizens of Indonesia, who have special Intelligence powers and dedicate themselves to the service of State Intelligence...</p> <p>Part One – Role</p> <p>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.</p> <p>Part Two – Purpose</p> <p>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.</p> <p>Part Four – Scope</p>

¹¹ See: <http://mha.nic.in/attached>.

¹² Available at: http://www.bin.go.id/asset/upload/UU_2011_17.pdf.

	State	Relevant Legislative Provisions
		<p>Article 7 - The scope of State Intelligence includes:</p> <ul style="list-style-type: none"> 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. <p>Article 9 – National Intelligence Agencies The administration of State intelligence consists of:</p> <ul style="list-style-type: none"> 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. <p>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.</p> <p>Paragraph 2 - Indonesian National Armed Forces Intelligence - 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.</p>
10.	<u>Italian Republic</u>	<p>Law No. 124, Intelligence System for the Security of the Republic and new provisions governing secrecy, of 8 March 2007 ¹³</p> <p>Section 6: The External Security and Intelligence Agency</p>

¹³ Available at: <http://www.sicurezza nazionale.gov.it/sisr.nsf/english/law-no-124-2007.html>.

	State	Relevant Legislative Provisions
		<p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>5. The AISE shall be directly answerable to the President of the Council of Ministers.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>10. The organization and operation of the AISE shall be governed by a specific Regulation</p> <p>Section 7: The Internal Security and Intelligence Agency</p> <p>1. The Internal Security and Intelligence Agency (AISI) is hereby established. Its functions shall be to gather and process all</p>

	State	Relevant Legislative Provisions
		<p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>5. The AISI shall be directly answerable to the President of the Council of Ministers.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>10. The organization and operation of the AISI shall be governed by a specific Regulation</p>
11.	<u>United Mexican States</u>	<p>National Security Act, 31 January 2005¹⁴</p> <p>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.</p>

¹⁴ Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/LSegNac.pdf>.

	State	Relevant Legislative Provisions
		<p>Article 19: Functions of the Centre</p> <p>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;</p> <p>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;</p> <p>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;</p> <p>IV. Devise general guidelines of the strategic plan and the National Agenda of Risks;</p> <p>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;</p> <p>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;</p> <p>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;</p> <p>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;</p> <p>IX. Operate relevant communication technology, in achieving the functions it has been entrusted or in support of government agencies as requested by the Council;</p> <p>X. Provide technical assistance to any government agency represented in the Council, in accordance with relevant agreements, and</p> <p>XI. Other powers conferred by other applicable laws that the Council or Executive Secretary deem is in the ambit of its competency.</p>
12.	<u>Kingdom of Morocco</u>	<p>Dahir Sharif Issued in Rabat in 8 Zil Hejja 1393 (2 January 1974), Signed by Prime Minister Ahmad Ossman¹⁵</p> <p>Article 1: The Directorate-General for the Surveillance of the National Territory, renewed by Dahir Sharif number 1.73.10</p>

¹⁵ Available at: <http://adala.justice.gov.ma/production/html/Ar/liens/..%5C65850.htm>.

	State	Relevant Legislative Provisions
		<p>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.</p> <p>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.</p> <p>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.</p> <p>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).</p>
13.	<u>New Zealand</u>	<p>New Zealand Security Intelligence Service Act 1996¹⁶</p> <p>Section 3: New Zealand Security Intelligence Service</p> <p>(1) Subject to the provisions of this Act, there shall continue to be a New Zealand Security Intelligence Service.</p> <p>(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.</p> <p>Section 4: Functions of New Zealand Security Intelligence Service</p> <p>(1) Subject to the control of the Minister, the functions of the New Zealand Security Intelligence Service shall be—</p> <p>(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:</p> <p>(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:</p> <p>(ba) to advise any of the following persons on protective measures that are directly or indirectly relevant to</p>

¹⁶ Available at: <http://www.legislation.govt.nz/act/public/1969/0024/latest/whole.html>.

	State	Relevant Legislative Provisions
		<p>security:</p> <ul style="list-style-type: none"> (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: <p>(bb) to conduct inquiries into whether particular individuals should be granted security clearances, and to make appropriate recommendations based on those inquiries:</p> <p>(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:</p> <p>(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:</p> <p>(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.</p> <p>(2) It is not a function of the Security Intelligence Service to enforce measures for security.</p>
14.	<u>Russian Federation</u>	<p>Federal Law No. 40-FZ on Organs of the Federal Security Service in the Russian Federation (adopted on 22 February 1995)¹⁷</p> <p>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.</p> <p>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.</p> <p>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:</p>

¹⁷ Available at: <http://www.fsb.ru/fsb/npd/more.htm?id=10340801@fsbNpa.html>.

	State	Relevant Legislative Provisions
		<ul style="list-style-type: none"> - 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); <i>(as per Federal Law No. 15-FZ of 07.03.2005)</i> - 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); <i>(as per Federal Law No. 15-FZ of 07.03.2005)</i> - 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 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. <i>(as per Federal Law No. 15-FZ of 07.03.2005)</i> <p>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. <i>(as per Federal Law No. 15-FZ of 07.03.2005)</i></p> <p>Article 3: Federal executive authority for security <i>(as per Federal Law No. 86-FZ of 30.06.2003)</i> 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. <i>(as per Federal Law No. 15-FZ of 07.03.2005)</i></p> <p>A Russian Federation Academy of Cryptography shall operate under the auspices of the federal executive authority for</p>

	State	Relevant Legislative Provisions
		<p>security. The statute of the Russian Federation Academy of Cryptography shall be ratified by the President of the Russian Federation.</p> <p>Article 4: Legal basis for the activity of the Federal Security Service (<i>as per Federal Law No. 86-FZ of 30.06.2003</i>) 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.</p> <p>Federal Law No. 5-FZ on Foreign Intelligence, 10 January 1996¹⁸ Chapter 2, Article 11</p> <p>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 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.</p>
15.	<u>Slovak Republic</u>	<p>Act of the National Council of the Slovak Republic dated 21 January 1993 on the Slovak Information Service¹⁹</p> <p>§ 1 Preamble</p> <p>(1) The Slovak Information Service (hereafter “The Information Service”) is hereby established.</p> <p>(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.</p> <p>(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.</p> <p>(4) The rights and freedoms of citizens may be limited by the measures of the Information Service only to the extent and</p>

¹⁸ Available at: http://svr.gov.ru/svr_today/doc02.htm.

¹⁹ Available at: http://www.sis.gov.sk/files/zakony/act_46_1993.pdf.

	State	Relevant Legislative Provisions
		<p>manner established by this act.</p> <p>(5) The Information Service is a non-profit organization financed from the State Budget.</p> <p>(6) In the fulfilment of its duties the Information Service is authorized to use technical means and means of transport usually undercover.</p> <p>§ 2</p> <p>(1) Within the scope of its functions the Information Service shall collect, accumulate and analyse information on</p> <ul style="list-style-type: none"> 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. <p>(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.</p> <p>(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.</p> <p>(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.</p> <p>(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.</p>

	State	Relevant Legislative Provisions
		<p>(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.</p> <p>(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.</p>
16.	<u>Swiss Confederation</u>	<p>Federal law on civil intelligence, 3 October 2008²⁰</p> <p>Article 1: Civil intelligence missions The Federal Council designates the federal agencies responsible for civil intelligence missions. These services:</p> <ol style="list-style-type: none"> 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. <p>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.</p> <p>Article 3: Collaboration and information sharing between the intelligence services</p> <ol style="list-style-type: none"> 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:

²⁰ Available at: <http://www.admin.ch/opc/fr/classified-compilation/20080697/index.html>.

	State	Relevant Legislative Provisions
		<p>a. collaboration and information exchange between civil intelligence services, in particular concerning joint and comprehensive threat analyses;</p> <p>b. collaboration and information exchange between civil intelligence services and the military intelligence service;</p> <p>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.</p> <p>Federal law instituting measures aimed at maintaining the internal security, 21 March 1997²¹</p> <p>Article 2: Mandates</p> <p>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.</p> <p>2. Preventive measures also include preparatory acts relating to illegal trade in arms and radioactive substances and the illegal transfer of technology.</p> <p>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 .</p> <p>4. Preventive measures means:</p> <p>a. Periodic evaluations of threat statuses by political authorities and of the mandates given to the agencies entrusted with internal security (security agencies);</p> <p>b. Processing of information relating to internal and external security;</p> <p>c. Security controls relating to persons;</p> <p>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;</p> <p>e. Seizure, isolation and confiscation of propaganda material inciting violence;</p> <p>f. the measures provided for in article 24a and 24c, which are aimed at preventing violence at sporting events.</p> <p>Article 4: Principle</p> <p>1. Each canton is primarily responsible for internal security on its territory.</p>

²¹ Available at: <http://www.admin.ch/opc/fr/classified-compilation/19970117/index.html>.

	State	Relevant Legislative Provisions
		<p>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.</p> <p>Article 5: Tasks performed by the Confederation</p> <p>1. To assume leadership on internal security, the Federal Council :</p> <ul style="list-style-type: none"> 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. <p>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.</p>
17.	<p><u>Democratic Republic of Timor-Leste</u></p>	<p>Decree Law No. 03/2009 (National Intelligence Service)²²</p> <p>Article 1 - Establishment: The Organic of the National Intelligence Service, hereinafter referred to as SNI, is hereby established.</p> <p>Article 2 – Nature:</p> <ol style="list-style-type: none"> 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. <p>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.</p>

²² Available at: <http://www.jornal.gov.tl/lawsTL/RDTL-Law/index-e.htm>.

	State	Relevant Legislative Provisions
		<p>Article 13 - Central Services:</p> <ol style="list-style-type: none"> 1. The following shall be central services of SNI: <ol style="list-style-type: none"> 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.	<u>Republic of Uganda</u>	<p>Security Organisations Act 1987²³</p> <ol style="list-style-type: none"> 2. Establishment of security organisations. <ol style="list-style-type: none"> (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. <p>The functions of the organisations shall be—</p> <ol style="list-style-type: none"> (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.
19.	<u>United Kingdom of Great Britain and Northern Ireland</u>	<p>Security Services Act 1989²⁴</p> <p>Section 1:</p> <ol style="list-style-type: none"> (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... <p>Intelligence Services Act 1994²⁵</p> <p>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-</p>

²³ Available at: <http://www.opm.go.ug/resource-center/legislation.html>.

²⁴ Available at: <http://www.legislation.gov.uk/ukpga/1989/5/contents>.

²⁵ Available at: <http://www.legislation.gov.uk/ukpga/1994/13/contents>.

	State	Relevant Legislative Provisions
		<p>(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.</p> <p>(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.</p>
20.	<u>United States of America</u>	<p>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.</p> <p>Executive Order 12333 United States Intelligence Activities²⁷ 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:</p> <p>(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;</p> <p>(2) Conduct counterintelligence activities; and</p> <p>(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.</p> <p>National Security Act of 1947 (P.L. 80-235, 61 Stat 496)²⁸</p>

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>.

²⁸ Available at: <http://www.intelligence.senate.gov/nsaact1947.pdf>.

	State	Relevant Legislative Provisions
		<p>Section 102(b): Principal Responsibility - Subject to the authority, direction, and control of the President, the Director of National Intelligence shall—</p> <ul style="list-style-type: none"> (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.

DECRETO-LEI N.º 3/2009

de 15 de Janeiro

SERVIÇO NACIONAL DE INTELIGÊNCIA

A consolidação do Estado de Direito democrático e a afirmação de Timor-Leste como país independente capaz de enfrentar as novas ameaças emergentes da prática de actos de terrorismo, sabotagem, espionagem, criminalidade organizada transnacional, reclamam do Governo a aprovação do regime jurídico que cria o Serviço Nacional de Inteligência (SNI) que agora se apresenta.

O SNI é, nos termos da Lei, um serviço personalizado do Estado incumbido da produção de informações que contribuam para a salvaguarda da independência nacional, dos interesses nacionais, da segurança externa e da garantia da segurança interna, da prevenção da sabotagem, do terrorismo, da espionagem, da criminalidade organizada e dos actos que pela sua natureza possam alterar ou destruir o Estado de Direito constitucionalmente estabelecido.

O SNI é um serviço personalizado do Estado dotado de competência interna e externa, impedido de praticar actos que envolvam a violação de direitos, liberdades e garantias consagradas na Constituição ou que sejam da competência exclusiva das demais autoridades que exerçam funções de segurança interna, do Ministério Público ou dos Tribunais, estando vedado aos seus agentes proceder à detenção de pessoas e à instauração de processos de natureza criminal.

Reafirma-se a competência do Governo na condução da política de segurança nacional e fixa-se a tutela directa do Primeiro-Ministro sobre o SNI, com a ressalva de que este organismo está exclusivamente ao serviço do Estado, sendo-lhe rigorosamente vedada a prossecução de qualquer actividade que vise atingir fins político/partidários.

Determina-se que a Comissão Interministerial de Segurança Interna (criada no âmbito da Lei de Segurança Interna) funcione também como órgão de consulta em matéria de Informações e cria-se um órgão novo de coordenação operacional designado por Comissão Técnica, que permitirá uma maior eficácia e articulação na troca de informações entre o SNI e os serviços de segurança e defesa.

Fixa-se um sistema de controlo político parlamentar sobre a actividade e processamento de dados recolhidos pelo SNI, exercido por uma comissão independente, designada por Conselho de Fiscalização, constituída por um elemento indicado pelo Presidente da República e dois eleitos por maioria absoluta dos deputados do Parlamento Nacional, com um mandato de cinco anos e garante-se a possibilidade de qualquer cidadão solicitar ao Conselho de Fiscalização o cancelamento ou rectificação de actos erróneos irregularmente obtidos ou violadores dos direitos, liberdades e garantias individuais.

Estas opções estão normalmente associadas à necessidade de criação de um serviço público que contribua para a afirmação de Timor-Leste como País independente, capaz de se defender das ameaças que possam pôr em causa a soberania nacional

ou subverter o Estado de Direito constitucionalmente estabelecido.

Assim, nos termos previstos na alínea d) do art.º 116º da Constituição, o Governo decreta, para valer como lei, o seguinte:

**CAPÍTULO I
NATUREZA, ATRIBUIÇÕES, COMPETÊNCIAS E
DEVERES**

**Artigo 1º
Criação**

O presente diploma cria a Orgânica do Serviço Nacional de Inteligência (SNI).

**Artigo 2º
Natureza**

1. O Serviço Nacional de Inteligência (SNI) é um serviço personalizado do Estado, na dependência directa do Primeiro-Ministro e goza de autonomia administrativa e financeira.
2. O SNI está exclusivamente ao serviço do Estado e exerce as suas atribuições no respeito da Constituição da República Democrática de Timor-Leste, das leis e de acordo com as disposições do presente diploma.

**Artigo 3º
Atribuições**

O SNI é o único organismo incumbido da produção de informações que contribuam para a salvaguarda da independência nacional, dos interesses nacionais e da segurança externa, bem como da garantia da segurança interna na prevenção da sabotagem, do terrorismo, da espionagem, da criminalidade organizada e dos actos que pela sua natureza possam alterar ou destruir o Estado de direito constitucionalmente estabelecido.

**Artigo 4º
Limites da actividade**

O SNI está impedido de praticar actos que sejam da competência exclusiva de cada uma das demais entidades que exercem funções de segurança interna, do Ministério Público e dos Tribunais, designadamente proceder à detenção de pessoas e à instauração de processos de natureza criminal.

**Artigo 5º
Competência material**

Compete ao SNI, no âmbito das suas atribuições:

- a) Promover de forma sistemática a pesquisa, recolha, análise, interpretação e conservação de informações e de dados;
- b) Informar o Primeiro-Ministro e as entidades constantes da lista por este designada, liderada pelo Presidente da República, do resultado das suas actividades e sempre que solicitado;
- c) Elaborar estudos e preparar documentos de acordo com as orientações do Primeiro-Ministro;

- d) Estudar e propor ao Primeiro-Ministro a adopção de mecanismos de colaboração e de coordenação entre o SNI e as forças e serviços de informações e de segurança estrangeiros;
- e) Comunicar às autoridades competentes para a investigação criminal e para o exercício da acção penal os factos configuráveis como ilícitos criminais, salvaguardado o que na lei se dispõe sobre segredo de Estado;
- f) Comunicar às autoridades competentes, nos termos da lei, as notícias e informações de que tenha conhecimento, e respeitantes à segurança interna e à prevenção e repressão da criminalidade.

Artigo 6º
Competência territorial

O SNI tem competência em todo o espaço territorial sujeito aos poderes soberanos da República Democrática de Timor-Leste.

Artigo 7º
Deveres gerais e especiais de colaboração

- 1. Os cidadãos têm o dever de colaborar na prossecução dos fins da segurança nacional, observando as disposições estabelecidas na presente lei, acatando as ordens e mandados legítimos das autoridades e não obstruindo o normal exercício das competências das forças e serviços de segurança.
- 2. Os funcionários e agentes do Estado ou das pessoas colectivas de direito público, bem como os membros dos órgãos de gestão de empresas públicas, têm o dever especial de colaboração com as forças e serviços de segurança, nos termos da lei.
- 3. Todos aqueles que estejam investidos em funções de direcção, chefia, inspecção ou fiscalização em qualquer órgão ou serviço da Administração Pública, têm o dever de comunicar prontamente às forças e serviços de segurança competentes os factos de que tenham conhecimento no exercício das suas funções ou por causa delas, e que constituam preparação, tentativa ou execução de actos criminais especialmente graves, designadamente actos de sabotagem, espionagem, terrorismo, tráfico de estupefacientes e de substâncias psicotrópicas, tráfico de armas e outras formas de criminalidade organizada, bem como a prática de actos que, pela sua natureza, possam pôr em causa, alterar ou destruir o Estado democrático constitucionalmente estabelecido.
- 4. A violação do disposto nos números anteriores implica responsabilidade disciplinar e criminal, nos termos da lei.

CAPÍTULO II
ÓRGÃOS E SERVIÇOS

Artigo 8º
Órgãos

São órgãos do SNI:

- a) O Director-Geral;

- b) O Conselho Administrativo.

Artigo 9º
Director-Geral

- 1. O SNI é dirigido por um Director-Geral nomeado pelo Primeiro-Ministro e equiparado, para efeitos remuneratórios, ao cargo do Ministro.
- 2. A nomeação a que se refere o número anterior é obrigatoriamente precedida de informação e consulta com o Presidente da República.
- 3. O Director-Geral é coadjuvado por dois Directores-Gerais Adjuntos, sendo substituído, na sua ausência e impedimentos, por um deles, designado para o efeito.

Artigo 10º
Competência do Director-Geral

Compete em especial ao Director-Geral:

- a) Representar o SNI;
- b) Orientar superiormente a actividade dos serviços e do Centro de Dados e exercer a sua inspecção, superintendência e coordenação;
- c) Presidir ao Conselho Administrativo;
- d) Dar execução às orientações genéricas e instruções concretas do Primeiro-Ministro, bem como às deliberações do Conselho de Fiscalização;
- e) Orientar a elaboração do orçamento do SNI;
- f) Preparar e submeter à aprovação do Primeiro-Ministro o plano de actividades para o ano seguinte e o relatório de actividades do ano anterior;
- g) Presidir à Comissão Técnica.

Artigo 11º
Deveres do Director-Geral

São deveres do Director-Geral:

- a) Zelar pelo normal funcionamento interno do SNI e afectar os recursos humanos e materiais de forma eficiente;
- b) Não se envolver em quaisquer actividades de natureza política e não ser filiado em partidos políticos;
- c) Manter o Primeiro-Ministro permanentemente informado relativamente às actividades do SNI;
- d) Não prestar declarações à comunicação social sobre as actividades do SNI ou, havendo necessidade de o fazer, apenas com autorização do Primeiro-Ministro;
- e) Manter uma postura isenta e neutra na abordagem das matérias e operações que lhe forem confiadas.

Artigo 12º

Competência do Conselho Administrativo

1. O Conselho Administrativo é composto pelo Director-Geral, pelos Directores Gerais Adjuntos e pelo responsável do serviço administrativo.
2. Compete ao Conselho Administrativo:
 - a) Elaborar o projecto de orçamento anual e submetê-lo à aprovação do Primeiro-Ministro;
 - b) Gerir as dotações orçamentais;
 - c) Autorizar a realização de despesas nos limites fixados por despacho do Primeiro-Ministro.

Artigo 13º

Serviços Centrais

1. São serviços centrais do SNI:
 - a) O Departamento de Informações Internas;
 - b) O Departamento de Informações Externas;
 - c) O Serviço Administrativo.
2. A organização interna de cada serviço ou departamento é definida por despacho do Primeiro-Ministro, sob proposta do Director-Geral.

CAPÍTULO III

RECRUTAMENTO, SELECÇÃO E FORMAÇÃO DE PESSOAL

Artigo 14º

Quadro de Pessoal

1. Os órgãos e serviços do SNI dispõem de pessoal provido de entre funcionários da Administração Pública, permanentes ou contratados.
2. Os cargos de direcção e chefia, bem como os quadros técnicos dos serviços que integram o SNI, podem ser providos de entre especialistas civis, policiais ou militares, nos termos do Estatuto da Função Pública.
3. O exercício por polícias, militares, ou funcionários públicos, requisitados, de funções nos serviços que integram o SNI, não prejudica os seus direitos de progressão na carreira.

Artigo 15º

Formação e instrução

1. O recrutamento e a formação dos quadros do SNI terão em conta a especial natureza do serviço e abrangem preparação especializada na respectiva actividade.
2. Para efeitos do número anterior serão regulamentadas, em diploma próprio, a organização e natureza dos respectivos cursos.

Artigo 16º

Requisitos gerais de recrutamento

São condições indispensáveis ao recrutamento e nomeação para os quadros técnicos do quadro do SNI:

- a) Reconhecida idoneidade cívica;
- b) Elevada competência profissional;
- c) Habilitações literárias mínimas correspondentes ao 12º ano.

Artigo 17º

Requisitos especiais de recrutamento

São requisitos especiais de recrutamento para o quadro do SNI:

- a) Ter nacionalidade originária timorense;
- b) Ter idade não inferior a 25 anos de idade nem superior a 35;
- c) Submeter-se às condições de recrutamento e selecção;
- d) Não desempenhar quaisquer cargos político-partidários;
- e) Não ter sido condenado por crimes de delito comum a que corresponda pena de prisão;
- f) Não ter participado em quaisquer actos contra o Estado de Direito constitucionalmente estabelecido;
- g) Não ter colaborado com qualquer serviço de informações estrangeiro.

Artigo 18º

Direitos

Para além dos direitos consagrados no Estatuto da Função Pública, aos membros do SNI assistem os seguintes direitos:

- a) Receber preparação específica para o exercício das suas funções;
- b) Uso e porte de arma de fogo em condições a regulamentar pelo Director-Geral do SNI;
- c) Livre-trânsito em lugares públicos de acesso condicionado, mediante exibição do respectivo cartão;
- d) Beneficiar de estatuto remuneratório específico;
- e) Beneficiar, para efeitos de aposentação, de um acréscimo de 25% em relação ao tempo de serviço prestado.

Artigo 19º

Restrições

1. Os membros do SNI estão sujeitos às seguintes restrições:
 - a) Exercem as suas funções em regime de exclusividade,

não podendo exercer qualquer outra actividade, incluindo as de natureza liberal ou empresarial;

- b) Não convocarem nem participarem em quaisquer actividades político-partidárias e sindicais;
 - c) Não proferirem declarações públicas de carácter político, partidário ou sindical;
 - d) Não exercerem o direito de greve.
2. Os membros do SNI consideram-se disponíveis permanentemente para o serviço.

CAPÍTULO IV DISCIPLINA

Artigo 20° Normas aplicáveis

Em matéria disciplinar é subsidiariamente aplicável ao pessoal do SNI, em tudo o que não esteja expressamente previsto no presente diploma, o disposto para a Administração Pública em geral.

Artigo 21° Infracções Disciplinares

1. Constitui infracção disciplinar a violação, por funcionário ou agente do SNI, dos respectivos deveres funcionais, incluindo, nomeadamente:
 - a) A prática, com prevalência da sua qualidade ou função, de facto que esteja fora das atribuições e competência do serviço;
 - b) O acesso, uso ou comunicação de dados ou informações, com violação das regras relativas a essas actividades;
2. A tentativa e negligência são puníveis.

Artigo 22° Sanções disciplinares

1. São aplicáveis aos funcionários e agentes do SNI as sanções disciplinares previstas no Estatuto Disciplinar da Função Pública.
2. São sanções especiais aplicáveis aos funcionários e agentes do SNI:
 - a) A cessação da comissão de serviço;
 - b) A rescisão do contrato administrativo de provimento.

Artigo 23° Competência disciplinar

1. O Director-Geral do SNI tem competência para aplicar qualquer sanção disciplinar.
2. Os Directores Gerais Adjuntos, em relação aos funcionários

colocados nos serviços que deles dependem, têm competência para aplicar qualquer sanção disciplinar até à pena de suspensão inclusive.

Artigo 24° Suspensão Preventiva

Sempre que a sua presença se revele inconveniente para o serviço, ou para o apuramento da verdade, pode ser decretada a suspensão preventiva do funcionário ou agente.

CAPÍTULO V CENTRO DE DADOS

Artigo 25° Centro de Processamento de Dados

1. O SNI dispõe de um Centro de Dados, compatível com a natureza do serviço, ao qual compete processar e conservar em arquivos apropriados os dados e informações recolhidas no âmbito da sua actividade.
2. O Centro de dados será criado de forma compartimentada, com base na natureza específica de cada um dos órgãos e serviços do SNI.

Artigo 26° Funcionamento

Os critérios e normas técnicas necessárias ao funcionamento do Centro de Dados, bem como os regulamentos indispensáveis à garantia da segurança das informações processadas, são aprovados pelo Conselho de Ministros, devendo ser ouvida a Comissão Interministerial de Segurança Interna.

Artigo 27° Acesso às Bases de Dados

1. Os funcionários ou agentes, civis ou militares, só podem ter acesso a dados e informações conservados no Centro de Dados, desde que autorizados pelos respectivos superiores hierárquicos, sendo proibida a sua utilização para fins estranhos aos do SNI.
2. Sem prejuízo dos poderes de fiscalização previstos na lei para o Conselho de Fiscalização, nenhuma entidade estranha ao SNI pode ter acesso directo aos dados e informações conservadas no Centro de Dados.

Artigo 28° Cancelamento e rectificação de dados

1. Se se produzir erro na imputação de dados ou informações, ou se verificar alguma irregularidade no seu tratamento, a entidade processadora fica obrigada a dar conhecimento do facto ao Conselho de Fiscalização.
2. Quem por acto de qualquer funcionário, ou agente de autoridade ou no decurso de processo judicial ou administrativo, tiver conhecimento de dados que lhe digam respeito e que considere erróneos, irregularmente obtidos ou violadores dos seus direitos, liberdades e garantias pessoais,

pode, sem prejuízo do direito de recorrer aos tribunais, requerer ao Conselho de Fiscalização que proceda às verificações necessárias e ordene o seu cancelamento ou a rectificação dos dados que se mostrarem incompletos e erróneos.

Aprovado em Conselho de Ministros de 6 de Outubro de 2008.

O Primeiro-Ministro,

CAPÍTULO VI SEGURANÇA

Artigo 29º Regras de Segurança

1. As actividades do SNI são consideradas, para todos os efeitos, classificadas e de interesse para a segurança nacional.
2. São abrangidos pelo Segredo de Estado todos os documentos respeitantes às matérias referidas no artigo 3º.
3. A actividade de pesquisa, recolha, análise, interpretação, classificação e conservação de informações relacionada com as atribuições do SNI, bem como o respectivo resultado, estão sujeitos ao dever de sigilo.

Kay Rala Xanana Gusmão

Promulgado em 18/12/08

Publique-se.

O Presidente da República,

José Ramos-Horta

Artigo 30º Prestação de depoimentos ou declarações

1. Nenhum membro do SNI chamado a depor ou a prestar declarações perante autoridades judiciais, pode revelar factos abrangidos pelo Segredo de Estado ou ser inquirido sobre os mesmos.
2. Se a autoridade judicial considerar injustificada a recusa invocada, nos termos do número anterior, poderá solicitar confirmação junto do Primeiro-Ministro.

CAPÍTULO VII DISPOSIÇÕES FINAIS

Artigo 31º Nomeação e exoneração

1. Os despachos de nomeação e exoneração dos funcionários e agentes do SNI não carecem de visto da Comissão do Orçamento Nacional nem de publicação no Jornal da República.
2. Os funcionários e agentes do SNI consideram-se em serviço a partir da tomada de posse.

Artigo 32º Omissões

As dúvidas e omissões resultantes da interpretação e aplicação da presente lei aplica-se subsidiariamente, o Estatuto da Função Pública.

Artigo 33º Entrada em vigor

Este diploma entra em vigor 30 dias após a sua publicação.

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 stupeficients 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 possess 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

COMMISSIONER OF AUSTRALIAN
FEDERAL POLICE AND ANOTHER..... APPELLANTS;
RESPONDENTS,

AND

PROPEND FINANCE PTY LIMITED AND
OTHERS..... RESPONDENTS.
APPLICANTS,

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

Privilege — Legal professional — Search warrant — Documents — Original documents not privileged — Copies of original documents made for sole purpose of obtaining or giving legal advice or for use in legal proceedings — Denial of privilege — Illegal or improper purpose — How established — Crimes Act 1914 (Cth), s 10.

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Feb 7
1997

Brennan CJ,
Dawson,
Toohey,
Gaudron,
McHugh,
Gummow and
Kirby JJ

During the execution of a search warrant issued pursuant to s 10 of the *Crimes Act 1914 (Cth)*, officers of the Australian Federal Police seized documents from the office of a solicitor. The solicitor claimed legal professional privilege in respect of the documents on behalf of his clients. The documents seized included copies of documents the originals of which were not privileged. The police officers opposed the claim to privilege and also contended that privilege did not attach to the copy documents because the information sworn in support of the warrants contained material which pointed to certain original documents having been brought into existence for, or in the furtherance of, illegal purposes.

Held, by Brennan CJ, Gaudron, McHugh, Gummow and Kirby JJ, Dawson and Toohey JJ dissenting, (1) that legal professional privilege attached to a copy document which was provided to a lawyer if the copy was made solely for the purpose of obtaining legal advice or solely for use in legal proceedings, even where the original document was not privileged.

Grant v Downs (1976) 135 CLR 674, applied.

Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd (1985) 3 NSWLR 44, disapproved.

Buttes Gas & Oil Co v Hammer [No 3] [1981] QB 223 at 244, not followed.

Baker v Campbell (1983) 153 CLR 52, referred to.

(2) That the claim to privilege was not displaced by an allegation that the communications the subject of the copy documents were made in furtherance of illegal or improper purposes; by Brennan CJ, McHugh and Gummow JJ on the ground that there was no admissible evidence before the trial judge to support the allegation; by Gaudron J on the ground that the opponent to the claim for privilege had failed to raise a prima facie case of illegality or improper purpose because fairness required that

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hearsay evidence of such purpose could not be relied upon without the party claiming privilege being given an opportunity to test it by cross-examination; and by Kirby J on the ground that hearsay evidence of an illegal or improper purpose was not sufficient to displace the claim to legal professional privilege.

Attorney-General (NT) v Kearney (1985) 158 CLR 500 at 516 and *O'Rourke v Darbishire* [1920] AC 581 at 604, applied.

Per Brennan CJ. The prima facie rule that copies of non-privileged documents are privileged if the copies are brought into existence solely for the purpose of obtaining or giving legal advice or solely for use in litigation that is pending, intended or reasonably apprehended is subject to the qualification that, if an original unprivileged document is not in existence or its location is not disclosed or is not accessible to the person seeking to execute the warrant and if no unprivileged copy or other admissible evidence is made available to prove the contents of the original, the privileged copy loses the privilege.

Decision of the Federal Court of Australia (Full Court): *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1995) 58 FCR 224, varied.

APPEAL from the Federal Court of Australia.

A justice of the peace issued search warrants pursuant to s 10 of the *Crimes Act* 1914 (Cth) authorising named police officers to search certain residential and office premises. One warrant authorised the search of office premises occupied by Mr Michael Dunkel, a solicitor retained by the other eight respondents in relation to certain taxation matters. The information upon which the warrants were issued stated that it was suspected that some or all of the respondents, including Mr Dunkel, were implicated in offences against the *Crimes Act* and the *Crimes (Taxation Offences) Act* 1980 (Cth). Members of the Australian Federal Police seized documents from various premises occupied by the respondents, including an office of Mr Dunkel. The warrant authorising the search of his premises required the police officers to proceed in accordance with guidelines agreed between the Commissioner of the Australian Federal Police and the Law Council of Australia. The guidelines set down procedures for the execution of search warrants on the premises of lawyers and were designed to preserve legal professional privilege and to provide for the return of seized documents if and when it was established. Mr Dunkel claimed legal professional privilege on behalf of his clients and, in accordance with the guidelines, the documents seized from his office were placed in a sealed envelope pending a decision on the claim.

The solicitor and his clients commenced proceedings in the Federal Court against the Commissioner of the Australian Federal Police, Detective Sergeant Taciak, and the justice of the peace who issued the warrants, seeking orders for review under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) and also under s 39B of the *Judiciary*

Act 1903 (Cth). The application sought the review of various decisions and of the conduct of the police officers involved in the execution of the warrants. Upon the hearing of the application for review by Davies J, it emerged that the documents seized from the solicitor included copies of documents the originals of which it was conceded were not privileged. The applicants claimed that legal professional privilege attached to those copy documents as they were made solely for the purpose of obtaining legal advice or solely for use in legal proceedings. The police officers opposed the claim to privilege and also submitted that the information sworn in support of the warrants contained material which pointed to certain original documents having been brought into existence for, or used in the furtherance of, the illegal activities alleged in that information and that, consequently, copies of those documents were to be treated as infected with that illegality. Davies J made an order declaring that copies of documents made for the purpose of obtaining legal advice, the originals of which were not subject to legal professional privilege, were themselves not privileged. He held further that the information constituted sufficient prima facie evidence to overcome the claim of legal professional privilege and made a declaration accordingly (1). The applicants appealed to the Full Court of the Federal Court (Beaumont, Hill and Lindgren JJ) which set aside the declaration that, by reason of the allegations of offences under the *Crimes Act*, privilege did not attach to the documents specified in the orders made by Davies J. The appeal was allowed in part and a fresh hearing was ordered on the claims of privilege (2). The police officers then appealed to the High Court by special leave granted by Brennan CJ, Dawson and Toohey JJ. The solicitor and his clients cross-appealed to argue that the copy of a document is privileged, even if the original is not, if the copy was brought into existence for the sole purpose of obtaining legal advice and, further, that the Full Court should have finally determined the question of illegality and not ordered a further hearing.

M Rozenes QC (with him *P Roberts* and *O P Holdenson*), for the appellants. As a general principle, the making of a copy of a non-privileged document for legal purposes cannot confer privilege. The purpose for which the document is made is irrelevant as privilege is determined by the purpose for which the original was brought into existence. This principle is not applicable where the document is not a mere copy of the original but a fresh document which, eg, bears

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- (1) *Propend Finance Pty Ltd v Commissioner, Australian Federal Police* [No 2] (1994) 35 ALD 25.
- (2) *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1995) 58 FCR 224.

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notations, markings or is the result of an editing process (3). In this case, there has been no suggestion that the documents were anything but precise reproductions of the non-privileged originals. A strong line of authority denies privilege to copy documents when the original is not privileged (4). Australian academic opinion supports the denial of privilege to copy documents when the original is not privileged (5). What is required to displace legal professional privilege where fraud or criminality is alleged has been stated in different ways. The mere assertion of fraud will not suffice. However, nowhere is there a firm statement of principle that there has to be admissible evidence. It is only necessary to demonstrate that the allegation has sufficient probability of truth to make it right to disallow privilege (6). In a proceeding involving search warrants, the court is ideally placed to see what evidence exists because it has available to it, should it seek to examine it, the information laid before the justice who granted the warrant. The person seeking to displace the privilege may also be able to produce other material, whether in the form of an affidavit or of other documents handed to the court, to which the court may refer in determining whether privilege is displaced. [He also referred to *R v Cox and Railton* (7) and *Bullivant v Attorney-General (Vict)* (8).]

D H Bloom QC (with him *N J Williams*), for the respondents. The test in relation to legal professional privilege in Australian courts is a sole purpose test (9). The copy documents were all brought into existence for the sole purpose of obtaining legal advice and thus legal professional privilege attached to them. Authorities which deny the existence of legal professional privilege to such copy documents are based on the pragmatic view that, by denying the privilege, one then gets accelerated production of the original document (10). Those cases were decided in the context of a dispute over discovery and paid no regard to the situation of a search warrant in the extra curial process. Copying a document may involve no communication, but if the document is copied for the purpose of being sent or delivered to a legal advisor, it is all part of the act of obtaining or giving legal

- (3) *Lyell v Kennedy* [No 3] (1884) 27 Ch D 1.
- (4) *Chadwick v Bowman* (1886) 16 QBD 561; *Shaw v David Syme & Co* [1912] VLR 336; *Lambert v Home* [1914] 3 KB 86; *Buttes Oil & Gas Co v Hammer* [No 3] [1981] QB 223 at 244; *Vardas v South British Insurance Co Ltd* [1984] 2 NSWLR 652; *J N Taylor Holdings Ltd v Bond* (1991) 57 SASR 21; *Roux v Australian Broadcasting Commission* [1992] 2 VR 577.
- (5) *Cross on Evidence*, 5th Aust ed (1996), p 710; McNicol, *Law of Privilege* (1992), pp 94-97.
- (6) *O'Rourke v Darbishire* [1920] AC 581 at 605.
- (7) (1884) 14 QBD 153.
- (8) [1901] AC 196.
- (9) *Grant v Downs* (1976) 135 CLR 674.
- (10) *Chadwick v Bowman* (1886) 16 QBD 561 at 562; *Buttes Gas & Oil Co v Hammer* [No 3] [1981] QB 223 at 244.

advice. The principle of legal professional privilege seeks to foster the act of communication with a legal advisor, not to protect the content of a particular document (11). [He also referred to *R v Board of Inland Revenue; Ex parte Goldberg* (12); *Dubai Bank Ltd v Galadari* (13); and *McCaskill v Mirror Newspapers Ltd* (14).] To deny legal professional privilege to a communication or document which prima facie attracts it, a prima facie case must be made that the communication or document was made in preparation for or in furtherance of the illegal or improper purpose (15). It must be established, at least prima facie, that particular documents were brought into existence in furtherance of the illegal or improper purpose. The court need not conduct a trial of the issue, but the prosecution must make a specific allegation of a crime and lead prima facie evidence that the documents were brought into existence in furtherance of it. More than hearsay is required. If this Court determines that hearsay evidence is admissible on the question, the proceeding should be remitted to the Full Court for determination of whether there was sufficient evidence to support the appellants' claim. [He also referred to *Clark v United States* (16).]

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P Roberts, in reply.

Cur adv vult

7 February 1997

The following written judgments were delivered:—

BRENNAN CJ. Gaudron J has stated the facts out of which this appeal arises and the course of the litigation in the Courts below. Her Honour has also cited the authorities which establish that the doctrine of this Court is that legal professional privilege “is not merely a rule of evidence applicable in judicial and quasi-judicial proceedings, but is a basic doctrine of the common law” (17). Although this was not my preferred view (18), I am bound now to accept it. As I pointed out in *Baker v Campbell* (19), the view that legal professional privilege qualified the power of search and seizure conferred by a warrant

- (11) *Carter v Northmore Hale Davy and Leake* (1995) 183 CLR 121 at 131, 133-138, 139, 140-141.
- (12) [1989] QB 267.
- (13) [1990] Ch 98.
- (14) [1984] 1 NSWLR 66.
- (15) *O'Rourke v Darbishire* [1920] AC 581 at 604; *Butler v Board of Trade* [1971] Ch 680 at 689; *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 at 516.
- (16) (1933) 289 US 1.
- (17) See *Goldberg v Ng* (1995) 185 CLR 83 at 93-94.
- (18) See *Baker v Campbell* (1983) 153 CLR 52 at 105-107.
- (19) (1983) 153 CLR 52 at 105.

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issued pursuant to s 10(1) of the *Crimes Act* 1914 (Cth) as it stood at the time — and as it stood with some immaterial variations when the warrants in the present case were issued (20) — necessitated the devising of some procedure for determining a claim of privilege if it should be raised during the execution of a warrant. Such a procedure was not devised by the courts, but the Law Council of Australia and the Australian Federal Police agreed upon “General Guidelines”. The Guidelines set out the procedure to be followed if, in the execution of search warrants on lawyers’ premises or the premises of Law Societies and like institutions, a claim of legal professional privilege should be made. The authority given by the warrants in the present case was to search and seize “in accordance with the procedure set out” in the General Guidelines.

The respondents made an application before Davies J in the Federal Court for judicial review of the applications for search warrants, of the decisions to issue the search warrants and of the conduct of the Federal Police in executing them. However, the principal relief claimed (though it was said to be “in the alternative”) was for a declaration that certain documents for which legal professional privilege had been claimed and which, in accordance with the General Guidelines, had been seized but not inspected were “subject to legal professional privilege”. One of the grounds on which the present appellants resisted this claim was that some of the documents for which legal professional privilege had been claimed were created for or in furtherance of the commission of the suspected offences set out in the search warrants.

Among the orders made by Davies J were declarations that “by reason of the allegation of offences ... and of the proof given in support thereof,” certain documents listed in the order “are not subject to legal professional privilege” (21) and “that copies of documents made for the purpose of obtaining legal advice, the originals of which are not subject to legal professional privilege are

(20) Section 10(1) then read as follows: “If a Magistrate or Justice of the Peace is satisfied by information on oath that there is reasonable ground for suspecting that there is in or upon any premises, aircraft, vehicle, vessel or place: (a) anything with respect to which any offence against any law of the Commonwealth or of a Territory has been, or is suspected on reasonable grounds to have been, committed; (b) anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any such offence; or (c) anything as to which there is reasonable ground for believing that it is intended to be used for the purpose of committing any such offence; or that any such thing may, within the next following 72 hours, be brought into or upon the premises, aircraft, vehicle, vessel or place, the Magistrate or Justice of the Peace may grant a search warrant authorising any constable named in the warrant, with such assistance, and by such force, as is necessary and reasonable, to enter at any time the premises, aircraft, vehicle, vessel or place named or described in the warrant, and to seize any such thing which he or she might find there.”

(21) Order No 5.

not privileged.” (22) In the Full Court, differing views were expressed on these questions. In the result, the declarations were set aside. The present appeal is brought to restore the order of Davies J.

Privilege attaching to copies of non-privileged documents

The respondents claim that the documents in question were produced solely for the purpose of obtaining professional legal advice in relation to litigation that was reasonably apprehended. In *Baker v Campbell*, though I would have construed s 10 of the *Crimes Act* as authorising, in general, the issue of a warrant to search for and seize documents to which legal professional privilege attaches, I would not have construed s 10 as authorising the seizure of documents (23) —

“(a) which are merely expressions of legal opinion; or (b) to which legal professional privilege attaches by reason of their having been brought into existence solely for use in litigation that is pending, intended or reasonably apprehended.”

The problem that now arises relates to copies of unprivileged documents when the copies were brought into existence solely for use in obtaining legal advice or for use in apprehended litigation. When photocopying and multiple production by word processing have become commonplace, it may be difficult to distinguish between an original and a copy and it may seem artificial to do so. In *J N Taylor Holdings Ltd v Bond* (24) DeBelle J said that, in general, “it would be absurd for the copy to be privileged while the original was not”. And, in *Lubrizol Corporation v Esso Petroleum Ltd* (25), Aldous J said that he found it “incredible, in these days of the photocopier, the computer and the fax, that any distinction concerning privilege can be drawn between a copy and the original”. Yet the purpose of bringing an original document into existence may not be the purpose of bringing the copy into existence and, since *Grant v Downs* (26), the protection of legal professional privilege has been confined to documents that have been brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings (27). In that case, Jacobs J said (28):

“I think that the question which the court should pose to itself is this — does the purpose of supplying the material to the legal adviser account for the existence of the material? I use the word

(22) Order No 6.

(23) *Baker v Campbell* (1983) 153 CLR 52 at 110.

(24) (1991) 57 SASR 21 at 34; affd (1992) 57 SASR 38.

(25) [1992] 1 WLR 957 at 961; (1993) 20 FSR 64 at 68.

(26) (1976) 135 CLR 674.

(27) *Grant v Downs* (1976) 135 CLR 674 at 688; *National Employers' Mutual General Insurance Association Ltd v Waind* (1979) 141 CLR 648 at 654; *Baker v Campbell* (1983) 153 CLR 52 at 86, 122.

(28) *Grant v Downs* (1976) 135 CLR 674 at 692.

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purpose here in the sense of intention — the intended use. The question is one of fact. In some cases a mere general description of documents in an affidavit of discovery may indicate an affirmative answer without any need further to examine the documents or the circumstances in which they came into existence (29). In other cases both an examination of the documents and of the surrounding circumstances may be necessary.”

The test is anchored to the purpose for which the document was brought into existence; the use to which a document is put after it is brought into existence is immaterial. So, on a strictly logical application of the test, if a copy is made solely for the purpose of providing it to a legal adviser in order to obtain legal advice or for use in connection with apprehended litigation, the copy would be privileged. A test which focuses on the purpose for which a document is brought into existence, rather than on the information given by or contained in the document, creates practical problems in ascertaining the intention of the maker of the document. If there be two copies on a file, has one (and if so, which), or both, or neither been brought into existence for a privileged purpose? Though the test raises problems of that kind, it must be applied unless there is some countervailing principle. Is there any countervailing principle? That calls for a consideration of the reason for according legal professional privilege to protect a copy of an unprivileged original from seizure or inspection.

The reason why privilege is accorded to a document produced for use in litigation or for the obtaining or giving of legal advice is because “it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers” (30). Privilege protects the confidentiality of documents produced for the purpose of communication between a potential litigant and the legal adviser and confidentiality facilitates the administration of justice. In *Grant v Downs*, Stephen, Mason and Murphy JJ said (31):

“This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure . . . to the solicitor.”

Communications may be documentary, as Mason J pointed out in *O’Reilly v State Bank of Victoria Commissioners* (32):

“But if communications in written form are to be privileged they

(29) *Westminster Airways Ltd v Kuwait Oil Co Ltd* [1951] 1 KB 134.

(30) *Grant v Downs* (1976) 135 CLR 674 at 685, per Stephen, Mason and Murphy JJ; *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 487.

(31) *Grant v Downs* (1976) 135 CLR 674 at 685; and see *Cross on Evidence*, 5th Aust ed (1996), p 693.

(32) (1983) 153 CLR 1 at 22-23.

must still be confidential communications between solicitor and client made for the purpose of advice or for the purpose of use in existing or anticipated litigation. The documents must come into existence for, and be prepared for, that purpose. So in *Grant* a majority of this Court held that legal professional privilege is confined to documents which are brought into existence for that sole purpose.’’

If privilege were denied to a copy of an unprivileged document when the copy is produced solely for the purpose of seeking advice from a solicitor or counsel or for the purpose of use in pending, intended or reasonably apprehended litigation, there would be a risk that the confidentiality of solicitor-client communications would be breached. The way would be open for the execution of search warrants by the emptying out of, and sifting through, solicitors’ files and counsel’s briefs. That would undermine the adversary system (33) under which most litigation is conducted (34).

Authority and principle thus combine to establish that, prima facie, copies of non-privileged documents are privileged if the copies are brought into existence solely for the purpose of obtaining or giving legal advice or solely for use in litigation that is pending, intended or reasonably apprehended. But the prima facie rule is subject to a qualification next to be mentioned.

In judicial and quasi-judicial proceedings, the contents of a private document are proved by producing the original document if it is in existence and can be produced. The original is the best evidence of its contents. Secondary evidence by way of production of a copy is not generally admissible at common law unless the original is not available to the party seeking to tender the document (35). And, if a party in litigation discloses in an affidavit of documents a material document that is no longer in the party’s possession or power, the procedures of discovery enable the other party to trace the location of the document (36), to require the first party to state the contents of the document (37) if the contents be known (38) or, perhaps, to be

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(33) *Anderson v Bank of British Columbia* (1876) 2 Ch D 644 at 649-650; *Hodgkinson v Simms* (1988) 55 DLR (4th) 577 at 582-583.

(34) See *In re L (A Minor)* [1997] AC 16 at 25.

(35) *Doe d Gilbert v Ross* (1840) 7 M & W 102 [151 ER 696]; *Dwyer v Collins* (1852) 7 Ex 639 [155 ER 1104]; *Commissioner for Railways (NSW) v Young* (1962) 106 CLR 535 at 556-557; *Butera v Director of Public Prosecutions (Vict)* (1987) 164 CLR 180 at 194, per Dawson J; but cf s 51 of the *Evidence Act 1995* (Cth, NSW). Section 48 of those Acts and s 45c of the *Evidence Act 1929* (SA) provide for a number of other ways of proving the contents of a document.

(36) *Lethbridge v Cronk* (1875) 23 WR 703; *Lacharme v Quartz Rock Mining Co* (1862) 1 H & C 134 [158 ER 832]; *Theodore v Australian Postal Commission* [1988] VR 272.

(37) *Wolverhampton Waterworks Co v Hawksford* (1859) 5 CB (NS) 703 [141 ER 283]; *Ramsey v Ramsey* [1956] 1 WLR 542; [1956] 2 All ER 165.

(38) *Dalrymple v Leslie* (1881) 8 QBD 5; *Dunbar v Perc* [1956] VLR 583 at 590.

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provided with a copy if the first party can obtain access to the original (39). In "*The Palermo*" (40), discovery of copies of unprivileged documents was refused by Butt J (the refusal being upheld by the Court of Appeal) on the ground that the copies were obtained "to form part of the brief". But in *Land Corporation of Canada v Puleston* (41) his Lordship said that he was "not inclined to extend [*The Palermo*] at all". In that case, when an original document which had been in the possession of the party's agent was not discovered, his Lordship ordered production of the original, "or affidavit sufficiently accounting for its destruction or loss. In latter case, order for production of extracts, properly verified by affidavit." (42) Thus, in proceedings in which discovery is available, the contents of an unprivileged original document can be proved as against a party who has had the original in his possession or power, even if a copy of the original is protected from inspection by legal professional privilege. When an unprivileged original can be produced or secondary evidence of its contents can be tendered in evidence, the according of legal professional privilege to a copy does not impair, although it does not hasten (43), the administration of justice.

But the procedures of discovery are not available in aid of the execution of a search warrant and, if legal professional privilege were accorded without qualification to a copy of an unprivileged document where the copy is brought into existence for a privileged purpose, the privilege might well frustrate the power to search and seize and thereby undermine the administration of justice (44). An offender whose premises were to be searched for incriminating documents could secure immunity from seizure of a key document in his possession by destroying or disposing of the original, after having a copy made for the sole purpose of the apprehended litigation. The offender would then be free to produce the copy at trial if, but only if, it advanced his case (45). This was the argument advanced by counsel in *Chadwick v Bowman* (46) but it was not necessary to deal with it in that case because the copies which were obtained by the solicitor in that case were found not to be privileged. However, Mathew J commented:

(39) *Taylor v Rundell* (1841) Cr & Ph 104 [41 ER 429]; but cf *Theodore v Australian Postal Commission* [1988] VR 272 at 280.

(40) (1883) 9 P 6.

(41) [1884] WN 1.

(42) *Land Corporation of Canada v Puleston* [1884] WN 1 at 2.

(43) *Buttes Gas & Oil Co v Hammer [No 3]* [1981] QB 223 at 244.

(44) See *Ventouris v Mountain* [1991] 1 WLR 607 at 621; [1991] 3 All ER 472 at 484, per Bingham LJ.

(45) Of course, destruction of the document might well redound to the offender's disadvantage: see *Allen v Tobias* (1958) 98 CLR 367 at 375; *Gray v Haig* (1855) 20 Beav 219 [52 ER 587].

(46) (1886) 16 QBD 561 at 562.

“I think that danger would follow if the privilege against inspection were made to cover such a case as this.”

The problems that arise when legal professional privilege is given an operation outside judicial and quasi-judicial proceedings may require some modification either of the privilege generally or of its operation in particular situations in order to ensure that the administration of justice — criminal as well as civil — is not impaired (47). No modification would be permitted if the privilege were claimed in response to an application for discovery or inspection in judicial or quasi-judicial proceedings. In such proceedings, the privilege, once it attaches, is not lost (48) unless it be waived by the holder of the privilege (49). No balancing of interests is called for, as the balancing has been done in according recognition to the privilege (50). But when the privilege is invoked in response to the exercise of a statutory authority to search and seize, some modification is required to avoid the frustration of the statute.

A problem of the same kind evoked the doctrine of imputed waiver of privilege. In *Attorney-General (NT) v Maurice* (51), Mason and Brennan JJ said (52) that an “implied waiver occurs when, by reason of some conduct on the privilege holder’s part, it becomes unfair to maintain the privilege”. Deane J said (53) that waiver of privilege —

“occurs in circumstances where a person has used privileged material in such a way that it would be unfair for him to assert that legal professional privilege rendered him immune from procedures pursuant to which he would otherwise be compellable to produce or allow access to the material which he has elected to use to his own advantage. Thus, ordinary notions of fairness require that an assertion of the effect of privileged material or disclosure of part of its contents in the course of proceedings before a court or quasi-judicial tribunal be treated as a waiver of any right to resist scrutiny of the propriety of the use he has made of the material by reliance upon legal professional privilege.”

Unfairness in the context of the execution of a search warrant might be found in maintaining the confidentiality of a privileged copy of an unprivileged original when neither the original nor its whereabouts is disclosed or any secondary evidence of its contents is made available.

(47) Manes and Silver, *Solicitor-Client Privilege in Canadian Law* (1993), pp 172-173.

(48) *Hobbs v Hobbs and Cousens* [1960] P 112; *Giannarelli v Wraith [No 2]* (1991) 171 CLR 592 at 601.

(49) *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 481, 487-488, 492-493, 497-498; *Goldberg v Ng* (1995) 185 CLR 83 at 96-98.

(50) *Waterford v The Commonwealth* (1987) 163 CLR 54 at 64-65, 74; *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 128, 134, 163.

(51) (1986) 161 CLR 475.

(52) *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 487-488.

(53) *Maurice* (1986) 161 CLR 475 at 492-493.

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In such a situation, privilege becomes a cloak thrown over evidence which the execution of the search warrant is intended to reveal.

The purpose of s 10(1) of the *Crimes Act* would not be frustrated or impaired by according legal professional privilege to copy documents if original unprivileged documents that are connected with the commission of an offence in any of the ways specified in that section are in existence and are susceptible of seizure under a warrant or if unprivileged copies of the original are available and can be tendered to prove the contents of the originals. But where privileged copies of original documents are seized under a search warrant, some qualification of the privilege is required to ensure that the person executing the warrant should have access to the contents of an unprivileged original to the same extent at least as a party to litigation can obtain access to the contents of an unprivileged original against a party who has or has had the unprivileged original in his or her possession or power. I would state the qualification in this way: if an original unprivileged document is not in existence or its location is not disclosed or is not accessible to the person seeking to execute the warrant and if no unprivileged copy or other admissible evidence is made available to prove the contents of the original, the privileged copy loses the privilege. The loss of privilege can be avoided by the production of a copy of the original (which might be produced by copying the privileged copy) the accuracy of which is verified by a person having knowledge of the contents of the original. So long as a copy of the unprivileged original (with verification if necessary) or other secondary evidence of its contents is available to be tendered to prove the contents of the original, the privilege attaching to any copy of the original can and should be maintained. Otherwise, I would hold the privilege of the privileged copy to be lost.

No objection to the production of an unprivileged copy or other evidence of the contents of the original can be entertained on the ground that it might expose the party to a penalty or forfeiture. That ground affords an excuse for refusing discovery or inspection in civil litigation but, once legal professional privilege is treated as a rule of general application affecting, inter alia, extra-judicial processes for the enforcement of the criminal law (54), that ground cannot operate to frustrate those processes. For that reason, I have used the words “at least” in stating the extent of the access to the contents of an unprivileged original which a person executing a search warrant should be able to obtain.

To qualify legal professional privilege in the way I have proposed is to deprive a person who has only a privileged copy in his or her possession or power of any tactical advantage that the privilege and the absence of an unprivileged original would otherwise have

(54) See, eg, s 10(1)(b) under which a search warrant may be issued with the very object of obtaining incriminating evidence.

conferred. But the privilege is not afforded in order to confer tactical advantages; it is afforded in order to facilitate the administration of justice.

Judicial review and declaratory relief

The application of these principles to the instant case presents some difficulty. The difficulty arises because the claim for declaratory relief seems to have been regarded as an incident of, or a step towards, the granting of relief by way of judicial review of the application for search warrants, the issuing of the search warrant and the conduct of the police in executing the search warrants. In truth, the determination of the claim for declaratory relief was not, and could not have been, determinative of the claims for judicial review. The fact that there were privileged documents (or documents that were prima facie privileged) in the premises in respect of which search warrants were sought says nothing as to the validity of the applications for warrants to search those premises, assuming that such applications were "decisions" or "conduct" amenable to review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) or were reviewable pursuant to s 39B of the *Judiciary Act*. There was nothing to show that the applications were made in bad faith to obtain warrants authorising a search for and seizure of privileged documents. Nor was the decision to issue the warrants invalid. The issuing justice restricted the execution of the warrants so as to ensure observance of the guidelines for dealing with documents in the event that a claim of privilege was made. The conduct of the police in executing the warrants complied with the guidelines. In accordance with those guidelines, the documents for which privilege was claimed were not seized under the warrant but were sealed up and delivered to a third party. The guidelines provide, in effect, that when the documents are sealed up and delivered to a third party, the execution of the warrant be suspended pending the decision in proceedings to establish the privilege. If no such proceedings are taken or such proceedings fail, the documents are released into the possession of a police officer to be dealt with under the warrant. In this way, an accommodation is reached between the legislative intention expressed by s 10(1) and the decision in *Baker v Campbell*.

When a claim of privilege attaching to a document seized under a warrant comes to be determined judicially, the court must ascertain for itself whether the document was brought into existence solely for a privileged purpose and, if it be found or assumed that the document is a copy of an unprivileged original but was brought into existence solely for a privileged purpose, whether the privilege has been lost. In determining the claim of privilege, the court is not reviewing judicially an executive action but is determining a distinct controversy between the person who seeks to inspect the seized document and the person who seeks to maintain its immunity from inspection on the ground of legal professional privilege. To determine that controversy, the court

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must act upon admissible evidence, not upon hearsay. In the present case, Davies J had regard to the sworn information laid before the issuing justice. That material was admissible to establish the basis on which the search warrant was issued and thus to support the validity of the issue of the warrant, but it was not admissible to show that the copy documents found in the custody of solicitors were not privileged.

Ulterior purpose in communications with legal adviser

In determining whether a claim of legal professional privilege can be upheld, it is open to the party resisting the claim to show reasonable grounds for believing that the communication effected by the document for which legal professional privilege is claimed was made for some illegal or improper purpose, that is, some purpose that is contrary to the public interest (55). I state the criterion as "reasonable grounds for believing" because (a) the test is objective and (b) it is not necessary to prove the ulterior purpose but there has to be something "to give colour to the charge" (56), a "prima facie case" that the communication is made for an ulterior purpose (57). The purposes that deny the protection of privilege for a communication (58) (whether documentary or oral) between a client and the client's solicitor or counsel include (59) the furthering of the commission of an offence (60).

When a party in curial proceedings is seeking to rebut a claim of privilege by asserting that the communication with the legal adviser was made for an ulterior purpose, the evidence of ulterior purpose must be admissible in those proceedings. It is not sufficient to rely on the information laid before the justice who issued the warrant. The informant is not necessarily a witness and, if he or she is a witness, the admissible evidence is what is then deposed to, not a statement made to or before the issuing justice. In the present case no admissible evidence was tendered, although Davies J at first instance recorded that counsel for the parties were content that he "should have regard to" the sworn information laid before the issuing justice.

Two issues that were relevant to the claim of privilege in respect of the copy documents seized under the warrant appear to await determination. The first is whether the privilege attached at all. That question may need to be re-litigated now that it has been held that a

(55) *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 at 514-515; *R v Bell; Ex parte Lees* (1980) 146 CLR 141 at 147, 156, 159, 161.

(56) *O'Rourke v Darbishire* [1920] AC 581 at 604, 633; *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 at 516, 517, 525, 527.

(57) *Butler v Board of Trade* [1971] Ch 680 at 689.

(58) *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 at 515; *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 163.

(59) *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 at 516, 528-529.

(60) *R v Cox and Railton* (1884) 14 QBD 153 at 175; *O'Rourke v Darbishire* [1920] AC 581 at 613, 632; *Varawa v Howard Smith & Co Ltd* (1910) 10 CLR 382 at 385, 386, 389-390; *Butler v Board of Trade* [1971] Ch 680 at 689.

concurrence of counsel in the judge's "having regard to" the sworn information was an inappropriate means of proving the facts relevant to that issue. The second is (in my opinion) whether, if privilege attached, it was lost by reason of the unavailability of the original unprivileged documents or of any secondary evidence of their contents.

Although these reasons differ from those of their Honours in the Full Court, the orders made by that Court suffice to allow effect to be given to these reasons. I would therefore dismiss the appeal and cross-appeal.

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DAWSON J. I have had the advantage of reading the reasons for judgment of Toohey J and agree with them and with the orders which he proposes. I wish only to add the following comments.

Legal professional privilege and copy documents

The first question which arises is whether a copy of a document may attract legal professional privilege where the original does not. As Toohey J points out, it is confusing to regard legal professional privilege as attaching to documents rather than the information they communicate. Whilst it is not uncommon in judgments for the distinction to be ignored, to say that a document is privileged is merely a shorthand way of saying that the communication constituted by the document is privileged (61). As I said in *Baker v Campbell* (62):

"Legal professional privilege attaches only to communications made for the purpose of giving or receiving advice or for use in existing or anticipated litigation. Moreover, if the communication in question is in the form of a document submitted by a client to his solicitor for use in existing or anticipated litigation, privilege will attach to it only if it comes into existence solely for that purpose. The privilege cannot operate to put beyond the reach of the law documentary or other material which has an existence apart from the process of giving or receiving advice or the conduct of litigation."

The last sentence of that passage would better convey its true meaning if, instead of the words "documentary or other material", I had continued to refer to "communications" because it is the communication of information that is protected by legal professional privilege against disclosure. That is so even where a document is brought into existence for use in existing or anticipated litigation, although in that case the information communicated may be of a somewhat different kind. Privilege does not protect a document from disclosure as a mere

(61) See *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1 at 22-23, per Mason J.

(62) (1983) 153 CLR 52 at 122.

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physical object any more than it protects from disclosure any other physical object (63).

That is why a document which has been brought into existence otherwise than as a communication between client and legal adviser seeking or giving advice or for use in existing or anticipated litigation does not attract the privilege: it is not a communication which has its origin in that confidential relationship between client and legal adviser that it is the purpose of the privilege to protect. It is why a document which merely evidences a transaction — a contract, for example — which is not a communication seeking or giving legal advice or for use in the conduct of litigation (in the sense that it pre-exists any actual or anticipated litigation) does not attract legal professional privilege, even if it is subsequently given to the legal adviser for the purpose of seeking advice or for use in litigation. And it is one of the reasons why the preferred view is (64) that a communication constituted by a document will only be protected by privilege if the document is brought into existence for the sole purpose of seeking or giving legal advice or for use in legal proceedings. The view that it is sufficient if that is the dominant purpose of the communication constituted by the document disregards the implication that the communication then has an existence apart from the confidential relationship between client and legal adviser and constitutes a communication which ought not be protected against disclosure (65).

Brett MR had some of these considerations in mind in *Pearce v Foster* (66) when he said of the documents in question in that case:

“It seems to me, therefore, that they fall within the class of documents with regard to which there is a professional privilege, on the ground that they are brought into existence for the purposes or in the course of professional communications between solicitor and client. I do not think that, where documents are already in existence aliunde, the mere fact of their being handed to a solicitor for the purposes of the conduct of the action can create a privilege; but, where documents are brought into existence by a solicitor or through a solicitor for the purposes of consultation with such solicitor, with a view to his giving professional advice or to the conduct of an action, these are in the nature of professional communications, and are as such privileged.”

The same considerations lie behind the question which Jacobs J in *Grant v Downs* (67) thought was appropriate to determine whether legal professional privilege existed or not, namely, “does the purpose

(63) *cf National Mutual Life Association of Australasia Ltd v Godrich* (1910) 10 CLR 1 at 10, per Griffith CJ.

(64) See *Grant v Downs* (1976) 135 CLR 674.

(65) *cf Waugh v British Railways Board* [1980] AC 521.

(66) (1885) 15 QBD 114 at 118-119.

(67) (1976) 135 CLR 674 at 692.

of supplying the material to the legal adviser account for the existence of the material?’

The words of Brett MR in *Pearce v Foster* (68) adopt an argument put by counsel. That argument concluded. ‘‘So a mere copy of such document made for the purposes of the action is not necessarily privileged (69).’’ Brett MR did not go so far in his judgment and it was unnecessary for him to do so for the purposes of the case before him, but it is, I think, the logical consequence of the argument which he accepted. That is illustrated by the Victorian case of *Shaw v David Syme & Co* (70).

In that case the transcript of shorthand notes of court proceedings which were held in public was held not to attract legal professional privilege, even though the transcript was brought into existence for the purpose of enabling solicitors to advise in respect of a libel action and to conduct the action. The transcript was treated as a copy of the shorthand notes, that is to say, it was not considered significant that the original was in shorthand and the copy was not. What is important is that it was held that the original was not a communication seeking or giving legal advice nor, being merely a record of proceedings which took place publicly and independently of anticipated litigation, was it brought into existence for the purposes of the anticipated litigation. Of the copy, that is to say, the transcript, Madden CJ, in delivering the judgment of the court, said (71):

‘‘It would, in our opinion, be wrong to say that, where a solicitor has said, ‘Get me a copy of that document, the original of which if in my possession will be liable to be discovered,’ and such a copy is obtained for him, that copy document has come into existence for the purpose of being put before the solicitor. The document in question is in effect merely a translation of a document which of itself and untranslated would be useless. Being in shorthand, it has to be brought into such a condition that ordinary persons can read it. Therefore it is, as I have said, merely a translation. We think this transcript was not brought into existence for the purposes of the litigation within the true meaning of the rule which gives the privilege here claimed, and it seems to be definitely established by *Chadwick v Bowman* (72) and *Lyell v Kennedy* (73) that if an original is not privileged a copy can be in no better position.’’

Thus it was accepted that if an original document does not attract legal professional privilege, a mere copy cannot do so. The reason for this is apparent from the emphasis placed by Madden CJ upon the fact that

(68) (1885) 15 QBD 114 at 117.

(69) *Lyell v Kennedy* (1884) 27 Ch D 1.

(70) [1912] VLR 336.

(71) *Shaw v David Syme & Co* [1912] VLR 336 at 340-341.

(72) (1886) 16 QBD 561.

(73) (1884) 27 Ch D 1.

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the copy was a mere translation. The communication constituted by the copy — the translation — was the same as it was in the case of the original. The information conveyed by the one was no more or less than the information conveyed by the other, so that the copy could be in no better position than the original so far as privilege is concerned. That is to say, if the communication constituted by the original did not (as it did not) seek or provide legal advice and was not (as it was not) made for the purpose of litigation, then the communication constituted by the copy could not be regarded differently.

The point is also illustrated by *Lambert v Home* (74), a case similar to *Shaw v David Syme & Co*. There it was held that a transcript of the shorthand notes of proceedings in open court was not privileged even though the transcript was made for use in future litigation. The transcriber had, in the words of Buckley LJ, “done nothing more than reproduce in a physical form that which came into existence in its relevant form when the witness spoke in the box. The writer is comparable to a gramophone or a photographic camera. The document as distinguished from its contents is not relevant” (75). The same reasoning applies here. It is the contents of the document — the information which it communicates — that is the important thing. The copy distinguished from its contents is not important, for legal professional privilege attaches to the contents of a document rather than the document itself.

In *Vardas v South British Insurance Co Ltd* (76), Clarke J said of *Lambert v Home* that it “rejected in categorical terms the notion that a copy of a document made for use in litigation was privileged although the original was not”. Clarke J disagreed with a decision of Hunt J earlier in the same year (77) where he concluded that “[i]f the sole purpose of submission to the party’s legal advisers for advice accounts for the existence of the copy, it should be privileged”. Hunt J cited *Grant v Downs* (78) and *National Employers’ Mutual General Insurance Association Ltd v Waind* (79) in support of that conclusion, relying in particular on the well-known principle stated by Mason J in *Waind* (80) that legal professional privilege is concerned with the purpose for which the particular document was brought into existence rather than the purpose for which the information which it records was obtained. Expressing the distinction in that way may, perhaps, be misleading. The law is concerned with the purpose for which the information contained in the document was communicated, rather than the purpose for which the information itself was originally obtained.

(74) [1914] 3 KB 86.

(75) *Lambert v Home* [1914] 3 KB 86 at 91-92.

(76) [1984] 2 NSWLR 652 at 659.

(77) See *McCaskill v Mirror Newspapers Ltd* [1984] 1 NSWLR 66 at 68.

(78) (1976) 135 CLR 674.

(79) (1979) 141 CLR 648.

(80) (1979) 141 CLR 648 at 654.

The former purpose remains unchanged upon the making of copies of the document. Clarke J had that in mind when he said (81) that *Grant v Downs* and *Waind* “were not concerned with, and do not deal with, the purpose of the mechanical reproduction or copying of a document. I regard the distinction between the collating and recording of information in a document and the mere reproduction of that document as one of substance”.

No doubt if the communication constituted by the copy in *Shaw v David Syme & Co* and *Lambert v Home* had been accompanied by some further communication which constituted the giving or seeking of legal advice or additional documentation for use in legal proceedings, the further communication would have been privileged. No doubt also a copy may be made of an unprivileged document or unprivileged documents in such a selective way as to render the copy or copies a communication of information which is different from or additional to the information conveyed by the original or originals. In that event, the copy or copies would be privileged.

In *Lyell v Kennedy* (82), documents which were copies of unprivileged originals were held to attract privilege because the selection involved in the making of the copies by a solicitor “might shew what his view was as to the case of his client as regards the claim made against him” (83). That is to say, the selected copies or the portions selected might by their very existence reveal the basis upon which the solicitor was proceeding and thus the nature of his advice to his client. It is implicit in the decision in *Lyell v Kennedy* that a mere copy of an unprivileged original document which does not reveal such additional information attracts privilege no more than the original. However, as was pointed out by Byrne J in *Roux v Australian Broadcasting Commission* (84):

“In the modern context where indiscriminate photocopying is the norm, it may be more difficult than in earlier days of manuscript copying to establish that there has been the interposition of professional skill and judgment in the selection of the materials to be copied so that their production discloses implicitly some confidential privileged information.”

Lyell v Kennedy, and the earlier decision in *Chadwick v Bowman* (85), appear to have been misunderstood in England for a time, perhaps because those cases did not spell out the true reason why a copy document does not attract privilege if the original does not do so. But the cases which seem to have applied a different principle were

(81) See *Vardas v South British Insurance Co Ltd* [1984] 2 NSWLR 652 at 660.

(82) (1884) 27 Ch D 1.

(83) *Lyell v Kennedy* (1884) 27 Ch D 1 at 26, per Cotton LJ.

(84) [1992] 2 VR 577 at 599.

(85) (1886) 16 QBD 561.

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called into question by Lord Denning MR in *Buttes Gas & Oil Co v Hammer [No 3]* (86) where he said:

“If the original document is privileged . . . so also is any copy made by the solicitor. But, if the original is not privileged, a copy of it also is not privileged — even though it was made by a solicitor for the purpose of the litigation (87). There are some cases which appear to give a privilege to copies on their own account, even when the originals are not privileged. They range from *The Palermo* (88) down to *Watson v Cammell Laird & Co (Shipbuilders & Engineers) Ltd* (89). But those cases are suspect. They were adversely commented on in the Sixteenth Report of the Law Reform Committee on Privilege in Civil Proceedings (1967) (90). Since *Waugh’s* case (91) it is open to us to reconsider them. In my opinion, if the original is not privileged, neither is a copy made by the solicitor privileged. For this simple reason, that the original (not being privileged) can be brought into court under a subpoena duces tecum and put in evidence at the trial. By making the copy discoverable, we only give accelerated production to the document itself. That was pointed out by Winn LJ’s committee in the Report of the Committee on Personal Injuries Litigation in July 1968 (92).”

The reason why a copy document attracts no greater privilege than the original is, as I have endeavoured to explain, more fundamental than that given by Lord Denning MR. It is true that to make the copy discoverable may only be to give accelerated production to the document itself, but that is an argument which has its foundation in policy rather than logic. There are exceptions to the general rule that is in the interests of justice that relevant documents be produced, and in this country that is so whether the production be for the purposes of litigation or the purposes of search and seizure preceding litigation. One of the exceptions exists where there is legal professional privilege and it exists in order to preserve the confidential relationship between client and legal adviser, a relationship which is to be fostered and preserved for the better working of the legal system. However, that relationship is not impaired and the interests of justice are best served if the client or his legal adviser on his behalf is compelled to disclose a copy of a document when production of the original might be compelled without any ground for objection. That may, I think, be said to be so as a matter of policy.

Notwithstanding the limited basis upon which Lord Denning MR

(86) [1981] QB 223 at 244.

(87) See *Chadwick v Bowman* (1886) 16 QBD 561.

(88) (1883) 9 P 6.

(89) [1959] 1 WLR 702; [1959] 2 All ER 757.

(90) Cmnd 3472.

(91) [1980] AC 521.

(92) Cmnd 3691, par 304.

justified his conclusion in *Buttes Gas & Oil Co v Hammer [No 3]*, that conclusion appears now to be accepted in England, although again upon grounds of policy rather than principle (93). In Australia there has been a division of judicial opinion, but the correct view is, for the reasons of policy and principle which I have identified, that a copy of a document which does not attract legal professional privilege is in no different position from the original. That view is supported by Australian authority (94).

Admissibility of hearsay to exclude legal professional privilege

The other question which arises is whether hearsay evidence was admissible to establish that certain of the documents in question failed to attract legal professional privilege because there was a sufficient indication that they were brought into existence in furtherance of a crime or fraud. That limit upon the ambit of legal professional privilege was first recognised in *R v Cox and Railton* (95). It is only those communications passing between a legal adviser and his or her client in professional confidence which are privileged and a communication made by the client for assistance in the commission of a crime or fraud lies outside any legitimate professional relationship. The issue in the present case is the nature of the evidence required to establish that the privilege is excluded on this ground.

The cases make it plain that those seeking to exclude legal professional privilege do not have to prove that the communication in question was in furtherance of a crime or fraud. In *Bullivant v Attorney-General (Vict)* (96), which was a case of fraud, the Earl of Halsbury LC said: "you must have some definite charge either by way of allegation or affidavit or what not." In *O'Rourke v Darbishire* (97) Viscount Finlay said: "there must be, in order to get rid of privilege, not merely an allegation . . . of a fraud, but there must be something to give colour to the charge." That test was accepted in *Attorney-General (NT) v Kearney* (98) by Gibbs CJ, with whom Mason and

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- (93) See *Ventouris v Mountain* [1991] 1 WLR 607; [1991] 3 All ER 472; *Dubai Bank Ltd v Galadari* [1990] Ch 98; *Dubai Bank Ltd v Galadari [No 7]* [1992] 1 WLR 106; [1992] 1 All ER 658; *Lubrizol Corporation v Esso Petroleum Co Ltd* [1992] 1 WLR 957; *Barclays Bank Plc v Eustice* [1995] 1 WLR 1238; [1995] 4 All ER 511.
- (94) See *Shaw v David Syme & Co* [1912] VLR 336; *Vardas v South British Insurance Co Ltd* [1984] 2 NSWLR 652; *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44; *J N Taylor Holdings Ltd v Bond* (1991) 57 SASR 21; *Roux v Australian Broadcasting Commission* [1992] VR 577; *Langworth Pty Ltd v Metway Bank Ltd* (1994) 53 FCR 556; *Bayliss v Cassidy* [1995] 2 Qd R 464.
- (95) (1884) 14 QBD 153.
- (96) [1901] AC 196 at 201.
- (97) [1920] AC 581 at 604.
- (98) (1985) 158 CLR 500 at 516.

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Brennan JJ agreed. Gibbs CJ added (99) the further words of Viscount Finlay (100):

“The statement [ie the allegation of fraud] must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact . . . The Court will exercise its discretion, not merely as to the terms in which the allegation is made, but also as to the surrounding circumstances, for the purpose of seeing whether the charge is made honestly and with sufficient probability of its truth to make it right to disallow the privilege of professional communications.”

In requiring less than proof of an allegation of crime or fraud to displace legal professional privilege, the law has made a compromise in the public interest between the competing principles which require, on the one hand, the availability of all relevant evidence and, on the other, the protection of professional confidence. It has done so in favour of the availability of all relevant evidence by placing the threshold for the displacement of the privilege a considerable distance short of proof of the allegation of crime or fraud. No doubt that is so because it is in the public interest that the law should not countenance even the possibility of legal professional privilege being raised as a cloak to hide criminal or fraudulent activities. Proof — that is to say, admissible evidence of the existence of the crime or fraud — is not required. It is enough that circumstances are made to appear which sufficiently point to the bona fides and credibility of the allegation. It is apparent that for this purpose hearsay evidence cannot be excluded. Thus in *O'Rourke v Darbishire* (101) Lord Sumner said:

“The stage in the action is only an interlocutory one, and the materials must be weighed, such as they are, without the apparatus of a formal trial of an issue. On such materials the Court must judge whether the claim of privilege is displaced or not.”

In the same case Lord Parmoor said (102):

“Whether the circumstances brought to the notice of the Court in a particular case are sufficiently explicit to establish a prima facie case of definite fraud, either by allegation, affidavit, or in some other way, will depend on the special facts in each case (103). But something more is required than mere pleading, or than mere surmise and conjecture.”

Lord Wrenbury said (104):

(99) *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 at 516.

(100) *O'Rourke v Darbishire* [1920] AC 581 at 604.

(101) [1920] AC 581 at 614.

(102) *O'Rourke v Darbishire* [1920] AC 581 at 623.

(103) *R v Cox* (1884) 14 QBD 153.

(104) *O'Rourke v Darbishire* [1920] AC 581 at 633.

“the plaintiff must show to the satisfaction of the Court good ground for saying that prima facie a state of things exists which, if not displaced at the trial, will support a charge of fraud. This may be done in various ways — admissions on the pleadings of facts which go to show fraud — affidavits in some interlocutory proceedings which go to show fraud — possibly even without admission or affidavit allegations of facts which, if not disputed or met by other facts, would lead a reasonable person to see, at any rate, a strong probability that there was fraud, may be taken by the Court to be sufficient.”

Of course, in interlocutory proceedings hearsay is ordinarily admissible in the form of affidavit evidence upon the basis of information and belief, but it is apparent that in determining whether the privilege is displaced not even affidavit evidence is necessarily required.

The proceedings in the present case in which Davies J determined that there was sufficient substance to the allegation of crime or fraud to displace the privilege in relation to certain documents may not perhaps be accurately described as interlocutory proceedings for they resulted in a declaration which was not part of any proceedings otherwise on foot. The true nature of those proceedings can only be seen by reference to the “General Guidelines between the Australian Federal Police and the Law Council of Australia as to the execution of search warrants on lawyers’ premises, Law Societies and like institutions in circumstances where a claim of legal professional privilege is made” (105). Under those guidelines, documents in relation to which legal professional privilege is disputed are placed by the legal adviser, under the supervision of the police officer seeking to execute the warrant, in a sealed container. The container is then jointly delivered into the custody of some independent person. That is to enable the question of legal professional privilege to be determined and that is how the proceedings before Davies J arose.

The real question before Davies J, despite the form of relief he ultimately gave, was whether the police officer was entitled to seize the documents which he wished to seize and to which the search warrant could not validly have extended if they were documents which attracted legal professional privilege. That is to say, the question which Davies J was required to decide was whether the police officer was entitled to implement the decision (the implementation being cut short by the invocation of the guidelines) which he reached, namely, the administrative decision to seize the documents in question notwithstanding the assertion of legal professional privilege. He was entitled to do so if it was sufficiently apparent that the documents came into

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(105) The guidelines appear as an appendix to the judgment of Beaumont J in the Full Federal Court: see *Propend Finance* (1995) 58 FCR 224 at 245-248.

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existence in furtherance of a crime or fraud. Clearly in reaching his conclusion upon that question the police officer could act on the materials available to him and was not confined to admissible evidence. Thus if the proceedings before Davies J be considered as, in effect, a review of the police officer's decision, then clearly his Honour was entitled to have regard to the same materials as were available to the police officer. On the other hand, if they were independent proceedings to determine whether legal professional privilege was displaced, then they were in substance, if not in form, interlocutory proceedings or at least the kind of proceedings in which it is established that hearsay evidence is not excluded. As Toohey J points out, much of the evidence before Davies J was not hearsay, but in any event, in my view, his Honour was entitled to have regard to hearsay evidence in concluding that the documents in question did not attract the privilege.

TOOHEY J. The circumstances giving rise to this appeal are detailed in other judgments. It is necessary to make only brief mention of them in these reasons. I come immediately to the two questions raised for decision by the appeal. In doing so, it is not possible to divorce these questions entirely from the form of the proceedings taken by the respondents in the Federal Court, that is, under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and pursuant to s 39B of the *Judiciary Act 1903* (Cth).

The first question is whether, and in what circumstances, legal professional privilege attaches to a communication in a copy document when no privilege attaches to the original. The second question is, in effect, whether hearsay material may be used to displace legal professional privilege where the claim of privilege relates to a document which is said to have come into existence in furtherance of an illegal or improper purpose.

The views of the primary judge and the Full Court

In allowing in part an appeal by the respondents (106), all members of the Full Court of the Federal Court (Beaumont, Hill and Lindgren JJ) rejected the view of the primary judge, Davies J, that a copy document could not be the subject of legal professional privilege if the original document was itself not privileged, even though the copy was made for the sole purpose of obtaining legal advice, unless particular legal expertise was used in the selection of the documents (107). However their Honours were not in entire agreement as to the test to be used to determine when the privilege might operate in respect of a copy of a non-privileged document.

(106) *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1995) 58 FCR 224.

(107) *Propend v Commissioner, Australian Federal Police* (1994) 35 ALD 25 at 40-41.

Beaumont J saw the relevant inquiry in these terms: ‘in the particular circumstances in which the copy document came into existence, should it be treated as, in truth, part of the substantive process of the seeking or the obtaining of legal advice or of preparing for litigation’ (108). Hill J approached the matter on the footing that the privilege attaches to communications, whether they be recorded in documents or are oral. It follows, said his Honour, ‘that copies of documents otherwise not the subject of legal professional privilege are themselves the subject of such privilege only where the copies are made for the sole purpose of obtaining advice upon matters contained in or concerning the original and in circumstances where to compel production of the copy would or could operate to reveal the subject matter upon which advice was sought’ (109). Lindgren J thought that ‘the public policy which supports the existence of legal professional privilege is satisfied if copy documents stand in the same position in relation to privilege as the original’ (110). His Honour accepted that in some cases this formulation of the law might seem inadequate. He instanced the situation where inspection may reveal a line of thinking, whether of lawyer or client, which led to the selection of the copies or to the form in which the material had been assembled. Again, a copy document may bear highlighting, underlining or even annotations. Yet again, copied documentation may be so integrated and mixed up with privileged original material that the former cannot be inspected without the latter being seen or its nature revealed. Lindgren J did not see these as exceptions to any principle but rather as falling within the general principle he had enunciated. The examples given applied equally to original documents (111). Thus, in terms of general principle, Lindgren J’s approach was close to that of Davies J.

Legal professional privilege

I accept that privilege may attach to a communication in the form of a copy of a non-privileged document, but only in the limited circumstances to which Lindgren J referred. Reference to copy documents tends to obscure the fact that privilege does not attach to a piece of paper. It attaches to a communication, written or oral, and it is the communication that is at issue. While it is natural to speak of legal professional privilege in terms of documents, it is the nature of the communication within the document that determines whether or not the privilege attaches (112). It is as a consequence of this distinction that a legal adviser may be ‘required to give evidence of observed fact, notwithstanding that he observed that fact while acting in the

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(108) *Propend Finance* (1995) 58 FCR 224 at 238.

(109) *Propend Finance* (1995) 58 FCR 224 at 259.

(110) *Propend Finance* (1995) 58 FCR 224 at 265.

(111) See *Propend Finance* (1995) 58 FCR 224 at 266-267.

(112) *Grant v Downs* (1976) 135 CLR 674 at 690, per Jacobs J.

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course of a retainer and would not have observed the fact had he not been so retained” (113).

As always, it is helpful to see what the author of the monumental treatise on evidence has to say. Wigmore identifies the general principle of privileged communications in the following way (114):

“[F]our fundamental conditions are recognized as necessary to the establishment of a privilege against the disclosure of communications:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.”

Although this formulation employs the language of “confidence” and “confidentiality”, the author makes it clear in what follows that confidentiality of itself does not create the privilege. Legal professional privilege relates to production, not admissibility (115). Wigmore’s formulation is important because of the emphasis it places on the communication rather than the form the communication takes. This distinction is not always maintained in the authorities. As Hill J noted (116), there are passages in judgments of this Court that speak of the privilege in relation to “documents” (117). But, when such passages are taken in context, it is apparent that it is the information in the document with which the Court is concerned. For that reason, the question whether privilege attaches to a communication in a copy document is not answered simply by asking whether the original document is itself privileged.

Before considering further the legal principles involved in this aspect of the appeal, it is as well to recall some of the circumstances which gave rise to the appeal. Documents in the possession of the respondents had been seized by the Australian Federal Police in execution of several search warrants. The validity of the warrants was upheld by the primary judge and by the Full Court. That matter has not been pursued in this Court. The relief which was sought by the respondents, and against the granting of which by the Full Court this

(113) *National Crime Authority v S* (1991) 29 FCR 203 at 218, per Heerey J.

(114) *Wigmore on Evidence*, McNaughton rev (1961), vol 8, par 2.285.

(115) *R v Tompkins* (1977) 67 Cr App R 181 at 184; *R v Governor of Pentonville Prison; Ex parte Osman* [1989] 3 All ER 701 at 730.

(116) *Propend Finance* (1995) 58 FCR 224 at 253.

(117) eg, *Grant v Downs* (1976) 135 CLR 674 at 688; *National Employers’ Mutual General Insurance Association Ltd v Waind* (1979) 141 CLR 648 at 657.

appeal is brought, was a declaration that certain of the documents seized “are subject to legal professional privilege” and an order for their return. Some of these documents had been seized at the offices of a solicitor who was a director of the first respondent, Propend Finance Pty Ltd (Propend). Included in the material for which privilege was claimed on behalf of Propend was a quantity of documents in the solicitor’s office which were copies of documents which themselves were not privileged. Davies J held (118):

“There are many bundles of documents in the schedule in respect of which, in my opinion, privilege fails for the reason that the original documents themselves are not shown to be the subject of legal professional privilege. At the present time, the evidence does not show that there was any particular legal expertise used in the selection of the documents.”

The present respondents successfully challenged that approach before the Full Court.

The importance of legal professional privilege has been emphasised in many decisions of this Court and of other courts. A recent instance is *Carter v Northmore Hale Davy & Leake* (119). At the same time a number of cases have sounded a warning against widening the privilege lest the need for the courts to have access to all relevant documents should be unduly undermined (120). Wigmore has said of legal professional privilege (121):

“It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.”

This view was endorsed by Mason J in *O’Reilly v State Bank of Victoria Commissioners* (122). I do not understand his Honour to have retreated from that view in *Baker v Campbell* (123). The importance of the disclosure and production of all relevant documents in the possession, custody or power of parties to litigation has been stressed again and again. Legal professional privilege is an exception to that principle and can only be justified as serving the public interest which gives rise to the exception (124). Not only that but, as Aldous J

(118) *Propend v Commissioner, Australian Federal Police* (1994) 35 ALD 25 at 41.

(119) (1995) 183 CLR 121. See also *R v Derby Magistrates’ Court; Ex parte B* [1996] 1 AC 487 and the note in *Law Quarterly Review*, vol 112 (1996) 535.

(120) *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 147, 150-154. See also Zuckerman, “Legal Professional Privilege and the Ascertainment of Truth”, *Modern Law Review*, vol 53 (1990) 381.

(121) *Wigmore on Evidence*, McNaughton rev (1961), vol 8, par 2,291.

(122) (1983) 153 CLR 1 at 25; *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 147.

(123) (1983) 153 CLR 52.

(124) *Ventouris v Mountain* [1991] 1 WLR 607 at 611-612; [1991] 3 All ER 472 at 476.

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observed in *Lubrizol Corpn v Esso Petroleum Ltd* (125), a judge must be able to explain why the particular exception sought to be maintained is in the public interest. The difficulties of explanation are accentuated when there is a departure from the basic proposition that if an original document is not privileged, nor is a copy of that document (126).

Legal professional privilege: copy documents

In *Buttes Gas & Oil Co v Hammer [No 3]* (127) Lord Denning MR said:

“If the original document is privileged . . . so also is any copy made by the solicitor. But, if the original is not privileged, a copy of it also is not privileged — even though it was made by a solicitor for the purpose of the litigation.”

His Lordship thought that the reason why this was so was because the original, not being privileged, “can be brought into court under a subpoena duces tecum and put in evidence at the trial”. But, with respect, that cannot afford a sufficient reason because it is the communication that is sought to be privileged, not the document. It may be that inspection of the copy document would disclose some confidential privileged communication. Nevertheless Lord Denning’s basic proposition holds good (128).

An early case in which the privilege attaching to copy documents was at issue is *Lyell v Kennedy* (129). The documents were in the possession of the defendant’s solicitor but they were copies of public records or other documents which were described as *publici juris*. The Court of Appeal held that the copies and extracts from the originals were privileged if made or obtained by the professional advisers of a party for his defence to the action and were the result of the

(125) [1992] 1 WLR 957 at 960.

(126) In appendices to his judgment Lindgren J lists cases in which it has been accepted that legal professional privilege attaches to copies simply because the purpose of making the copy was a privileged purpose satisfying the relevant test and also cases in which that view has been rejected, though in some of the latter cases reference is made to additional factors which might make the copy privileged.

(127) [1981] QB 223 at 244.

(128) The view that a copy of a non-privileged document is itself not privileged is shared by a number of Australian decisions including *Shaw v David Syme & Co* [1912] VLR 336; *Vardas v South British Insurance Co Ltd* [1984] 2 NSWLR 652 at 659-660; *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44 at 59-62; *Bayliss v Cassidy* [1995] 2 Qd R 464. It also represents the preponderance of English authority. In addition to *Buttes Gas & Oil Co v Hammer [No 3]*, see *Chadwick v Bowman* (1886) 16 QBD 561; *Lambert v Home* [1914] 3 KB 86; *Dubai Bank Ltd v Galadari* [1990] Ch 98; *Ventouris v Mountain* [1991] 1 WLR 607; [1991] 3 All ER 472; *Lubrizol Corpn v Esso Petroleum Ltd* [1992] 1 WLR 957.

(129) (1884) 27 Ch D 1.

professional knowledge, research and skill of those advisers. Bowen LJ said (130):

“A collection of records may be the result of professional knowledge, research, and skill, just as a collection of curiosities is the result of the skill and knowledge of the antiquarian or virtuoso, and even if the solicitor has employed others to obtain them, it is his knowledge and judgment which have probably indicated the source from which they could be obtained.”

As to *Lyell v Kennedy*, I agree with the view expressed by Byrne J in *Roux v Australian Broadcasting Commission* (131) that:

“the decision in that case to uphold the privilege was in fact based on the premise that to permit inspection of the solicitors’ copies, would show to the plaintiff what was the view of the defendant or its lawyers as to the issues in the plaintiff’s case.”

Legal professional privilege is concerned with protecting the confidence of communications between lawyer and client. If therefore an original document is not privileged, a copy of that document is not privileged merely because the lawyer receives it from his or her client, even if it is to assist in the conduct of litigation. Where privilege is claimed for the contents of a document, it is necessary to look at the purpose for which the document recording the information came into existence, not the purpose for which the information was obtained (132). If the document was not brought into existence for the purpose of litigation, its contents are not privileged even if the information which it contains was obtained for that purpose. “Therefore, if a solicitor gets from a third person for use in conducting the client’s case a document that was not created in circumstances that attract privilege, on discovery the client must produce the document to the other side.” (133) There must be something in the circumstances in which a copy of a non-privileged document came into existence in order to attach privilege to the copy. An illustration is where a lawyer makes annotations on a copy document, for the purposes of the conduct of litigation. On the other hand, it might be said that once annotated the copy document is different from the original. In that event only the annotation may be privileged. Selective copying is unlikely to attract the privilege, particularly at the present time “where indiscriminate photocopying is the norm” (134). If the position of the copy in a collection of

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(130) *Lyell v Kennedy* (1884) 27 Ch D 1 at 31.

(131) [1992] 2 VR 577 at 597, endorsed by Lindgren J in *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1995) 58 FCR 224 at 267.

(132) *Waind* (1979) 141 CLR 648 at 654.

(133) Williams, “Four Questions of Privilege: the Litigation aspect of Legal Professional Privilege”, *Civil Justice Quarterly*, vol 9 (1990) 139, at pp 154-155.

(134) *Roux v Australian Broadcasting Commission* [1992] 2 VR 577 at 599.

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documents or something else about the copy tends to indicate the manner in which the litigation is to be conducted, privilege may attach. That is a limited situation indeed and, in the ordinary course, there is no reason why the document in question should not be removed from the collection so that it may be inspected (135). It must be accepted that the exercise of professional skill in the assembly of material does not offer a very certain test but it is, I think, a necessary qualification to the general proposition that a copy document does not attract privilege if the original is not privileged.

It is argued that to refuse privilege to a copy document because the original is not privileged will encourage resort by investigators to the documents in a solicitor's office rather than carrying out ordinary investigative procedures. This is an argument based on inconvenience rather than on principle. This is not to underestimate the inconvenience that may sometimes be involved though, in the case of warrants executed on the premises of lawyers, the problems have to some extent been alleviated by the General Guidelines between the Australian Federal Police and the Law Council of Australia, dated 7 June 1990 (136). And the argument tends to overlook the fact that in civil proceedings an affidavit of documents must disclose the existence of all documents that are or have been in the possession or power of the deponent, including documents for which privilege is claimed.

If a third party shows to the solicitor for a party to litigation a non-privileged document and the solicitor takes the document into his or her custody for the sole purpose of claiming the privilege, it is clear that the document is not protected by privilege (137). As Byrne J observed in *Roux* (138):

“It seems to me to be absurd in these circumstances to say that where the solicitor does not retain the original, but makes a verbatim transcript or a photocopy of the document for the relevant sole purpose, that copy document acquires immunity which the original does not have.”

To take as a basic proposition that a copy of a non-privileged document does not attract privilege does not in any way undermine the importance of the privilege. Rather it sets logical bounds to the privilege (139).

Although, on the question of legal professional privilege and copy documents, the Full Court allowed the appeal from Davies J, it should not be thought that all members of the Full Court took an entirely

(135) *Grofam Pty Ltd v ANZ Banking Group Ltd* (1993) 43 FCR 408.

(136) The guidelines are set out in the judgment of Beaumont J: *Propend Finance* (1995) 58 FCR 224 at 245-248.

(137) *R v King* [1983] 1 WLR 411 at 414; [1983] 1 All ER 929 at 931; *Roux v Australian Broadcasting Commission* [1992] 2 VR 577 at 598.

(138) [1992] 2 VR 577 at 598-599.

(139) See generally McNicol, *Law of Privilege* (1992), pp 94-97.

different view of the matter from the primary judge. All their Honours were of the view that the submission to a legal adviser of a copy of a non-privileged document does not of itself attract legal professional privilege. There has to be something more. The difference between the primary judge and the members of the Full Court, as I read their judgments, is this. Davies J confined what I have referred to as the “something more” to situations in which the legal practitioner brings to bear his or her particular legal expertise in the selection of the copy documents for which privilege is claimed. Beaumont J asked whether, in the particular circumstances in which the copy document came into existence, it should be treated as part of the substantive process of the seeking or the obtaining of legal advice or preparing for litigation. Hill J’s reasons led him to the conclusion that copies of documents not otherwise the subject of privilege are themselves the subject of such privilege only where the copies are made for the sole purpose of obtaining advice upon matters contained in or concerning the original and in circumstances where to compel production of the copy would or could reveal the subject matter upon which advice was sought. Lindgren J put the matter in terms not all that dissimilar to the approach of Davies J, by asking whether the original is privileged. If the original is non-privileged, so is a copy of it even though the copy was made for a privileged purpose. The qualifications accepted by Lindgren J are somewhat wider than those recognised by Davies J. I agree with the approach taken by Lindgren J (140).

I also agree with Lindgren J that par 6 of the orders made by Davies J declaring that “copies of documents made for the purpose of obtaining legal advice, the originals of which are not subject to legal professional privilege are not privileged” needs modification to account for these qualifications (141). Lindgren J would have allowed the appeal to the Full Court in respect of par 6, by substituting a declaration that “copies of documents made *solely* for the purpose of obtaining legal advice, the originals of which are not subject to legal professional privilege, are not, *by that reason alone*, privileged”. I agree with that course. Because the orders made by the Full Court simply set aside a number of orders made by Davies J including par 6, I would allow the appeal to the extent envisaged by Lindgren J. It follows that I would refuse the cross-appeal in so far as the respondents rely upon the “sole purpose” test for the privilege.

Illegal or improper purpose

This aspect of the appeal has a somewhat artificial character. The review sought by the respondents was with respect to the issue of the search warrants. The warrants did not authorise the seizure of

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(140) Lindgren J’s approach was adopted by Moore J in *Alphapharm Pty Ltd v Eli Lilly Australia Pty Ltd* (1996) 69 FCR 149.

(141) See *Propend Finance* (1995) 58 FCR 224 at 269-270.

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documents to which legal professional privilege attached. Davies J did not determine that privilege attached to particular documents. In par 4 of his order, his Honour directed that, subject to declaration 5, issues as to privilege should be determined after the documents had been examined. Paragraph 5 declares that, “by reason of the allegation of offences under s 86(1)(e) and s 86A of the *Crimes Act* 1914 (Cth) and of the proof given in support thereof, the following documents are not subject to legal professional privilege”. The documents are then identified. Paragraph 6 of the order declares that “copies of documents made for the purpose of obtaining legal advice, the originals of which are not subject to legal professional privilege are not privileged”. Paragraph 6 then gives examples of such documents. His Honour ordered that documents to which privilege did not attach “be released to the Australian Federal Police” (142).

The Full Court held that the privilege is not displaced by making a mere charge of crime or fraud; there must be some prima facie evidence that the charge has some foundation in fact. The allegation that offences had been committed was made in a sworn information containing more than forty pages and with annexures presented to this Court in three lever arch files. The informant was the second respondent, Detective Sergeant Taciak who, in the information, spoke of his belief as to various matters “on the basis of the facts stated below”. The information was exhibited to an affidavit sworn by Assistant Commissioner Baer who did not depose to the truth of any of the contents of the information. Because the affidavit of Assistant Commissioner Baer merely exhibited the information and did not speak to its contents, the Full Court held that the information was hearsay as to anything it contained. In the view of the Full Court, once the material in the information was rejected, as it should have been, all that remained was a bare assertion of improper or illegal purpose. It ordered that “there be a fresh hearing on the [respondents’] claims for privilege”.

I have great difficulty in understanding why it was said that the information was hearsay as to anything it contained. It is no doubt true that Detective Sergeant Taciak had no personal knowledge of much of what appears in the information. But some of the material was a matter of public record, and if admissibility is the relevant test (as to which see below) some was admissible as to the existence of the material, if not as to the truth of the contents.

The respondents also complained that Detective Sergeant Taciak was not available for cross-examination. Before this Court, counsel for the appellants said that, if the respondents had wished to cross-examine the police officer, they had only to ask and “we would have

(142) The orders which in the end were made by Davies J differ from those proposed, as to which see *Propend v Commissioner, Australian Federal Police* (1994) 35 ALD 25 at 46.

brought him forward". In all the circumstances I would not attach any importance to this aspect.

Again it is necessary to bear in mind the nature of the proceedings before Davies J. His Honour was entertaining applications for declaratory relief. His declaration that, "by reason of the allegation of offences" and "of the proof given in support thereof", some of the documents seized were not subject to the privilege was not based on the information document alone. Indeed he said expressly (143):

"It is clear from *Baker v Campbell* that the mere fact that a Justice of the Peace has accepted a sworn information and has issued a warrant under s 10 of the *Crimes Act* will not, of itself, be sufficient to overcome legal professional privilege. The proof must be sufficient to justify the court in holding that the privilege does not apply."

And his Honour had earlier said (144):

"I have read the sworn information of Detective Sergeant Taciak but cannot see in it sufficient material to overcome the privilege."

On this footing his Honour rejected a submission that a substantial number of documents were "exempt from privilege by reason of the allegation of offences under the *Crimes (Taxation Offences) Act*". But his Honour also held that a substantial number of documents "should . . . be exempt from the privilege". He reached this conclusion on the footing that there was "sufficient prima facie evidence in the material before the Justice of the Peace to overcome, in the public interest, the claim of legal professional privilege". This conclusion followed a review of the material before him. With respect, I do not think that the judgments of the Full Court had sufficient regard to all the material Davies J took into account in reaching his conclusion that certain documents were exempt from legal professional privilege.

There is perhaps an ambiguity in the sentence (145):

"But it seems to me that there is sufficient prima facie evidence in the material before the Justice of the Peace to overcome, in the public interest, the claim of legal professional privilege."

Was Davies J then reviewing a "decision" of the Justice or simply alluding to the material before her? It must have been the latter because the Justice made no decision as to exemption from privilege. She did accept, by issuing the warrant, that there were "reasonable grounds for believing" that the material "will afford evidence of the following offences". She then referred to ss 86(1)(e) and 86A of the *Crimes Act* 1914 (Cth) and ss 5 and 13 of the *Crimes (Taxation*

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(143) *Propend v Commissioner, Australian Federal Police* (1994) 35 ALD 25 at 46.

(144) *Propend v Commissioner, Australian Federal Police* (1994) 35 ALD 25 at 45.

(145) *Propend v Commissioner, Australian Federal Police* (1994) 35 ALD 25 at 44.

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Offences) Act 1980 (Cth) (146). I do not think this matters in the end because it is clear that Davies J reached his own finding of “sufficient prima facie evidence”. The view of the Full Court that there was no admissible evidence before Davies J is therefore not warranted.

The respondents take their stand on the judgment of Gibbs CJ in *Attorney-General (NT) v Kearney* (147) (a judgment with which Mason and Brennan JJ agreed), in which his Honour said: “[Legal professional] privilege is of course not displaced by making a mere charge of crime or fraud.” Gibbs CJ then adopted the language of Viscount Finlay in *O’Rourke v Darbishire* (148) that “there must be something to give colour to the charge . . . there must further be some prima facie evidence that it has some foundation in fact”. Goff J put the test somewhat higher when, in *Butler v Board of Trade* (149), he said:

“If one rejects the bare relevance test, as I have done, then what has to be shown prima facie is not merely that there is a bona fide and reasonably tenable charge of crime or fraud but a prima facie case that the communications in question were made in preparation for or in furtherance or as part of it.”

I am not persuaded that the material before Davies J could not establish to the reasonable satisfaction of his Honour prima facie evidence of illegal or improper purpose (150). There is no reason why hearsay material should be excluded. Indeed, the very nature of the exercise involved will often necessitate some hearsay evidence. If there is nothing more than hearsay the Court is unlikely to be persuaded to the required standard. But that is not to say that hearsay material must be disregarded.

The relevant English authorities are canvassed by Vinelott J in *Derby & Co Ltd v Weldon [No 7]* (151). It is unnecessary to refer to those authorities but his Lordship’s conclusion may be noted that

“it is, I think, too restrictive to say that the plaintiff’s case must always be founded on an admission or supported by affidavit evidence or that the court must carry out the preliminary exercise of deciding on the material before it whether the plaintiff’s case will probably succeed, a task which may well present insurmountable difficulties in a case where fraud is alleged and the court has no more than affidavit evidence” (152).

(146) See *George v Rockett* (1990) 170 CLR 104.

(147) (1985) 158 CLR 500 at 516.

(148) [1920] AC 581 at 604.

(149) [1971] 1 Ch 680 at 689.

(150) See *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362.

(151) [1990] 1 WLR 1156; [1990] 3 All ER 161.

(152) *Derby & Co Ltd v Weldon [No 7]* [1990] 1 WLR 1156 at 1173; [1990] 3 All ER 161 at 177.

A decision directly in point is that of Dohm J in *Re Milner* (153) where a claim of solicitor-client privilege was met by an allegation of fraud. Dohm J asked whether there was a prima facie case of fraud on the material before the Court and held that there was, by reason of an affidavit sworn by a taxation officer setting out particulars which indicated fraudulent preferences. His Lordship concluded (154):

“These sworn facts and the inferences go beyond mere conjecture and give credence to the sworn allegation of fraudulent misconduct.”

Orders proposed

Because of the view I have taken of the question of legal professional privilege and copy documents I would allow the appeal to the extent that the order made by the Full Court directs that “there be a fresh hearing on the appellants’ claims for privilege”. I would confine the claims of privilege for copy documents in the manner suggested by Lindgren J. I would dismiss the respondents’ cross-appeal.

GAUDRON J. The questions which fall for decision in this appeal arise out of the execution of search warrants issued pursuant to s 10 of the *Crimes Act* 1914 (Cth) (155). The warrants were issued by Ms Wendy Elder JP, on an information sworn by the second appellant, Detective Sergeant Alan Taciak, a member of the Australian Federal Police. The warrants authorised named police officers to search various residential and office premises occupied by the respondents. One warrant authorised the search of office premises occupied by Mr Michael Dunkel, the ninth respondent. Mr Dunkel is a solicitor. He was retained by the other eight respondents with respect to certain taxation matters relating to their membership of or association with a partnership which carried on business under the name Best & Less (the Best & Less Partnership).

The information sworn by Detective Sergeant Taciak revealed that it was suspected that some or all of the respondents, including

(153) (1968) 70 DLR (2d) 429.

(154) *Re Milner* (1968) 70 DLR (2d) 429 at 432.

(155) At the time the warrants were issued s 10(1) relevantly provided that: “If a Magistrate or Justice of the Peace is satisfied by information on oath that there is reasonable ground for suspecting that there is in or upon any premises . . . : (b) anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of [an] . . . offence [against any law of the Commonwealth or of a Territory]; . . . the Magistrate or Justice of the Peace may grant a search warrant authorising any constable named in the warrant, with such assistance, and by such force, as is necessary and reasonable, to enter at any time the premises . . . named or described in the warrant, and to seize any such thing which he or she might find there.”

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Mr Dunkel, were implicated in offences against ss 86(1)(e) and 86A of the *Crimes Act* (156) and, also, in offences against the *Crimes (Taxation Offences) Act* 1980 (Cth). So far as concerns offences against the *Crimes Act*, it was revealed in the information that it was suspected that companies in the Best & Less Partnership had claimed deductions for garment testing carried out overseas but that the testing was carried out for much less than the remitted amount, the difference finding its way to various intermediary companies and, ultimately, being lent back to the companies in the Best & Less Partnership. It was also revealed that it was suspected that Mr Dunkel was associated with the intermediary companies and that some of the money came back pursuant to a loan agreement executed by him.

So far as concerns offences against the *Crimes (Taxation Offences) Act*, the information revealed that various persons had entered into an arrangement to sell the business of the Best & Less Partnership in circumstances resulting in the payment of all secured and unsecured creditors except the Commissioner of Taxation. It was suspected that this had been done contrary to ss 5(1) and 13 of that Act (157).

Members of the Australian Federal Police seized documents from various premises occupied by the respondents, including office premises occupied by Mr Dunkel. The warrant authorising the search of his premises required the persons to whom the warrant was issued to proceed in accordance with guidelines agreed between the Commissioner of the Australian Federal Police and the Law Council of Australia following the decision of this Court in *Baker v Campbell* (158) that s 10 of the *Crimes Act* does not authorise the seizure of documents to which legal professional privilege attaches (the guidelines). The guidelines set down procedures for the execution of search warrants on the premises of lawyers and are designed to preserve legal professional privilege and to provide for the return of seized documents if and when the privilege is established (159).

(156) Both provisions related to conspiracies to defraud the Commonwealth or a public authority under the Commonwealth.

(157) Section 5(1) provides that: "Where a person enters into an arrangement or transaction for the purpose, or for purposes which include the purpose, of securing, either generally or for a limited period, that a company or trustee (whether or not a party to the arrangement or transaction) will be unable, or will be likely to be unable, having regard to other debts of the company or trustee, to pay sales tax payable by the company or trustee, the person is guilty of an offence." In effect, s 13 allows various provisions of the *Crimes (Taxation Offences) Act*, including s 5(1), to have application as if references, in those provisions, to sales tax and terms related to sales tax were references to income tax and related terms.

(158) (1983) 153 CLR 52.

(159) In summary, the guidelines ensure that, where the lawyer agrees to assist the police in their search, no documents identified as potentially within the warrant will be inspected before an opportunity is given to the lawyer to make a claim of legal professional privilege. If a claim of privilege is maintained, the documents subject to the claim may not be inspected by the police until such time as the

Mr Dunkel claimed legal professional privilege on behalf of his clients and, in accordance with the guidelines, the documents seized from him were placed in a sealed envelope pending a decision on the claim.

Shortly after the execution of the warrants, the respondents commenced proceedings in the Federal Court of Australia against the Commissioner of the Australian Federal Police, the second appellant, Detective Sergeant Taciak, and the issuing justice, Ms Wendy Elder JP, seeking orders for review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and, also, under s 39B of the *Judiciary Act 1903* (Cth) (160). The application sought review of various decisions and of the conduct of the police officers involved in the execution of the warrants. So far as concerns the conduct of those police officers, review was sought on the ground, amongst others, that “[d]ocuments were seized to which legal professional privilege attaches” (161). The only issue in this appeal is whether that ground has been established.

As already indicated, s 10 of the *Crimes Act* does not authorise the seizure of documents to which legal professional privilege attaches (162). However, the guidelines proceed on the basis that, as with the warrant authorising search of Mr Dunkel’s premises, warrants will issue in terms which encompass privileged documents. That that was so in the case of the warrant with respect to Mr Dunkel’s premises clearly appears from its requirement that it be executed in accordance with the guidelines. Accordingly, it may be that it would have been more appropriate for the respondents to seek review of the decision to issue that warrant on the ground that it purported to authorise the seizure of privileged documents (163). However, no point has been taken as to the nature of the review sought. And no point has been taken that, contrary to their objective, the guidelines do not preserve legal professional privilege (164). Rather, the proceedings have been

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claim is abandoned, waived or dismissed by a court. For the text of the guidelines, see *Australian Law News*, vol 12 (1986), pp 21-24. See also *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1995) 58 FCR 224 at 245-248.

(160) Sub-section (1) of that section provides that: “The original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth.”

(161) *Propend Finance Pty Ltd v Commissioner, Australian Federal Police [No 2]* (1994) 35 ALD 25 at 27.

(162) *Baker v Campbell* (1983) 153 CLR 52.

(163) More accurately, on the ground that, to that extent, it was not authorised by law: s 5(1)(d) of the *Administrative Decisions Judicial Review Act 1977* (Cth).

(164) As to the loss of privilege when documents pass into the possession of another, see *Baker v Campbell* (1983) 153 CLR 52 at 67-68, per Gibbs CJ; at 80, per Mason J; at 109-110, per Brennan J; at 112, per Deane J; at 129, per Dawson J and the cases there cited. And see, as to the circumstances in which equity will require third parties to observe confidentiality, *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 459-463, per Gaudron J.

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conducted on the footing that, if legal professional privilege attached to the documents which were in Mr Dunkel's possession until seized pursuant to the search warrant, the respondents are entitled to succeed in their application and to have the documents returned.

The respondents' application for review was heard by Davies J. It emerged at the hearing that the documents seized from Mr Dunkel included copies of documents, the originals of which, it is conceded, are not privileged. There was evidence that certain of the documents in question were copied and given to Mr Dunkel by one or more of the other respondents, either solely for the purpose of obtaining legal advice in connection with their liability to pay tax or solely for use in anticipated litigation relating to that matter. Others were copy documents included in one or more briefs to counsel to advise, the copies apparently having been made by Mr Dunkel or members of his firm solely for the purpose of obtaining counsel's advice. There was nothing to suggest that any of the copy documents bear markings or writing which distinguish them in any way from the originals.

In the hearing before Davies J, the respondents claimed that legal professional privilege attaches to copy documents in the possession of a solicitor if the copies are made solely for the purpose of obtaining legal advice or solely for use in legal proceedings. On the other hand, the appellants claimed that the privilege does not attach to copy documents the originals of which are not, themselves, privileged. The appellants also claimed that the information sworn in support of the warrants contained material which pointed to certain original documents having been brought into existence for or used in the furtherance of the illegal activities alleged in that information. They argued that copies of those documents were or were to be treated as infected with that illegality and, thus, that, quite apart from their status as copies, no privilege attaches to them.

On the question whether privilege attaches to copy documents, Davies J expressed his agreement with the view adopted by Wood J in *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* (165). It was held in that case that privilege does not attach to a copy document unless "it involves a selective copying or results from research, or the exercise of skill and knowledge on the part of [the] solicitor" (166). On the question of illegality, Davies J held that, so far as it concerned offences under the *Crimes (Taxation Offences) Act*, the information did not reveal material sufficient to displace the claim of privilege but that, so far as it concerned offences under the *Crimes Act*, it did

(165) (1985) 3 NSWLR 44.

(166) *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44 at 61-62, referring to *Lyell v Kennedy* (1884) 27 Ch D 1.

constitute “sufficient prima facie evidence . . . to overcome, in the public interest, the claim of legal professional privilege” (167).

The orders made by Davies J included orders declaring that, by reason of the allegation of offences under the *Crimes Act*, certain specified documents were not privileged (Order 5) and directing that the question whether privilege attached to the other documents should be determined after the documents were examined (Order 4). There was also an order declaring that “copies of documents [examples of which were specified] made for the purpose of obtaining legal advice, the originals of which are not subject to legal professional privilege are not privileged” (Order 6). There were further orders directing that the documents to which legal professional privilege did not attach be released to the Australian Federal Police (Order 8) and granting a stay of that order in the event of an appeal being lodged and prosecuted expeditiously (Order 9). It is not clear that the declaration in Order 6 is entirely consistent with the direction in Order 4 that questions of privilege be determined after examination of the documents.

On appeal, the Full Court of the Federal Court (Beaumont, Hill and Lindgren JJ) set aside the declaration that, by reason of the allegations of offences under the *Crimes Act*, privilege did not attach to the documents specified in Order 5 of the orders made by Davies J. On that issue, the Full Court held that, as Detective Sergeant Taciak had not been called as a witness, the matters alleged in the information were hearsay and, thus, there was no basis for any finding of illegality. It was ordered that there should be a fresh hearing of the issue.

The members of the Full Court differed in their views with respect to the question whether privilege attaches to a copy of a document which, itself, is not privileged. Beaumont J was of the view that a copy of what is otherwise an unprivileged document is privileged if “in the particular circumstances in which the copy document came into existence, [it] should . . . be treated as, in truth, part of the substantive process of the seeking or the obtaining of legal advice or of preparing for litigation” (168). Hill J considered that privilege attaches if but only if “the copies are made for the sole purpose of obtaining advice upon matters contained in or concerning the original and in circumstances where to compel production of the copy would or could operate to reveal the subject matter upon which advice was sought” (169). Finally, Lindgren J adopted an approach similar to that taken by Davies J at first instance and held that privilege does not attach unless “inspection would reveal more than merely the content

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(167) *Propend Finance Pty Ltd v Commissioner, Australian Federal Police* [No 2] (1994) 35 ALD 25 at 44.

(168) *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1995) 58 FCR 224 at 238.

(169) *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1995) 58 FCR 224 at 259.

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of the copy document'' (170). His Honour instanced cases in which a copy document would reveal a line of thinking, or is marked in a way that would reveal a line of thinking or is inextricably mixed with privileged original material. However, his Honour would have varied the declaration in Order 6 of the orders made by Davies J to make it clear that privilege does not attach to copy documents simply because they have been brought into existence for the sole purpose of obtaining legal advice.

In this Court, the appellants seek restoration of the orders made at first instance by Davies J. They argue, as they have at all stages of the proceedings, that legal professional privilege does not attach to a copy document if the original is not, itself, privileged. Alternatively, they argue that the tests propounded by Beaumont and Hill JJ in the Full Court are wrong. As well, they argue that the information sworn by Detective Sergeant Taciak provides a proper basis for holding that legal professional privilege does not attach to the documents specified in Order 5 of the orders made by Davies J. On the other hand, the respondents, who also cross-appeal, argue that the copy of a document is privileged, even if the original is not, provided that it was brought into existence for the sole purpose of obtaining legal advice. They also argue that the Full Court should, itself, have finally determined the question of illegality and should not have ordered a further hearing on that issue.

The decision in *Baker v Campbell* (171) which, as already mentioned, holds that s 10 of the *Crimes Act* does not authorise the seizure from a solicitor of documents which are the subject of legal professional privilege rests on the proposition that legal professional privilege is not merely a rule of evidence applicable in judicial and quasi-judicial proceedings, but is a basic doctrine of the common law (172). And, being a basic doctrine of the common law, it is not abrogated by statute unless there is a clear indication that that was intended (173). The privilege has been described as ''a substantive general principle'' and as ''a practical guarantee of fundamental rights'' (174). And in *Goldberg v Ng*, Gummow J cautioned against

(170) *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1995) 58 FCR 224 at 266.

(171) (1983) 153 CLR 52.

(172) *Baker v Campbell* (1983) 153 CLR 52 at 88-89, per Murphy J; at 94, per Wilson J; at 116-117, per Deane J; at 127-128, per Dawson J.

(173) *Baker v Campbell* (1983) 153 CLR 52 at 123, per Dawson J and the cases there referred to.

(174) *Goldberg v Ng* (1995) 185 CLR 83 at 93, per Deane, Dawson and Gaudron JJ, and at 121, per Gummow J, respectively. For similar descriptions, see also: *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 480, per Gibbs CJ (a ''fundamental or essential'' rule); at 491, per Deane J (a fundamental principle of our judicial system''); *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 132, per Deane J (a substantive and fundamental common law principle''); at 145, per Toohey J (as being of ''fundamental importance to the protection and

reliance on certain English decisions which appear to treat the privilege as no more than a rule of evidence (175).

The decisions with respect to the status of copy documents are not uniform in their approach, perhaps because they consist mainly of first instance rulings on evidence or first instance decisions on applications for discovery. The clearest judicial statement in support of the primary proposition advanced by the appellants is to be found in *Buttes Gas & Oil Co v Hammer [No 3]* (176). In that case Lord Denning MR expressed the view, obiter, that “if the original is not privileged, neither is a copy made by the solicitor privileged”. His Lordship explained that that was for the “simple reason, that the original (not being privileged) can be brought into court under a subpoena duces tecum and put in evidence at the trial”, adding that “[b]y making the copy discoverable, we only give accelerated production to the document itself” (177).

There are earlier decisions with statements to the same effect or statements which have been treated as being to the same effect as that of Lord Denning MR in *Buttes Gas & Oil Co*. Thus, for example, in *Chadwick v Bowman* (178) Denman J said of the copy documents in issue in that case that “[t]he originals . . . would have been admissible in evidence against the defendant, and it seems to me that there is nothing in the circumstances under which the copies came into existence to render them privileged against inspection”. Similarly, it was said by Madden CJ in *Shaw v David Syme & Co* (179) that “it seems to be definitely established by *Chadwick v Bowman* and *Lyell v Kennedy* that if an original is not privileged a copy can be in no better position”. *Lyell v Kennedy* (180) was concerned with copies made by a solicitor and it seems reasonably clear, as Madden CJ observed in *Shaw v David Syme & Co*, that discovery would have been granted “had that been all there was to be said about the matter, that they were copies” (181). In fact, the copies had been made selectively and it was held that they were privileged.

The approach of Lord Denning MR in *Buttes Gas & Oil Co* has

(174) *cont*

preservation of the rights, dignity and equality of the ordinary citizen under the law’); at 161, per McHugh J (“a substantive rule of law . . . [best explained as] ‘a practical guarantee of fundamental, constitutional or human rights’”).

(175) *Goldberg v Ng* (1995) 185 CLR 83 at 121.

(176) [1981] QB 223.

(177) *Buttes Gas & Oil Co* [1981] QB 223 at 244, referring to the *Report of the Committee on Personal Injuries Litigation* (1968) [3691], par 304.

(178) (1886) 16 QBD 561 at 562. Note, however, that, as Mathew J pointed out (at 562), the documents did not come “into existence for the purposes of the action”.

(179) [1912] VLR 336 at 341.

(180) (1884) 27 Ch D 1.

(181) *Shaw v David Syme & Co* [1912] VLR 336 at 341.

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been applied in subsequent cases in England (182) and in this country (183), but not uniformly (184). The approach has been treated as one dictated by logic and common sense (185). Thus, it was said by DeBelle J in *J N Taylor Holdings Ltd v Bond* (186) that “[g]enerally speaking, it would be absurd for the copy to be privileged while the original was not”. The qualification in that statement stems from DeBelle J’s acknowledgment of an exception along the lines recognised in *Lyell v Kennedy* (187), though the exception is circumscribed more narrowly by his Honour than was done in *Nickmar Pty Ltd* (188). The acknowledgment of exceptions has resulted in a tendency, in more recent cases, to state the position with respect to copy documents in terms which indicate that privilege does not attach simply because the copies were made solely for the purpose of obtaining legal advice or solely for use in litigation.

There are several problems with the approach of Lord Denning MR in *Buttes Gas & Oil Co*. First, his Lordship’s remarks clearly treat legal professional privilege as a rule of evidence and not as a substantive legal principle which protects against compulsory disclosure. In this regard, it should be noted that it was not until the decision of *Baker v Campbell*, in 1983, that it was recognised by this Court that legal professional privilege is a substantive legal principle. More recently, the House of Lords has also recognised that the privilege is “much more than an ordinary rule of evidence, limited in its application to the facts of a particular case” (189). Decisions and judicial statements with respect to copy documents made when the privilege was seen as merely a rule of evidence, as, for example, in *Shaw v David Syme & Co*, are not, in my view, a sure guide to the

- (182) See, eg, *Dubai Bank Ltd v Galadari* [1990] Ch 98; *Ventouris v Mountain* [1991] 1 WLR 607; [1991] 3 All ER 472; *Lubrizol Corporation v Esso Petroleum Co Ltd* [1992] 1 WLR 957.
- (183) See, eg, *Vardas v South British Insurance Co Ltd* [1984] 2 NSWLR 652; *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44; *Roux v Australian Broadcasting Commission* [1992] 2 VR 577; *Bayliss v Cassidy* [1995] 2 Qd R 464.
- (184) See, eg, *McCaskill v Mirror Newspapers Ltd* [1984] 1 NSWLR 66; *R v Board of Inland Revenue; Ex parte Goldberg* [1989] QB 267; *Davis v Lambert-Bain Pty Ltd* [1989] Tas R 274.
- (185) See, eg, McNicol, *Law of Privilege* (1992), pp 94-97; Ligertwood, *Australian Evidence*, 2nd ed (1993), p 218; *Cross on Evidence*, 5th Aust ed (1996), p 710.
- (186) (1991) 57 SASR 21 at 34. (Upheld on appeal: *Bond v J N Taylor Holdings Ltd* (1992) 57 SASR 38.) See also *Vardas v South British Insurance Co Ltd* [1984] 2 NSWLR 652 at 660; *Water Authority (WA) v AIL Holdings Pty Ltd* (1991) 7 WAR 135 at 138; *Roux v Australian Broadcasting Commission* [1992] 2 VR 577 at 598-599.
- (187) (1884) 27 Ch D 1 at 26, per Cotton LJ; at 31, per Bowen LJ.
- (188) (1985) 3 NSWLR 44 at 61-62. See also *Vardas v South British Insurance Co Ltd* [1984] 2 NSWLR 652 at 660; *Water Authority (WA) v AIL Holdings Pty Ltd* (1991) 7 WAR 135 at 139.
- (189) *R v Derby Magistrates’ Court; Ex parte B* [1996] 1 AC 487 at 507.

approach properly to be adopted once the privilege is recognised as a substantive legal principle.

Another difficulty with the view that privilege does not attach to a copy document unless the original is also privileged is that it cuts across the purpose which the privilege serves. That purpose was described by Gibbs CJ in *Baker v Campbell* in these terms (190):

“It is necessary for the proper conduct of litigation that the litigants should be represented by qualified and experienced lawyers rather than that they should appear for themselves, and it is equally necessary that a lawyer should be placed in full possession of the facts to enable him to give proper advice and representation to his client. The privilege is granted to ensure that the client can consult his lawyer with freedom and candour, it being thought that if the privilege did not exist ‘a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case’.”

It cannot be doubted that the prospect of search warrants being executed in solicitors’ offices with a view to obtaining copies of a client’s documents is a substantial disincentive to persons who might otherwise wish to put all the facts before a lawyer and, thus, also as an impediment to the provision of proper advice and effective representation.

There is a third and greater difficulty with the view that privilege does not attach to a copy document unless the original is also privileged, namely, that it pays insufficient regard to the consideration that legal professional privilege does not protect documents, as such, but protects communications between lawyer and client (191). In *Carter v Northmore Hale Davy & Leake* (192), Deane J spoke in terms of a “privileged communication or document”. However, a document which is brought into existence solely for the purpose of obtaining legal advice or solely for use in litigation and which is then provided to a lawyer for that purpose is, itself, a communication with the lawyer and, in accordance with the decision of this Court in *Grant v Downs* (193), a privileged communication. Equally, a copy of a document made solely for the purpose of obtaining legal advice or solely for use in legal proceedings is, when provided to a lawyer for that purpose, a communication to the lawyer. Save that it is likely to

(190) *Baker v Campbell* (1983) 153 CLR 52 at 66, quoting *Greenough v Gaskell* (1833) 1 My & K 98 at 103 [39 ER 618 at 621]. See also *Grant v Downs* (1976) 135 CLR 674 at 685; *R v Bell*; *Ex parte Lees* (1980) 146 CLR 141 at 152, 161; *Baker v Campbell* (1983) 153 CLR 52 at 74, 89, 93, 105-106, 114, 128; *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 480, 487, 490; *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 126-128, 132, 144-147.

(191) See *Grant v Downs* (1976) 135 CLR 674 at 690, per Jacobs J.

(192) (1995) 183 CLR 121 at 139; see also at 131, 133-138, 140-141.

(193) (1976) 135 CLR 674 at 688, 690.

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be more accurate, the provision of a copy document in those circumstances is no different from the oral communication, in the same circumstances, of the material contained in the original document. And the latter is unequivocally a privileged communication.

The consideration that the provision to a lawyer of a copy document is, itself, a communication different only in form from the oral communication of the contents of the original document leads me to conclude that privilege attaches to a copy document which is provided to a lawyer if the copy was made solely for the purpose of obtaining legal advice or solely for use in legal proceedings.

It does not seem to me absurd or contrary to common sense for privilege to attach to copy documents provided to a lawyer and made solely for the purpose of obtaining legal advice or solely for use in legal proceedings. If the original is not privileged, it is susceptible to whatever compulsory processes are available to secure its production; and the fact that it may be easier to obtain a copy from a solicitor than it is to obtain the original by compulsory process is no reason to cut down or abrogate legal principle, especially one of such fundamental importance to the administration of justice as legal professional privilege. Indeed, if it were held that privilege does not attach to a copy document made solely for the purpose of obtaining legal advice or solely for use in legal proceedings and provided to a lawyer for that purpose, it might well encourage less than thorough investigative methods on the part of law enforcement agencies, with the obvious risks that that entails for the administration of justice.

Although no separate argument was addressed to them, it is necessary to say something of the copy documents included in counsel's brief to advise. There is no basis for treating documents provided by a solicitor to counsel for advice or for inclusion in his or her brief on hearing any differently from documents provided by a country solicitor to his or her town agent. The latter have long been accepted as being within the scope of legal professional privilege (194). Both are properly to be viewed as communications on behalf of the client (195).

Once it is accepted that communications by a solicitor with his or her agent and with counsel are communications on behalf of the client, it follows that communications with those persons by means of copy documents are in no different position from communications by a client with his or her lawyer by the same means. And, of course, the same is true of communications by means of copy documents by a lawyer with his or her clients. It follows that a copy document which has been brought into existence by a lawyer solely for the purpose of obtaining counsel's advice, solely for inclusion in his or her brief on

(194) See *Hughes v Biddulph* (1827) 4 Russ 190 [38 ER 777].

(195) See also *Hobbs v Hobbs and Cousens* [1960] P 112.

hearing or solely for the purpose of advising his or her client is the subject of legal professional privilege.

It remains to consider whether, by reason of illegality, privilege has been “displaced” in relation to the documents specified in Order 5 of the orders made by Davies J. In this regard, it is to be noted that the material and the argument in this Court clearly indicate that that question is raised with respect to copy documents, not originals. Thus, it was said in reply by counsel for the appellants that his argument was that “the copies do not have any greater privilege than the originals and if we are right that they were transactional type documents made in furtherance of [the] conspiracy . . . they are not privileged”.

It is to be noted that it was not put that the copy documents in question were provided by the other respondents to Mr Dunkel or by Mr Dunkel to counsel in furtherance of the fraud alleged in the information. If either were the case, no privilege would attach (196). Nor was it put that they were provided to or by Mr Dunkel “for the purpose of frustrating the processes of the law itself”, a situation which Gibbs CJ said was outside legal professional privilege in *Attorney-General (NT) v Kearney* (197) “even though no crime or fraud is contemplated”. Rather, as already indicated, all that was put was that the originals were the means by which a fraud was effected and that the copies were infected with that same illegality.

Communications made in furtherance of future wrongdoing fall outside legal professional privilege, although there is no particularly precise statement as to the nature of the wrongdoing that produces that result (198). However, legal professional privilege clearly extends to the situation in which a person seeks advice with respect to past misdeeds. And, once that is accepted, it follows that copy documents which relate to those misdeeds are in no different position from other copy documents provided to a lawyer for the purpose of obtaining legal advice or for use in legal proceedings. Thus, they are privileged if they were made solely for one or other of those purposes.

As there is evidence that the copy documents referred to in Order 5 of the orders made by Davies J were made solely for the purpose of obtaining legal advice or solely for use in legal proceedings and no suggestion has been made that they were provided to or by Mr Dunkel for any other purpose, they are to be treated in precisely the same way as the copy documents to which Order 4 relates. And that being so, there is no necessity for that issue to be remitted for further hearing.

It is not strictly necessary to say anything of the argument with

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(196) See, generally, *Attorney-General (NT) v Kearney* (1985) 158 CLR 500.

(197) (1985) 158 CLR 500 at 515. See also *R v Bell; Ex parte Lees* (1980) 146 CLR 141.

(198) As to the different formulations of the nature of the wrongdoing which “displaces” legal professional privilege, see *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 at 528-529, per Dawson J, and the cases there cited.

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respect to the nature of the evidence required to “displace” legal professional privilege. However, the matter was fully argued and it is appropriate to make some short observations on the subject. Because legal professional privilege attaches to communications contained in documents (including copy documents) brought into existence and provided to a lawyer solely for the purpose of obtaining legal advice or solely for use in legal proceedings, the privilege does not attach to documents which are brought into existence or which are provided to a lawyer for the purpose of furthering some illegal object. Thus, as McHugh J pointed out in *Carter v Northmore Hale Davy & Leake*, the so-called “exceptions” to legal professional privilege, namely, communications to further illegal purposes, communications made for the purpose of frustrating the processes of the law and communications made to further an abuse of public power “are in truth not exceptions at all” (199). Rather, legal professional privilege never attaches to them. This has some significance in relation to the nature of the evidence necessary to raise a question of illegality.

If illegality were a true exception to legal professional privilege, it would be arguable that the person challenging the existence of the privilege should establish that the communication in question was made in furtherance of some illegal purpose (200). However, it is not a true exception and, thus, it is not necessary that illegality be established positively. On the other hand, a mere allegation of illegal purpose is not, itself, sufficient. There must be “not merely an allegation . . . of a fraud, but . . . something to give colour to the charge” (201), “some prima facie evidence that it has some foundation in fact” (202). The reason for this is obvious. Persons are presumed innocent, not guilty. And, thus, there must be evidence to raise a sufficient doubt as to a claim of privilege to cast a further evidentiary onus on the person making the claim to show that, in truth, the privilege attaches.

Inevitably, what will be sufficient to cast a further evidentiary burden on a person claiming legal professional privilege will vary according to the facts of each case. However, the presumption of innocence is not lightly displaced. Thus, for example, it was said by Lord Wrenbury in *O’Rourke v Darbishire*, a case involving an allegation of fraud, that there must be material which shows “good ground for saying that prima facie a state of things exists which, if not displaced at the trial, will support a charge of fraud” (203). Similarly,

(199) *Carter* (1995) 183 CLR 121 at 163.

(200) As to the onus of proving matters which except a situation from the general rule, see, generally, *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249.

(201) *O’Rourke v Darbishire* [1920] AC 581 at 604, per Viscount Finlay, cited with approval in *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 at 516, per Gibbs CJ.

(202) *O’Rourke v Darbishire* [1920] AC 581 at 604.

(203) *O’Rourke v Darbishire* [1920] AC 581 at 633.

in *Buttes Gas & Oil Co*, Lord Denning MR said that it was necessary for there to be “strong evidence” (204).

Bearing in mind the purpose served by legal professional privilege and the importance of the presumption of innocence, a further evidentiary burden is, in my view, cast upon a person claiming legal professional privilege only if there is evidence which, if accepted, raises a prima facie case of illegal or other purpose falling outside the privilege. Evidence of that nature need not be led by the person resisting the claim of privilege. It might emerge, for example, from documents for which the claim is made.

If a person wishes to resist a claim of privilege and to lead evidence of an illegal or other purpose inconsistent with its existence, that evidence must be in admissible form. Ordinarily, that will exclude hearsay. But if, as here, hearsay evidence is properly admitted on some other issue, ordinary considerations of fairness require that the person claiming privilege be given an opportunity to test that evidence by cross-examination. Thus, in the present case, if the allegation of illegality founded on the information sworn by Detective Sergeant Taciak had any bearing on the question whether privilege attached to the copy documents seized from Mr Dunkel, ordinary considerations of fairness would require that, notwithstanding that the information was in evidence for other purposes, it should not be relied upon in opposition to the claim of privilege without Detective Sergeant Taciak’s being available for cross-examination.

The appeal should be dismissed and the cross-appeal allowed. Order 3 of the orders made by the Full Court should be varied by deleting the words “and that . . . for privilege”. In lieu of those words it should (a) be declared that legal professional privilege attaches to copy documents in the possession of a lawyer if the copies were made solely for the purpose of obtaining or giving legal advice or solely for use in legal proceedings and (b) be ordered that the matter be remitted to a single judge for determination of the application in accordance with that declaration and for determination of the question of costs reserved by Davies J. The respondents should have their costs in this Court.

MCHUGH J. This appeal from a decision of the Full Court of the Federal Court of Australia raises two questions of law: (1) whether legal professional privilege can apply to a copy document where no privilege attaches to the original; and (2) whether hearsay material may be relied upon to displace legal professional privilege where the privilege is claimed for a document alleged to have been made in furtherance of an illegal or improper purpose.

I would answer the first question: yes, and the second question: no.

(204) *Buttes Gas & Oil Co* [1981] QB 223 at 246.

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Nine search warrants were issued

Suspecting that the respondents were guilty of tax evasion, the Australian Federal Police (the AFP) applied to a justice of the peace for the issue of warrants to search residential and office premises connected with the respondents. Among those premises was the office of the ninth respondent, a solicitor. Pursuant to s 10 of the *Crimes Act* 1914 (Cth) (205), the justice issued nine warrants. They were identical in terms, apart from the warrant that authorised the search of the solicitor's office. The justice directed that that warrant be executed in accordance with the "General Guidelines between the Australian Federal Police and the Law Council of Australia as to the execution of search warrants on lawyers' premises", a copy of which was attached to the warrant (206).

In issuing the warrants, the justice acted on an information sworn by a member of the AFP. In the information, the officer alleged that there were reasonable grounds for suspecting that upon the various premises were documents that would provide evidence of offences against the *Crimes Act* and the *Crimes (Taxation Offences) Act* 1980 (Cth). He swore that companies in a partnership known as the Best & Less group had claimed inflated income tax deductions for the expense of garment testing; the testing had been performed for the group by an overseas organisation for fees substantially less than the deductions claimed. The officer alleged that only part of the moneys "paid" to this organisation for garment testing went to the organisation. The rest of the money remitted went to other corporations which lent the money to Australian entities which included Propend Finance Pty Ltd (Propend), the first respondent. In addition, the informant alleged that the ninth respondent, Mr Dunkel, a solicitor, was suspected of being involved in this scheme.

When Mr Dunkel's premises were searched, he claimed legal professional privilege for some documents seized by the AFP. As a

(205) At the time s 10(1) of the *Crimes Act* relevantly provided: "If a Magistrate or Justice of the Peace is satisfied by information on oath that there is reasonable ground for suspecting that there is in or upon any premises, aircraft, vehicle, vessel or place: (a) anything with respect to which any offence against any law of the Commonwealth or of a Territory has been, or is suspected on reasonable grounds to have been, committed; (b) anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any such offence; or (c) anything as to which there is reasonable ground for believing that it is intended to be used for the purpose of committing any such offence; or that any such thing may, within the next following 72 hours, be brought into or upon the premises, aircraft, vehicle, vessel or place, the Magistrate or Justice of the Peace may grant a search warrant authorising any constable named in the warrant, with such assistance, and by such force, as is necessary and reasonable, to enter at any time the premises, aircraft, vehicle, vessel or place named or described in the warrant, and to seize any such thing which he or she might find there."

(206) The Guidelines are set out in the judgment of Beaumont J in *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1995) 58 FCR 224 at 245-248.

result, the AFP officers who executed the warrants lodged those documents with the issuing justice and, upon commencement of proceedings in the Federal Court, with the Registry of that Court. The AFP officers also gave undertakings not to inspect the seized documents until the courts resolved the privilege claim. In lodging the documents and giving the undertakings, the AFP officers were complying with the practice set out in the Guidelines.

After the warrants were executed, the respondents instituted proceedings in the Federal Court challenging the validity of the warrants and the manner of their execution. In addition, they sought the return of the documents the subject of the privilege claim.

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The proceedings before the Federal Court of Australia

In the Federal Court, the respondents applied for declaratory relief under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and s 39B of the *Judiciary Act 1903* (Cth) on the basis that the search warrants were invalid. Alternatively, they sought a declaration that some of the seized documents were protected from disclosure by legal professional privilege.

Exhibited to one of Mr Dunkel's affidavits in support of the proceedings was a compendious schedule entitled "Schedule of Privileged Documents". In the affidavit, he swore that each document for which privilege was claimed, or a copy thereof, had been brought into existence for the sole purpose of providing legal advice or for use in legal proceedings.

At first instance, Davies J held that, in the absence of any particular legal expertise used in the selection of the documents to be copied, legal professional privilege did not apply to them. His Honour also held that the evidence before the justice of the peace constituted prima facie evidence of fraud and prevented legal professional privilege applying to the documents. As a result, his Honour rejected the claim of legal professional privilege in respect of various documents (207).

The respondents then appealed to the Full Court of the Federal Court of Australia. That Court allowed the appeal in part and ordered that there be a fresh hearing on the respondents' claim of legal professional privilege in respect of the documents.

On appeal to this Court, the appellants seek an order that the appeal to the Full Court from the orders of Davies J be dismissed. In their cross-appeal, the respondents seek to set aside the order of the Full Court for a general hearing on the issue of privilege. They contend that the only issue on the rehearing is, which copy documents are the subject of legal professional privilege.

(207) *Propend Finance Pty Ltd v Commissioner, Australian Federal Police* [No 2] (1994) 35 ALD 25.

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Whether copies of non-privileged documents may be privileged

Legal professional privilege is the shorthand description for the doctrine that prevents the disclosure of confidential communications between a lawyer and client, confidential communications between a lawyer and third parties when they are made for the benefit of a client, and confidential material that records the work of a lawyer carried out for the benefit of a client unless the client has consented to the disclosure (208). To be protected by the privilege, a communication must be made solely for the purpose of contemplated or pending litigation or for obtaining or giving legal advice (209). The privilege does not extend to communications that are made to facilitate the commission of crime or fraud (210), to abuse the exercise of public power (211) or to frustrate the order of a court (212).

To many, it has seemed an illogical — even absurd — proposition that the copy of a document can be privileged from disclosure when the original document is not privileged (213). For this and other reasons, many judges who have considered the question have held that legal professional privilege cannot apply to a copy of a document unless the original was privileged. For example, the Divisional Court has held that, where letters have been lost or destroyed, no privilege attaches to copies of them taken by a solicitor for use in pending litigation (214). But other English courts have held that a copy document may be privileged although the original was not privileged (215). In Australia, a similar division of judicial opinion on the

- (208) *Grant v Downs* (1976) 135 CLR 674; *Attorney-General (NT) v Kearney* (1985) 158 CLR 500; *Attorney-General (NT) v Maurice* (1986) 161 CLR 475; *Waterford v The Commonwealth* (1987) 163 CLR 54; *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121.
- (209) *Grant* (1976) 135 CLR 674; *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1; *Carter* (1995) 183 CLR 121 at 160-161.
- (210) *R v Cox and Railton* (1884) 14 QBD 153 at 165; *Bullivant v Attorney-General (Vict)* [1901] AC 196 at 201; *Varawa v Howard Smith & Co Ltd* (1910) 10 CLR 382 at 385, 386, 390; *Carter* (1995) 183 CLR 121 at 151, 160.
- (211) *Attorney-General (NT) v Kearney* (1985) 158 CLR 500.
- (212) *R v Bell; Ex parte Lees* (1980) 146 CLR 141.
- (213) *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44 at 62; *Roux v Australian Broadcasting Commission* [1992] 2 VR 577 at 598; *J N Taylor Holdings Ltd v Bond* (1991) 57 SASR 21 at 34; *Lubrizol Corporation v Esso Petroleum Ltd* [1992] 1 WLR 957 at 961.
- (214) *Chadwick v Bowman* (1886) 16 QBD 561, per Denman and Mathew JJ. In recent years the preponderance of English authority is against the existence of the privilege in these circumstances. See, eg, *R v King* [1983] 1 WLR 411; [1983] 1 All ER 929; *Lambert v Home* [1914] 3 KB 86; *Buttes Gas & Oil Co v Hammer [No 3]* [1981] 1 QB 223 at 244; *Dubai Bank Ltd v Galadari* [1990] Ch 98; *Ventouris v Mountain* [1991] 1 WLR 607 at 616; [1991] 3 All ER 472 at 480; *Lubrizol Corporation* [1992] 1 WLR 957.
- (215) *The Palermo* (1883) 9 P 6; *Watson v Cammell Laird* [1959] 1 WLR 702; [1959] 2 All ER 757; *R v Board of Inland Revenue; Ex parte Goldberg* [1989] QB 267; *R v Derby Magistrates' Court; Ex parte B* [1996] 1 AC 487.

question has emerged (216). However, the balance of authority in this country favours the view that, if the original is not privileged, neither is a copy, even if it was made for the sole purpose of advice or use in litigation. Because the precedents and their reasoning are so inconsistent, this Court can only decide the present case by reference to the fundamental principles and the rationale behind the doctrine of legal professional privilege.

The rationale for legal professional privilege

This Court has stated the rationale for legal professional privilege (217) in the following terms (218):

“The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available. As a head of privilege

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- (216) For cases rejecting the proposition that such copies can be privileged see, *Shaw v David Syme & Co* [1912] VLR 336; *Vardas v South British Insurance Co Ltd* [1984] 2 NSWLR 652; *Nickmar* (1985) 3 NSWLR 44; *Bond v J N Taylor Holdings Ltd* (1992) 57 SASR 38; *Roux* [1992] 2 VR 577; *Langworth Pty Ltd v Metway Bank Ltd* (1994) 53 FCR 556; *Water Authority (WA) v AIL Holdings Pty Ltd* (1991) 7 WAR 135; *Director of Public Prosecutions (Cth) v Blake* [1992] ACL Rep 250 NSW 5; *Bayliss v Cassidy* [1995] 2 Qd R 464. Cases in which it has been accepted that legal professional privilege may attach to copy documents include: *Wade v Jackson's Transport Services Pty Ltd* [1979] Tas R 215; *Kaye v Hulthen* [1981] Qd R 289; *McCaskill v Mirror Newspapers Ltd* [1984] 1 NSWLR 66; *Davis v Lambert-Bain Pty Ltd* [1989] Tas R 274.
- (217) For the historical development of the privilege, see *Wigmore on Evidence* (1961), 3rd ed rev, par 2290; *Cross on Evidence*, 5th Aust ed (1996), par 25215; McNicol, *The Law of Privilege* (1992), pp 46-51; ALRC Report No 26, *Evidence* (1985), vol 1, pp 494-495; Law Reform Commission of Western Australia, Project No 90 (1993), *Report on Professional Privilege for Confidential Communications*, pp 29-30; Lai, “History and Judicial Theories of Legal Professional Privilege”, *Singapore Journal of Legal Studies* (1995), p 558; Williams, “Discovery of Civil Litigation Trial Preparation in Canada”, *Canadian Bar Review*, vol 58 (1980) 1, at pp 45-46; *R v Derby Magistrates' Court; Ex parte B* [1996] AC 487 at 503-508, per Lord Taylor of Gosforth CJ.
- (218) *Grant* (1976) 135 CLR 674 at 685. More recently see, *Baker v Campbell* (1983) 153 CLR 52 at 79, 93-94; *Maurice* (1986) 161 CLR 475 at 487, per Mason and Brennan JJ; *Carter* (1995) 183 CLR 121 at 126-128, 132-133, 144-147, 160-161.

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legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision.”

Three important points emerge from this statement. First, the statement properly identifies the inherent tension in the doctrine of legal professional privilege: on the one hand, there is the need to protect the confidences of the client and, on the other, there is the public interest in parties to litigation having access to all relevant evidence (219).

Second, the statement correctly identifies the subject matter of the privilege — *communications*. This point, however trite it may seem, is fundamental to the determination of the present appeal. Much of the confusion present in the case law arises from a failure to apply it. Legal professional privilege is concerned with communications, either oral, written or recorded, and not with documents per se.

Third, the statement emphasises the paramountcy of the principle of legal professional privilege in our legal system. In this country, legal professional privilege is more than a mere rule of evidence; it “is a substantive general principle which plays an important role in the effective and efficient administration of justice by the courts” (220), the best explanation of which is that it is a “practical guarantee of fundamental, constitutional or human rights” (221). In *Carter* (222), I pointed out that:

“By protecting the confidentiality of communications between lawyer and client, the doctrine protects the rights and privacy of persons including corporations by ensuring unreserved freedom of communication with professional lawyers who can advise them of their rights under the law and, where necessary, take action on their behalf to defend or enforce those rights. The doctrine is a natural, if not necessary, corollary of the rule of law and a potent force for ensuring that the equal protection of the law is a reality.”

No doubt it seems contrary to commonsense that the law should give privilege to the copy of a document when it does not give it to the original. But in this area of the law, as in other areas of law and life, commonsense turns out to be a misleading guide. This is because legal professional privilege turns on purpose, and no argument is needed to show that the purpose of a client or lawyer in making a copy

(219) See dicta to this effect in *Waterford* (1987) 163 CLR 54 at 64-65.

(220) *Goldberg v Ng* (1995) 185 CLR 83 at 93-94. See also *Carter* (1995) 183 CLR 121 at 161; *R v Derby Magistrates' Court; Ex parte B* [1995] 3 WLR 681 at 695; [1995] 4 All ER 526 at 540-541, per Lord Taylor CJ.

(221) *Carter* (1995) 183 CLR 121 at 161.

(222) (1995) 183 CLR 121 at 161. See also *Maurice* (1986) 161 CLR 475 at 490, per Deane J, where his Honour described the privilege as “a bulwark against tyranny and oppression”. A similar sentiment was expressed by McEachern CJ in the leading Canadian authority on point, *Hodgkinson v Simms* (1988) 55 DLR (4th) 577 at 581.

document may be very different from the purpose of the person who created the original.

To concentrate on the similarity between the original and the copy or on how the copy came to be made is to miss the whole point of legal professional privilege. The privilege attaches whenever the communication or material is made or recorded for the purpose of confidential use in litigation or the obtaining of confidential legal advice. The protected communication or material may be a telephone conversation between a solicitor and client, a research memo of the legal adviser on an issue pertinent to the client's affairs or, as in the present case, the collection and collation of material and documents for the purpose of litigation or obtaining legal advice. As long as the communication was made or the material recorded for the sole purpose of legal advice or pending litigation and was intended to be confidential, the actual form of the communication or recording is irrelevant.

Part of a protected communication may even be a document that was created for a non-privileged purpose but which has been given to, and is in the custody of, a lawyer for the purpose of obtaining legal advice or for confidential use in litigation. As Mason J, with whose judgment Barwick CJ, Stephen, Jacobs and Aickin JJ agreed, pointed out in *National Employers' Mutual General Insurance Association Ltd v Waind* (223), "[d]ocuments submitted by the client to his solicitors for advice or for use in anticipated litigation attract the privilege". Thus, in *The Palermo* (224), the Court of Appeal upheld the judgment of Butt J who had refused to order discovery of depositions made by the master and crew of a ship in proceedings before the Board of Trade which the plaintiffs had "obtained for the purposes of this action, and as the phrase is, 'to form part of the brief'". If the privilege does not attach to such documents while they are in the custody of the lawyer, disclosure of their contents while in that custody, coupled with the surrounding circumstances, might reveal the nature of the advice that the client was seeking or the client's or the lawyer's view of the pending litigation (225). By compelling disclosure, more than just the documents themselves might be handed over to an adversary.

When original documents leave the lawyer's custody, however, they cannot by themselves identify the contents of the communication between the lawyer and his or her client. Thereafter, their privileged status depends on the purpose of their original creation. No doubt if the client is required to produce an original document which has been the subject of a communication between a lawyer and the client, an inference can sometimes be drawn as to why the document was in the

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(223) (1979) 141 CLR 648 at 654.

(224) (1883) 9 P 6 at 8.

(225) *McCaskill* [1984] 1 NSWLR 66 at 68.

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lawyer's custody. But since the original document was not created solely for the purpose of obtaining legal advice or assistance, it would be stretching legal professional privilege too far to cloak the document with privilege merely because at some stage it was the subject of legal advice or assistance.

Where a claim for privilege is made in respect of the copy of a document given to a lawyer for the purpose of obtaining legal advice or assistance, it is likely that the copy was prepared solely for that purpose. Because this is so, the copy will usually have a stronger claim for privilege than the original document. It will usually have a stronger claim because the relevant communication is not the original document; it is the client's conduct in giving the copy to the lawyer. Handing the copy to the lawyer is as much a part of the communication between lawyer and client as an oral summary of the original document would be part of a communication between lawyer and client. If handing the copy to the lawyer satisfies the test in *Grant v Downs* (226), as it usually does, it is privileged.

It follows that, if a solicitor makes a copy of a document that was not privileged, the copy will be privileged if it was created for the sole purpose of obtaining or giving confidential legal advice or for the confidential use of legal advisers in pending litigation. Similarly, if the client makes a copy of a document solely for that purpose or use, the copy will be privileged. If this were not so, inspection of the copied material could expressly or inferentially reveal information that would destroy the confidentiality of the communication between the legal representative and the client. Either in their assembly or their selection, disclosure of the documents could reveal a line of reasoning as to the relevant issues in the case or their relative merit. Moreover, once the privilege attaches, it remains until the client waives it. The copy document constitutes and records part of the communication between the lawyer and the client and was created solely for the purpose of obtaining legal advice. In these circumstances, the copy is always privileged. Even if it is sought for use in subsequent and unrelated proceedings, it is privileged from production (227).

It also follows that, whether the claim for privilege concerns a communication or the work product of a lawyer, purpose and not skill is the criterion for determining the claim. It is true that statements can be found in the cases to the effect that a copy will be privileged if it involves the application of legal skill on the part of a lawyer (228). Thus in *Lyell v Kennedy*, Bowen LJ seems to have upheld a claim of legal professional privilege in respect of copies of public documents on the basis that their collection was "the result of professional

(226) (1976) 135 CLR 674.

(227) *McCaskill* [1984] 1 NSWLR 66 at 68.

(228) *Nickmar* (1985) 3 NSWLR 44 at 61-62; *Roux* [1992] 2 VR 577 at 597-599.

knowledge, research, and skill'' (229). If the application of legal expertise was the test for determining whether privilege attached to a copy document, however, an unmarked photocopy of a solicitor's notes for use by counsel would arguably have no privilege.

Two arguments have been used against giving legal professional privilege to copy documents. In *Roux v Australian Broadcasting Commission*, Byrne J said that such a rule would result in "trial by ambush" which in the "modern era" was "no longer acceptable" (230). But the question of privilege for a copy document has no bearing on litigation where the original non-privileged document is in the hands of the party required to make discovery. That party must produce the original, whether or not any copy of it is privileged. Moreover, if a party copied a non-privileged document with the intention of destroying the original, the copy would not be privileged even if it was also made for the sole purpose of obtaining legal advice or for confidential use in litigation. In that situation, the conclusion is inevitable that one of the purposes of making the copy was to ensure that the maker could safely destroy the original yet at the same time retain a record of the underlying transaction. Similarly, if a party copied a document and placed the non-privileged original in the custody of a lawyer, there would probably be no privilege for either document.

A second argument commonly put against giving privilege to a copy of a non-privileged document is that the public interest is not served by denying parties access to information relevant to litigation if obtaining the information in its original form would cause delay or expense. This argument has much force. But if a copy were not privileged unless the original was privileged, a lawyer could still make a summary of the original and that summary would be privileged. If copies had only a derivative privilege, lawyers would be forced to summarise the contents of original documents to protect their clients' confidences. Such a practice would add to the expense of litigation (231). Overall, that expense would almost certainly be greater than the additional expense incurred from time to time in obtaining original documents when copies are in the possession of the person claiming privilege.

The first question in this appeal must therefore be answered, "yes".

In the present case, many of the documents listed by Mr Dunkel in

(229) *Lyell v Kennedy* (1884) 27 Ch D 1 at 31. Cotton LJ, however, upheld the claim on the basis that to disclose the copies "might shew what [the solicitor's] view was as to the case of his client as regards the claim made against him" (at 26). Fry LJ agreed with both judgments (at 31). In so far as the headnote to the case suggests that the use of professional knowledge, research or skill is the test for determining whether a copy is privileged, it is misleading.

(230) *Roux* [1992] 2 VR 577 at 599.

(231) Williams, "Four Questions of Privilege: the Litigation aspect of Legal Professional Privilege", *Civil Justice Quarterly*, vol 9 (1990) 139, at p 160.

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the "Schedule of Privileged Documents" attached to his affidavit were described as being created solely for a privileged purpose. If this is so, then, subject to the issue of fraudulent purpose, those documents are protected by legal professional privilege. It follows that the Full Court of the Federal Court was correct in setting aside the orders made by Davies J in respect of this part of the decision.

Whether the allegations of criminal offences prevent legal professional privilege applying to the communications

In one of his orders, Davies J declared that, "by reason of the allegation of offences under s 86(1)(e) and s 86A of the *Crimes Act* 1914 (Cth) and of the proof given in support thereof, the following documents [which he identified] are not subject to legal professional privilege." (232) I agree with Gummow J for the reasons he gives that the Full Court did not err in setting aside this declaration. However, by their cross-appeal, the respondents claim that this issue should have been decided in their favour. To this issue, I now turn.

Communications in furtherance of a fraud or crime are not protected by legal professional privilege because the privilege never attaches to them in the first place (233). While such communications are often described as "exceptions" to legal professional privilege, they are not exceptions at all. Their illegal object prevents them becoming the subject of the privilege (234).

A mere allegation of illegal purpose or fraud is not, of itself, sufficient to displace a claim of legal professional privilege. A person who alleges that legal professional privilege does not apply to a communication tenders an issue for decision and has the onus of proving it. Subject to any statutory provisions to the contrary, any evidence tendered in a court of justice to prove an issue must comply with the ordinary rules of evidence. Legal professional privilege is a legal right. Its prima facie application to a communication can only be displaced by admissible evidence. That evidence does not have to prove that the communication was made in furtherance of a crime or the commission of a fraud, but it must establish a prima facie case that the communication was so made. In *O'Rourke v Darbishire* (235), Viscount Finlay said that what is required is "something to give colour to the charge. The statement must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact".

(232) *Propend Finance Pty Ltd v Commissioner, Australian Federal Police* [No 2] (1994) 35 ALD 25 at 46.

(233) *R v Cox and Railton* (1884) 14 QBD 153; *Varawa* (1910) 10 CLR 382; *Kearney* (1985) 158 CLR 500; *Sut v Nominal Defendant* [1968] 2 NSW 78; *L T & K T Conlon v Lensworth Interstate (Vic) Pty Ltd* [1970] VR 293.

(234) *Carter* (1995) 183 CLR 121 at 163.

(235) [1920] AC 581 at 604 cited with approval in *Kearney* (1985) 158 CLR 500 at 516, per Gibbs CJ.

To displace the privilege in the present case, the appellants relied on an affidavit of Assistant Commissioner Baer to which was exhibited a copy of the information put before the justice of the peace. The information was sworn by Detective Sergeant Taciak, the second appellant in this appeal, who did not give evidence before Davies J. Davies J held that the affidavit of Assistant Commissioner Baer and its exhibit was sufficient to discharge the evidentiary onus upon the appellants and to displace any attached privilege (236).

However for the purpose of the proceedings before Davies J, the statements in the informations were hearsay. The out of court statements of Detective Sergeant Taciak recorded in the information were not evidence in the proceedings before his Honour. They got before the Full Federal Court only through the affidavit of Assistant Commissioner Baer. In so far as he can be taken to have deposed to the facts in the information, his evidence was hearsay and inadmissible. There is nothing in s 10 of the *Crimes Act*, any other part of that Act or any other legislation which declares that the rules of evidence do not apply in determining whether a communication is privileged. That being so, the claim of the appellants that the respondents could not rely on legal professional privilege failed because there was no admissible evidence before Davies J to support the claim.

The appellants relied on *Baker v Evans* (237) for the proposition that the contents of the information used to obtain a search warrant can be used to prove that evidence exists to support a claim of fraudulent purpose. In *Baker*, a case where the prosecution appears to have relied only on the "facts" in the information to displace legal professional privilege, Pincus J held that the claim of privilege could not prevail (238). However, while there is no legal rule that prevents the facts alleged in an information being used to determine whether legal professional privilege has been displaced, such facts can only be relied on when somebody with first-hand knowledge of them has sworn to their accuracy in the judicial proceedings which has to decide the issue of privilege. Whether or not that was the case in *Baker* (239), it is not the case here.

The cross-appeal must therefore be allowed because there was no admissible evidence before Davies J upon which he could find that legal professional privilege did not attach to the documents because of the respondents' illegal object or purpose.

(236) *Propend Finance Pty Ltd v Commissioner, Australian Federal Police* [No 2] (1994) 35 ALD 25 at 42.

(237) (1987) 77 ALR 565. This case concerned a search pursuant to a warrant issued under s 10 of the *Crimes Act* of a solicitor's office for documents relating to an allegedly fraudulent tax scheme.

(238) *Baker* (1987) 77 ALR 565 at 574.

(239) (1987) 77 ALR 565.

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Orders

I agree with the orders proposed by Gaudron J.

GUMMOW J. In Australia what now generally is identified as modern administrative law has its own federal statutory regime (240). In the past, significant questions of public law frequently were determined not by the prerogative writ procedures but as issues in actions for damages at law or in equity suits. In such litigation the plaintiff claimed redress for tortious injury to private or individual rights.

Ashby v White (241) established “the right to vote”, but was the trial of an action on the case. In *Musgrove v Chun Teeong Toy* (242), the Privy Council, on appeal from Victoria (243), held there was no absolute and unqualified right of an alien to admission to a British colony. This result was reached in an action for damages against the official who had refused to allow the alien to land. In another action Bradlaugh sought to test the efficacy of his exclusion from the House of Commons by claiming an injunction to restrain the Serjeant-at-Arms from using force to exclude him (244). Of more direct relevance to this appeal are eighteenth century decisions of the Court of Common Pleas expounding, in actions for trespass, the common law principles with respect to general warrants (245).

This appeal shows that such issues may still arise for determination in this fashion. It also demonstrates the need to avoid a narrow classification of what is involved in “administrative law” litigation.

The nature of the case

This appeal is brought from a Full Court of the Federal Court of Australia (Beaumont, Hill and Lindgren JJ) (246) and concerns two aspects of the law of legal professional privilege. Orders of review of decisions under s 10 of the *Crimes Act 1914* (Cth) were sought under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the AD(JR) Act). In addition, the respondents sought injunctive (and ancillary declaratory) relief against the appellants under s 39B of the *Judiciary Act 1903* (Cth). There was no cross-application by the appellants for declaratory relief to the contrary effect of that sought against them.

(240) *Administrative Appeals Tribunal Act 1975* (Cth), *Ombudsman Act 1976* (Cth), *Administrative Decisions (Judicial Review) Act 1977* (Cth).

(241) (1703) 2 Ld Raym 938 [92 ER 126].

(242) [1891] AC 272. See also *Robtelmes v Brenan* (1906) 4 CLR 395 at 417.

(243) *Toy v Musgrove* (1888) 14 VLR 349.

(244) *Bradlaugh v Gossett* (1884) 12 QBD 271.

(245) *Wilkes v Wood* (1763) Lofft 1 [98 ER 489]; *Entick v Carrington* (1765) 2 Wils KB 275 [95 ER 807]. See also *George v Rockett* (1990) 170 CLR 104 at 110.

(246) *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1995) 58 FCR 224; on appeal from *Propend v Commissioner, Australian Federal Police [No 2]* (1994) 35 ALD 25 (Davies J).

Analysis of these and other distinctions was somewhat obscured at earlier stages in the litigation. As will become apparent, this is a circumstance of some significance for resolution of the issues of legal professional privilege now before this Court. Upon examination, the issues on the appeal do not turn upon considerations going directly to judicial review of administrative decisions. Rather, they arise from the reliance of the respondents upon their private rights to enjoin what otherwise would be wrongful interference with ownership or possession of documents. Interference with those rights is beyond the scope of what is allowed upon execution of warrants issued under s 10 of the *Crimes Act*. That is because s 10 does not affect the operation of the doctrine of legal professional privilege. It will be necessary to refer to these matters further when considering the decision in *Baker v Campbell* (247).

The first appellant is the Commissioner, Australian Federal Police (the AFP), and the second appellant is a member of that force. It is established by the *Australian Federal Police Act 1979* (Cth) (the AFP Act). On 2 September 1993, on application of the second appellant, a Justice of the Peace issued nine warrants in exercise of the power conferred by s 10(1) of the *Crimes Act* (248).

At the time of the issue of the warrants, s 10(1) stated:

“If a Magistrate or Justice of the Peace is satisfied by information on oath that there is reasonable ground for suspecting that there is in or upon any premises, aircraft, vehicle, vessel or place:

- (a) anything with respect to which any offence against any law of the Commonwealth or of a Territory has been, or is suspected on reasonable grounds to have been, committed;
- (b) anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any such offence; or
- (c) anything as to which there is reasonable ground for believing that it is intended to be used for the purpose of committing any such offence;

or that any such thing may, within the next following 72 hours, be brought into or upon the premises, aircraft, vehicle, vessel or place, the Magistrate or Justice of the Peace may grant a search warrant authorising any constable named in the warrant, with such assistance, and by such force, as is necessary and reasonable, to enter at any time the premises, aircraft, vehicle, vessel or place named or described in the warrant, and to seize any such thing which he or she might find there.”

(247) (1983) 153 CLR 52.

(248) Section 10 was later repealed by s 5 of the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994* (Cth) and s 4 thereof inserted in the *Crimes Act* a new Pt 1AA (ss 3C-3ZY), headed “SEARCH WARRANTS AND POWERS OF ARREST”. Nothing for this appeal turns upon the repeal of s 10.

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The warrants authorised sixty members of the AFP to search nine business and residential premises associated with the respondents. The ninth respondent is a solicitor. In all but one respect, the warrants were relevantly in identical terms. The text of one of the warrants is set out as an annexure to the judgment of Beaumont J (249). The warrant specifies three conditions, the third of which is the existence of reasonable belief that the documents and records to be seized would afford evidence as to the commission of certain offences. It continues:

“YOU ARE HEREBY AUTHORISED with such assistance and by such force as is necessary and reasonable, to enter at any time the said place, and to seize any such things as satisfy ALL of the THREE above conditions and as may be found in the said place and in accordance with the procedure set out in the GENERAL GUIDELINES BETWEEN THE AUSTRALIAN FEDERAL POLICE AND THE LAW COUNCIL OF AUSTRALIA (dated 7 June 1990) as to the execution of search warrants on lawyer’s premises, the Law Society and like institutions in circumstances [where] a claim of legal professional privilege is made, and for so doing this shall be your SUFFICIENT WARRANT.”

Annexed to the warrant to search the offices of the firm of the ninth respondent was a copy of those General Guidelines (the Guidelines). This document also was attached to the judgment of Beaumont J (250).

The warrants recite the satisfaction of the Justice of the Peace, by information on oath placed before her, that there were reasonable grounds for suspecting the presence on the designated premises of materials affording evidence as to the commission of offences against ss 86(1)(e) and 86A of the *Crimes Act* and against ss 5 and 13 of the *Crimes (Taxation Offences) Act 1980* (Cth). Section 86(1) creates various offences of conspiracy. Paragraph (e) thereof was concerned with conspiracies “to defraud the Commonwealth or a public authority under the Commonwealth”. It was repealed by s 3 of the *Statute Law (Miscellaneous Provisions) Act (No 2) 1984* (Cth) (the 1984 Act) with effect from 25 October 1984. Section 3 of the 1984 Act also inserted, to commence on 25 October 1984, s 86A of the *Crimes Act*. This provision also is concerned with conspiracy to defraud the Commonwealth or a public authority under the Commonwealth. The conspiracies contrary to s 86A which are specified in the warrants are stated to have commenced on 25 October 1984. Those in respect of s 86(1)(e) are stated as having taken place between 30 June and 24 October 1984.

The search warrants were executed by officers of the AFP on the day of issue and documents were seized. During the search of the

(249) *Propend Finance* (1995) 58 FCR 224 at 239-244.

(250) *Propend Finance* (1995) 58 FCR 224 at 245-248.

premises of the ninth respondent, claims were made that legal professional privilege attached to some of the documents the AFP sought to seize. With respect to those documents, the AFP complied with the practice set out in the Guidelines. On the commencement of the proceeding in the Federal Court on 10 September 1993, the documents were lodged with the Registry of that Court. Undertakings were given by the AFP not to inspect the seized documents which were the subject of the claim for privilege until the resolution of that claim.

Three points should be made here. The first (to which it will be necessary to return) was made in the Full Court by Lindgren J. His Honour said (251):

“Although it is convenient to speak of ‘privileged documents’, this involves an ellipsis which is apt to mislead. What are privileged from disclosure are communications, whether between lawyer and client or between one of them and a third party, and information which happens to be in documentary form.”

The second point was made by Hill J (252). It is that the unchallenged evidence was that the seized documents the subject of the claim of privilege were copies which had been made for the sole purpose of obtaining or giving legal advice. Some of the documents were copies made by the client and sent to the client’s solicitor for advice. Others were copies included in briefs to advise which had been sent by the solicitor to counsel. As Gaudron J explains in her reasons for judgment, the privilege extended to both categories of copy document. The third point also will require elaboration. It follows from the first two and is that the communications, of which the making and transmission of the copies formed part, were not themselves alleged to have been made in furtherance of an improper purpose constituted by the alleged conspiracies. Rather, the appellants approached the matter on the footing that any taint attaching to the original documents necessarily infected copies thereof.

There were no pleadings in the Federal Court proceeding. In the application an order for review was sought under the AD(JR) Act and the jurisdiction conferred by s 39B of the *Judiciary Act* was invoked for prohibitory and mandatory injunctive relief and supporting declarations. However, the application was drawn so as not clearly to distinguish between the various foundations of jurisdiction. On the one hand, the applicants (the present respondents) sought review of the decisions of the second appellant to apply for issue of the warrants and the decisions of the Justice of the Peace to issue them. The applicants contended that the warrants were “too wide and uncertain”, and that the decisions were improper exercises of the power said to be

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(251) *Propend Finance* (1995) 58 FCR 224 at 264.

(252) *Propend Finance* (1995) 58 FCR 224 at 250.

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conferred by s 10 of the *Crimes Act* and were so unreasonable that no reasonable person could have so exercised that power. None of these issues arise on the present appeal.

Complaint also was made of the “conduct” of members of the AFP in the execution of the warrants, in particular in seizing documents to which legal professional privilege was said to attach. This “conduct” was posterior rather than anterior to the decisions in respect of which review was sought. Section 6 of the AD(JR) Act is concerned with review of past, present or proposed conduct “for the purpose of making a decision to which this Act applies”. In the course of submissions to this Court, counsel for the respondents, recognising this, emphasised s 39B of the *Judiciary Act* as the jurisdictional basis in respect of the complaint as to seizure of documents. Among the relief sought was an order restraining the first and second appellants from inspecting or copying the documents seized, a declaration that the documents deposited with the New South Wales District Registry of the Federal Court were subject to legal professional privilege, and an order that those documents be delivered forthwith to the persons from whom they had been seized.

The trial judge made an order, styled a “direction”, and made two declarations which are presently significant. The Court directed that, subject to the first declaration, issues as to whether legal professional privilege attached to the documents seized were to be determined after the documents in question had been examined. The first relevant declaration was that “by reason of the allegation of offences under s 86(1)(e) and s 86A of the *Crimes Act* 1914 (Cth) and of the proof given in support thereof, the following documents are not subject to legal professional privilege . . .”. The second relevant declaration was that “copies of documents made for the purpose of obtaining legal advice, the originals of which are not subject to legal professional privilege are not privileged”. These declarations were adverse to the interests of the respondents, the moving parties at the trial, and favoured the appellants. This was so despite there being before the Court no cross-application by the appellants, seeking negative declarations.

On appeal (taken by leave), the Full Court set aside that direction and those declarations. In place thereof, the Full Court ordered that there be a fresh hearing on the respondents’ claims for privilege.

In this Court, the appellants seek an order that the appeal to the Full Court be dismissed, thereby reinstating the relief granted by the trial judge. By their cross-appeal the respondents contend that the Full Court should not have ordered any fresh hearing in respect of the issue whether the original documents were not subject to legal professional privilege for the reasons expressed in the first declaration made by the trial judge. The respondents say that the Full Court should have remitted only the questions of identification of those copy documents to which the privilege attached.

Special leave

This Court granted special leave to appeal in respect to the two questions dealt with in the declarations made by the trial judge. One is the contention of the appellants that legal professional privilege does not extend to a copy of a document if the original is not a subject of the privilege. The other is that the privilege had been displaced because there had been before the Justice of the Peace sufficient “prima facie evidence” that the communications the subject of the documents sought by the warrants were made in furtherance of improper purposes, in particular the alleged offences.

It is convenient to undertake consideration of these matters bearing in mind that any incursion into the area occupied by the privilege should be, in the phrase of Lord Nicholls of Birkenhead, “principled and clear” (253), and after reference to some basic propositions.

Basic propositions

The first proposition is that it is settled in Australia (254) (and perhaps now in England (255)) that the doctrine of legal professional privilege itself represents a balance struck between competing public interests. Given its application, no further “balancing exercise”, such as that involved with a claim of public interest immunity, is appropriate.

The second is that in various jurisdictions regard is had to the “dominant purpose” in the preparation of documents claimed to be protected from inspection (256). This is on the ground that to hold, in accordance with *Grant v Downs* (257), that the purpose must be the sole purpose would, apart from difficulties of proof, confine the privilege too narrowly. These differing views of the scope of the privilege are to be understood when considering the many decisions from other common law jurisdictions to which we were referred.

Thirdly, the privilege does not attach to a communication made as part of a criminal or unlawful proceeding or in furtherance of an illegal object. The privilege would not attach where the plaintiff sought legal assistance as a step in, or preparatory to, the commission of a crime or

(253) *R v Derby Magistrates' Court; Ex parte B* [1996] 1 AC 487 at 512.

(254) *Waterford v The Commonwealth* (1987) 163 CLR 54 at 64-65, 74, 98.

(255) *R v Derby Magistrates' Court; Ex parte B* [1996] 1 AC 487 at 508, 509, 511; but cf *In re L (A Minor)* [1997] AC 16 at 27, 30, 33.

(256) *Waugh v British Railways Board* [1980] AC 521; *Guardian Royal Assurance v Stuart* [1985] 1 NZLR 596. The Canadian decisions are divided: Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1992), pp 656-657. Section 119 of the *Evidence Act 1995* (Cth) states the privilege in terms of “the dominant purpose” of the preparation of a “confidential document”, a term defined in s 117(1). The scope of s 119 is unsettled: *Sparnon v Apand* (1996) 68 FCR 322 at 325. The new law applies to litigation in the Federal Court but (s 4) not to proceedings the hearing of which (as with this case) began before 18 April 1995.

(257) (1976) 135 CLR 674.

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fraud, even though the solicitor was unaware of the purpose of the communication at the time it was made (258). The communication would still be “designed to facilitate future wrongdoing” (259). In addition, the privilege does not protect communications made to further a deliberate abuse of statutory power and by that abuse to prevent others from exercising their rights under the law (260). It follows that the operation of the privilege is not decided, as a general proposition, merely by a determination in the instant proceeding of whether facts amounting to a crime have been proved. The nature of the alleged impropriety and thus the issue of existence of the privilege will vary from case to case.

Fourthly, it is established in Australia by *Baker v Campbell* (261) that the right that protects privileged communications from disclosure without consent of the lay client is more than an aspect of civil and criminal procedure and more than a rule of evidence applicable in the course of litigation. Some English decisions to which we were referred, including *Ventouris v Mountain* (262) and *Lubrizol Corporation v Esso Petroleum Ltd* (263) may proceed upon a different footing. This corresponds to the doctrine which previously prevailed in this Court under the majority decision in *O’Reilly v State Bank of Victoria Commissioners* (264). It had been held that the privilege was not available outside the realm of judicial and quasi-judicial proceedings where, in general, the rules of evidence are applied, because the privilege was a rule of evidence and the underlying policy it serves did not demand an extension beyond that realm. However, the law in England has been clarified. The House of Lords recently affirmed that the privilege is “much more than an ordinary rule of evidence, limited in its application to the facts of a particular case” and that it “is a fundamental condition on which the administration of justice as a whole rests” (265).

Finally, legal professional privilege being more than an aspect of procedural law, it is then a question of identifying its true character. Views differ as to whether the privilege is to be characterised as “a practical guarantee . . . of fundamental constitutional or human rights” (266), “a substantive rule of law” (267), or one of those traditional common law rights which is not to be abolished or cut

(258) *R v Bell; Ex parte Lees* (1980) 146 CLR 141 at 145.

(259) *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 163.

(260) *Attorney-General (NT) v Kearney* (1985) 158 CLR 500.

(261) (1983) 153 CLR 52.

(262) [1991] 1 WLR 607 at 611-612; [1991] 3 All ER 472 at 475-476.

(263) [1992] 1 WLR 957 at 960.

(264) (1983) 153 CLR 1.

(265) *R v Derby Magistrates’ Court; Ex parte B* [1996] 1 AC 487 at 507; but cf *In re L (A Minor)* [1997] AC 16.

(266) *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 490; cf *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 129.

(267) *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 161.

down otherwise than by clear statutory provision (268). Certainly the privilege alike protects the strong as well as the vulnerable, the shabby and discredited as well as the upright and virtuous, those whose cause is in public disfavour as much as those whose cause is held in popular esteem.

At common law, and in the absence of any statutory indemnity or other protection against liability, an officer who executed a search warrant in excess of the authority conferred by it, incurred a liability for damages in tort for trespass to land or goods (269), false imprisonment (270) or for other misfeasance (271). However, the privilege itself is not to be characterised as a rule of law conferring individual rights, breach of which gives rise to an action on the case for damages, or an apprehended or continued breach of which may be restrained by injunction.

It is true that if the use of privileged documents by the defendant is, or is a consequence of, a breach of confidence owed the plaintiff, then there may be an equity to protect that confidence (272). In *Lord Ashburton v Pape* (273), it was decided that the client whose privileged documents, being letters written to his solicitor, had fallen into the hands of a third party by a trick, might obtain injunctive relief requiring the return of the documents and restraining the third party from making use of them. On the other hand, in *Calcraft v Guest* (274), the defendant was permitted to adduce as secondary evidence copies of proofs of witnesses, with notes of the evidence, in a previous action brought in 1787 by the plaintiff's predecessor in title and concerning the true boundary of the plaintiff's fishery. The original documents remained privileged but the defendant, having obtained copies of the privileged documents, was not precluded by that privilege from tendering them as secondary evidence. It was held that

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(268) *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 491; *Bropho v Western Australia* (1990) 171 CLR 1 at 17-18; *Coco v The Queen* (1994) 179 CLR 427 at 437-438, 446.

(269) *Parton v Williams* (1820) 3 B & Ald 330 [106 ER 684]; *Crozier v Cundey* (1827) 6 B & C 232; [108 ER 439]; *Dillon v O'Brien* (1887) 16 Cox CC 245. See also *Field v Sullivan* [1923] VLR 70.

(270) *Hoye v Bush* (1840) 1 Man & G 775 [133 ER 545]. See also *Little v The Commonwealth* (1947) 75 CLR 94.

(271) Section 64B of the AFP Act renders the Commonwealth liable as a joint tortfeasor in respect of a tort committed by a member of the AFP "in the performance or purported performance of his duties as such a member".

(272) *Ritz Hotel v Charles of the Ritz [No 22]* (1988) 14 NSWLR 132 at 134; *Goddard v Nationwide* [1987] QB 670; *Webster v James Chapman & Co* [1989] 3 All ER 939; *Hartogen Energy Ltd v AGL Co* (1992) 36 FCR 557 at 566-568; Andrews, "The Influence of Equity upon the Doctrine of Legal Professional Privilege", *Law Quarterly Review*, vol 105 (1989) 608; Newbold, "Inadvertent Disclosure in Civil Proceedings", *Law Quarterly Review*, vol 107 (1991) 99.

(273) [1913] 2 Ch 469.

(274) [1898] 1 QB 759.

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the question of provenance of the documents tendered was a collateral issue.

The distinction between these authorities may be seen to lie in the character of the privilege as a bar to compulsory process for the obtaining of evidence rather than as a rule of inadmissibility. The effect of the authorities has been identified as follows (275):

“All that *Calcraft v Guest* decided was that when a privileged document was no longer in the hands of those entitled to claim immunity from production, there was nothing to prevent its use in evidence. Of course, a person who has a right to confidence in a document can enforce his right by injunction, and this is what lay behind *Ashburton v Pape*.”

Baker v Campbell

Although conceptually separate, the three elements of privilege, confidence, and excess of authority were all involved in *Baker v Campbell* (276). As in the present case, a search warrant had been issued pursuant to s 10 of the *Crimes Act* and it authorised the seizure of certain documents on premises occupied by solicitors. The defendant, acting pursuant to the warrant, attempted to seize certain documents to which it was alleged legal professional privilege attached. The plaintiff commenced an action in this Court to restrain the defendant from seizing the documents (277). The action thus appears to have been one to enjoin apprehended misfeasance by conduct in excess of the authority conferred by law on the defendant. The matter came before the Full Court on a case stated. By majority, the Court held that the *Crimes Act* did not evince any intention to oust the privilege and that the privilege applied to documents within the scope of the search warrant issued pursuant to s 10.

Gibbs CJ (278) took *Lord Ashburton v Pape* as authority for the proposition that the owner of a document which has been improperly obtained may secure an injunction prohibiting its use in evidence, provided this is done in a separate proceeding before the document has been put in evidence. Brennan J (279) said that the court's power to restrain by injunction the use of documents obtained in breach of confidence could not be exercised to restrain the use in evidence of documents which had been seized under a warrant if, upon its true

(275) Zuckerman, “Legal Professional Privilege and the Ascertainment of Truth”, *Modern Law Review*, vol 53 (1990) 381, at p 383. The distinction to be drawn between privilege and confidence was further emphasised by Scott J in *Webster v James Chapman & Co* [1989] 3 All ER 939 at 943-944.

(276) (1983) 153 CLR 52.

(277) cf *Smorgon v Australia & New Zealand Banking Group Ltd* (1976) 134 CLR 475 at 478-479.

(278) *Baker v Campbell* (1983) 153 CLR 52 at 68.

(279) *Baker v Campbell* (1983) 153 CLR 52 at 110.

construction, s 10 authorised their seizure. Later, in *Johns v Australian Securities Commission* (280), Brennan J emphasised that the subject matter of the equitable obligation is information and the requirement of confidence in respect of it; and, in a passage with which I respectfully agree, Gaudron J (281) pointed out that in some circumstances third parties may be bound by the obligation. Equitable relief thus may extend to use of copy documents.

The primary significance of *Baker v Campbell* for the present case rests in the construction given s 10 of the *Crimes Act*. That construction illustrates the proposition that, even in respect of legislation not directed to the conduct of litigation, the privilege is not to be taken as abolished or qualified other than by clear statutory provision. In that regard, reference was made to the apparent tendency in legislation to compel a disclosure of evidence as an adjunct to modern administrative procedure, and to the risk thereby created of undermining the policy supporting the privilege (282).

The propositions for which *Baker v Campbell* is authority are encapsulated in the following statement by Dawson J (283):

“[T]he doctrine of legal professional privilege is, in the absence of some legislative provision restricting its application, applicable to all forms of compulsory disclosure of evidence. Section 10 of the *Crimes Act* does not expressly or by necessary implication restrict the application of the doctrine and the section should, therefore, be construed as being not intended to affect it.”

Baker v Campbell did not decide that the warrant in question was, to any degree, invalid. Rather, the Court answered in the negative the question whether the documents the subject of the privilege might properly be made the subject of a search warrant issued under s 10. It follows that the objective of the respondents in initiating the present litigation, namely to protect privileged communications, was not to be attained by seeking judicial review of decisions leading up to the issue of the warrants. The power conferred upon the authorities designated in s 10 to grant search warrants is to be so construed, in accordance with s 46(1)(b) of the *Acts Interpretation Act* 1901 (Cth), that any warrant granted thereunder is to be read so as not to exceed that power (284). The power did not extend to restrict the application of the doctrine of legal professional privilege.

Of course, in the execution of warrants, issues arise as to the application of the privilege and thus the operation of the warrant. The Guidelines were designed to provide a means of preserving the status

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(280) (1993) 178 CLR 408 at 426-428.

(281) *Johns* (1993) 178 CLR 408 at 459-460.

(282) *Baker v Campbell* (1983) 153 CLR 52 at 132.

(283) *Baker v Campbell* (1983) 153 CLR 52 at 132.

(284) cf *Harrington v Lowe* (1996) 70 ALJR 495 at 503; 136 ALR 42 at 52.

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quo pending curial resolution of a dispute as to the existence of the privilege. In the present case, the means for curial resolution were provided by the application for injunctive and ancillary relief, founded upon s 39B of the *Judiciary Act*. It was for the respondents, as the parties seeking injunctive relief, to establish that the privilege applied in respect of those documents otherwise falling within the terms of the warrants.

By way of answer to the case presented by the respondents (285), it was open to the appellants to demonstrate that the documents in question were not protected, not because of any exception to the general rule but because there was a sufficient element of impropriety or illegality in the otherwise privileged communications of which they were part to take them outside the area covered by the privilege (286). This is the second issue arising on the grant of special leave. I turn to consider the first issue.

Copy documents and communications

Whilst issues as to the privilege frequently arise upon discovery or tender (or, as in this case, upon seizure) of documents, the subject matter of the privilege is communications made solely for a particular purpose. In *Grant v Downs* (287), Jacobs J identified the rule that:

“communications with one’s legal adviser are privileged from disclosure and that the privilege extends not only to communications actually made but to material prepared for the purpose of communication thereof to the legal adviser.”

These communications may be oral, written or a combination thereof. Moreover, many communications made to obtain or to give legal advice will not concern contemplated or pending litigation and, further, in any event may involve third persons. Hence the particular significance of the second sentence in the following passage from the judgment of McHugh J in *Carter v Northmore Hale Davy & Leake* (288):

“Communications between legal advisers and their clients concerning contemplated or pending litigation cannot be disclosed without the consent of the client (289). Similarly, communications made to obtain or to give legal advice cannot be disclosed without

(285) See *Bullivant v Attorney-General (Vict)* [1901] AC 196 at 206.

(286) *Follett v Jefferyes* (1850) 1 Sim (NS) 3 at 17 [61 ER 1 at 6]; *R v Bell; Ex parte Lees* (1980) 146 CLR 141 at 152.

(287) (1976) 135 CLR 674 at 690.

(288) (1995) 183 CLR 121 at 159.

(289) *Grant v Downs* (1976) 135 CLR 674; *Attorney-General (NT) v Kearney* (1985) 158 CLR 500; *Attorney-General (NT) v Maurice* (1986) 161 CLR 475; *Waterford v The Commonwealth* (1987) 163 CLR 54.

the consent of the client (290). ‘Legal professional privilege’ is the shorthand description of the right that protects these communications from being disclosed without the consent of the lay client.’

It also is significant, as Beaumont J emphasised in the present case (291) that the privilege extends to any document prepared by a lawyer or client from which there might be inferred the nature of the advice sought or given. Examples include communications between the various legal advisers of the client, draft pleadings, draft correspondence with the client or the other party, and bills of costs (292).

This identification of the privilege with communications, rather than merely with documents, is important for the first issue on the grant of special leave.

Upon that issue this Court was referred, as had been the Full Court, to a large number of authorities from Australia and other common law jurisdictions (293). In a number of the authorities, the reasoning proceeds from the false premise that what is involved is privilege for particular documents rather than for communications. The differing views to be gathered from the decisions were collected by Hill J (294). His Honour pointed out that the strongest statement that privilege will never attach to copies appears to be that of Lord Denning MR in *Buttes Gas & Oil Co v Hammer [No 3]* (295). His Lordship said:

“In my opinion, if the original is not privileged, neither is a copy made by the solicitor privileged. For this simple reason, that the original (not being privileged) can be brought into court under a subpoena duces tecum and put in evidence at the trial. By making the copy discoverable, we only give accelerated production to the document itself.”

Some decisions support the proposition that the privilege will attach to copies of documents brought into existence for the purposes of obtaining legal advice or for litigation. Others adopt what Hill J identified as intermediate positions that (a) copy documents will not generally be privileged, but the privilege will exist where disclosure would reveal the “line of reasoning” of the legal adviser, and (b) privilege attaches to a copy only if there has been “selective copying” or “the exercise of skill and knowledge by the solicitor”.

The mere circumstance that the production of an original document,

(290) *Minet v Morgan* (1873) 8 Ch App 361; *Bullivant v Attorney-General (Vict)* [1901] AC 196.

(291) *Propend Finance* (1995) 58 FCR 224 at 237.

(292) See *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at 245-246; *Waterford v The Commonwealth* (1987) 163 CLR 54 at 87.

(293) Many of them are collected and summarised in the appendices to the judgment of Lindgren J in *Propend Finance* (1995) 58 FCR 224 at 270-273.

(294) *Propend Finance* (1995) 58 FCR 224 at 254-255.

(295) [1981] QB 223 at 244.

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which is not privileged, may be required by subpoena and that it then may be put in evidence does not meet the points of principle which are involved. One of these, as mentioned earlier in these reasons when discussing *Lord Ashburton v Pape* (296) and *Calcraft v Guest* (297), is that the privilege is to be characterised as a bar to compulsory process for the obtaining of evidence rather than a rule of inadmissibility. Further, the Master of the Rolls was not addressing that important aspect of privilege which is concerned not with current or contemplated litigation but with the provision of advice to assist in the conduct of the client's affairs in conformity with relevant legal rights and obligations.

Nor does the privilege exist to protect the labour of the legal adviser by exercising skill and knowledge in selective copying or production of summaries (298). The privilege is that of, and protects the interests of, the client, and is not limited to what in the United States has been called "the attorney's work-product" (299). Nor is the privilege concerned merely to protect disclosure of litigation strategy or the line of reasoning of the legal adviser (300).

In the course of argument, it was said that there would be an anomaly if a photocopy of a publicly registered document, made solely for a privileged communication, were protected whereas a certified copy of the original might readily be obtained and put into evidence. Other curiosities or apprehensions were suggested. One was the fear that copy documents might be brought into existence to enable destruction of the original whilst the copy was employed in obtaining legal advice and thus became part of a privileged communication. Yet, given the gross impropriety that this would involve, it surely would be difficult to sustain an argument for the subsistence of privilege. To uphold the privilege in such a case would be to allow the "privilege to be used for a purpose alien to its whole purpose and history" (301). Further, as McHugh J points out in his reasons for judgment, on these

(296) [1913] 2 Ch 469.

(297) [1898] 1 QB 759.

(298) cf *Lyell v Kennedy* (1884) 27 Ch D 1 at 26, 31; *Roux v Australian Broadcasting Commission* [1992] 2 VR 577 at 597-598; *R v Inland Revenue; Ex parte Goldberg* [1989] QB 267 at 276; *Langworth Pty Ltd v Metway Bank Ltd* (1994) 53 FCR 556 at 566-567; *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44 at 61-62.

(299) Meaning the work which is reflected "in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways": *Hickman v Taylor* (1947) 329 US 495 at 511; see also *National Labor Relations Board v Sears, Roebuck & Co* (1975) 421 US 132 at 154-155. The substantial nature of this "work-product" may be significant where protection in equity is sought in respect thereof to prevent breach of confidence: see *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 461.

(300) cf *J N Taylor Holdings Ltd v Bond* (1991) 57 SASR 21 at 37.

(301) *R v Bell; Ex parte Lees* (1980) 146 CLR 141 at 154.

assumed facts the copy documents would not have been made for the sole purpose of obtaining legal advice.

On the other hand, it may be that a broad test of privilege in respect of copy documents where the original is not privileged rests upon the practical consideration that protection of the copy is essential to the proper functioning of the adversary system of adjudication. The denial of privilege in respect of copies of non-privileged non-party documents, made for litigation, would impair the proper preparation of cases for trial. It would encourage parties to use discovery, rather than their own investigations, to seek out documents in the hands of third parties. The point has particular force where prosecuting authorities thereby are tempted to obtain copies from the legal advisers of those who are suspected or accused of offences. A summary of the document prepared by the solicitor would attract the privilege. Yet reproduction of a document is the soundest way of obtaining a record of its contents for supply by a solicitor to obtain the advice of counsel. To deny privilege in this case is to encourage slow and more expensive procedures (302).

In the end, the matter turns upon the application of the basic principles outlined earlier in these reasons, in particular those (a) that communications with one's legal adviser which satisfy the criterion of sole purpose are privileged from disclosure and (b) that this privilege extends to the various components of a communication, including material prepared for submission to the legal adviser.

It is not a question of extracting one or other of what may be numerous documents, all of which form part of the privileged communication, and declassifying those particular documents on the footing that the original or other copies exist and there is no bar to compulsory process for the obtaining of them to put in evidence. The communication as a whole is protected to foster the confidential relationship in which legal advice is given and received and thereby to advance the respect for and observance of the law (303). The circumstance that a particular document is a copy of an original which is not protected from compulsory process by the privilege does not mean that there is no bar to compulsory process for the obtaining of the copy. The status of the original, from the viewpoint of privilege, does not determine that of the copy. Of course, if there is an equity of the kind revealed in *Lord Ashburton v Pape*, then distinct considerations may apply alike to original and copy documents. But that is not this case.

Rather, the question here is whether, having regard to the circumstances in which the copy document was brought into existence, it is to be treated as a communication, or, with other oral or written

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(302) See Williams, "Four Questions of Privilege: the Litigation aspect of Legal Professional Privilege", *Civil Justice Quarterly*, vol 9 (1990) 139, at p 160.

(303) *Baker v Campbell* (1983) 153 CLR 52 at 95, 120, 130.

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material, an element in a communication, concerning contemplated or pending litigation or made to obtain or give legal advice. In that setting, it would not be sufficient that the original document was made in furtherance of an improper purpose such as those asserted in the nine warrants issued on 2 September 1993. In a particular case it may be established that the communication for which the copy was made is part of a criminal or unlawful proceeding or was made in furtherance of an illegal object such as the commission of a crime or fraud (304). But this litigation has not been so conducted as to raise any issue that the legal advice which was sought was of that character.

It follows that the result reached by the Full Court in setting aside the second declaration made by the trial judge was correct.

Illegal or improper purpose

As outlined above, the first relevant declaration made by the trial judge was that “by reason of the allegation of offences” under ss 86(1)(e) and 86A of the *Crimes Act* “and of the proof given in support thereof”, certain documents were not subject to the privilege. The declaration was so framed as to assume the privilege operated in respect of documents rather than communications. Moreover, the true issue would have been whether sufficient evidence had been offered in respect of the proposition that the communications for which the copies were made were part of a criminal or unlawful proceeding or in furtherance of an illegal object. If the appellants had made good the allegation that the offences under the *Crimes Act* tainted the preparation and contents of the original documents, the question of sufficiency of proof still would have remained as to whether the privileged communications were in furtherance of the conspiracies so alleged or were part themselves of some other criminal or unlawful proceedings.

Consideration of the subject of sufficiency of proof thus was conducted upon a false footing. For that reason alone, the first declaration was properly set aside. However, it is convenient to consider whether, had the true issue been addressed, it would have been incumbent upon the appellants to adduce some admissible evidence from which there might appear in relation to the communications an illegal or improper purpose or the furtherance of an illegal object.

The respondents rely upon the statement by Gibbs CJ in *Attorney-General (NT) v Kearney* (305) (with whom Mason and Brennan JJ agreed (306)) that the privilege is not displaced by the making of “a mere charge of crime or fraud”. Before the trial judge, the appellants tendered an affidavit of Assistant Commissioner P W Baer to which

(304) *R v Bell; Ex parte Lees* (1980) 146 CLR 141 at 145.

(305) (1985) 158 CLR 500 at 516.

(306) *Kearney* (1985) 158 CLR 500 at 516-517.

there was exhibited a copy of the information on which the Justice of the Peace had acted in issuing the warrants. The information was sworn by the second appellant. He gave no evidence at the trial.

The appellants submit that search warrants are an “investigative tool” and that they are obtained usually at a stage when there is insufficient evidence to lay criminal charges and, indeed, often are obtained in order to ascertain if a suspected criminal offence has occurred. They contend that it would appear absurd to require proof of illegality in order to displace legal professional privilege when the alleged illegality is the very subject matter of the inquiry. Indeed, the trial judge dealt with this aspect of the case by saying that the information put before the Justice of the Peace “provided evidence that there were reasonable grounds for suspecting” that the specified offences had occurred (307).

However, the issue here is not whether the warrants were issued upon a sworn information which was sufficient then to displace the privilege. Before the Federal Court, the task of the appellants, in resisting the privilege propounded by the respondents in their application under s 39B of the *Judiciary Act*, was to satisfy the Federal Court that there was more than an allegation of crime or impropriety, and that the privilege was displaced. In the Full Court, Hill J explained the position as follows (308):

“The learned trial judge relied upon the information which had been admitted into evidence subject to the [respondents’] objection to it. Without the information there would have been no more than a bare assertion. The information was exhibited to an affidavit . . . That affidavit no doubt served to identify the information but did not enable the information to be treated as evidence of the matters contained in it. Not only was the information itself hearsay, emanating in part from undisclosed sources but the informant was not available for cross-examination. The information should not have been admitted into evidence.

As no other evidence of illegal or improper purpose was before the Court, his Honour should have held that the material for which privilege was claimed should, in the absence of agreement between the parties, have been examined to determine whether the privilege was properly claimed.”

In a number of the authorities dealing with this aspect of the doctrine of legal professional privilege, the issue has arisen upon the response to obligations to provide discovery of documents (309) or to

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(307) *Propend* (1994) 35 ALD 25 at 42.

(308) *Propend Finance* (1995) 58 FCR 224 at 260.

(309) *O'Rourke v Darbishire* [1920] AC 581; *Buttes Gas & Oil Co v Hammer [No 3]* [1981] QB 223; *Attorney-General (NT) v Kearney* (1985) 158 CLR 500.

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answer interrogatories (310). In others, for example, *Bullivant v Attorney-General (Vict)* (311), the issue arose upon an order to attend and produce documents.

The plaintiff in *Butler v Board of Trade* (312) instituted a suit claiming an injunction against the Board of Trade using the contents of a letter written to him by a solicitor. Goff J (313) pointed out that, on some occasions, the question whether the privilege does not apply has "to be determined on a prima facie basis, often without seeing the documents or knowing what was orally communicated" and that in such circumstances "the proper prima facie inference will be that the communication was made in preparation for or in furtherance or as part of the criminal or fraudulent purpose".

In *Bullivant*, the Attorney-General, by an information filed in the Supreme Court of Victoria, claimed that certain conveyances had been executed "with intent to evade the payment of duty" under the *Administration and Probate Act 1890 (Vict)*. The Attorney unsuccessfully sought to answer the claim of privilege in respect of communications with the solicitor who had prepared the conveyances by reliance solely upon the terms of the information. This attempt was unsuccessful because, as Lord Lindley pointed out, "evade" was an ambiguous expression and could identify no more than the doing of something which would not bring a party within the scope of the statute (314).

The assertion and determination of claims of privilege may be attended by special evidentiary considerations. The procedures for discovery under the Judicature system have been said not to allow for any right of cross-examination of the deponent of an affidavit of documents (315) and, subject to the qualifications explained by Menzies J in *Mulley v Manifold* (316), the affidavit is conclusive. It was the view of Bowen CJ (317) that a certificate or affidavit making a claim to public interest immunity is received not as evidence in the lis but for the purpose of enabling the court to rule on the claim, so that any cross-examination going beyond the issue of the claim to immunity is impermissible (318). Further, in cases of defence secrets,

(310) *Follett v Jefferyes* (1850) 1 Sim (NS) 3 [61 ER 1].

(311) [1901] AC 196.

(312) [1971] Ch 680.

(313) *Butler* [1971] Ch 680 at 687.

(314) *Bullivant* [1901] AC 196 at 207.

(315) *Lyell v Kennedy* (1884) 27 Ch D 1; *Brambles Holdings Ltd v Trade Practices Commission [No 3]* (1981) 58 FLR 452 at 454; *Fruehauf Finance Pty Ltd v Zurich Australian Insurance Ltd* (1990) 20 NSWLR 359 at 366; *Bray on Discovery* (1885) p 211. Other authority decides that there is a discretion in the court to permit cross-examination: *National Crime Authority v S* (1991) 29 FCR 203 at 211; *Hartogen Energy Ltd v AGL Co* (1992) 36 FCR 557 at 560-561.

(316) (1959) 103 CLR 341 at 343.

(317) *Young v Quin* (1985) 4 FCR 483 at 485-486.

(318) See also *Zarro v Australian Securities Commission* (1992) 36 FCR 40 at 60-61.

matters of diplomatic relations, or affairs of government at the highest level it may so readily appear to the court that the balance of public interest is against disclosure, that of its own motion the court should enjoin disclosure and do so even in the absence before it of any claim to Crown privilege; the Crown may not be a party or may be unaware of what is afoot (319). But no such special considerations attended the adjudication of the privilege claimed in the present proceeding.

The existence of the privilege may be denied in response to an obligation to allow inspection upon discovery. In such instances, much will turn upon the particular statute or rules of court regulating discovery. Thus, in *O'Rourke v Darbishire* (320), in the course of a passage partly extracted by Gibbs CJ in *Attorney-General (NT) v Kearney* (321) and in which the phrase "prima facie case" is used, Viscount Finlay said:

"It is with reference to cases of this kind that it can be correctly said that the Court has a discretion as to ordering inspection of documents. It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud. The Court will exercise its discretion, not merely as to the terms in which the allegation is made, but also as to the surrounding circumstances, for the purpose of seeing whether the charge is made honestly and with sufficient probability of its truth to make it right to disallow the privilege of professional communications. In the present case it seems to me clear that the appellant has not shown such a prima facie case as would make it right to treat the claim of professional privilege as unfounded."

These discretionary considerations do not enter into the matter where one of the issues being tried on the hearing of an action is the existence of the privilege or where the determination of the existence of the privilege is a necessary step to the admission of evidence at a trial. The present case is in the former category, and the decision of the Court for Crown Cases Reserved in *R v Cox and Railton* (322) is in the latter. Cox and Railton had been tried and convicted upon a charge of conspiring to defraud one Munster. At the trial, a solicitor was called on behalf of the prosecution to testify that, after Munster had obtained a judgment against Railton, Cox and Railton had consulted him as to how they could defeat the judgment. Objection was taken to the reception of that evidence. The evidence was received but the question whether this had been properly done was reserved after the verdict of the jury. The Court for Crown Cases Reserved proceeded on

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(319) *Sankey v Whitlam* (1978) 142 CLR 1 at 44, 58-59.

(320) [1920] AC 581 at 604.

(321) (1985) 158 CLR 500 at 516.

(322) (1884) 14 QBD 153.

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the footing (323) that the jury had found that, as far as Cox and Railton were concerned, their communication with the solicitor was a step preparatory to the commission of a criminal offence, namely, a conspiracy to defraud.

In the present case, the question for decision by the trial judge was whether the appellants had made out a good answer to what otherwise would be a claim of privilege. It was not whether there were prima facie grounds to the satisfaction of the Justice of the Peace, before issuing the warrants, that there was the reasonable ground of suspicion referred to in s 10 of the *Crimes Act*. The issue did not arise upon judicial review of the decision of the Justice of the Peace. It arose at trial, in the manner I have described. Attempts to put glosses upon the ordinary civil standard of proof which applied at the trial are to be discouraged.

The best overall guide remains the following statement by Dixon J in *Briginshaw v Briginshaw* (324):

“Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters ‘reasonable satisfaction’ should not be produced by inexact proofs, indefinite testimony, or indirect inferences.”

In the present case, quite apart from the failure accurately to frame the relevant issue, the inexactitude, indefiniteness and indirection referred to by Dixon J crippled the attempt of the appellants to take the documents in question out of the operation of the doctrine of legal professional privilege. The result achieved in the Full Court on this aspect of the case should not be disturbed.

Orders

The course taken at the trial is referable to the somewhat confused fashion in which the respondents framed their case in the application and to the absence of any cross-application by the appellants. In all the circumstances, there should be no fresh hearing on the respondents’ claims to privilege.

Rather, there should be a declaration that those copies of documents, being copies made for the sole purpose of obtaining or giving legal

(323) *R v Cox and Railton* (1884) 14 QBD 153 at 165.

(324) (1938) 60 CLR 336 at 361-362.

advice or solely for use in legal proceedings and seized upon execution of the warrant, issued 2 September 1993, at the premises of the ninth respondent, were the subject of legal professional privilege. The question of the identification of which particular documents (if any) fall within the terms of that declaration should be remitted to a single judge of the Federal Court, for determination, together with any reserved questions of costs of the proceedings at first instance. There was no appeal to the Full Court against Order 7 which reserved those costs.

The appeal should be dismissed. The cross-appeal should be allowed and upon the cross-appeal, Order 3 of the Full Court should be varied so as to set aside Orders 4, 5, 6 and 8 of the orders made by Davies J and provide for a declaration to the above effect and for remitter of outstanding issues to a single judge of the Federal Court.

The respondents should have their costs of this Court. The Full Court made no order as to the costs of the appeal to it. That had raised issues in addition to those which came to this Court. I would not disturb that costs order.

KIRBY J. In this appeal and cross-appeal from the Full Court of the Federal Court of Australia (325), special leave was granted to permit the consideration of two questions of law: 1. Whether legal professional privilege may apply to a communication in a copy document when no privilege attaches to the original; and 2. Whether hearsay material may be relied on to displace legal professional privilege where that privilege is claimed for a communication in the form of a document alleged to have been made in furtherance of an illegal or improper purpose.

Allowing an appeal from a single judge of the Federal Court (326) the Full Court determined the questions adversely to the police who now appeal to this Court.

A challenge to search warrants and access to documents

The proceedings arise out of an allegation that certain companies in partnership had made false claims for deductions from income declared for income tax. The deductions were claimed in respect of the costs of testing of garments allegedly performed by an overseas company. It is suggested that only a small part of the moneys remitted for garment testing actually went to that company. The balance is said to have found its way to companies in Luxembourg and the Cook Islands, thence to a local company, Propend Finance Pty Ltd, which was the financier of the corporate partnership. The prosecution claims

(325) *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1995) 58 FCR 224.

(326) *Propend Finance Pty Ltd v Commissioner, Australian Federal Police [No 2]* (1994) 35 ALD 25, per Davies J.

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that a solicitor was a director of the financier and of the corporate recipient of funds in Luxembourg and the Cook Islands. By the round-robin arrangement described, it is alleged that the moneys sent overseas found their way back to Australia in the form of a loan to the financier under an agreement settled by the solicitor. The police, represented by the appellant, the Commissioner of Australian Federal Police, came to suspect that offences had been committed against the *Crimes Act* 1914 (Cth), ss 86(1)(e) and 86A, involving income tax fraud. Offences against ss 5 and 13 of the *Crimes (Taxation Offences) Act* 1980 (Cth) were also suspected.

In September 1993, members of the Australian Federal Police obtained nine search warrants pursuant to s 10 of the *Crimes Act*. These warrants, on their face, authorised nominated police officers to search residential and office premises connected with the respondents who were, in turn, connected with the companies allegedly involved in the round-robin. One of the premises so nominated was the offices of the solicitor. The search of those offices resulted in a number of challenges to the validity of the search warrant and the lawfulness of its execution. Some of these challenges were rejected by Davies J (327). One of them was the subject of earlier proceedings before the Full Court of the Federal Court, differently constituted (328). Davies J rejected all of the arguments contesting the initial validity of the warrants and the manner of their execution. The correctness of those decisions is not now in question.

In respect of documents for which legal professional privilege was claimed, the police conformed to a practice established by agreement with the Law Council of Australia as to the execution of search warrants on lawyers' premises. Documents which had been seized and which fell within a claim of legal professional privilege were lodged, ultimately, in the registry of the Federal Court. Undertakings were given by the police not to inspect those documents until the resolution of all of the respondents' legal challenges. Relevantly, those challenges claimed a return to the solicitor of the documents in respect of which legal professional privilege was claimed by him on behalf of his clients.

Decisions in the Federal Court

The point concerning legal professional privilege, now in issue, arose before Davies J in this way. The respondents (being relevantly the solicitor and the clients) prepared a schedule of documents in respect of which they claimed privilege. A group of these comprised copies of documents the originals of which would not themselves be privileged in the possession of the clients. The respondents argued that

(327) *Propend Finance* (1994) 35 ALD 25 at 27-37.

(328) *Propend Finance Pty Ltd v Commissioner, Australian Federal Police* [No 1] (1994) 94 ATC 4399.

legal professional privilege attached to the communications in those copy documents because the copies had been made for the sole purpose of obtaining legal advice for the clients in connection with anticipated litigation. There was no evidence or suggestion that the documents were in any way marked, annotated or organised in ways different from the non-privileged originals. The police asserted that privilege did not, in law, attach to the copies as such. They contended that it did not attach because the original documents were created in furtherance of the illegal schemes the subject of the anticipated criminal charges. The latter contention was expressed, otherwise, that, if privilege did in law attach, it was displaced by the "exception" applicable to communications in the furtherance of a crime or fraud (329). In this way the two issues now before this Court were presented for decision.

Davies J upheld the police submission in respect of those communications constituted by copy documents (330). However he left it to the parties, a judge, registrar, or other agreed independent person to determine which of the remaining documents were prima facie entitled to legal professional privilege and which were not (331). As to these, he was obliged to resolve the suggested taint of illegality or fraud which either prevented the privilege attaching or resulted in its loss. Contrary to the submissions of the respondents, Davies J held that there had been "a sufficient particularisation of and verification of the allegations of crimes" under the *Crimes Act* to "overcome the privilege which would otherwise attach" (332). As to the suspected offences against the *Crimes (Taxation Offences) Act* Davies J accepted that there was no evidence tending to show criminal involvement of the respondents. In respect of this category of documents, Davies J rejected the contention that the privilege, which would otherwise attach, had been lost.

The respondents' appeal wholly succeeded on the point concerning the communications with the solicitor by way of copy documents. All Judges comprising the Full Federal Court (Beaumont (333), Hill (334) and Lindgren (335) JJ), for different reasons, rejected any general

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(329) *R v Cox and Railton* (1884) 14 QBD 153 at 165; *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 130.

(330) *Propend Finance Pty Ltd v Commissioner, Australian Federal Police [No 2]* (1994) 35 ALD 25 at 37-46, per Davies J.

(331) *Propend Finance Pty Ltd v Commissioner, Australian Federal Police [No 2]* (1994) 35 ALD 25 at 42, per Davies J.

(332) *Propend Finance Pty Ltd v Commissioner, Australian Federal Police [No 2]* (1994) 35 ALD 25 at 44.

(333) *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1995) 58 FCR 224 at 238.

(334) *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1995) 58 FCR 224 at 259.

(335) *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1995) 58 FCR 224 at 263.

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proposition that, in law, legal professional privilege could not attach to communications by a client with a lawyer by way of the copy of documents which were not themselves privileged. All held that such communications could, depending on the circumstances in which they came into existence, be entitled to the privilege if the copies of documents by which the communication was effected were shown to have been made for the sole purpose of obtaining legal advice. Lindgren J was inclined to confine the privilege to copy documents only if inspection of them would reveal the confidential communication or line of thought of the client or the lawyer which was privileged from disclosure (336).

All Judges in the Full Court agreed that, in respect of communications by way of other documents which were claimed to have forfeited or lost legal professional privilege, because created or used in the furtherance of a crime or fraud, the primary Judge had erred in relying, in effect, on the police allegation of such wrongdoing without having any admissible evidence to support it (337). Accordingly, to that extent, the Full Court set aside Davies J's orders and directed that there should be a fresh hearing on the claims for privilege. Those are the orders of the Full Court which are under challenge in the present appeal and cross-appeal.

Legal professional privilege and its importance

I address myself first to the question concerning the suggestion that legal professional privilege may attach to communications by way of copies of documents held by lawyers for the sole purpose of giving legal advice, where the original material would not itself be privileged in the hands of the client or some other person. A number of considerations inform my approach:

1. The point in issue is the subject of a great deal of conflicting judicial, academic and other legal opinion. Many (but by no means all) of the relevant English and Australian cases are collected in a helpful appendix annexed to the reasons of Lindgren J in the Full Federal Court (338). It is not suggested that the point now before us is determined by earlier authority binding on this Court. The respondents (including the solicitor) urged that the logic of this Court's decision in *Grant v Downs* (339), by focusing attention on the purpose for which the particular communication was brought into existence, provided the answer to the first question in the form of a simple test, sufficient in itself. If the 'sole purpose' for creating the copies was to

(336) *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1995) 58 FCR 224 at 268.

(337) *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1995) 58 FCR 224 at 238-239, per Beaumont J; at 260, per Hill J; at 270, per Lindgren J.

(338) *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1995) 58 FCR 224 at 270-273.

(339) (1976) 135 CLR 674.

communicate them in order to secure legal advice, then the copies had an existence and a relevant “sole purpose” of their own, separate from the originals (340). By the common law, they were therefore entitled to legal professional privilege under the authority of this Court’s decision. But nowhere in *Grant v Downs* did the Court address its attention to the precise controversy now before it. In the absence of a clear statutory provision or of a binding rule of the common law, this Court must resolve the problem now presented by reference to relevant decided authority, extended by logic and analogous reasoning, and to legal principle and policy (341).

2. The starting point for the resolution of what the law is, must be a recognition of the importance, for the proper administration of justice, of having all relevant evidence available to the decision-maker (342). This is as true in the investigation by police of suspected crime as it is in the conduct of pre-trial and trial proceedings, criminal and civil. Especially in the proof of crimes of a complex character, the facility to have access to relevant contemporaneous materials, is an extremely important one to confirm or dispel suspicion on the part of police and, where confirmed, to assist in the accurate proof of the offence to a court of law. Increasingly, in recent years, including, to some extent, in criminal proceedings, the Australian legal system has moved away from trial by ambush. The limits imposed by the common law upon essential procedural facilities such as search warrants, discovery, subpoenas, etc, are generally to be fixed in such a way as not unduly to impede the beneficial operation of these facilities where applicable (343). A realisation of this consideration has contributed to a tendency in Australia to define narrowly the applicability of legal professional privilege (344). Indeed, it has been suggested that a brake on the application of legal professional privilege is needed to prevent its operation bringing the law into “disrepute” (345), principally because it frustrates access to communications which would otherwise help courts to determine, with accuracy and efficiency, where the truth lies in disputed matters.

3. Where the power to secure access to documents is provided by or

(340) *Grant v Downs* (1976) 135 CLR 674 at 688; *National Employers’ Mutual General Insurance Association Ltd v Waind* (1979) 141 CLR 648 at 656; *O’Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1 at 22-23; cf *Grant v Downs* (1976) 135 CLR 674 at 677.

(341) *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 252.

(342) See, eg, *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 128; *Waugh v British Railways Board* [1980] AC 521.

(343) *Roux v Australian Broadcasting Commission* [1992] 2 VR 577 at 600, per Byrne J.

(344) Ligertwood, *Australian Evidence*, 2nd ed (1993), pp 226-227, 228-229; *Cross and Tapper on Evidence*, 8th ed (1995), p 472; cf *United States of America v Mammoth Oil Co* [1925] 2 DLR 966.

(345) Zuckerman, “Legal Professional Privilege and the Ascertainment of Truth”, *Modern Law Review*, vol 53 (1990) 381.

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under a statute, the limitations upon the right of access thereby conferred are any that have been expressed by, or are implied in, the legislative grant of power. The common law principles governing the ambit of legal professional privilege may be over-ridden by the legislative grant of power. Each statutory provision must be construed according to its own language and to achieve its expressed purposes. Sometimes, legislation has been held to indicate a purpose of extinguishing legal professional privilege (346). But in respect of s 10 of the *Crimes Act*, which is here in issue, a majority of this Court held that the Act did not manifest a legislative purpose to oust the privilege, so important is it (347). Any such ouster must be made plain because of the high public interest which the privilege defends. This principle, and the decision which supports it, were not called into question in these proceedings.

4. The fundamental basis of legal professional privilege, which has been upheld by the common law since at least the sixteenth century, has been variously described. Early cases suggested that it belonged to a solicitor and derived from his Honour as a ‘‘professional man and a gentleman (348)’’. However, this explanation gave way to the current understanding that the privilege belongs to the client. It protects the client’s interests; but also the interests of the entire community in the proper administration of justice. In some jurisdictions of the common law, notably England, the doctrine has, at least until lately, been seen as no more than a rule of evidence (349). However, in other jurisdictions, it is described as resting upon a more fundamental basis. In Canada it has been suggested that, in criminal proceedings at least, its character may now be derived from the *Canadian Charter of Rights and Freedoms*, which guarantees to accused persons access to counsel (350). It has therefore been characterised as a basic civil

(346) See, eg, *O’Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1 in respect of the *Income Tax Assessment Act 1936* (Cth), s 264(1) (now in part overruled by *Baker v Campbell* (1983) 153 CLR 52). See also *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 in respect of the *Companies (New South Wales) Code*, s 295(1); cf *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 341; *Mortimer v Brown* (1970) 122 CLR 493 at 499; *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385.

(347) *Baker v Campbell* (1983) 153 CLR 52, per Murphy, Wilson, Deane and Dawson JJ; Gibbs CJ, Mason and Brennan JJ dissenting.

(348) Discussed in Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2nd ed (1992), p 635. Remnants of this view persist in the United States of America, as Gummow J points out.

(349) The English position appears to be in the process of change. See *R v Derby Magistrates’ Court; Ex parte B* [1996] 1 AC 487 at 507; but cf *In re L (A Minor)* [1997] AC 16 at 24-25.

(350) Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2nd ed (1992), p 672.

right (351). Similar language has been used in New Zealand (352). In this Court, the language has been, if anything, even more emphatic. In *Attorney-General (NT) v Maurice* (353), Deane J described the doctrine as “a substantive general principle of the common law and not a mere rule of evidence”. It is “of great importance to the protection and preservation of the rights, dignity and freedom of the ordinary citizen under the law and to the administration of justice and law”. It defends the right of the individual to consult a lawyer and that is “a bulwark against tyranny and oppression”. For these reasons it is not “to be sacrificed even to promote the search for justice or truth in the individual case” (354). No more vivid illustration of the strength of the principle in this country, and of its rigorous application by this Court could be found than in *Carter v Northmore Hale Davy & Leake* (355). A practical consideration called to notice by McHugh J in *Carter* needs to be kept in mind. A great deal of material in the possession of legal advisers (and clients) would not be admissible at common law as hearsay. But, under legislation for the admission of business records and other documentary evidence now applicable in most Australian jurisdictions, it would be admissible in defined cases. If that legislation were available, it might be necessary to call the legal adviser or some other person, to give evidence concerning the fact or matter referred to in the communication. That, in turn, could open up the nature and existence of the communication which would display the secret, contrary to the client’s wishes and interests.

5. Once the doctrine applies and is not excluded by the various derogations and exceptions recognised by the common law, it attaches to the communications concerned. No further balancing of public interests, for example between that of protecting the privilege and that of securing the truth, is either necessary or possible (356). Legal professional privilege is itself the product of a balancing exercise between competing public interests. The derogations and exceptions are sufficient to express the competing public interests (357). Thus the search, where the doctrine is invoked, concerns solely whether, given its definition, it applies to the communications in question or not.

6. Various reasons of a practical character have been suggested as to

(351) *Solosky v Canada* (1980) 105 DLR (3d) 745 at 760, per Dickson J.

(352) *R v Uljee* [1982] 1 NZLR 561 at 569, per Cooke J. See also the position in the European Court of Justice in *A M & S Europe v Commission* [1983] QB 878 at 913, noted in *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 145; cf *Saunders v United Kingdom* (unreported; European Court of Human Rights; 17 December 1996).

(353) (1986) 161 CLR 475.

(354) *Maurice* (1986) 161 CLR 475 at 490; cited in *Goldberg v Ng* (1994) 33 NSWLR 639 at 654-655.

(355) (1995) 183 CLR 121.

(356) *Waterford v The Commonwealth* (1987) 163 CLR 54.

(357) *Waterford v The Commonwealth* (1987) 163 CLR 54 at 64; *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 134-135.

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why the common law developed such a strong principle which would be ‘‘accorded paramountcy over the public interest that requires, in the interests of a fair trial, the admission in evidence of all relevant documentary evidence’’ (358). Many of these reasons refer to the need to provide to every person a protected zone for completely candid communication with a lawyer concerning civil or criminal proceedings commenced or apprehended. The doctrine’s practical object is thus to remove from the client’s concerns an apprehension that matters communicated to the lawyer for the purpose of securing such advice might thereafter be used against the interests of the client (359). If that were a possibility, and the rule were not simple and clear in its operation, clients might not frankly and fully communicate their problems to lawyers and produce all documents and other evidence relevant to the provision of proper legal advice. This would be counter-productive to the efficient and accurate provision of advice, the best available presentation of the client’s case (if need be) and the achievement of well-informed settlements in civil litigation or pleas in criminal trials. Other authorities view the doctrine as an outgrowth of the adversary system of trial observed by the common law (360). That system may have defects and be in need of reform (361). But whilst it is maintained, the boundaries of the doctrine of legal professional privilege must take into account the fundamental assumption of the system that parties should ordinarily be able to communicate with their lawyers without fear that the confidentiality of their communication will be invaded except in clear, limited and defined circumstances. Respecting that fundamental assumption has been said to contribute to community respect for the law (362).

7. In considering the boundaries of the operation of the doctrine of legal professional privilege, it is essential both to fulfil the purposes upheld by the doctrine, as described above, and to confine its operation to the extent strictly necessary for the fulfilment of those purposes. In Australia, two relevant limitations in the expression of the ambit of the common law doctrine of legal professional privilege may be mentioned. The first is that it is now settled that the privilege, at common law, extends only to communications brought into existence for the *sole* purpose of submission to legal advisers for advice or for

(358) *Waterford v The Commonwealth* (1987) 163 CLR 54 at 65.

(359) *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 128.

(360) *Hobbs v Hobbs and Cousens* [1960] P 112 at 116; *Regional Municipality of Ottawa-Carleton v Consumers’ Gas Co Ltd* (1990) 74 DLR (4th) 742 at 748-749.

(361) *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 133, per Deane J. The Australian Law Reform Commission is examining aspects of the suggested defects of the adversarial system: see Australian Law Reform Commission, *Background Paper No 3 — Adversarial — Judicial and Case Management* (1996).

(362) Miller, ‘‘The Challenges to the Attorney-Client Privilege’’, *Virginia Law Review*, vol 49 (1963) 262; noted in *Yuill v Corporate Affairs Commission (NSW)* (1990) 20 NSWLR 386 at 405. See also *Baker v Campbell* (1983) 153 CLR 52 at 86, 112; *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 490.

use in legal proceedings (363). In England, Canada and other common law jurisdictions, a test of “*dominant purpose*” was adopted (364). But not by the Australian common law (365). Secondly, it is repeatedly emphasised that what is protected is communication between lawyer and client and with a third party in connection with the giving of legal advice. It is not the documents, as such, which attract the privilege, still less the information within them. It is the communication to and by the lawyer (366). However, for practical purposes, in response to search warrants, orders of discovery and subpoenas, proof of the communication in the past would ordinarily involve documents. Because of advances in information technology, compulsory process will now, increasingly, involve the multitude of material forms used in effecting communication: ranging from photocopies of original documents to audio/video tapes and computer software. Necessarily, the doctrine of legal professional privilege must adapt to a world in which these media are the stuff of disputes concerning criminal and civil obligations and the rights of clients.

8. A large controversy exists in respect of the duration of legal professional privilege. Some authorities support the proposition that, once it attaches, it endures for all time, unless waived or otherwise lost by the operation of the doctrine (367). Other authorities suggest that communications with third parties (as distinct from with the client itself) may not continue to enjoy privilege beyond the end of the relevant litigation or dispute (368). Other authorities (including the opinion of Hill J in the Full Court in the present case) are prepared to accept that the privilege may be spent in time (369). In the circumstances of this case, it is unnecessary to explore that issue as the proceedings are still current.

Legal professional privilege and copies — four possible approaches

Various responses have been expressed in judicial opinions in respect of communications constituted by copies of evidentiary materials not themselves entitled to privilege but which are submitted to legal advisers for advice or for use in legal proceedings and for that

(363) *Grant v Downs* (1976) 135 CLR 674 at 688.

(364) See now *Evidence Act 1995* (Cth), s 118; Gillies, *Law of Evidence in Australia*, 2nd ed (1991), p 448.

(365) See, eg, *National Employers' Mutual General Insurance Association Ltd v Waind* (1979) 141 CLR 648 at 648; *O'Reilly v State Bank of Victoria Commissioners* (1983) 153 CLR 1 at 22-23.

(366) *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1995) 58 FCR 224 at 238, per Beaumont J; at 253, 258, per Hill J; at 264, per Lindgren J.

(367) See *Hobbs v Hobbs and Cousens* [1960] P 112 at 117; *Re Goodman and Carr and Minister of National Revenue* (1968) 70 DLR (2d) 670.

(368) Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2nd ed (1992), p 659.

(369) See, eg, *R v Ataou* [1988] QB 798 at 807, per French J; citing *R v Craig* [1975] 1 NZLR 597 at 598, per Cooke J.

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use only. Four different responses can be discerned. It will be helpful to conceptualise the competing possibilities by mentioning the approaches hitherto endorsed by courts.

1. First, there are the cases which have held that no copy acquires the protection of legal professional privilege, in whatever circumstances, if the original is not itself privileged. The contrary view has been described as “absurd and anomalous” (370) and “suspect” (371). It has been said that, to accept it, is to defy commonsense (372). Various hypotheses have been paraded to demonstrate the unacceptability of extending the privilege, notably the possibility that the client could destroy the original documents, give a copy to its lawyer for advice and then shelter behind the privilege (373). Since the advent of photography, it is argued, the copy is but the mirror image of the original. So it is with electronic reproductions. The original, held in the lawyer’s office would not be entitled to protection of legal professional privilege simply because of its locus (374). Accordingly, the facsimile or photographic copy could not do so. This view probably commands majority judicial assent in common law countries and much support in academic writing, including in Australia (375).

2. Then there are the authorities which disclaim a universal rule for communications with lawyers by copies but would allow, in certain circumstances, that copies might attract the protection of legal professional privilege. Thus, if copy documents bore the notes of a lawyer they would, to that extent, be privileged (376); if selective copying revealed the line of the client’s concerns or the lawyer’s advice, the copies to that extent would be privileged (377); if the copies come into the hands of the lawyers after the compulsory process in question and are placed in counsel’s brief, they may be exempt from production (378).

3. A third approach suggests that copies may be the subject of the

(370) *Vardas v South British Insurance Co Ltd* [1984] 2 NSWLR 652 at 660, per Clarke J.

(371) *Buttes Gas & Oil Co v Hammer [No 3]* [1981] QB 223 at 244.

(372) Ligertwood, *Australian Evidence*, 2nd ed (1993), p 218; Zuckerman, “Legal Professional Privilege and the Ascertainment of Truth”, *Modern Law Review*, vol 53 (1990) 381, at p 383.

(373) Zuckerman, “Legal Professional Privilege and the Ascertainment of Truth”, *Modern Law Review*, vol 53 (1990) 381.

(374) See, eg, *Hodgkinson v Simms* (1988) 55 DLR (4th) 577 at 594, per Craig JA.

(375) Ligertwood, *Aust Evidence*, 2nd ed (1988), p 218; Heydon, *Cross on Evidence*, 5th Aust ed (1996), par 25275.

(376) *McCaskill v Mirror Newspapers Ltd* [1984] 1 NSWLR 66, per Hunt J; *Water Authority (WA) v AIL Holdings Pty Ltd* (1991) 7 WAR 135 at 139.

(377) *Dubai Bank Ltd v Galadari* [1990] Ch 98; *J N Taylor Holdings Ltd (In liq) v Bond* (1992) 57 SASR 21; *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44 at 61-62, per Wood J.

(378) *TNT Management Pty Ltd v Trade Practices Commission* (1983) 47 ALR 693 at 699.

privilege but not in respect of documents available in public registers or otherwise legally exempt (379).

4. A fourth group of cases supports the proposition that, in every disputed instance, a simple task of characterisation must be performed. If the sole purpose of the production of the particular medium of communication (original or copy) is for submission of that medium to legal advisers for advice or for use in actual or apprehended legal proceedings, that is enough. The privilege attaches to it. If those with access to compulsory process wish to enforce that process, they must do so by directing that process to the holder of the original, if they can. They cannot invade the confidentiality of the communication between the client and the legal advisers unless, for other legal reasons, the privilege is excluded or lost.

Legal professional privilege may attach to copies

In my view, the Full Federal Court was right to conclude that legal professional privilege may attach to the copies of communications provided to a lawyer for the sole purpose of advice or use in actual or apprehended legal proceedings. Legal authority on this point has, until now, been unclear, at least in this country. Here, as in England and elsewhere, it has vacillated. To resolve the difference, it is necessary to recall the basic reason for legal professional privilege. The trend in English judicial authority, generally supporting the limits which the appellant has urged on this Court, is to be understood by viewing the doctrine of legal professional privilege as a mere rule of evidence. Until recently, that is how the English Courts have seen it (380). But as repeated and recent authority of this Court has made plain, in Australia it is more than that. In its modern understanding, it is a fundamental feature of our system for the administration of justice. It is essential to the defence of rights and freedoms and for the protection of the individual who is, or apprehends that he or she may be, in legal difficulties. It is true that, sometimes, hiding behind the privilege, are powerful wrong-doers. But the law protects them because the privilege is deeply embedded in our society's notions as to how the rule of law can best be achieved for all. The privilege protects the weak, the frightened, the unpopular and the disadvantaged.

Having regard to the way in which this Court has lately portrayed the privilege, and explained its purposes, it should defend the right of the individual to provide to legal advisers all relevant copy material necessary to obtain accurate legal advice. It would be artificial, absurd

(379) See, eg, *Watson v Cammell Laird & Co (Shipbuilders and Engineers) Ltd* [1959] 1 WLR 702; [1959] 2 All ER 757; *R v Board of Inland Revenue*; *Ex parte Goldberg* [1989] QB 267; *Shaw v David Syme & Co* [1912] VLR 336; *Davis v Lambert-Bain Pty Ltd* [1989] Tas R 274.

(380) See now *R v Derby Magistrates' Court*; *Ex parte B* [1996] 1 AC 487 at 507; cf discussion of the Police Bill 1996 (UK) in House of Lords, *Parliamentary Debates* (Hansard), 26 November 1996, pp 203-242.

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and anomalous if a client were forced to seek advice by oral communications, rote learning of documents or summaries, only or mainly, to avoid the peril that the provision of actual copy documents, and copies of like evidentiary material, would be susceptible to compulsory process. Far from reducing the argument for extending the privilege to copies because of technological developments, such advances make it essential that the law acknowledges their existence and that they need to be provided to lawyers in the course of a client's securing appropriate legal advice.

If the task of characterising the "sole purpose" of bringing the material communication into existence is properly performed, it affords a sufficient answer to the first question before the Court in the appeal. Thus, if, properly characterised, a copy document was brought into existence to permit the original to be destroyed and not solely for the purpose of securing legal advice, it would fall outside the protection of the privilege. If the destruction of the original were done in pursuance of a crime or fraud, the privilege could be lost. Conceding that there are some anomalies whichever view the Court adopts, there are fewer artificialities if the Court insists upon the logic of the principle established by it in *Grant v Downs* (381). Only by doing so will the Court safeguard the zone of professional confidentiality which serves the high purposes which have repeatedly and rightly been upheld. Only in this way will we offer a principle appropriate to the adversary system which is a cardinal feature of the administration of justice in this country.

The view to which I have come was well expressed by a Canadian judge (382):

"[A]ny benefit that might flow to the parties and the court in this case by ordering such production would be gained at the expense of serious interference with our adversarial system of justice and would reduce the likelihood of full and early disclosure in future cases.

The adversarial system is based on the assumption that if each side presents its case in the strongest light the court will be best able to determine the truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel. The invasion of the privacy of counsel's trial preparation might well lead to counsel postponing research and other preparation until the eve of or during the trial, so as to avoid early disclosure of harmful information. This result will be counter-productive to the present goal that early and thorough investigation by counsel will encourage an early settlement of the case. Indeed, if counsel knows he must turn over to the other

(381) (1976) 135 CLR 674.

(382) *Regional Municipality of Ottawa-Carleton v Consumers' Gas Co Ltd* (1990) 74 DLR (4th) 742 at 748-749, per O'Leary J.

side the fruits of his work, he may be tempted to forgo conscientiously investigating his own case in the hope he will obtain disclosure of the research, investigations and thought processes compiled in the trial brief of opposing counsel . . .

[Although statute may derogate] I believe, that the . . . privilege is required to preserve the integrity of the adversarial system.”

With some adaptation, the same comments apply to the search warrant in issue here. Test it further thus. If copies of original documents could be secured by the simple expedient of executing search warrants in complex criminal cases, upon offices of the known legal advisers of the accused, various consequences might follow. Certainly, documents and other materials would in some cases be secured under search warrant which may help to win cases, prove difficult points, bring the guilty to justice and establish their wrongdoing. But these consequences would be bought at too high a price. Clients would lose their faith in their supposed entitlement to consult legal advisers with copies of all relevant materials produced for their advice. The legal advisers themselves would doubtless advise the client not to provide copy documents or other materials and to store them elsewhere than in the legal offices. The disruption to solicitors’ offices and the orderly provision of advice, including advice to other, unconnected, clients, would be considerable. Lazy prosecution practices would be encouraged so that instead of going to the source, for the original medium, police and other investigators would be tempted to seek copies from suspects’ or accuseds’ legal advisers. An undesirable practice of “trawling”, to use the word of the Director of Public Prosecutions, in the offices of legal advisers might become the norm. Evidentiary materials, the originals of which are outside the jurisdiction, could be obtained by this expedient whereas the originals could not. Such consequences would undermine not only the adversary system, as it has heretofore operated, but also respect for the rule of law. Of course, it is said that these extreme possibilities would never, in practice, occur. Perhaps not. But the legal proposition advanced for the appellants must be tested by the consequences that would follow if it became a general rule and a common occurrence. Following the logic of *Baker v Campbell* (383), if it is to become such in respect of search warrants such as those here in question, it must happen with the express authority of Parliament.

In every case, it is for the lawyer whose materials are seized, and who believes them to be the subject of legal professional privilege to claim that privilege on behalf of the client. If the materials apparently fall within the warrant, and there is a dispute as to excepting them, it is then necessary to invoke the process of differentiation in which Davies J became engaged in the present case. Neither the assertion of

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the privilege, nor an allegation that it is lost, will establish those propositions if they are disputed. It is for a judicial officer or other appropriate decision-maker, if it goes so far, to examine the materials and to rule upon them seriatim (384). There is thus a safeguard which permits the conflicting public interests at stake to be evaluated and the law to be upheld in deciding a contested claim for legal professional privilege.

The question as to whether legal professional privilege can apply to a copy document when no privilege attaches to the original should therefore be answered in the affirmative. To that extent, the appeal from the orders of the Full Court of the Federal Court should be dismissed. To clarify what should now happen I agree in the course which Gaudron J has proposed for the disposal of the appeal and cross-appeal.

Attempt to overcome the privilege

A second point was argued, upon which it is convenient to make some comments. Davies J determined that the material provided to him by the police was sufficiently persuasive of the existence of a disqualifying crime or fraud, as to displace any legal professional privilege in relation to documents allegedly connected with offences against the *Crimes Act*, but not the *Crimes (Taxation Offences) Act*.

In respect of the documents falling into the latter class, the police relied upon the sworn information which was placed before the primary Judge as an annexure to an affidavit of an Assistant Commissioner of Federal Police read in an early interlocutory stage of the proceedings. That affidavit had been produced in connection with a claim of public interest immunity made in respect of part of the information no longer relevant. The Assistant Commissioner was neither the informant who had sworn the original information for the purpose of securing the search warrant. Nor was he able personally to swear to the truth of the matters contained in the information or even his belief in such truth. When the question arose before Davies J as to whether identified documents were covered by legal professional privilege, no affidavit was supplied by the police officer who had sworn the information, viz, the then Detective Sergeant Alan Taciak, the second appellant before this Court. Nor was Mr Taciak called to give oral evidence before Davies J. The police representative simply read again, over objection, the affidavit of the Assistant Commissioner.

In these circumstances, the respondents contend that Davies J erred in upholding (385) the submission that any part of the material, the subject of the claim for legal professional privilege, lost that privilege

(384) *Grant v Downs* (1976) 135 CLR 674 at 689.

(385) *Propend Finance Pty Ltd v Commissioner, Australian Federal Police [No 2]* (1994) 35 ALD 25 at 42.

on the ground that it had been shown to have come into existence in furtherance of a disqualifying purpose, ie a crime or fraud. In the Full Court, Beaumont J (386) sustained this complaint. He found that, in the absence of “some admissible evidence to show why the Court should disallow the privilege”, Davies J had erred in upholding the police contention that any privilege had been lost. Hill J (387) concluded that, absent any evidence as to the truth of its contents, the copy information did not prove the truth of the matters stated in it, so that the objection for the respondents to its being read should have been upheld. Lindgren J (388) agreed.

The appellant argued that it was permissible to rely on the information itself to prove that there was evidence supporting the truth of the allegations made (389) and that Davies J had been entitled to look at its contents to see whether, on its face, a case had been made for displacement of legal professional privilege on the ground, relevantly, of illegality. In support of this argument it was urged that search warrants are, of their nature, investigative facilities. They are secured to ascertain if a suspected criminal offence has occurred and if there is sufficient evidence to lay criminal charges against identified persons. In these circumstances, it would defeat the achievement of their lawful purpose to require the informant, seeking the issue of a search warrant, to establish in every case, with particularity, proof that illegality had in fact occurred when the investigation of such illegality was the very subject matter of the proposed search.

Displacement of the privilege for crime or fraud

The principles applicable to the resolution of these conflicting arguments are not in doubt, although their application sometimes gives rise to difficulty:

1. The person alleging that legal professional privilege is lost for illegality must state clearly the charge of illegality made for the purpose of showing, with some precision, what it is (390). Vague or generalised contentions of crimes or improper purposes will not suffice.

2. The mere making of an allegation of a crime or of fraud is not sufficient to “get rid of privilege” (391). Something more must be

(386) *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1995) 58 FCR 224 at 238-239.

(387) *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1995) 58 FCR 224 at 260.

(388) *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1995) 58 FCR 224 at 270.

(389) cf *R v Cox and Railton* (1884) 14 QBD 153 at 175-176.

(390) *Bullivant v Attorney-General (Vict)* [1901] AC 196 at 201; applied *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 at 516.

(391) *O'Rourke v Darbishire* [1920] AC 581 at 604. See also *K-West Estates Ltd v Linemayr, McCandless and Zacharias; Westcoast Savings Credit Union v Linemayr* [1984] 4 WWR 375 at 379.

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added, as it has been described, to “give colour to the charge” (392). The reason for this requirement is simple enough. It is a serious thing to override legal professional privilege where it would otherwise be applicable. Once overridden, it is difficult, or impossible, to restore the status quo ante. That is why, where a contest arises, it is important that it be resolved accurately and lawfully because the situation can rarely, if ever, be retrieved. Where, as is sometimes the case, it is suggested that the lawyer has been a party to the relevant crime or fraud, the allegation, if made good, will ordinarily have extremely serious consequences for the person so accused. This is another reason why a mere allegation, without more, is insufficient to displace the privilege (393).

3. Some decisional authority suggests that evidence, even “strong evidence” is required to “do away with the privilege” (394). Whilst what is required will depend upon the particular facts of each case (395) and although surmise and conjecture will never be sufficient, something less than the full proof of illegality by admissible evidence must suffice. This is because of the nature and purposes of the compulsory process, the interlocutory stage at which the consideration of this issue typically takes place and the complete unacceptability of turning that stage into a full-scale trial of the suggested illegality (396). The primary decision-maker is certainly entitled to look at the sworn information (397). But something more is required, by way of “admission or affidavit allegations of facts” (398). Otherwise, the information amounts to no more than the prosecutor’s assertion of what it is hoped may be proved. When some evidence is supplied then, “the seal of secrecy is broken” (399). But not before.

Loss of privilege: conclusions

When the foregoing principles are applied to the facts of this case, I come to the same conclusion as did the Judges in the Full Court of the Federal Court. Something more was required than the information attached to an affidavit, prepared for a different purpose by a deponent who could not be questioned on it and who did not even swear to his information and belief.

It is impossible to fix with precision the material that will be required. But it is such as would “lead a reasonable person to see” a

(392) *O'Rourke v Darbishire* [1920] AC 581 at 604.

(393) *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 at 516, per Gibbs CJ.

(394) *Buttes Gas & Oil Co v Hammer [No 3]* [1981] QB 223 at 246; *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 165-166.

(395) *O'Rourke v Darbishire* [1920] AC 581 at 623.

(396) *O'Rourke v Darbishire* [1920] AC 581 at 614.

(397) cf *Baker v Evans* (1987) 77 ALR 565.

(398) *O'Rourke v Darbishire* [1920] AC 581 at 633.

(399) *Clark v United States* (1933) 289 US 1 at 15.

strong probability that there was a disqualifying crime or fraud (400), although not necessarily that the lawyer was a party to it (401). The line lies short of the full trial of the issue, for that would be inappropriate to the process invoked. Indeed, in many cases it would defeat or frustrate the achievement of its purpose. Equally, it falls short of the requirement to make out with ‘strong evidence’ a prima facie case of crime or fraud. But it also goes beyond an unchallengeable allegation by hearsay evidence such as was offered in this case.

The second question upon which special leave to appeal was granted therefore requires an elaborated answer. Hearsay evidence may be relied upon to displace legal professional privilege where that privilege is claimed for materials alleged to have come into existence in furtherance of crime or fraud. But hearsay evidence alone, which amounts to no more than the assertion of what is suspected and sought to be proved, will not be sufficient to displace the privilege. Something more will be required to warrant the serious step of overriding the legal professional privilege and thus of depriving the client of the protections of such privilege. Something more was required in the facts of this case.

This was especially so because the proceedings in this case were not conducted upon the basis that the *copy* documents in question were provided by the lawyer in furtherance of a fraud or to frustrate the processes of the law. What was suggested was that the *originals* were the means of effecting the fraud or illegality and that the copies were, for that reason, equally tainted by the illegality of the original. Once that view is rejected, the documents were properly seen as communications prima facie entitled to the shield of legal professional privilege. To penetrate that shield the police needed more than a mere assertion about the originals, and that based upon untestable hearsay evidence.

Future cases must be decided on their own facts taking into account the preliminary character of the decision as well as its serious consequences for the various interests involved. But in this case the Full Court rightly exposed a defect in the procedure followed by the primary Judge. The challenge to that finding fails.

Orders

I agree in the orders proposed by Gaudron J.

1. *Appeal dismissed.*
2. *Cross-appeal allowed.*
3. *Vary Order 3 of the Orders of the Full Federal Court to read:*
 ‘‘Orders 4, 5, 6 and 8 be set aside; and

(400) *O'Rourke v Darbishire* [1920] AC 581 at 633.

(401) *Clark v United States* (1933) 289 US 1 at 15.

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- (a) *declare that legal professional privilege attaches to those copy documents (if any) which were made solely for the purpose of obtaining or giving legal advice or solely for use in legal proceedings and which were in the possession of the ninth respondent and were seized upon execution of the warrant, issued 2 September 1993, at the premises of the ninth respondent; and*
- (b) *order that the matter be remitted to a single judge of the Federal Court for determination of the application in accordance with that declaration and for determination of the question of costs reserved by Davies J.'*
4. *The appellants pay the respondents' costs in this Court.*

Solicitor for the appellants, *Director of Public Prosecutions (Cth)*.

Solicitors for the respondents, *Minter Ellison*.

CMC

FEDERAL COURT OF AUSTRALIA

AWB Limited v Honourable Terence Rhoderic Hudson Cole (No 5) **(2006) 155 FCR 30, [2006] FCA 1234**

EVIDENCE – legal professional privilege – documents required to be produced by notice under *Royal Commissions Act 1902* (Cth) – whether documents brought into existence for the dominant purpose of giving or obtaining legal advice – whether documents brought into existence in furtherance of fraud or improper purpose – waiver of privilege – imputed waiver – associated material waiver – whether privilege has been waived by disclosures made by applicant to Independent Inquiry Committee into the United Nations Oil-For-Food Program, Australian Government and royal commission

Royal Commissions Act 1902 (Cth) ss 2(3A), 6AA(2)
Royal Commissions Amendment Act 2006 (Cth)
Judiciary Act 1903 (Cth) s 39B
Evidence Act 1995 (Cth) ss 69, 78, 79, 135

AWB Limited v Honourable Terence Rhoderic Hudson Cole [2006] FCA 571 discussed
Esso Australia Resources Limited v Commissioner of Taxation (1999) 201 CLR 49 approved
Daniels Corporations International Pty Ltd v Australian Competition & Consumer Commission (2002) 213 CLR 543 approved
Waterford v Commonwealth (1987) 163 CLR 54 cited
Grant v Downs (1976) 135 CLR 674 cited
Commissioner of Taxation v Pratt Holdings Pty Ltd (2005) 225 ALR 266 cited
National Crime Authority v S (1991) 29 FCR 203 cited
Candacal Pty Ltd v Industry Research & Development Board (2005) 223 ALR 284 cited
Seven Network Limited v News Limited [2005] FCA 142 cited
Kennedy v Wallace (2004) 142 FCR 185 applied
Southern Equities Corporation Ltd (in liq) v Arthur Anderson & Co (No 6) [2001] SASC 398 cited
Kennedy v Wallace (2004) 208 ALR 424 considered
Pratt Holdings Pty Ltd v Commissioner of Taxation (2004) 136 FCR 357 considered
Balabel v Air India [1988] 1 Ch 317 approved
Nederlandse Reassurantie Groep Holding NV v Bacon and Woodrow [1995] 1 All ER 976 cited
Three Rivers District Council v Governor and Company of the Bank of England (No 6) [2005] 1 AC 610 cited
Dalleagles Pty Ltd v Australian Securities Commission (1991) 4 WAR 325 considered
DSE (Holdings) Pty Ltd v Intertan Inc (2003) 135 FCR 151 cited
Commissioner of Australian Federal Police v Propend Finance Pty Ltd (1997) 188 CLR 501 applied
Trade Practices Commission v Sterling (1979) 36 FLR 244 cited
Propend Finance Pty Ltd v Commissioner of Australian Federal Police (1995) 58 FCR 224 considered

Saunders v Commissioner of Australian Federal Police (1998) 160 ALR 469 cited
GSA Industries (Aust) Pty Ltd v Constable (2002) 2 Qd R 146 cited
Glengallan Investments Pty Ltd v Arthur Andersen (2002) 1 Qd R 233 cited
Commonwealth v Vance (2005) 158 ACTR 47 cited
Mitsubishi Electric Australia Pty Ltd v Victoria WorkCover Authority (2002) 4 VR 332 cited
Mann v Carnell (1999) 201 CLR 1 applied
Attorney-General (NT) v Maurice (1986) 161 CLR 475 discussed
Goldberg v Ng (1995) 185 CLR 83 considered
Commissioner of Taxation v Rio Tinto Ltd [2006] FCAFC 86 distinguished
Goldman v Hesper [1988] 1 WLR 1238 cited
Trans America Computer Co Inc v IBM Corporation 573 F2d 646 (9th Cir 1978) cited
Baker v Campbell (1983) 153 CLR 52 approved
Restom v Battenberg [2006] FCA 781 considered
Network Ten Ltd v Capital Television Holdings Ltd (1995) 36 NSWLR 275 cited
Australian Rugby Union Ltd v Hospitality Group Pty Ltd (1999) 165 ALR 253 considered
British Coal Corporation v Dennis Rye Ltd (No 2) [1988] 1 WLR 1113 considered
Gotha City v Southeby's (No 1) [1988] 1 WLR 1114 cited
Giannarelli v Wraith (No 2) (1991) 171 CLR 592 considered
Weil v Investment/Indicators Research and Management, Inc 647 F2d 18, 24 (9th Cir 1981) cited
United States v Aronoff 466 FSupp 855 (DC NY 1979) cited
In re Sealed Case 676 F2d 793 (DC Cir 1982) considered
United States v AT & T Co 642 F2d 1285 (DC Cir 1980) cited
Diversified Industries Inc v Meredith 572 F2d 596 (8th Cir 1977) questioned
Permian Corp v United States 665 F2d 1215 (DC Cir 1981) cited
In re Weiss 596 F2d 1185 (4th Cir 1979) cited
S & K Processors Ltd v Campbell Ave Herring Producers Ltd (1983) CPC 146 (BCSC) cited
Professional Institute of the Public Service of Canada v Canada (Director of the Canadian Museum of Nature) [1995] 3 FC 643 cited
British Columbia (Securities Commission) v BDS (2000) BCJ No 2111 (BCSC); (2003) 226 DLR (4th) 393 cited
Adelaide Steamship Co Ltd v Spalvins (1998) 81 FCR 360 cited
Bennett v Chief Executive Officer of the Australian Customs Service (2004) 140 FCR 101 followed
Nine Films and Television Pty Ltd v NINOX Television Ltd (2005) 65 IPR 442 considered
Seven Network Ltd v News Ltd (No 12) [2006] FCA 348 cited
Rio Tinto Ltd v Commissioner of Taxation (2005) 224 ALR 299 considered
British American Tobacco Australia Services Ltd v Cowell (2002) 7 VR 524 questioned
Australian Securities & Investments Commission v Southcorp Ltd (2003) 46 ACSR 438 discussed
Thomas v New South Wales [2006] NSWSC 380 applied
Newcrest Mining (WA) Limited v Commonwealth (1993) 40 FCR 507 considered
Dunlop Slazenger International Ltd v Joe Bloggs Sports Limited [2003] EDWCA Civ 901 cited
Nea Karteria Maritime Co Ltd v Atlantic & Great Lakes Steamship Corporation (No 2) [1981] Com LR 138 approved
R v Secretary of State for Transport; Ex parte Factortame (1997) 9 Admin LR 591 considered
Fulham Leisure Holdings Ltd v Nicholson Graham & Jones [2006] 2 All ER 599 applied

Attorney-General (NT) v Kearney (1985) 158 CLR 500 considered
Clements, Dunne & Bell Pty Ltd v Commissioner of Australian Federal Police (2001) 188 ALR 515 considered
R v Cox and Railton (1884) 14 QBD 153 cited
Bullivant v Attorney-General (Vic) [1901] AC 196 cited
Annesley v Anglesea (1743) 17 St Tr 1139 cited
Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd [1972] Ch 553 cited
Gartner v Carter [2004] FCA 258 cited
Australian Securities & Investments Commission v Mercorella (No 3) [2006] FCA 772 considered
Barclays Bank plc v Eustice [1995] 4 All ER 511 considered
R v Bell; Ex parte Lees (1980) 146 CLR 141 cited
Butler v Board of Trade [1971] 1 Ch 680 applied
O'Rourke v Darbishire [1920] AC 581 approved
Briginshaw v Briginshaw (1938) 60 CLR 336 cited

T Harman, *Fairness and the Doctrine of Subject Matter Waiver of the Attorney-Client Privilege in Extrajudicial Disclosure Situations* (1988) University of Illinois Law Review 999

AM Pinto, *Cooperation and Self-Interest are Strange Bedfellows: Limited Waiver of the Attorney-Client Privilege through Production of Privileged Documents in a Government Investigation* (2004) 106 West Virginia Law Review 359

RH Porter, *Voluntary Disclosures to Federal Agencies – Their Impact on the Ability of Corporations to Protect from Discovery Materials Developed During the Course of Internal Investigations* (1990) 39 Catholic University Law Review 1007

RD Manes and MP Silver, *Solicitor-Client Privilege in Canadian Law*, Butterworths, 1993

S Odgers, *Uniform Evidence Law*, 7th edn, Lawbook, 2006

**AWB LIMITED v THE HONOURABLE TERENCE RHODERIC HUDSON COLE
AO RFD QC AND COMMONWEALTH OF AUSTRALIA
VID 594 OF 2006**

**YOUNG J
18 SEPTEMBER 2006
MELBOURNE**

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY**

VID 594 OF 2006

**BETWEEN: AWB LIMITED
 Applicant**

**AND: THE HONOURABLE TERENCE RHODERIC HUDSON
 COLE AO RFD QC
 First Respondent**

**COMMONWEALTH OF AUSTRALIA
Second Respondent**

JUDGE: YOUNG J

DATE OF ORDER: 18 SEPTEMBER 2006

WHERE MADE: MELBOURNE

THE COURT ORDERS THAT:

1. Within 3 business days AWB and the Commonwealth file an agreed minute of orders that give effect to these reasons for judgment. If AWB and the Commonwealth are unable to agree upon appropriate orders, within 3 business days AWB and the Commonwealth shall each file and serve a minute of the orders that it contends are necessary and appropriate to give effect to these reasons for judgment.
2. The proceeding be adjourned to Monday 25 September 2006 at 10.15am for any argument as to the orders.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY**

VID 594 OF 2006

**BETWEEN: AWB LIMITED
 Applicant**

**AND: THE HONOURABLE TERENCE RHODERIC HUDSON
 COLE AO RFD QC
 First Respondent**

**COMMONWEALTH OF AUSTRALIA
Second Respondent**

JUDGE: YOUNG J

DATE: 18 SEPTEMBER 2006

PLACE: MELBOURNE

REASONS FOR JUDGMENT

INTRODUCTION

1 Iraq has been a major export market for Australian wheat for many years. Prior to 1999, the overseas marketing and export of wheat from Australia was controlled by the Australian Wheat Board ('Board'), which was a Commonwealth statutory authority. The Board was first established during the second world war under the Wheat Acquisition Regulations 1939 (Cth). After the war, the Board was established by the *Wheat Industry Stabilization Act 1948* (Cth) and it has continued in existence under later Commonwealth legislation including, most recently, the *Wheat Marketing Act 1989* (Cth) ('WMA').

2 As a result of amendments made to the WMA by the *Wheat Marketing Amendment Act 1997* (Cth) and the *Wheat Marketing Legislation Amendment Act 1998* (Cth), the control of wheat exports from Australia was transferred to AWB Limited ('AWB'). Since 1 July 1999, AWB has carried on business as the exclusive manager and marketer of bulk wheat exports from Australia. It is required to purchase all wheat that is offered to it by Australian growers for inclusion in a pool operated by AWB, provided that the wheat meets standards set by AWB. Growers are paid a purchase price that must be calculated by reference to the

net return for the pool in which the wheat is included: s 84 of the WMA. AWB carries out these functions under the general supervision of the Wheat Export Authority which is the successor to the Board: see ss 5, 5D, 57 and 84 of the WMA.

3 By Letters Patent dated 10 November 2005, the Governor-General appointed the Honourable Terence Rhoderic Hudson Cole AO RFD QC ('the Commissioner') to inquire into, and report on, inter alia:

- (a) whether any decision, action, conduct, payment or writing of AWB, or any person associated with it, might have constituted a breach of any law of the Commonwealth, a State or Territory;
- (b) whether any decision, action, conduct, payment or writing of BHP Limited (now BHP Billiton Limited), BHP Billiton Petroleum Pty Limited, BHP Petroleum Limited, The Tigris Petroleum Corporation Pty Limited or The Tigris Petroleum Corporation Limited, or any person associated with one of those companies, in relation to specified shipments of Australian wheat to the Grain Board of Iraq, might have constituted a breach of any law of the Commonwealth, a State or a Territory; and
- (c) if the answer to either paragraph (a) or (b) above is in the affirmative – whether the question of criminal or other legal proceedings should be referred to the relevant Commonwealth, State or Territory agency.

4 Between 23 November 2005 and 20 March 2006, the Commissioner issued twelve notices to produce documents to AWB pursuant to s 2(3A) of the *Royal Commissions Act 1902* (Cth) ('RCA'). In addition, various notices to produce documents were directed by the Commissioner to employees of AWB. From early 2006, AWB has maintained that a large number of documents falling within the scope of these notices are the subject of legal professional privilege.

5 These proceedings were instituted on 30 May 2006, shortly before the *Royal Commissions Amendment Act 2006* (Cth) ('the Amending Act') came into force on 15 June 2006. It is common ground that nothing in the RCA, as amended by the Amending Act, abrogates AWB's right to withhold documents caught by the notices to produce if they are

properly the subject of legal professional privilege.

6 The Commissioner is named as the first respondent. He has advised the Court that he intends to take no part in the proceedings and will abide any order made by the Court. The second respondent, the Commonwealth of Australia, has acted as AWB's contradictor.

7 The principal relief sought by AWB in this proceeding is a declaration that the documents specified in revised lists of documents that have been filed with the Court are, or record, confidential communications that are protected from production to the Commissioner by legal professional privilege. This claim falls squarely within the Court's jurisdiction under s 39B(1) and (1A)(c) of the *Judiciary Act 1903* (Cth). The Commonwealth does not suggest that the Amending Act deprives this Court of its jurisdiction to hear and determine AWB's claims for relief; on the contrary, it accepts that the Court has jurisdiction to determine whether the documents attract legal professional privilege.

8 At the commencement of the hearing, some 1,450 original documents were in issue. During the course of the hearing, AWB withdrew its claim for a declaration that various documents were privileged and the Commonwealth accepted that other documents were the subject of legal professional privilege. As a result, the number of contested original documents was reduced by some 550 to approximately 900 documents occupying 28 lever arch folders.

9 The trial of this proceeding was conducted on affidavit. In support of its privilege claims, AWB relied upon thirty-two affidavits. In addition, AWB relied upon specified exhibits to two affidavits sworn by Leonie Thompson of Arnold Bloch Leibler ('ABL') on 30 May 2006 and 19 June 2006 and certain background documents contained in Exhibit SMXD17 to the affidavit of Simon Daley, a solicitor acting for the Commonwealth, sworn 3 July 2006. The deponents included AWB executives and employees, AWB's in-house lawyers, and lawyers from three Melbourne law firms, Blake Dawson Waldron ('Blakes'), Minter Ellison ('Minters') and ABL, that were retained to advise AWB in connection with issues arising from AWB's supply of wheat to Iraq. None of the deponents were cross-examined.

10 The Commonwealth did not rely upon any affidavit evidence. However, it tendered a

substantial volume of documents and passages from the transcript of evidence given to the Commission.

11 The documents at issue in this proceeding span a period of years from about 2002 to 2006. Over that period, AWB was involved in a number of investigations concerning its sale of wheat to Iraq under the United Nations' Oil-For-Food Programme ('OFF Programme'). AWB conducted two internal investigations, known as Project Rose and Project Water. In addition, AWB was exposed to investigations by the United States Senate, the Independent Inquiry Committee of the United Nations and ultimately the Commission. As many of the documents arise out of these investigations, it is necessary to describe their nature and scope in general terms.

THE OIL-FOR-FOOD PROGRAMME

12 Following the invasion of Kuwait by Iraq, the United Nations Security Council determined on 2 August 1990 that trade sanctions should be imposed on Iraq. In particular, the Security Council adopted Resolution 661 of 6 August 1990 ('Resolution 661') which provided, inter alia, that all States:

- (a) shall prevent the sale or supply by their nationals of any commodities or products to any person or body in Iraq or for the purposes of any business carried on in or operated from Iraq, *'but not including supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs'*; and
- (b) shall prevent their nationals and any persons within their territory from removing or otherwise making available any funds or other financial or economic resources to the Government of Iraq or to persons or bodies within Iraq, *'except payments exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs'*.

13 In April 1991, the Security Council passed Resolution 687 which provided that the prohibition against the sale or supply to Iraq of commodities or products other than medicine and health supplies would not apply to foodstuffs notified to the Committee established by Resolution 661.

14 On 14 April 1995, the Security Council adopted Resolution 986 which established the OFF Programme. Specifically, by that resolution:

- (a) the Security Council authorised States to purchase petroleum and petroleum products originating in Iraq;
- (b) provided that full payment for each purchase was to be made directly into the escrow account to be established in accordance with the Resolution; and
- (c) decided that funds in the escrow account:

'... shall be used to meet the humanitarian needs of the Iraqi population and for the following other purposes, and requests the Secretary-General to use the funds deposited in the escrow account:

- (a) *To finance the export to Iraq, in accordance with the procedures of the Committee established by resolution 661 (1990), of medicine, health supplies, foodstuffs, and materials and supplies for essential civilian needs, ... provided that:*
 - (i) *Each export of goods is at the request of the Government of Iraq;*
 - (ii) *Iraq effectively guarantees their equitable distribution, on the basis of a plan submitted to and approved by the Secretary-General, including a description of the goods to be purchased;*
 - (iii) *The Secretary-General receives authenticated confirmation that the exported goods concerned have arrived in Iraq'.*

15 The escrow account was under the control of the United Nations in New York. Funds standing to the credit of the escrow account were available to be used by Iraq for the purchase of humanitarian goods and services, including the purchase of food, in accordance with the conditions and procedures laid down by the United Nations.

16 On 20 May 1996, the United Nations and the Government of Iraq entered into a Memorandum of Understanding in relation to the implementation of Resolution 986. Section II of that Memorandum provided for the Government of Iraq to adopt a distribution plan that was designed to achieve an equitable distribution of medicine, health supplies, foodstuffs and other materials to the Iraqi population throughout the various Governates of Iraq.

THE INDEPENDENT INQUIRY COMMITTEE

17 On 21 April 2004, following allegations of fraud and corruption in relation to the administration of the OFF Programme, the Secretary-General of the United Nations appointed an Independent Inquiry Committee ('the IIC') to investigate the administration of the OFF Programme. The chairman of the IIC was Paul Volcker, a former chairman of the United States Federal Reserve. The other members of the IIC were Mark Pieth of Switzerland, an expert on money laundering in the Organisation for Economic Co-operation and Development, and Justice Richard Goldstone of South Africa, a former chief prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda. The IIC's terms of reference were as follows:

'The independent inquiry shall collect and examine information relating to the administration and management of the Oil-for-Food Programme, including allegations of fraud and corruption on the part of United Nations officials, personnel and agents, as well as contractors, including entities that have entered into contracts with the United Nations or with Iraq under the Programme:

- (a) *to determine whether the procedures established by the Organization, including the Security Council and the Security Council Committee Established by Resolution 661 (1990) Concerning the Situation between Iraq and Kuwait (hereinafter referred to as the "661 Committee") for the processing and approval of contracts under the Programme, and the monitoring of the sale and delivery of petroleum and petroleum products and the purchase and delivery of humanitarian goods, were violated, bearing in mind the respective roles of United Nations officials, personnel and agents, as well as entities that have entered into contracts with the United Nations or with Iraq under the Programme;*
- (b) *to determine whether any United Nations officials, personnel, agents or contractors engaged in any illicit or corrupt activities in the carrying out of their respective roles in relation to the Programme, including, for example, bribery in relation to oil sales, abuses in regard to surcharges on oil sales and illicit payments in regard to purchases of humanitarian goods;*
- (c) *to determine whether the accounts of the Programme were in order and were maintained in accordance with the relevant Financial Regulations and Rules of the United Nations.'*

18 By Security Council Resolution 1538, the Security Council called upon the Coalition Provisional Authority, Iraq, and all Member States of the United Nations, including their national regulatory authorities, to cooperate fully by all appropriate means with the IIC.

19 The IIC issued its final report, entitled ‘Manipulation of the Oil-for-Food Programme by the Iraqi Regime’, on 27 October 2005 (‘the Final Report’). The IIC found that Iraq had received illicit income totalling about US\$1.8 billion from companies that obtained oil and humanitarian goods contracts. It also found that the largest source of illicit income for the Iraqi regime came from payments made by companies that Iraq selected to receive contracts for humanitarian goods under the OFF Programme. These payments were disguised by various subterfuges and were not reported to the United Nations by Iraq or by the participating contractors.

20 In its Final Report, the IIC said that the illicit payments developed in mid-1999 from Iraq’s effort to recoup the costs it incurred to transport goods to inland destinations after their arrival by sea at the Persian Gulf port of Umm Qasr. The IIC said that, rather than seeking approval from the United Nations for compensation for such costs from the OFF Programme’s escrow account, Iraq required humanitarian contractors to make such payments directly to Iraqi-controlled bank accounts or to front companies outside Iraq that in turn forwarded the payments to the Government of Iraq. The IIC observed that, not only were these side payments unauthorised, it was also an easy matter for Iraq to impose ‘inland transportation’ fees that far exceeded the actual transportation costs. The IIC also stated that, by mid 2000, Iraq instituted a broader policy that applied a 10 per cent surcharge on all humanitarian contracts, in addition to any requirement that contractors pay inland transportation fees. The surcharge was described in most cases as an ‘after sales service fee’.

21 The IIC said that one conduit for the payment of inland transportation fees to the Iraqi regime was a Jordanian company called Alia for Transportation and General Trade Co (‘Alia’). The IIC stated that Alia was owned partly by Iraq’s Ministry of Transportation and acted as a collection agent for the Government of Iraq to receive inland transportation payments from certain humanitarian goods suppliers. The IIC found that the actual transportation of goods from the port of Umm Qasr to inland destinations in Iraq was in fact provided by Iraqi Government employees, and not by Alia.

22 In its Final Report, the IIC made a number of specific findings in relation to AWB. It found that AWB paid transportation fees to Alia from December 1999 through until about May 2003 when the OFF Programme came to an end as a result of the invasion of Iraq by US

and coalition forces. In connection with AWB's first three contracts from late 1999 to mid 2000, inland transport fees ranged between \$10.80 and \$12.00 per metric tonne ('pmt'). The rates rose to between \$14.00 and \$15.00 pmt in 2000 and then sharply increased in contracts from 2001 to 2003 to between \$45.00 and \$56.00 pmt. The IIC also found that AWB did not advise the United Nations that it was making payments to Alia for inland transportation costs.

23 The IIC summed up its conclusions in relation to AWB in the following passage of its Final Report:

'In summary, based on the available evidence, AWB paid to Alia over \$221.7 million for what it termed inland transport or trucking fees. These payments were channeled to the Government of Iraq by Alia. Both AWB and Alia deny that AWB knew of Iraq's partial ownership of Alia, and there is no evidence to contradict these denials. AWB also denies knowing that Alia did not actually transport its wheat from Umm Qasr and that Alia remitted the money paid by AWB to the Government of Iraq. On the one hand, there is no evidence that Alia told AWB that it was not performing transport services for AWB's wheat or that it was channeling AWB's payments to the Government of Iraq. On the other hand, numerous aspects of the AWB-Alia relationship, as well as the nature of many of the documents received by AWB and discussed above, suggest that some employees of AWB were placed on notice of facts strongly suggesting that AWB's payments were in whole or in part for the benefit of the Government of Iraq. Of particular significance is the degree to which Alia's trucking prices rose sharply beyond what would apparently be a reasonable transportation fee and without other apparent justification. Such increases, in conjunction with AWB's knowledge that Alia had been nominated in the first place by the Government of Iraq, should have signaled AWB officials to the probability that the Government of Iraq stood to illicitly benefit financially from AWB's payments to Alia. In addition, IGB [the Iraqi Grain Board] and ISCWT [the Iraqi State Company for Water Transport – ie the port authority] initiated or were party to communications concerning AWB's payment of Alia's fees, and AWB was warned that the Government of Iraq would not allow its ships to unload until Alia was paid.'

24 It is relevant to note that, in February 2005, investigators from the IIC travelled to Australia and interviewed a number of senior officers of AWB. In addition, AWB made a large number of documents available to the IIC investigators. Certain disclosures by AWB to the IIC represent one ground upon which the Commonwealth contends that there has been a waiver of legal professional privilege by AWB over some of the documents at issue in these proceedings.

PROJECT ROSE

25 Project Rose commenced in about June 2003 when James Cooper ('Cooper'), the then general counsel of AWB, was asked to initiate an internal investigation of AWB's trading activities in Iraq. The internal investigation began following the publication of a letter dated 3 June 2003 from Alan Tracey ('Tracey'), president of a lobby group known as US Wheat Associates, to Colin Powell, then the US Secretary of State, in which Tracey alleged that prices in contracts for the sale of wheat under the OFF Programme had been inflated and that some of the sale proceeds might have gone into the accounts of Saddam Hussein's family. Cooper engaged Christopher Quennell ('Quennell'), a consultant employed by Blakes in its Melbourne office, to advise in relation to AWB's internal investigations.

26 In evidence before the Commission, Cooper described the scope of Project Rose in these terms:

'The subject matter was all of ... AWB's dealings with Iraq during the operation of the Oil-for-Food Program. ...

... The issues that were raised were the underlying collection of information to understand the company's position and, secondly, the understanding of the requirement for AWB to be involved in an inquiry in the United States, which involved many, ... fairly complex legal issues, particularly over jurisdiction.'

27 Later in his evidence to the Commission, Cooper described his retainer of Quennell and Blakes in these terms:

'What initially happened in June 2003 was that Chris Quennell came in and took instructions and was told to undertake a review of all of the facts and his assessment of the allegations made by the US Wheat Associates, and he did that by obtaining email records, ... he got paper files, he interviewed staff members and conducted quite a large review.

... it was an open-ended instruction to him to come into the company and undertake this review and report back on his findings from time to time.'

On this evidence, Cooper plainly contemplated that Quennell would assess the evidence and the allegations and report back his findings.

28 In this proceeding, Quennell gave evidence on affidavit that his understanding of his instructions was to review available evidence and interview potential witnesses for the

purpose of advising AWB as to its legal position in respect of its sale of wheat to the Grain Board of Iraq ('GBI') under the OFF Programme. He added that the scope of his task and instructions evolved as the matter progressed, particularly following the announcement by the Permanent Investigations Committee of the United States Senate ('PSI') of its intention to conduct an investigation and then the appointment of the IIC by the United Nations to conduct an independent inquiry into the OFF Programme.

29 In due course, the board of AWB received a briefing on Project Rose on 25 May 2004. The board minutes record the following:

'Project Rose

The Board noted it had received a briefing on Project Rose (attended also by directors of AWB (International) Limited) on Tuesday 25 May 2004 and had also received a memorandum on this matter from the Managing Director on 6 May 2004. Project Rose is the code-name for the AWB Group's internal investigation of AWB's wheat exports to Iraq and AWB's involvement in the United Nations Oil for Food Program (OFF) in regard to which allegations of impropriety had been made in the public arena.

The briefing session was addressed by Mr Jim Cooper, General Counsel, and Mr Chris Quennell, trade and transport lawyer of Blake Dawson Waldron. (The Board noted that a copy of the briefing presentation would be filed with the Board papers).

The Board noted the following with regard to the Project Rose briefing:

- (a) The allegations of impropriety had commenced with correspondence from the US Wheat Associates to the US Secretary of State, Mr Colin Powell, on 3 June 2003. There had been sporadic media commentary since that time, and a number of inquiries (all of which remain unconfirmed) had been reported as follows: UN independent inquiry into the OFF program; Interim Iraqi Governing Council Investigation (reportedly to be conducted by KPMG); US House of Representatives Investigation; and a US Senate Committee on Foreign Relations Investigation.*
- (b) The Project Rose investigation commenced in June 2003 and has involved a comprehensive review of all contract arrangements for the export of wheat by AWB to Iraq from mid 1999 to 2002, including the inland freight arrangements within Iraq.*
- (c) The findings to date of the Project Rose Investigation are as follows:*
 - 1. all AWB contracts were approved by the Office of the Iraq Program at the United Nations;*
 - 3. no evidence has been identified of any AWB knowledge that money*

paid to the Jordanian transport firm, Alia, was onpaid to the Iraq regime;

4. *no evidence has been identified of payment of funds by AWB to any other person in relation to the OFF shipments; and*
5. *no evidence has been identified of payment of funds to any AWB employee or any other person in relation to OFF shipments.'*

30 Blakes made a power point presentation to the board concerning the outcome of its investigations. The presentation said that Blakes had taken a 'factual snapshot' by reviewing 14 international sales and marketing ring binders, 100 chartering files and more than 30,000 AWB emails for 1999 and 2000, interviewing AWB personnel and conducting an audit of documents held by AWB (USA). It set out Blakes' findings in terms similar to those recorded in the board minutes. In addition, it referred to findings that wheat contracts from July 1999 to December 2002 included a trucking fee payable to Alia that had been nominated by GBI; that the same trucking fee was payable under each contract regardless of the destination of the cargo or the distance transported; and that the trucking fee increased from time to time for no apparent reason. The presentation also stated that Richard Tracey QC (as his Honour then was) had given legal advice in conference on 25 May 2004 that there was no evidence of breach of the relevant United Nations resolution on sanctions and no evidence of breach of Australian domestic law.

31 The evidence before this Court makes it clear that Project Rose was a continuing process of review and reporting that extended beyond the board meeting of 25 May 2004 and throughout 2004 and 2005. For instance, Mr Tracey QC provided memoranda of advice on 31 March 2005 and 12 August 2005 in relation to Project Rose and the question whether AWB had paid inflated prices for transport or port charges in breach of the United Nations' sanctions or Australian domestic law. Its scope also broadened to include the provision of legal advice and assistance in connection with the PSI investigation, the inquiry undertaken by the IIC and, lastly, the inquiry that is being undertaken by the Commission.

32 As time passed, Blakes, Minters and ABL each provided advice and assistance to AWB under the umbrella of Project Rose. Although the immediate focus of Project Rose shifted from time to time between allegations that were publicly made against AWB, the PSI investigation, the IIC investigation, and the Commission, it always involved an ongoing review and investigation of documents and other evidence to determine whether AWB, or

any of its employees, had made payments to the Iraqi regime in breach of the United Nations' sanctions or engaged in any other wrongdoing in connection with the sale of wheat to Iraq under the OFF Programme.

PROJECT WATER

33 Cooper instructed Quennell to commence the investigation known as Project Water on 12 August 2004. It involved a review of all matters concerning The Tigris Petroleum Corporation Limited ('Tigris'). The Commonwealth contends that AWB and Tigris entered into a transaction whereby AWB agreed to inflate the prices in two contracts (A1670 and A1680) for the supply of 1,000,000 mt of wheat to GBI, as a means of extracting funds from the United Nations' escrow account to repay a debt of approximately US\$8 million which GBI owed to Tigris and to provide AWB with the funds required to make a rebate payment to GBI of approximately US\$2 million ('the Tigris transaction').

34 Before the Commission, Cooper gave evidence that on or shortly before 12 August 2004 he was asked, either by Andrew Lindberg ('Lindberg') or Sarah Scales ('Scales'), to undertake a review of AWB's dealings with Tigris. Lindberg was AWB's managing director, and Scales was the general manager of AWB (International) Limited ('AWBI'). AWBI is the subsidiary of AWB that is responsible for international wheat sales and marketing. He said that Scales wanted the review undertaken because a sum of money of over US\$8 million was being held in an account of AWBI, and she was not comfortable in approving the payment of that sum to Tigris without understanding all of the circumstances of its receipt by AWBI. As a result, on 12 August 2004 Cooper and two members of his legal division, Rosemary Peavey ('Peavey') and Rosalyn Santen ('Santen'), initiated a telephone call to Quennell. In the course of that telephone conversation, Cooper asked Quennell to commence a review of all dealings with Tigris, with particular focus on whether it was proper to make a payment to Tigris of the money held in AWBI's account. Quennell's review took about three months. Then in December 2004, AWB paid the sum of US\$7,087,202.24 to Tigris and retained a fee of US\$500,000.00 for assisting in the repayment of the debt.

35 Some evidence suggests that Project Water, as such, came to an end in December 2004, while other evidence suggests it was an ongoing investigation. But, whether or not the description of Project Water strictly applied, AWB and its legal advisers continued to

investigate and review the facts and circumstances of the Tigris transaction during 2005 in order to determine whether it involved any wrongdoing by AWB or any of its employees.

THE INQUIRY BY THE UNITED STATES SENATE PERMANENT SUB-COMMITTEE ON INVESTIGATIONS

36 In mid 2004, the PSI announced that it proposed to conduct an investigation into the OFF Programme. AWB retained Minters and several US law firms to advise it in relation to the PSI investigation. The evidence indicates that Blakes also provided some advice to AWB in connection with this investigation.

THE MAIN ISSUES

37 As argued before me, the case focused on three issues. The first issue is whether AWB has established its claim that legal professional privilege attaches to each of the documents that remain in contest. The only head of privilege that AWB relies on is the privilege that attaches to documents brought into existence for the dominant purpose of obtaining or giving legal advice. In *AWB Limited v Honourable Terence Rhoderic Hudson Cole* [2006] FCA 571 (*'AWB v Cole'*), I held that litigation privilege was not available to protect documents brought into existence in contemplation of the Commission and none of the parties has disputed that decision. AWB has not contended that legal professional privilege is available solely because documents were brought into existence in contemplation of inquiries being undertaken by the PSI or by the IIC.

38 The second issue is whether, assuming privilege attaches, that privilege has been waived by virtue of AWB's disclosure of the gist or substance of certain legal advices which it obtained. I will have to determine whether waiver should be imputed to AWB as a matter of law and, if so, what is the extent of that waiver. The Commonwealth contends that the waiver extends to all documents that relate to Project Rose and Project Water.

39 The third issue is whether legal professional privilege attaches to documents that came into existence in connection with AWB's settlement of a claim by GBI for a rebate of approximately US\$2 million on account of the fact that earlier shipments of wheat by AWB had been contaminated by iron filings (*'the iron filings claim'*). The Commonwealth contends that the iron filings claim is inextricably linked with the Tigris transaction, in that

the prices for wheat contracts A1670 and A1680 were inflated to cover both the amount of the iron filings claim and the repayment by GBI of the debt which it owed to Tigris. It said that AWB proposed to pay the iron filings claim directly to Alia as an addition to inland transport fees, but spread over several contracts. The Commonwealth argued that the inflation of the contract prices to cover the iron filings claim was concealed from the United Nations and that it involved a contravention of the United Nations' sanctions. In these circumstances, the Commonwealth contends that AWB cannot maintain its claim to privilege over the legal advice it obtained in relation to the iron filings claim as that advice was obtained in furtherance of a fraud, wrongful conduct or sham transaction.

40 AWB contends that there is no evidence which would permit this Court to conclude that the arrangements for payment of the iron filings claim involved a breach of the United Nations' sanctions or any breach of Australian law, or that the relevant advice was given in furtherance of any improper conduct. It submitted that the documents relating to the iron filings claim over which privilege is claimed go to the issue of the legality of the payment and were not created in furtherance of any sham or fraud.

LEGAL ADVICE PRIVILEGE – GENERAL PRINCIPLES PRIVILEGE

41 Under the legal advice limb of legal professional privilege, a document will attract privilege if it was brought into existence for the dominant purpose of giving or obtaining legal advice: *Esso Australia Resources Limited v Commissioner of Taxation* (1999) 201 CLR 49 (*Esso*) at 64-65 [35]; *Daniels Corporations International Pty Ltd v Australian Competition & Consumer Commission* (2002) 213 CLR 543 (*Daniels*) at 552 [9].

42 AWB placed particular reliance on Dawson J's formulation of the scope of legal advice privilege in *Waterford v Commonwealth* (1987) 163 CLR 54 at 95:

'The legal professional privilege relied upon in this case is that which attaches to communications between a legal adviser and his client for the purpose of giving or receiving legal advice and to documents recording those communications or containing information for the purpose of enabling the advice to be given. In order to attract that privilege, the communications must be confidential and the legal adviser must be acting in his professional capacity: see Minet v Morgan; Wheeler v Le Marchant; Smith v Daniell; Bullivant v Attorney-General (Vict.); Jones v Great Central Railway Co; O'Rourke v Darbishire.'

There is nothing controversial about this formulation of the principle.

43 I reviewed the relevant authorities and extracted the principles which govern legal advice privilege in my decision in *AWB v Cole* at [60]-[63] and [85]-[110]. I adhere to what I said in that case. I do not propose to engage in a lengthy discussion of the authorities concerning legal advice privilege in these reasons for judgment, other than to the extent necessary to address the arguments advanced by the parties.

44 The general principles that I consider relevant to the disposition of this case can be summarised as follows:

- (1) The party claiming privilege carries the onus of proving that the communication was undertaken, or the document was brought into existence, for the dominant purpose of giving or obtaining legal advice. The onus might be discharged by evidence as to the circumstances and context in which the communications occurred or the documents were brought into existence, or by evidence as to the purposes of the person who made the communication, or authored the document, or procured its creation. It might also be discharged by reference to the nature of the documents, supported by argument or submissions: see *Grant v Downs* (1976) 135 CLR 674 (*'Grant v Downs'*) at 689; *Commissioner of Taxation v Pratt Holdings Pty Ltd* (2005) 225 ALR 266 at 278 [30] (*'FCT v Pratt Holdings'*); and *AWB v Cole* at [63].
- (2) The purpose for which a document is brought into existence is a question of fact that must be determined objectively. Evidence of the intention of the document's maker, or of the person who authorised or procured it, is not necessarily conclusive. It may be necessary to examine the evidence concerning the purpose of other persons involved in the hierarchy of decision-making or consultation that led to the creation of the document and its subsequent communication: see *AWB v Cole* at [110].
- (3) The existence of legal professional privilege is not established merely by the use of verbal formula: *Grant v Downs* at 689 per Stephen, Mason and Murphy JJ. Nor is a claim of privilege established by mere assertion that privilege applies to particular communications or that communications are undertaken for the purpose of obtaining or giving 'legal advice': *National Crime Authority v S* (1991) 29 FCR 203 at 211-212

per Lockhart J; *Candacal Pty Ltd v Industry Research & Development Board* (2005) 223 ALR 284 ('*Candacal*') at 298 [70]; *Seven Network Limited v News Limited* [2005] FCA 142 at [6]–[8]. If assertions of that kind are received in evidence in support of the privilege claim, their conclusory nature can leave unclear what advice was really being sought. There will be cases in which a claim of privilege will not be sustainable in the absence of evidence identifying the circumstances in which the relevant communication took place and the topics to which the instructions or advice were directed: *Kennedy v Wallace* (2004) 142 FCR 185 ('*Kennedy v Wallace*') at 189–190 [12]–[17] per Black CJ and Emmett J and at 211–212 [144]–[145] and at 215–216 [166]–[171] per Allsop J; see also *Southern Equities Corporation Ltd (in liq) v Arthur Andersen & Co (No 6)* [2001] SASC 398.

- (4) Where communications take place between a client and his or her independent legal advisers, or between a client's in-house lawyers and those legal advisers, it may be appropriate to assume that legitimate legal advice was being sought, absent any contrary indications: *Kennedy v Wallace* (2004) 208 ALR 424 at 442 [65] per Gyles J; affirmed on appeal, *Kennedy v Wallace* at 191-192 [23]-[27] per Black CJ and Emmett J. In *Kennedy v Wallace*, Black CJ and Emmett J inclined to the view that in the ordinary case of a client consulting a lawyer about a legal problem in uncontroversial circumstances, proof of those facts alone will provide a sufficient basis for a conclusion that legitimate legal advice is being sought or given.
- (5) A 'dominant purpose' is one that predominates over other purposes; it is the prevailing or paramount purpose: *AWB v Cole* at [105]-[106]; *FCT v Pratt Holdings* at 279-280 [30] per Kenny J.
- (6) An appropriate starting point when applying the dominant purpose test is to ask what was the intended use or uses of the document which accounted for it being brought into existence: *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357 at 366 [35] per Finn J.
- (7) The concept of legal advice is fairly wide. It extends to professional advice as to what a party should prudently or sensibly do in the relevant legal context; but it does not extend to advice that is purely commercial or of a public relations character: *Balabel v*

Air India [1988] 1 Ch 317 ('*Balabel*') at 323 and 330; *Nederlandse Reassurantie Groep Holding NV v Bacon and Woodrow* [1995] 1 All ER 976 ('*Nederlandse*') at 983; *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610 ('*Three Rivers*') at 652-653 [43]-[44], 657-658 [59]-[60], 681 [114] and 683 [120]; *Dalleagles Pty Ltd v Australian Securities Commission* (1991) 4 WAR 325 ('*Dalleagles*') at 332-333; *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 135 FCR 151 ('*DSE*') at 161-173 [25]-[71]; and *AWB v Cole* at [100]-[101].

- (8) Legal professional privilege protects the disclosure of documents that record legal work carried out by the lawyer for the benefit of the client, such as research memoranda, collations and summaries of documents, chronologies and the like, whether or not they are actually provided to the client: *Daniels* at 563 [44] per McHugh J; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 ('*Propend*') at 550 per McHugh J; *Dalleagles* at 333-334 per Anderson J; *Trade Practices Commission v Sterling* (1979) 36 FLR 244 ('*Stirling*') at 245-246 per Lockhart J; and *Kennedy v Lyell* (1883) 23 Ch D 387 at 407; *Lyell v Kennedy* (1884) 27 Ch D 1 at 31 per Bowen LJ; *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1995) 58 FCR 224 at 266 per Lindgren J.
- (9) Subject to meeting the dominant purpose test, legal professional privilege extends to notes, memoranda or other documents made by officers or employees of the client that relate to information sought by the client's legal adviser to enable him or her to advise: *Stirling* at 246. The privilege extends to drafts, notes and other material brought into existence by the client for the purpose of communication to the lawyer, whether or not they are themselves actually communicated to the lawyer: *Saunders v Commissioner of Australian Federal Police* (1998) 160 ALR 469 at 472.
- (10) Legal professional privilege is capable of attaching to communications between a salaried legal adviser and his or her employer, provided that the legal adviser is consulted in a professional capacity in relation to a professional matter and the communications are made in confidence and arise from the relationship of lawyer and client: *Waterford v Commonwealth* (1987) 163 CLR 54 at 96 per Dawson J; see also Deane J at 79-82. Some cases have added a requirement that the lawyer who

provided the advice must be admitted to practice: see Dawson J in *Waterford* at 96; *GSA Industries (Aust) Pty Ltd v Constable* (2002) 2 Qd R 146 at 150; *Glengallan Investments Pty Ltd v Arthur Andersen* (2002) 1 Qd R 233 at 245. However, in *Commonwealth v Vance* (2005) 158 ACTR 47, the Full Court (Gray, Connolly and Tamberlin JJ) did not regard the possession of a current practising certificate as an essential precondition to the availability of legal professional privilege: at [23]–[35]. The same view was taken by Lee J in *Candacal* at 303 [99], by Gillard J in *Australian Hospital Care (Pindara) Pty Ltd v Duggan* [1999] VSC 131 at [111], and by Downes J in *Re McKinnon and Secretary, Department of Foreign Affairs and Trade* (2004) 86 ALD 780 at 785 [51].

- (11) Legal professional privilege protects communications rather than documents, as the test for privilege is anchored to the purpose for which the document was brought into existence. Consequently, legal professional privilege can attach to copies of non-privileged documents if the purpose of bringing the copy into existence satisfies the dominant purpose test: *Propend* at 507 per Brennan CJ, 544 per Gaudron J, 553-554 per McHugh J, 571-572 per Gummow J, and 587 per Kirby J. In *Propend* at 512, Brennan CJ added a qualification to this principle: if an original unprivileged document is not in existence or its location is not disclosed or is not accessible to the persons seeking to execute the warrant, and if no unprivileged copy or other admissible evidence is made available to prove the contents of the original, the otherwise privileged copy loses its protection.
- (12) The Court has power to examine documents over which legal professional privilege is claimed. Where there is a disputed claim, the High Court has said that the court should not be hesitant to exercise such a power: *Esso*; see also *Grant v Downs* at 689. If the power is exercised, the court will need to recognise that it does not have the benefit of submissions or evidence that might place the document in its proper context. The essential purpose of such an inspection is to determine whether, on its face, the nature and content of the document supports the claim for legal professional privilege.

AWB'S LAWYERS AND THEIR RETAINERS

45 The Commonwealth contended that Project Rose and Project Water were purely factual investigations and therefore should not be regarded as attracting any legal professional privilege. In advancing this contention, the Commonwealth tended to assume that factual investigations by lawyers, such as a review of documents and interviews of persons involved in the matter under investigation, can be separated from the ultimate legal advice given by the lawyers as a result of their factual investigation. Leaving aside any question of waiver, this seems to be an unduly narrow approach to the scope of legal advice privilege. In my view, it finds no support in the authorities.

46 In recognition of the fact that legal professional privilege is a fundamental common law right, the courts have eschewed an overly narrow or technical approach to the identification of communications or documents that fall within the scope of legal advice privilege. As I said in *AWB v Cole* at [127]–[133], the legal advice limb of the privilege extends beyond material that is literally a communication, or a record of a communication, of legal advice or instructions. In *Propend* at 569, Gummow J said that the privilege extends to any document prepared by a lawyer or client from which one might infer the nature of the advice sought or given. The principle extends to internal documents or parts of documents of the client, or of the lawyer, reproducing or otherwise revealing communications which would be covered by privilege: *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1992] 2 Lloyd's Rep 540 at 540 per Saville J.

47 Where a lawyer has been retained for the purposes of providing legal advice in relation to a particular transaction or series of transactions, communications between the lawyer and the client relating to that transaction will be privileged, notwithstanding that they do not contain advice on matters of law; it is enough that they are directly related to the performance by the lawyer of his or her professional duty as legal adviser to the client: *Minter v Priest* [1930] AC 558 at 581–586; *Balabel* at 330; *Nederlandse* at 983 and *Dalleagles* at 332–333. In *Dalleagles*, Anderson J said at 332–333 that professional discourse in a professional capacity between a solicitor and his client with reference to the transactions covered by his instructions should be regarded as prima facie for the purpose of giving and receiving advice. In his Honour's view, this would apply to any communication that is on its face a communication of a professional nature from the solicitor to the client or

his agent touching the subject matter of the solicitor's engagement and any communication from the client to the solicitor in connection with that engagement. These propositions were referred to, with approval, by Allsop J in *DSE* at [51]-[52] and by Branson J in *Wenkart v Commissioner of Federal Police* (unreported, Federal Court, Branson J, 11 November 1996).

48 In *DSE*, Allsop J said that there was no substantive difference between the views expressed in *Balabel* and *Dalleagles*: at [51], [52] and [71]. Allsop J also observed that what underlies the expression of opinion in those cases is the recognition that the obligation of the lawyer to advise, once retained, is pervasive. In his Honour's view, it would be rare that one could, with any degree of confidence, say that a communication between client and lawyer, in the circumstances of a retainer requiring legal advice and the directing of the client by a legal adviser, was not connected with the provision or requesting of legal advice. Indeed, too literal a requirement of identifying legal advice as express advice about the law would place undue emphasis on formalism and undermine the privilege. Rix J (as his Lordship then was) expressed much the same view in *Hellenic Mutual War Risks Associated (Bermuda) Ltd v Harrison* [1997] 1 Lloyd's Rep 160 at 168.

49 In *Three Rivers*, the relevant legal context consisted of a commission of inquiry into the part played by the Bank of England in the collapse of the Bank of Credit and Commerce International SA. The House of Lords upheld the Bank of England's claim that legal advice privilege attached to documents that had been generated for the purposes of providing information to the Bank's legal advisers to enable them to prepare submissions and evidence, and to advise on the nature, presentation, timing and content of the Bank's responses to the inquiry. Relevant passages from the speeches in the House of Lords are extracted in my decision in *AWB v Cole* at [92]-[96].

50 In this case, the relevant legal context consisted, initially, of public allegations that AWB had acted in breach of United Nations' sanctions by making improper payments to the Iraqi regime. Those public allegations were soon followed by a series of investigations by the IIC, the PSI and the Commission. Blakes was retained for the purpose of advising whether, as a matter of law, there was any substance in the allegations of improper conduct by AWB.

51 As the various investigations were announced, Blakes' retainer was extended to the

provision of advice in connection with them. AWB specifically extended Blakes' retainer to include the provision of advice in relation to AWB's dealings with Tigris. It is unclear whether Blakes provided any substantial advice to AWB in connection with the Commission.

52 The catalyst for AWB's engagement of Minters appears to have been the announcement of the PSI investigation. From about 1 July 2004, Minters advised AWB in relation to the PSI investigation. However, Minter's engagement extended more widely than the provision of advice concerning the actual conduct of the PSI investigation; it included a comprehensive review by Minters of all of the documents and other evidence surrounding AWB's sales of wheat to Iraq under the OFF Programme. A key objective of this review was to determine whether there was any evidence that AWB or any of its employees had made payments to Iraq that contravened the United Nations' sanctions or engaged in any other wrongdoing in connection with the OFF Programme.

53 Minter's engagement was subsequently extended to the provision of advice and assistance to AWB in connection with the IIC investigation. Minters' wider role in reviewing and analysing the available documents and evidence, which included interviewing employees or former employees, continued during the period of the IIC investigation. Minters played a prominent role in liaising with the US law firms which AWB retained to act for it in connection with the PSI and IIC investigations.

54 Minters and Blakes acted in tandem in providing advice in connection with the PSI and IIC investigations and in their ongoing review and investigation of the facts and circumstances surrounding AWB's wheat exports to Iraq. Both law firms were involved in interviewing present and former employees of AWB and AWBI.

55 In about February 2005, AWB retained ABL to act for it in relation to the IIC investigation and subsequently in relation to the Commission. Throughout 2005, ABL worked closely in conjunction with Blakes and Minters. All three firms were involved in analysing and reviewing the facts and obtaining evidence from potential witnesses, with a view to determining whether there was any evidence that AWB or its employees had made payments to Iraq in breach of the United Nations' sanctions or engaged in any other wrongdoing in connection with the OFF Programme.

56 The evidence does not contain any letters of retainer, or any other documentary record of the precise scope of the retainers, under which the three firms acted for AWB. The affidavit evidence contains the briefest description of each retainer. The work performed by the three firms overlapped very substantially and, if there were any lines of demarcation, they were very blurred. Nonetheless, the scope of the work performed by each firm can be discerned with reasonable clarity from the affidavit evidence and the documents referred to in AWB's revised list of documents. I am satisfied that Blakes, Minters and ABL were engaged professionally to provide legal advice and assistance within the scope of their respective retainers as described above. In each relevant context, I consider that it would be inappropriate and artificial to attempt to sever the factual investigations carried out by the lawyers from the legal advice they provided under their retainers. As I have said, a key purpose of those factual investigations was to enable Blakes, Minters and ABL to determine whether there was any evidence that AWB, or any of its employees, had made payments to Iraq in breach of the sanctions or engaged in any other wrongdoing in connection with its sale of wheat to Iraq. By that means, the three law firms placed themselves in a position to advise AWB as to the risks it confronted and the course of action it should take in relation to the investigations.

57 I do not see any reason why professional communications between AWB and its lawyers concerning the investigations by the IIC, the PSI, and the Commission should be incapable of attracting legal advice privilege. In these contexts, the concept of legal advice includes advice as to what AWB should prudently and sensibly do in connection with the relevant investigation. Advice of this kind is capable of attracting legal advice privilege, notwithstanding that a particular communication is part of a continuum and does itself contain any specific advice on matters of law or any specific request for such advice.

AWB'S AFFIDAVIT EVIDENCE

58 The Commonwealth contended that AWB had failed in its attempt to prove legal professional privilege because it had not adduced any proof as to AWB's dominant purpose in seeking or obtaining legal advice. AWB largely relied upon evidence given by in-house and external lawyers involved in the particular communications at issue. The Commonwealth submitted that evidence proving the lawyer's understanding of the purpose of the particular communication and that he or she was giving legal advice affords no

evidence of the client's dominant purpose. There is no real substance in this criticism. Dominant purpose must be determined objectively, but it is not uncommon for the relevant purpose to be established by evidence given by the maker of the statement or another person responsible for commissioning the relevant document or bringing it into existence, such as a solicitor: see *Mitsubishi Electric Australia Pty Ltd v Victoria WorkCover Authority* (2002) 4 VR 332 at [14]; *Grant v Downs* at 677 and *AWB v Cole* at [110].

59 The Commonwealth objected to the admissibility of statements in AWB's affidavits where the deponent asserted that particular documents recorded 'legal' advice or were brought into existence for the purpose of obtaining, or giving, 'legal' advice. It submitted that the description 'legal' was a conclusionary assertion or opinion based on other facts and circumstances that were not disclosed by the deponent. AWB argued that the word 'legal' ought to be received on the ground that it was an opinion or description about the relevant facts and circumstances as perceived by the deponent. Alternatively, where the deponent was legally qualified, AWB argued that the description represented an opinion that was based on the deponent's specialised knowledge, training and experience within the meaning of s 79 of the *Evidence Act 1995* (Cth).

60 After hearing submissions from counsel, I ruled that I would not exclude the word 'legal' where it was used by a lawyer to characterise the relevant advice or communication. In those circumstances, the presumption referred to in *Kennedy v Wallace* would be available: see [44] (4) above. In addition, the description would, I think, be admissible as an opinion, based on specialised knowledge, within the meaning of s 79 of the *Evidence Act*. On the other hand, I rejected the term 'legal' in affidavits where the deponent was not legally qualified. In those affidavits, the use of the term amounted simply to a conclusion or opinion by a lay person that was based, in most instances, on facts which were not fully disclosed in the affidavit. Further, I held that the evidence was not admissible under s 78 of the *Evidence Act*; that provision is concerned with lay perceptions of things or events, such as a person's apparent age or state of intoxication: see S Odgers, *Uniform Evidence Law*, 7th edn, Lawbook, 2006, pp 281-282.

61 At the time I made this ruling, I observed that where I had not struck the expression 'legal' from the affidavits, the weight that would be attached to that description in any

particular affidavit would depend on the circumstances in which the communication took place; the description might be entitled to little or no weight in the absence of further evidence as to the circumstances surrounding the relevant communications or the topics to which the advice was directed: see *Kennedy v Wallace* at 189–190 [12]–[17] and 211–212 [144]–[145] and 215–216 [166]–[171].

DOES PRIVILEGE ATTACH?

62 During the course of the hearing, AWB and the Commonwealth reduced the number of documents which are in contest.

63 On the first day of the hearing, AWB announced that it no longer pressed for a declaration of privilege in respect of a significant number of documents in its list. In doing so, AWB did not concede that the documents are not protected by legal professional privilege. As finally revised, those documents are as follows: 27-29, 37-39A, 43, 53, 54, 61, 73-76, 109, 118, 119A, 125, 134, 141, 142, 146A-149, 153, 191-193, 195, 198, 202, 203, 212, 214, 216, 223, 236, 242-244, 248, 249, 272, 287, 289, 312, 314, 325, 328, 329, 335, 360, 363, 364, 366, 367, 369-373, 383, 396, 397, 409, 411, 415, 429, 458, 466, 469, 474, 489, 512, 528, 531, 532, 535, 540A, 545, 546, 597, 598, 604, 606-670, 673, 674, 676, 677, 678, 680, 682-689, 690, 692, 693, 695, 697, 698, 705, 716-720, 723, 726, 728, 734, 735, 746, 750, 767, 774, 776, 778, 782, 783, 786, 789, 791, 793, 795, 796, 803, 805, 825, 832-834, 836, 838, 839, 841-846, 848, 853-855, 858, 859, 862, 864, 871, 874, 875, 878, 880, 884, 886, 890, 890AO, 896, 897, 916, 917, 920, 922, 926, 927, 937, 938-941, 943-946, 949, 954-955, 967-969, 993, 993A, 996, 999, 1007-1008, 1010, 1014-1024, 1027, 1034-1050, 1052-1055, 1057-1058, 1060-1069, 1072, 1082, 1084-1085, 1102-1111, 1113B, 1122, 1125-1143, 1153, 1154, 1156, 1157, 1164-1182, 1188, 1189, 1203, 1205, 1208, 1210, 1211, 1220, 1223, 1224, 1241, 1242, 1263-1292, 1294, 1295 and 1298.

64 Both AWB and the Commonwealth submitted that the consequence of AWB's announcement was that the Court need not make any ruling as to the status of these documents. Many of the documents relate to the Tigris transaction. In paragraphs [90]-[108] of its written submissions, which were filed shortly before the commencement of the trial, the Commonwealth argued that all of the documents in AWB's revised list that recorded any legal advice in relation to the Tigris transaction attracted the fraud exception to legal

professional privilege. Alternatively, it submitted that any privilege attaching to those documents had been waived by AWB. Following AWB's announcement, the Commonwealth and AWB also submitted that the Court need not consider or rule upon any of the arguments raised in paragraphs [90]-[108] of its written submissions. On the joint submission of AWB and the Commonwealth, I made an order that paragraphs [90]-[108] should be excised from the Commonwealth's written submissions when those submissions were made available by the Court for public inspection.

65 The Commonwealth accepted AWB's claim to legal professional privilege over a number of the documents in the list. The documents are as follows: 1-11, 13, 16-19, 23-25, 34-36, 40, 42, 44-52, 57-60, 62-72, 80, 86-88, 99, 128, 511, 891-895, 898-915, 918, 919, 921, 923-925, 928-936, 937AA-937AI, 937AK-937AO, 1100, 1101, 1191-1194, 1197-1199, 1201, 1202, 1204, 1207, 1209, 1212, 1216, 1217, 1219, 1227, 1228, 1230, 1233, 1235, 1236, 1238, 1244, 1245, 1251, 1253, 1254, 1257-1259, 1296 and 1302-1304.

66 The remainder of the documents in AWB's revised list are in issue. The Commonwealth submitted that in respect of a number of documents (eg 1190 and following), it understood AWB to be contending those documents were listed as privileged documents in error because they are not within the scope of existing notices to produce. Although the basis for this 'understanding' was never identified, the Commonwealth submitted that the question whether these documents fall within the scope of the notices is not before the Court and, accordingly, the privileged status of those documents does not arise for determination in these proceedings. I do not agree. On the material before the Court, I am bound to proceed on the basis that, but for the documents that are no longer pressed and those that are conceded, AWB seeks a declaration over all of the documents in its list because they fall, or may fall, within the scope of notices to produce issued by the first respondent.

67 In determining claims of legal professional privilege, the Court will look to the substance of the matter, having regard to the context, the nature of the document, the evidence that is led in support of the claim of privilege, any cross-examination of the claimant's witnesses and, if necessary, the content of the document as revealed by inspection.

68 The documents over which AWB claims privilege can be categorised in various ways, such as communications to and from Blakes, or Minters, or ABL containing legal advice;

information obtained from AWB's records and employees by AWB's in-house counsel for the purpose of giving or obtaining legal advice; instructions provided by the in-house lawyers to external lawyers for the purpose of obtaining legal advice; and documents brought into existence by lawyers so as to assist them in the provision of legal advice. But, ultimately, the categories provide limited assistance. It is necessary to examine the evidence concerning each relevant document over which privilege is claimed and to examine that evidence in the light of the relevant context. I have also inspected each of the original documents over which AWB has claimed privilege.

69 Applying the legal principles discussed above, I have identified the documents which, in my view, have not been proven to be the subject of legal professional privilege. I will defer listing these documents at this stage, as many of them are affected by the waiver issue. I will need to consider waiver and the fraud exception before I express any view about the remaining documents. My conclusions, listing each affected document, are set out towards the end of these reasons.

AWB'S DISCLOSURES IN RELATION TO PROJECT ROSE

70 The Commonwealth contends that AWB has waived privilege in relation to its Project Rose documentation by reason of:

- (1) the disclosures by Hargreaves and other AWB executives to the Australian Government from 24 March 2005 onwards;
- (2) the disclosures by Lindberg to the IIC in the course of his interview with IIC investigators on 28 February 2005;
- (3) its production of various documents to the Commission under notices to produce after waiving claims of legal professional privilege, including legal advice that Blakes gave to AWB's board of directors on 25 May 2004, instructions given to, and advices obtained from, Mr Tracey QC in the period from May 2004 to August 2005, and the instructions given to, and the expert opinion obtained from, Sir Anthony Mason AC KBE in relation to the applicability of Resolution 661; and

- (4) the evidence that Lindberg gave to the Commission in the course of its public hearings.

71 In the paragraphs that follow, I have set out my factual findings concerning these disclosures.

DISCLOSURES BY HARGREAVES

72 Peter Hargreaves ('Hargreaves') was a senior executive of AWB who acted as the manager of Project Rose. On 24 March 2005, Hargreaves made a power point presentation to officers of the Department of Foreign Affairs and Trade ('the Department') in Canberra that reported on the IIC visit to AWB in February 2005. It contained references to the results of AWB's own legal review:

'AWB's Response

- *AWB interviewees told the IIC that we believe our trade with Iraq was undertaken in accordance with UN guidelines throughout the life of the OFF Program they had no knowledge that Alia might have an ownership connection back to the old regime.*
- *Alia was regarded as a company providing a genuine service which saved Australian wheat growers considerable demurrage costs, and*
- *They only became aware of a possible connection when the allegations were raised in the media well after the OFF Program ended.*
- *Advised IIC that AWB's own legal review had found no evidence of:*
 - *corruption by AWB or individuals*
 - *side payments or after sales payments to individuals of the former regime, or*
 - *payments by the regime to former or existing AWB representatives*
- *IIC advised they had found no evidence to the contrary.*

...

Focus – inland trucking arrangements

Questioning seems designed to establish whether, through the use of Alia, AWB had wittingly or unwittingly paid money to the Government of Iraq in violation of the Security Council Resolutions 661 and 986.

Questioning also sought to establish:

- *How much did AWB know about the background of Alia?*
- *AWB representatives assured the IIC they knew nothing of any connection between Alia and the former regime until well after the OFF Program ended and allegations first began to appear in the media*

- *Unreasonable expectation should AWB have known or inquired of any connection with the former regime?*
- *AWB saw nothing untoward – paying for a service that was genuinely needed to improve efficiency of humanitarian program – also reduced demurrage – a big cost to growers*
- *It was no secret the Iraqis were paying for inland trucking – it was stated on the contracts*
- *UN contractors Contechna were inspecting the port operation including the discharge into Alia trucks*
- *No concerns were raised with AWB by the UN, Contechna or any other body throughout the life of the OFF Program*
- *Was AWB aware of any payments being channelled from Alia to the old regime?*
- *No and subsequent legal review has found no evidence to the contrary*

...

Allegations of Corrupt Payments:

AWB's legal review had found no evidence of:

- *Corruption by AWB or individuals*
 - *Side payments or after sales payments to individuals of the former regime, or*
 - *Payments by the regime to former or existing AWB representatives*
- Importantly, IIC advised they had found no evidence to the contrary'.*

73 On 20 April 2005, Hargreaves attended at the Australian Embassy in Washington DC to brief Ambassador Michael Thawley and members of his staff. The uncontested evidence before me includes a statutory declaration by Anastasia Carayanides, a Minister Counsellor (Commercial) at the Embassy in Washington, who attended the briefing by Hargreaves. The statutory declaration records that Hargreaves made statements to the following effect:

'... "I think that AWB has cooperated with the IIC and that the IIC now has a better appreciation of AWB operations under OFF. AWB has not been involved in paying bribes in Iraq. I think the IIC will conclude that AWB was not knowingly involved in breaching sanctions, or at worst that it was unwittingly involved." When someone asked what he meant by that statement, he replied in words to the following effect: "The IIC is looking at the use of a fictitious trucking company. But I'm confident that AWB does not fall in that category." To my knowledge, Mr Hargreaves referred to Alia by name for the first time either in this meeting or in the meeting on 15 June 2005 (see paras 36-37 below).'

74 Hargreaves made a further presentation to Embassy staff on 15 June 2005 at which Hargreaves told Ms Carayanides and others that:

'... "I can assure you that AWB has not been involved in any illicit payments to the Iraqi regime or breaches of sanctions. AWB has conducted an internal audit and an independent legal review by a law firm, and both had found no wrongdoing."

...

"AWB has done nothing wrong. It has not been involved in breaking sanctions. All of AWB's contracts were approved by the UN. No-one in AWB is aware of paying kickbacks to Iraq."

...

"Alia is a Jordanian trucking company that provided real trucking services to AWB in Iraq. Alia unloaded ships at Umm Qasr directly on to its trucks and delivered the wheat throughout the country. As far as AWB knew Alia was not a front company. AWB was not aware of Alia channelling money to Iraq".'

75 On 25 June 2005, in consultation with AWB's legal advisers, Hargreaves prepared a memorandum for Lindberg to speak to at a board meeting of AWB that was scheduled for 28 June 2005. The memorandum apprised board members of meetings which AWB had held with key elements of the Federal Government, including the Australian Embassy in Washington, and expanded on those meetings as follows:

'Meetings with Federal Government

- *Chairman and MD met with*
 - *PM's office – senior Foreign Affairs Advisor*
 - *John Anderson and his chief of staff*
 - *Alexander Downer*
 - *Warren Truss*
 - *Heads and other officials of DFAT and DAFF*
- *Provided briefing on progress so far with IIC and our deep concern over AWB's treatment so far and that AWB might become victim of its cooperation*
- *Alerted them to possibility of adverse [findings] including possibility of finding AWB has wilfully breached sanctions through the trucking arrangements*
- *Sought their advice on impact if AWB withdrew from process*
- *Reassured them that:*
 - *AWB has QC's opinion it has not breached sanctions*
 - *AWB complied with the guidelines laid down by the relevant*

- authorities*
- *AWB had no knowledge of any connection between the trucking company and the former regime during the OFF program*
- *AWB has found no evidence of fraud or corrupt payments etc*
- *Overall the meetings were very satisfactory for AWB*
- *While there is concern over damage to reputation of Australia and AWB, the feedback from all parties was:*
 - *AWB should continue to engage in the process*
 - *That Fed Gov't is ready to back AWB but this would be difficult if AWB withdraws from process*
 - *No indication from any individual or any meeting that Fed Gov't was distancing itself from AWB in this process*
 - *Strong support came from Minister Downer who indicated he saw it as his responsibility to defend AWB*
 - *Their view of the facts was that:*
 - *AWB had followed the process*
 - *AWB did what it was instructed to do*
 - *AWB did not know, could not have known of any connection between the trucking company and the former regime.'*

76 Later in the memorandum, Hargreaves identified the commercial objectives which AWB was pursuing:

'Our objectives

1. *Protect and defend the reputation of AWB both within Australia and overseas*
2. *To minimize any attack by US wheat interests on the single desk selling system arising from this report*
3. *To manage the media, politics in Canberra and domestic stakeholders in order to avoid any need for a further inquiry into AWB's role in OFF*
4. *To manage the media and politics in the United States with the aim of containing this issue and preventing our involvement in the OFF Program from becoming the subject of inquiry by Congressional Committees*
5. *Avoiding any impact on our relationship with Iraq or other customers.'*

77 Hargreaves had a further meeting in Washington DC with Ms Carayanides at some time in the period between 16 June 2005 and September 2005. In the course of this meeting, Hargreaves was asked whether the amount paid by AWB to Alia for trucking services was reasonable. Ms Carayanides said that he responded in words to the following effect:

“Yes, he thought it was reasonable, because it reflected the costs of insurance and transportation throughout the country in difficult circumstances. Alia was providing a real service, and AWB was paying for

that service. It was the only trucking company that was reliable and that AWB could use to off load wheat into trucks at Umm Qasr. No one in AWB knew of any money being channeled to the Iraqi regime through Alia. AWB had conducted an independent legal review which hadn't turned up any wrongdoing".'

DISCLOSURES TO THE IIC

78 On 28 February 2005, Lindberg was interviewed by several investigators from the IIC. The interview was also attended by Cooper and Leonie Thompson of ABL. The record of interview, as subsequently revised by Lindberg and AWB's lawyers, sets out the following exchange between Lindberg and an IIC investigator:

[The investigator said] 'that it appeared that AWB had "dismissed" media reports that accused the company of engaging in sanctions-busting. [No basis was given for the assumption that AWB had been dismissive as alleged]. He asked LINDBERG what actions AWB had taken to determine if there existed any truth to these allegations. LINDBERG said that he had asked COOPER to conduct a "legal review" and that COOPER had assembled a team to look into the matter. The review, LINDBERG said, had found nothing that would substantiate claims of fraud or corruption and had identified no payments to individuals in the Government of Iraq by AWB or vice-versa. LINDBERG said that AWB would "obviously" have been concerned had COOPER's team uncovered evidence of improper or unlawful conduct.'

Later in the interview, Lindberg said that AWB would certainly have taken corrective action had it uncovered evidence suggesting possible fraud or corruption, but no such evidence had come to light.

79 Apparently, the IIC investigators interviewed a number of other AWB officers and employees, but their records of interview have not been tendered in evidence before me.

80 AWB made its executives available for interview by the IIC, and also made documents available for inspection by the IIC, under the terms of a Memorandum of Understanding between the IIC and AWB dated 25/26 February 2005. The Memorandum records that AWB agreed to cooperate with the IIC and to disclose information in accordance with its terms. Relevantly, the Memorandum provided:

- '2. **Document Production and Confidentiality** – AWB will provide the IIC with access to the scheduled AWB documents (see attached). The IIC may request, in writing, further documents that it considers relevant. In responding to the IIC's document requests, AWB has advised that it may*

take into account that certain documents may be commercially sensitive, subject to legal professional privilege, or expose AWB or its employees, officers, or representatives (past or present) to breaches of Australian law. In the event that AWB decides to withhold documents for any of the aforementioned reasons, it will so advise the IIC in writing, and the parties may agree to additional terms for production. The IIC's review of all documents provided by AWB will be governed by the AWB Data Room Protocol, a copy of which is attached to this memorandum. At the IIC's request, except in exceptional circumstances (addressed further in paragraph 7), AWB will furnish the IIC with copies of documents that the IIC reviews in the AWB Data Room and determines are necessary for purposes of its inquiry. The IIC will maintain in strict confidence the documents provided by AWB, and it will not provide copies of the documents to third parties. However, AWB agrees that the IIC may use documents provided by AWB for the purposes of its investigation and for any report. ...

3. ***Witness Interviews and Confidentiality*** – *The IIC will maintain in strict confidence the information gathered in the course of these interviews, and it will not provide any records of this information to third parties. However, AWB agrees that the IIC may use information that it gathers in the course of AWB interviews as well as the fact of these interviews for the purposes of its investigation and for any report. The IIC will provide AWB with reasonable notice of its request to interview any current AWB employee, officer, or representative as well as reasonable notice of any former AWB employee, officer, or representative for whom the IIC desires AWB's assistance in locating and interviewing. With respect to the IIC's interview of a person who worked for AWB in connection with the Programme, the parties understand that each interview will be on the record and for attribution. In advance of the interview, the IIC will submit a list of the subject areas to be addressed with the witness. At each interview, two representatives of the IIC will be present. A witness may have – at the witness's choosing – a personal legal counsel. In addition, if the witness agrees, up to two representatives of AWB may be present at each interview. A witness will advise the IIC prior to the interview who will be present on his behalf.'*

DISCLOSURES TO THE MINISTER FOR FOREIGN AFFAIRS

81 On 4 October 2005, a conversation took place between Lindberg, the Minister for Foreign Affairs, the Honourable Alexander Downer MP, Brendan Stewart, the chairman of AWB, and others. A minute of this meeting prepared by the Department states:

2. *Mr Downer said the IIC allegations were worse than he had thought. There was evidence presented by the IIC in the most recent letter. Mr Downer noted the letter claimed that Alia was a front company. He enquired what was the role of the Iraqi State Company for Water*

Transport (ISCWT). Mr Lindberg replied it was the port authority, which had responsibility for discharging goods from ships. Alia was not a front company and had provided transportation services. The AWB had been unaware of any wrongdoing and had used its services in good faith. Mr Downer said AWB needed to provide evidence. Mr Lindberg said AWB had been seeking additional information from the IIC about the claims, before providing a written response to the 26 September letter. The so-called evidence did not support the facts. AWB had provided explanations to the IIC which had been ignored. AWB could demonstrate that it had paid no kickbacks. Nor had AWB breached the sanctions regime. This had been confirmed by independent legal advice both in Australia and overseas (Richard Tracy in Australia and a Cornell University Professor who had previously participated in drafting the sanctions regime).'

The minute also records that later in the meeting Lindberg reiterated that ‘as far as AWB was aware, no one had been paid off nor any personal gain. AWB had acted in accordance with the sanctions regime and that this had been supported by legal advice.’

82 AWB objected to the admissibility of the Department’s minute on the ground that the statements contained in it were hearsay. There is, in my view, no substance in this objection. The document constitutes a business record which is admissible under s 69 of the *Evidence Act*. The definition of ‘business’ in clause 1(1) of Part 2 of the Schedule to the *Evidence Act* includes an activity engaged in or carried on by the Crown in any of its capacities. The document was tendered by the Commonwealth as evidence of the fact that the statements it records were made by Lindberg. The minute was prepared by Marc Innes-Brown, the head of the Department’s Iraq Task Force, who was present at the meeting. The representation in the minute that Lindberg made the statements attributed to him was therefore made by a person who had personal knowledge of what statements were made by Lindberg. Lindberg was questioned about the minute at the Commission and did not dispute its accuracy in any respect.

BLAKES’ SLIDE PRESENTATION

83 I have already referred to the presentation which Blakes made to AWB’s board on 25 May 2004. The slides recording Blakes’ presentation were originally withheld from production to the Commission on grounds of legal professional privilege. The objection was withdrawn in two stages. First, on or shortly before 6 April 2006, AWB withdrew its claim for legal professional privilege over the presentation, other than one page headed ‘Legal

advice'. This page set out the advice given by Mr Tracey QC in conference on 25 May 2004. On 7 April 2006, AWB withdrew the balance of the claim, basically because of the presentations which Hargreaves made to the Australian Government.

SENIOR COUNSEL'S ADVICE

84 When AWB revised its privilege claims and produced Blakes' presentation to the Commission, it also produced a memorandum of advice by Mr Tracey QC dated 12 August 2005 confirming the advice he gave in conference on 25 May 2004, together with the instructions and bundle of documents on which he founded that advice. Mr Judd, senior counsel for AWB, informed the Commission that AWB had taken the view that, as Mr Tracey QC's advice was based upon a review of documents, and turned on the question whether or not the documents disclosed evidence, the advice could not be separated from the documents. Therefore, AWB had determined to produce the bundle of material on which Mr Tracey QC had based his advice.

85 Mr Tracey QC's instructions from Blakes were dated 12 May 2000 but this appears to be an obvious error; the date should have read 12 May 2004. They requested him to advise whether, based on the documents and information provided to him, AWB and AWBI may have contributed to a contravention by Australia of its obligations under Resolution 661 or contravened any Commonwealth or State legislation.

86 In the instructions to counsel, Blakes said that it had deliberately included a significant number of AWB's documents for 1999 and 2000 as this was the key period during which the trucking fee was discussed. The documents included correspondence between AWB and GBI, AWB and other participants in the Iraqi wheat market, AWB and various shipping companies engaged to perform the ocean carriage of the wheat, and AWB and the Department. The instructions set out extracts from a number of AWB documents which, according to Blakes, contained comments as to the validity or otherwise of AWB's payment of trucking fees to Alia.

87 The instructions discussed the genesis of AWB's payment of trucking fees to Alia. GBI's invitation to AWB to tender dated 16 July 1999 requested a new price provision in the following terms:

“10 – PRICE

CIF free on truck to silo at all Governarate [sic]. Cost of discharge at Umm Qaser and land transport will be USD 12 per metric ton to be paid to the land transport co. For more details contact Iraqi Maritin [sic] in Basrah.”’

88 The instructions noted that AWB included a clause in broadly this form in its contracts A4653, A4654 and A4655 (all dated 14 July 1999) and A4822 (dated 14 October 1999). For instance, contract A4653 included the following terms as to shipment and price:

‘SHIPMENT To be shipped during 01 October 1999 to 31 December 1999 subject to receipt of appropriate UN approval.

...

The cargo will be discharged Free in to Truck to all silos within all Governates of Iraq at the average rate of ... The discharge cost will be a maximum of US\$12.00 and shall be paid by sellers to the nominated Maritime Agents in Iraq. This clause is subject to UN approval of the Iraq distribution plan.

PRICE The CIF, Free in Truck price per tonne of 1,000 kilos is ... UNITED [States] of America dollars as follows:’

In these contracts, the discharge cost of US\$12 pmt was added to the sale price of the wheat but the contract made no specific reference to ‘land transport’.

89 The instructions also stated that subsequent contracts between AWB and GBI (eg A4970, A4971 and A4972 dated 20 January 2000) continued to include a provision to the effect that the discharge costs would be a maximum amount (eg US\$15 pmt) and was to be paid by the sellers to the nominated maritime agents in Iraq. However, the signed contracts that were submitted to the United Nations (eg A4970, A4971 and A4972) did not include the above provision. Omitting any reference to discharge costs, the shipment clause in the contract submitted to the United Nations merely stated that the ‘cargo will be discharged free into truck to all silos within all Governates of Iraq at the average rate of 3,000 mt per day.’

90 From January 2000, all AWB contracts submitted to the United Nations followed the same format and made no specific reference to the payment of a discharge cost or a trucking

fee.

91 The instructions also said that the trucking fee in respect of contracts A4653, A4654, A4655 and A4822 was paid directly by AWB to Alia. For a time thereafter, payment of the trucking fee was effected by whichever shipping company had undertaken to provide the ocean carriage. However, after 25 July 2000 the procedure was then changed so that AWB remitted the funds direct to Alia. The instructions then set out the following observations:

'8. Comments on the "trucking fee"

The documents which instructing solicitors have examined do not indicate whether the trucking fees paid by AWB to Alia can be regarded as a genuine payment for the provision of inland freight services actually provided by Alia. We have not seen any contract between AWB and Alia. We have seen no evidence to indicate whether or not the trucks used to transport wheat after its discharge at Umm Qasr were provided by Alia. We have seen no explanation as to how the trucking fee was calculated or the basis upon which the trucking fee was subsequently increased. The trucking fee does not appear to have been calculated with regard to the differing distances between Umm Qasr and the various Governorates [sic] (cf. Tab 14).'

92 In his memorandum of 12 August 2005 confirming his oral advice given in conference on 25 May 2004, Mr Tracey QC discussed his instructions and the documentary evidence provided to him. Mr Tracey QC concluded as follows:

'Ultimately, however, the question that I was asked to advise on was whether there was evidence that AWB may have contributed to a contravention by Australia of its obligations under Resolution 661. A breach of that resolution would only have occurred if the trucking fees had been paid to the IGB or the Iraqi Government and then only if it was not paid for a legitimate commercial purpose. Whilst some of the material with which I have been briefed raises suspicions that there may have been a perception within the AWB that any payment of the trucking fee may have contravened Resolution 661 and that it was necessary to make the payment to Alia in order to avoid any suggestion that the payments, if made directly to the IGB, would have been in breach of the Resolution, there is absolutely no evidence in the material provided to me that any of the money paid by the AWB to Alia was ever forwarded to the IGB or any other arm of the Iraqi government. It was for this reason, that, despite some misgivings I answered the question posed for advice in the negative.'

93 Additional advice was sought from Mr Tracey QC in about June 2004. On this occasion, Blakes instructed Mr Tracey QC that it had now ascertained the basis of calculation of the increase in trucking fees that was applied to AWB's contracts after 2 November 2000.

Specifically, Blakes instructed Mr Tracey QC that an additional 10 per cent had been added to the price of wheat by way of an increase in the trucking fee. All subsequent contracts were priced on the same basis, ie a base price inclusive of a trucking fee, with 10 per cent of the base price then being added to the trucking fee. Mr Tracey QC was asked to advise whether his previous advice, to the effect that there was no evidence of a breach of the relevant UN resolution on sanctions, and no evidence of a breach by AWB of Australian domestic law, remained unchanged.

94 After Mr Tracey QC raised some queries, Quennell provided supplementary instructions as follows:

- '(a) each and every contract pursuant to which AWB supplied wheat to the Grain Board of Iraq under the Oil for Food Program was approved by the UN Committee; however, the price of the wheat as expressed in the contract was not broken down so as to identify the different components of the price, eg ocean freight and inland transport costs;*
 - (b) there was no apparent commercial justification for the increase;*
 - (c) ...*
- In the circumstances please advise on the above basis.'*

95 On 8 June 2004, Mr Tracey QC provided the following advice by email to Quennell:

'In the absence of commercial justification for the introduction, increases and decreases in the trucking fee and the lack of specific approval for the fee and its quantum by the UN there is reason to suspect that the fee (or part of it) was used as a kick-back to the IGB or persons associated with it. Whether the money was so used can only be determined by an investigation of the finances of the Jordanian trucking company which was the recipient of the trucking fees.

A further reason for suspecting the efficacy of the fee is Hogan's assertion that UN approval for its payment had been obtained. If this was not the case then a question arises as to why the assertion was made. Was it a deliberate attempt to mislead AWB management or did he make an honest mistake?

None of this establishes that the AWB or any of its employees is guilty of any offence or of breaching UN resolutions. What it does suggest is the need for further enquiries (if this is possible) to determine all the facts surrounding the payment of the trucking fee and, in particular, whether any part of it found its way to the IGB or any Iraqi officials.'

96 These communications between Blakes and senior counsel were marked 'RE: Project Rose'. They were produced to the Commission after AWB determined that privilege over the

documents had been waived by Hargreaves' disclosures to the Australian Government.

97 Mr Tracey QC provided a further memorandum of advice on 31 March 2005 confirming oral advice which he provided to his instructors the previous day. This memorandum is headed 'Re AWB Limited – Project Rose', and states:

1. *This memorandum confirms oral advice provided to my instructor yesterday.*
2. *I have been briefed with a series of documents which evidence various transactions and arrangements entered into by AWB Limited relating to the sale by it of wheat to Iraq. I have been asked to examine these documents with a view to advising whether the contents of any of them lead me to change [my] earlier advice that, on material earlier examined, there was no evidence of a breach by Australia (as a result of conduct by AWB) of UN Resolution 661 and no evidence of a breach by AWB, its officers and/or employees of Australian domestic law.*
3. *I confirm that there is nothing in the documents which causes me to vary advice earlier given.*
4. *There are some documents (for example the emails under tab 8A) which suggest that AWB paid port fees at the rate of US\$1,500 per vessel in 2001 and that such payments were "technically in breach of sanctions". The payments were known to the UN Sanctions Committee and to the Australian Mission to the United Nations. AWB was advised by the Australian Mission that this fee for normal port agency services did not violate current sanctions procedures. In confirming my earlier advice about breaches of Security Council Resolution 661 I have assumed that this advice was correct.*
5. *Some of the documents also contain evidence of attempts by Iraqi Government agencies to obtain direct payment for port fees and payments through Alia for inland transportation (for example, faxes under tabs 8, 9 and 14). The terms of these communications add to the concern which I expressed in my email of 8 June 2004. However, I note my instructions that there is no evidence of any payments of the kind contemplated in the documents briefed having been made. There is also some comfort for AWB in the repeated refusals of its officers to agree to the paying of US\$50¢ per metric ton port fees as demanded by Iraqi authorities (for example, documents collected under tabs 8 and 8A) but AWB's position was subsequently undermined by its agreement to incorporate the port fees into the inland transport fee which it paid to Alia (see under tab 11A).'*

98 The evidence tendered in this Court does not include any written instructions or other

documents supplied to Mr Tracey QC in relation to this request for advice, and it is unclear whether that material has been produced to the Commission.

FURTHER REPORTS TO AWB'S BOARD OF DIRECTORS

99 After 25 May 2004, the board of AWB received further reports concerning Project Rose. The evidence includes the redacted minutes of a meeting of the joint board committee of AWB and AWBI held on 27 April 2005 which is headed 'Project Rose – Joint Board Committee'. The minutes note that the managing director briefed the committee on Project Rose, but the balance of this entry has been excised on the ground that it is protected by legal professional privilege. There was no suggestion before me that the complete minutes have been produced to the Commission.

100 Cooper and Quennell exchanged emails on 27 July 2004. Scott Chesterman ('Chesterman') of Minters was copied into the exchange of emails. The subject matter of the emails was 'RE: Project Rose – AWB Board briefing for tomorrow'. The emails show that Cooper consulted both Quennell and Chesterman about the contents of the proposed AWB board briefing. Two passages have been excised from Quennell's email to Cooper of 27 July 2004 on the ground of legal professional privilege. The remaining passage states:

'One suggestion which was made at the last Board meeting was that we should conduct an investigation of Alia's structure, shareholding etc (I think the idea may have come from Chris Moffatt). The decision was subsequently taken (by management) not to go down that route.'

101 The evidence in this Court includes a slide presentation entitled 'Project Rose – AWB Limited Board Briefing – 28 July 2004'. The document includes a page headed 'Initial Legal Advice' which is otherwise blank, presumably on the ground that it is still the subject of a claim for legal professional privilege. It also includes a page relating to Alia which states:

'Alia for Transportation and General Trade Company

- *A Jordanian company based in Amman, Jordan*
- *Owned 51% by the Al-Khawam family based in Iraq*
- *Chairman is Mr Hussain Al-Khawam*
- *Directly reporting to him is the General Manager, Mr Othman Al-Absi (AWB's most frequent contact)*
- *Apparently 49% owned by the Iraqi Ministry of Transport*
- *The company was formed in 1995 as a joint venture with the Iraqi*

Ministry of Transport

- *Al-Khawam's clan is prominent in southern Iraq and in Jordan. His father led a rebellion against the British mandate in Iraq in 1920 and against a British-backed government in 1935.'*

The document concludes with a statement that AWB's strategy includes the full engagement of Australian Government support.

102 The evidence in this Court also includes a handwritten note dated 10 March 2005 of a joint meeting of directors of AWB and AWBI. The note is headed 'Project Rose' and it shows that the joint boards were briefed on matters relating to the payment of trucking fees to Alia and the question of any breach by AWB of Resolution 661.

LEGAL ADVICE CONCERNING RESOLUTION 661

103 AWB also produced to the Commission the instructions which ABL gave to Sir Anthony Mason on 16 September and 20 October 2005, and Sir Anthony Mason's expert opinion dated 24 October 2005. The specific questions upon which Sir Anthony Mason was asked to express an expert opinion were:

- '(i) Did the inclusion, on the insistence of the Iraqi Grain Board, of an inland delivery payment term in its wheat contracts with AWB violate the UN sanctions against Iraq that started with Resolution 661 in 1990 and continued until the Oil-for-Food Program ended in 2003?*
- (ii) Did the UN sanctions Resolutions prohibit AWB from paying fees for the inland delivery of wheat to a transport company?'*

The instructions summarised legal advice which AWB had already obtained both in Australia and in the United States as to the applicability of Resolution 661 and concluded with the following statement:

'In summary, AWB's payment of the trucking fees to Alia, as directed by the IGB, was consistent with the 661 Resolution exemption for payments to commercial enterprises in Iraq in humanitarian circumstances for foodstuffs, and also with the overall humanitarian purposes of the OFF Program reflected in Resolution 986. That the IGB negotiated the trucking fees directly with Alia, without any involvement on AWB's part, was also consistent with the IGB's responsibility, on behalf of the MOT [Ministry of Transport], to ensure the equitable distribution of wheat throughout the country, in accordance with the state-controlled PDS [Public Distribution System] administered by MOT.'

104 AWB's revised list of documents includes two opinions dealing with the applicability of Resolution 661, namely Mr Tracey QC's memorandum of advice dated 22 September 2005 (documents 541 and 543) and Professor David Wippman's advice dated 27 September 2005 (document 544). I infer that Professor Wippman is the Cornell University professor who Lindberg identified in the course of his meeting with Minister Downer on 4 October 2005. AWB has maintained its claim that privilege attaches to these documents.

105 The instructions to Sir Anthony Mason did not contain any specific reference to legal advice that AWB had obtained in the course of Project Rose. They did, however, state that there was no evidence available to AWB during the currency of the OFF Programme to suggest that payments made to Alia were, or might have been, remitted to the Iraqi regime or to individuals in the regime.

LINDBERG'S EVIDENCE TO THE COMMISSION

106 The Commonwealth contended that in the course of his evidence to the Commission, Lindberg voluntarily, repeatedly and at times non-responsively disclosed the gist or substance of legal advice that AWB had obtained in the course of its Project Rose investigations.

107 In support of this submission, the Commonwealth tendered relevant extracts from the transcript of Lindberg's evidence to the Commission. AWB initially objected to the tender of any passages from the Commission transcript on the ground that it was hearsay, or irrelevant, or alternatively it reflected evidence given under compulsion that ought to be excluded by the Court in the exercise of its discretion under s 135 of the *Evidence Act*. However, AWB withdrew its objection during the course of the hearing.

108 The transcript shows that Lindberg explained the origins of the Project Rose review, and the conclusions it reached, without any objection being raised by AWB's counsel that the evidence intruded into areas protected by AWB's legal professional privilege.

109 Lindberg told the Commission that, following public allegations that AWB had paid kickbacks to the Iraqi regime, he asked Cooper to institute inquiries to ascertain whether any of those allegations could be substantiated. Lindberg said he understood that the review commenced in mid 2003 and that Cooper was assisted by legal advisers. The purpose of the

review was to determine whether the allegations had any substance in fact, that is to say whether they were true. When asked when the review concluded, Lindberg said:

'A. Well, it concluded in the – it concluded in the lead-up or as part of the overall inquiry process and, in fact, it continued through that process. So I'm not sure it's accurate to say that it concluded; it undertook certain investigations and it reported periodically, and it didn't find any evidence to substantiate the allegations.'

110 When asked by the Commissioner whether there were any records concerning the establishment of the Project Rose review or its periodical reports to the board of AWB, Lindberg answered as follows:

'A. My evidence is that I don't recall there being a written record of the brief. There certainly were reports, oral reports, quite extensive reports given to both the boards of AWB International and AWB Limited and there were a number of reports, and the findings of those reports are recorded in the minutes and the basis of those findings has been communicated in letters that have been sent to the government and elsewhere.'

Q. But all of the reports to the two boards you mentioned were oral; is that right ?

A. To the best of my knowledge, that is so.

[MR AGIUS:] Q. Can you recall whether or not, in the course of any of these oral reports, anything was said about whether or not the AWB had engaged in conduct in breach of the UN sanctions ?

A. I can't recall. Clearly we found nothing that led us to believe that we weren't operating through the authorised process.

Q. The "authorised process" being the process which --

A. To get UN approval for contracts into Iraq.'

111 Lindberg gave evidence that Project Rose had concluded that AWB's contracts for the sale of wheat had been approved by the United Nations. He also said that he became aware during the course of Cooper's legal review that trucking fees were incorporated into the contract price and paid to the trucking company.

112 When asked about the allegation in the draft report by the IIC that contracts had been inflated by 10 per cent because of a direction from the Iraqi regime, Lindberg said he only became aware of that fact as a result of the IIC investigation and in preparation for the Commission. He said that Cooper's review did not reveal the 10 per cent addition to the

contract prices:

'Well, as I say, we had made inquiries and we found no evidence of that and no-one told me'.

113 In the same context, Lindberg said that as the IIC had commented on the imposition of after sales service fees, he asked Cooper, who obtained the assistance of Ferrier Hodgson, to review all the payments. Lindberg said that '[t]hey found no evidence of payments being made by AWB so characterised ... There were inland transport payments, but no 10 per cent service fee payments'.

114 Later in his evidence, Lindberg was asked about the findings recorded in AWB's board minute of 26 May 2004:

Q. Were you satisfied with those findings as at 26 May 2004?

A. Yes.

Q. Were you satisfied that, as at the date of that report, 26 May 2004, the transportation fee had never been used as a conduit for the payment of money by the AWB to any Iraqi entity?

A. Well, that was the finding.

Q. Were you satisfied with that?

A. I had no reason to question it.'

115 The evidence tendered to this Court concerning Project Rose is obviously far from complete. It is likely to represent a fraction of the evidence available to the Commission. Nonetheless, it represents the evidence that the Commonwealth has relied upon for its contention that there has been a wholesale waiver by AWB of legal professional privilege in relation to the Project Rose investigations. The Commissioner has not adduced any additional evidence in this Court. Consequently, I must determine whether legal professional privilege has been waived in relation to Project Rose documents on the basis of the evidence before me.

AWB'S DISCLOSURES IN RELATION TO PROJECT WATER

116 The Commonwealth contends that AWB has disclosed the gist of legal advice which it obtained in connection with Project Water and, consequently, it should be taken to have waived privilege over other documents associated with Project Water. It relies upon:

- (a) the broad terms in which AWB made disclosures to the IIC and to the Australian Government in the course of 2005, as discussed above; and
- (b) the disclosures which AWB made to the Commission through oral evidence given by its officers and employees and the production of documents.

117 I have already described the general nature and scope of Project Water. Acting on Cooper's instruction, Quennell commenced the investigations known as Project Water on 12 August 2004 and those investigations resulted in a report to AWB's board on 14 December 2004.

118 In his evidence to the Commission, Cooper said that Quennell briefed him on his findings and that he relied on Quennell's advice. On 10 September 2004, Cooper gave Lindberg a report on the state of the Project Water investigation. Cooper also said that, as a result of Quennell's investigations, he learnt that wheat contracts had been inflated to incorporate an amount relating to the debt owed to Tigris by GBI.

119 Cooper attended a board meeting of AWB on 14 December 2004 at which the board was briefed as to the results of the investigation of the Tigris matter. Cooper's handwritten note of proceedings at the board meeting on 14 December 2004 includes a statement that:

'I have checked compliance with all necessary laws and confirm there have been no breaches.'

Cooper's evidence to the Commission was that this statement recorded something that was said by Lindberg. On the other hand, the evidence given by Lindberg and Scales to the Commission attributed this statement to Cooper.

120 Lindberg's evidence to the Commission was that he asked Cooper to institute a legal review to determine how AWB should deal with the money it had received. Lindberg was cross-examined on the basis that the file note of 14 December 2004 recorded a statement made by Cooper. Lindberg told the Commission he could not recall who made the statement.

121 Lindberg told the Commission that the contract price of wheat was inflated in certain contracts to allow for the recovery of the Tigris debt from GBI. The contracts were sent to

the United Nations for approval and approval was obtained. Lindberg then referred to the legal advice that had been obtained after the money had been collected from the United Nations' escrow account:

'The next time we considered the Tigris matter was when the money had been collected and the Oil-for-Food Program had ceased; that's when the money was there. And the question arose what to do with that money. After taking advice, it was decided that the money should be paid because, after all, it was for a wheat debt and a wheat cargo delivered under the sanctions program, and people will say that that was done with the full knowledge ... of the United Nations and the government at the time.'

122 Lindberg expanded somewhat on the legal advice that AWB obtained. He said that AWB took advice as to whether or not it was legal to make the payment to Tigris. He also said that the legal advice did not relate to the lawfulness or otherwise of the conduct of the AWB employees who had inflated the prices which were reflected in the contracts. When asked what he did when he found out that the United Nations had been deceived into approving contracts which had inflated prices for wheat, Lindberg answered:

'Well, the Oil-for-Food Program had ceased. Having a view that it was for the payment – basically the delayed payment for a wheat shipment, having the understanding that that had occurred - ... with the understanding of the UN and our government in the first place going in – we recovered the money and, having recovered the money, and there were various options talked about, and I wasn't aware of what the final option was or how it occurred, the detail of how it occurred – having recovered the money, we took advice about what to do about it and it was decided to pay it.'

123 Lindberg also confirmed in his evidence to the Commission that the payment to Tigris was only made after the matter had been reviewed by Cooper, legal advice had been considered, and the matter had been taken to AWB's board.

124 In her evidence to the Commission, Scales said that she went to see Cooper because she wanted to make sure that everything was legal and there was an agreement to support the payment to Tigris of the money that was sitting in AWBI's account. She said that she wanted external legal advice because she was concerned about whether any United Nations' sanctions had been breached and whether it was therefore appropriate for her to authorise payment to Tigris. She confirmed that Cooper set in train a process of obtaining external legal advice that involved a review of the whole Tigris event. She said that she believed that

it was Cooper who made the statement to the AWB board that is recorded in Cooper's file note of 14 December 2004.

125 After legal advice had been obtained, Scales and Cooper signed the authorisation for the sum of US\$7,087,202.24 to be paid out of AWBI's account to Tigris on 6 December 2004. Scales' evidence to the Commission was that:

'I authorised the payment because the recommendation from senior counsel was to do so, and I believe there was a period of time where there was some – I don't know – confusion, certainly in my mind, as to whether it was a debt recovery or for services rendered, because of the half million to one million tonnes issue, and I was assured during that process that, you know, it was fine to authorise payment.'

126 In the course of 2005, AWB made numerous disclosures concerning the outcome of the legal review which it had undertaken. The Commonwealth submits that these disclosures (which are discussed at [72] to [115] above) were expressed in such broad terms that they should be regarded as encompassing both the outcome of the Project Rose investigations and the outcome of Project Water.

IMPUTED WAIVER

127 The crux of the Commonwealth's case is that AWB has disclosed the gist or substance, and in some cases the entirety, of legal advices it obtained as a result of the Project Water and Project Rose investigations. In these circumstances, the Commonwealth contends that the law will impute a waiver of privilege over associated documents. It argues that the associated documents comprise documents that were brought into existence as a result of the Project Rose and Project Water investigations respectively or, at the very least, all of the investigatory reports, documents and communications that directly or indirectly represented the foundation for the advices that have been disclosed by AWB.

128 The kind of waiver that is in issue in this case is commonly referred to as imputed or implied waiver. The former expression is preferable, as it reflects the way in which the High Court expressed the governing legal principles in *Mann v Carnell* (1999) 201 CLR 1 (*'Mann'*).

129 In *Mann* at 13 [29], Gleeson CJ, Gaudron, Gummow and Callinan JJ said:

'Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by operation of law". This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege. Thus, in Benecke v National Australia Bank, the client was held to have waived privilege by giving evidence, in legal proceedings, concerning her instructions to a barrister in related proceedings, even though she apparently believed she could prevent the barrister from giving the barrister's version of those instructions. She did not subjectively intend to abandon the privilege. She may not even have turned her mind to the question. However, her intentional act was inconsistent with the maintenance of the confidentiality of the communication. What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.'

130 The concluding part of this passage draws attention to the fact that the test for imputed waiver had previously been expressed in terms of fairness: see *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 (*'Maurice'*) at 481 per Gibbs CJ, 487–488 per Mason and Brennan JJ, 492–493 per Deane J, and 497–498 per Dawson J. Under the test propounded in *Mann*, it is inconsistency between the conduct of the client and the maintenance of the confidentiality that the privilege is intended to protect which effects a waiver of the privilege. Fairness has become a subsidiary consideration; it may be relevant to the court's assessment of inconsistency in some contexts but not in others.

131 In *Commissioner of Taxation v Rio Tinto Limited* [2006] FCAFC 86 (*'Rio Tinto'*) at [44], the Full Court (Kenny, Stone and Edmonds JJ) said that there was a good deal of doubt whether the language used by the majority in *Mann* worked any real change in the principle which governs imputed waiver. This observation was made somewhat tentatively and was not material to the Court's decision. My own view is that a test expressed in terms of inconsistency more readily accommodates the variety of situations in which questions of imputed waiver can arise than a test expressed in terms of fairness. The criterion of fairness is readily understandable in the context of inter partes litigation, but it is difficult to apply sensibly in other contexts: see the observations by McHugh J in *Mann* at 40 [128] and Toohey J in *Goldberg v Ng* (1995) 185 CLR 83 (*'Goldberg v Ng'*) at 110.

132 AWB submitted that this Court should hold that there has been no imputed waiver because the Commonwealth has made no attempt to identify why it would be unfair or inequitable for AWB to maintain privilege in the underlying investigations. This submission immediately raises the question – unfair or inequitable to whom? I doubt that any question arises of fairness to the Commission – it is an arm of the executive government charged with the investigation of specified matters. Nor does any question arise of fairness to the Commonwealth. Fairness presupposes a balancing of interests between parties who are in dispute. In that context, partial disclosures raise a question of fairness because there is the capacity to mislead one party to the dispute to his or her detriment. These concepts do not translate easily to the present case: cf McHugh J in *Mann* at 40 [127]-[128]. There is also the difficulty that, outside the framework of an inter partes dispute, fairness is truly a term of ‘indeterminate reference’: *Mann* at 40 [129] per McHugh J, citing RJ Desiatnik, *Legal Professional Privilege in Australia*, 1999, p 122.

133 *Mann* anticipated that there will be cases in which considerations of fairness have little or no role to play. This is such a case. The broad question posed by *Mann* is whether, and to what extent, AWB’s disclosures are inconsistent with the maintenance of confidentiality in the documents which are at issue in these proceedings. This question wraps up several subsidiary issues, in particular whether AWB’s disclosures involved, on each occasion, a disclosure of the gist or substance of its legal advice, whether AWB consciously deployed that advice so as to advance its own commercial or other interests, and, if so, whether that disclosure has resulted in an imputed waiver of privilege over any and what associated materials.

134 In any application of *Mann*, the starting point must be an analysis of the disclosures or other acts or omissions of the party claiming privilege that are said to be inconsistent with the maintenance of confidentiality in the privileged material: see *Rio Tinto* at [45]. The disclosures in question here were made variously to the IIC, to the Australian Government, to the Commission and in some instances via the procedures of the Commission to the public at large. In my opinion, there is no reason why these disclosures cannot support a finding that AWB has waived legal professional privilege over associated material.

135 AWB submitted that imputed waiver cannot arise in the context of a commission

established under the RCA. Alternatively, it submitted that the coercive and inquisitorial context in which the alleged waiver has taken place is an important factor which strongly militates against waiver. These submissions ignore the voluntary disclosures that AWB made to the Australian Government. In any event, I am not persuaded that AWB's disclosures to the Commission and the IIC are incapable of giving rise to an imputed waiver.

136 Leaving aside any question of waiver, AWB was entitled to maintain legal professional privilege in the course of proceedings before the Commission and, by and large, it sought to do so. To the extent that AWB has already produced documents to the Commission containing legal advice or instructions, it did so because it recognised that actions it had taken outside the Commission had the consequence of waiving privilege over those documents. As for the oral evidence that the Commonwealth now relies upon, Lindberg, Cooper and Scales were senior executives of AWB when they gave that evidence to the Commission. There is nothing before me to suggest that they were not speaking as executives of AWB when they gave their evidence, or that their evidence fell outside the scope of their authority from AWB. Further, their evidence was given in the presence of AWB's legal representatives, without any objection being raised on grounds of legal professional privilege. Lindberg, Cooper and Scales may have been compelled to give evidence at the Commission, but they were under no compulsion to reveal the gist or substance of legal advice that had been obtained by AWB.

137 In these circumstances, I infer that the relevant evidence given by Lindberg, Cooper and Scales was given with the authority or acquiescence of AWB. I also infer that AWB was content for the evidence to be given at public hearings of the Commission, having regard to its own commercial interests. The evidence before me makes it clear that AWB was concerned to defend its integrity and commercial reputation in the course of the Commission's hearings. I infer that AWB made the assessment that it would advance its commercial interests if it were to be known publicly that it had undertaken extensive legal reviews and that, as a result, it had obtained legal advice that there was no evidence that it had engaged in any improper or unlawful conduct in breach of the United Nations' sanctions. AWB was content for information of this character to be disclosed publicly in relation to both Project Rose and Project Water.

138 It would, of course, be a different case if the documents and information that the Commonwealth relies upon were disclosed under legal compulsion. On any view, the fact that documents and information were disclosed under compulsion would be very relevant to the question whether the person claiming privilege had engaged in inconsistent conduct. There is, moreover, authority to the effect that a production of documents or evidence under compulsion will not result in any waiver of privilege: *Goldman v Hesper* [1988] 1 WLR 1238 ('*Goldman*'); *Trans America Computer Co Inc v IBM Corporation* 573 F2d 646 (9th Cir 1978) ('*Trans America*') at 651.

139 AWB's disclosures to the IIC were not made under legal compulsion. They were made by choice under a confidentiality regime negotiated by AWB. The Memorandum of Understanding between AWB and the IIC provided that AWB could withhold documents from the IIC on grounds of commercial sensitivity or legal professional privilege, or if there was a risk that AWB, its officers or employees would be exposed to breaches of Australian law. It also provided that any interviews conducted by the IIC of AWB officers or employees could be undertaken in the presence of a personal legal counsel and/or up to two representatives of AWB. AWB thereby retained the right to object to any question that intruded into areas protected by legal professional privilege. On the evidence before me, including in particular the various briefings which Hargreaves gave to the Australian Government, it is clear that AWB decided that it needed to cooperate, and be seen to cooperate, with the IIC so as to retain the support of the Australian Government and to protect and defend its commercial reputation.

140 I do not agree with AWB's submission that, even if its disclosures were not compelled by law, the inquisitorial context in which they took place is a factor which strongly militates against waiver. In Australia, legal professional privilege is a fundamental common law right that can be asserted outside the context of adversarial litigation. It can, for instance, be invoked to resist the production of documents in answer to a search warrant or the giving of information or the production of documents pursuant to coercive statutory powers or notices: *Daniels* at 552-553 [9]–[11] and 563 [44]; *Baker v Campbell* (1983) 153 CLR 52. As legal professional privilege can be invoked outside the context of judicial or quasi-judicial proceedings, logic suggests that it should be capable of being waived if the claimant engages in conduct that is inconsistent with the maintenance of the confidentiality that the privilege is

intended to protect. It should not matter whether the conduct takes place within, or outside, the framework of the proceedings or investigatory process in which a demand has been made for the production of privileged documents or information. The crucial question is whether the conduct is inconsistent with the maintenance of confidentiality.

141 The disclosure of privileged communications to a third party can result in an imputed waiver of privilege, even if there is no intention of waiving privilege and the disclosure is for a limited and specific purpose. In *Mann*, the Chief Minister of the Australian Capital Territory conveyed legal advice, on a confidential basis, to a member of the Territory's Legislative Assembly to enable him to consider the reasonableness of the Government's decision to settle certain legal proceedings. The majority decision turned on the fact that the disclosure to a member of the Legislative Assembly was not regarded as disclosure to a third party. In their joint judgment, Gleeson CJ, Gaudron, Gummow and Callinan JJ said at 15 [35] that:

'The purpose of the privilege being to protect the Territory from subsequent disclosure of the legal advice it received concerning the litigation instituted by the appellant, there was nothing inconsistent with that purpose in the Chief Minister conveying the terms of that advice, on a confidential basis, to a member of the Legislative Assembly who wished to consider the reasonableness of the conduct of the Territory in relation to the litigation.'

However, their Honours also observed that, while the voluntary disclosure of privileged legal advice to a third party will not necessarily waive privilege, it can do so. They said that *Goldberg v Ng* illustrates that, depending on the circumstances, the disclosure of a privileged communication to a third party for a limited and specific purpose, and on terms as to confidentiality, can have the consequence of waiving privilege.

142 McHugh J dissented. In his view, any disclosure of privileged material to a third party who is a stranger to the privileged relationship (ie to a person who is not the lawyer or the client) should have the consequence that privilege in that material is waived as against the world: at 34 [108], 37-38 [118], 42 [133]-[134]. As I read his Honour's judgment, the key reason why his Honour preferred a bright line rule of this kind is that it would ensure that legal professional privilege was not extended beyond the rationales that support it (at 37 [117]-[118]):

'Ensuring candid communications between a lawyer and a client is unlikely to

be endangered if a privilege holder is held to waive privilege because he or she has voluntarily disclosed the communication to a stranger. Whether the communication will be disclosed in the future to a stranger to the privilege is entirely within the control of the client. At that stage, the client will determine whether his or her interests are best served by retaining the privilege or disclosing the communication. But it is difficult to see how the possibility of voluntary disclosure will prevent the client being candid with his or her lawyer. ...

*A client who voluntarily discloses privileged information to a stranger to the privileged relationship has made a choice, based no doubt on considerations personal to him or her, that the purpose for which the communication is disclosed to the stranger is more important than protecting the absolute confidentiality of the communication by preventing the stranger from having knowledge of it. The person may be encouraged to do so, as in *Goldberg v Ng*, by an expectation that the stranger will not further disclose the communication. But in my opinion, if privileged material is voluntarily disclosed to a stranger to the privileged relationship, the fact that it may be received under an obligation of confidence should not be relevant to whether privileged is waived.'*

On the facts, McHugh J considered that disclosure to a member of the Legislative Assembly who was not a member of the Executive Government was relevantly a disclosure to a stranger to the privileged relationship: at 44 [139].

143 In *Goldberg v Ng*, the respondents sued their solicitor, Goldberg, for failure to account for monies received and disbursed by him as their solicitor. They also made a professional conduct complaint against him to the Law Society of New South Wales. In answer to the complaint, Goldberg prepared statements, with annexures that included a draft brief to counsel, and submitted them to the Society's professional conduct department. In doing so, Goldberg told the Society that the statements and the annexures were confidential and he wished to retain his legal professional privilege in them. The Society dismissed the complaint on the ground that there was no evidence of professional misconduct or unsatisfactory professional conduct. Subsequently, in the course of the Supreme Court proceedings instituted by the respondents against Goldberg, the respondents served a subpoena on the Society requiring it to produce documents relating to the complaint against Goldberg.

144 All of the members of the High Court held that there had been no express or intentional waiver by Goldberg of his legal professional privilege in the statements and

annexures. The issue that divided the Court was whether waiver should be imputed by operation of law. Deane, Dawson and Gaudron JJ held at 100-102 that it should because the professional complaint and the Supreme Court proceedings were but different emanations of the one dispute, and Goldberg's provision of the statements to the Society was voluntary and for the calculated purpose of demonstrating the reliability of his denial of the alleged failure to account. Their Honours analysed the issue in terms of 'fairness', but they could equally, and perhaps more appropriately, have done so in terms of inconsistency.

145 Toohey and Gummow JJ dissented in separate judgments. Each expressed the view that waiver should not be imputed because the disclosures by Goldberg were made to a third party for a limited and specific purpose. Toohey J said at 110 that the following factors militated strongly against any implied or imputed waiver: first, Goldberg disclosed material to the Society because of a complaint against him on an undertaking by the Society that the contents would be kept confidential; secondly, the disclosure was made in the context of the Society's investigation of a complaint in pursuance of its statutory powers and, consequently, it could be regarded as having been made for the purposes of the Act; and thirdly, the disclosure was confined to the Society. Gummow J said at 123 that, as the disclosures were made in the context of compulsory statutory processes, the circumstances of the case supplied no sufficient reason for depriving Goldberg of privilege, even allowing for the advantage he sought to gain by making the disclosure.

146 The case of *Restom v Battenberg* [2006] FCA 781 provides an example of a case where disclosures to a third party triggered a waiver of legal professional privilege. In the course of bankruptcy proceedings, the debtor claimed privilege over a letter that passed between his Australian and Scottish solicitors. Stone J held that the disclosure of the contents of the letter to the Scottish Employment Tribunal was inconsistent with the maintenance of confidentiality in the letter and constituted a waiver of privilege.

147 In *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275, which predated *Goldberg v Ng* and *Mann*, Giles J held that a limited and specific disclosure of privileged material, on terms of confidentiality, did not result in a loss of privilege. In *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (1999) 165 ALR 253, Sackville J said that it follows from *Goldberg v Ng* that the disclosure of a privileged communication for

a limited purpose and subject to a confidentiality requirement may, or may not, amount to a waiver of privilege, depending on the circumstances of the case: at 262-263 [42]-[43]. On the facts of that case, Sackville J held that a disclosure of legal advice to the solicitors and representatives of two other companies, on strict terms as to confidentiality and for the purpose of those other companies obtaining legal advice, did not result in an imputed waiver. His Honour distinguished *Goldberg v Ng* as a case in which the disclosure was made to gain an advantage over the opposing party in related litigation: at 263 [45].

148 There are several English cases in which disclosure to a third party for a limited and specific purpose has not resulted in a loss of privilege: *British Coal Corporation v Dennis Rye Ltd (No 2)* [1988] 1 WLR 1113 (*'British Coal'*); *Goldman*; and *Gotha City v Southeby's (No 1)* [1988] 1 WLR 1114.

149 In *British Coal*, Neill LJ (with whom Stocker LJ and Dillon LJ agreed) held that the disclosure of documents by the plaintiff to the police to assist in a criminal investigation and criminal trial did not constitute a waiver of the privilege. Neill LJ said at 822:

'In my judgment the action of the plaintiff in making documents available for the purpose of the criminal trial did not constitute a waiver of the privilege to which it was entitled in the present civil proceedings. Its action in regard to both the category A and the category B documents was in accordance with its duty to assist in the conduct of the criminal proceedings, and could not properly be construed as an express or implied waiver of its rights in its own civil litigation. Indeed, it would in my view be contrary to public policy if the plaintiff's action in making the documents available in the criminal proceedings had the effect of automatically removing the cloak of privilege which would otherwise be available to them in the civil litigation for which the cloak was designed.'

150 In *Goldman*, the Court of Appeal considered the effect of a statutory requirement that a claimant for costs must disclose privileged materials to the Court's taxing officers. Taylor LJ (with whom Woolf LJ and Lord Donaldson MR agreed) said that once a party puts forward privileged documents as part of his case for costs, the privilege is relaxed temporarily and *pro hac vice*. If the taxing officers felt compelled by natural justice considerations to disclose part or all of the contents of a privileged document to the opposite party, that disclosure would be for the purposes of the taxation only and would not amount to a waiver that prevented the owner of the document from reasserting privilege in any

subsequent context: at 102. McHugh J took a stricter view in *Giannarelli v Wraith (No 2)* (1991) 171 CLR 592. His Honour noted that in Victoria, unlike in England, a litigant can refuse to produce documents to the taxing master on the grounds of legal professional privilege. However, McHugh J said that if the litigant chooses to produce privileged documents to the taxing master, then the litigant will be taken to have waived privilege and must let the opposing parties see the documents. His Honour did not countenance any middle course under which privilege could be waived solely for the purposes of the taxation and then re-asserted in some other context: at 607.

151 The general rule adopted in the United States is that any voluntary disclosure of privileged communications by a client to a third party breaches the confidentiality of the attorney-client relationship and therefore waives the privilege, not only as to the specific communication disclosed but as to all other communications relating to the same subject matter: see *Weil v Investment/Indicators Research and Management Inc* 647 F2d 18 (9th Cir 1981) at 24; *United States v Aronoff* 466 FSupp 855 (DC NY 1979) at 862 [9]-[10]; *In re Sealed Case* 676 F2d 793 (DC Cir 1982) (*'re Sealed Case'*) at 809 [6]-[7]; *United States v AT & T Co* 642 F2d 1285 (DC Cir 1980) at 1299; cf *Diotima Shipping Corp v Chase, Leavitt & Co.*, 102 F.R.D. 532 (D Me 1984); *von Bulow v von Bulow*, 114 F.R.D. 71 (SD NY 1987); and T Harman, *Fairness and the Doctrine of Subject Matter Waiver of the Attorney-Client Privilege in Extrajudicial Disclosure Situations* (1988) University of Illinois Law Review 999.

152 The US courts have also considered whether a disclosure of privileged material to government investigators will have the consequence of waiving privilege. In *re Sealed Case*, the United States Court of Appeals for the District of Columbia considered whether a corporation that had submitted its own investigating counsel's report into alleged bribes and improper payments to the Internal Revenue Service and the Securities and Exchange Commission ('SEC') pursuant to voluntary disclosure programs had thereby impliedly waived its privilege over documents which were clearly identified in the report. The Court held that, by revealing part of privileged communications to the agencies to gain a commercial advantage, the corporation had made a disclosure which was inconsistent with the maintenance of confidentiality. Accordingly, the Court held that the corporation had waived privilege as to all other communications relating to the same subject matter.

153 The principle applied by the Court was that (at 818 [29]):

'Courts need not allow a claim of privilege when the party claiming the privilege seeks to use it in a way that is not consistent with the purpose of the privilege. Thus, since the purpose of the attorney-client privilege is to protect the confidentiality of attorney-client communications in order to foster candor within the attorney-client relationship, voluntary breach of confidence or selective disclosure for tactical purposes waives the privilege. Disclosure is inconsistent with confidentiality, and courts need not permit hide-and-seek manipulation of confidences in order to foster candor.'

154 The Court rejected an argument that waiver should not be imputed because the corporation had disclosed the investigating counsel's report for specific and limited purposes only. In doing so, it declined to follow the decision in *Diversified Industries Inc v Meredith* 572 F2d 596 (8th Cir 1977) (*'Diversified Industries'*) at 611 in which the Eighth Circuit Court of Appeals held that disclosures to the SEC under a voluntary disclosure program did not constitute a waiver to anyone but the SEC. It noted that the decision in *Diversified Industries* was rejected in *Permian Corp v United States* 665 F2d 1215 (DC Cir 1981) at 1220-1222 on the ground that it unnecessarily expanded the scope of attorney-client privilege: see also *In re Weiss* 596 F2d 1185 (4th Cir 1979) at 1186. Like the District Columbia Circuit, the First, Third, Fourth, Sixth and Federal Circuit Courts of Appeal have rejected the approach adopted by the Eighth Circuit in *Diversified Industries*: see AM Pinto, *Cooperation and Self-Interest are Strange Bedfellows: Limited Waiver of the Attorney-Client Privilege through Production of Privileged Documents in a Government Investigation* (2004) 106 West Virginia Law Review 359, p 372; RH Porter, *Voluntary Disclosures to Federal Agencies – Their Impact on the Ability of Corporations to Protect from Discovery Materials Developed During the Course of Internal Investigations* (1990) 39 Catholic University Law Review 1007, pp 1029-1052.

155 The US courts have accepted that there will be no imputed or implied waiver of privilege if the disclosure of the privileged material is involuntary and compelled by law: see eg *Trans America*.

156 The Canadian courts apply a waiver test that is based on considerations of fairness and consistency: see *S & K Processors Ltd v Campbell Ave Herring Producers Ltd* (1983) CPC 146 (BCSC) at 150; *Professional Institute of the Public Service of Canada v Canada*

(*Director of the Canadian Museum of Nature*) [1995] 3 FC 643; *British Columbia (Securities Commission) v BDS* (2000) BCJ No 2111 (BCSC), affirmed (2003) 226 DLR (4th) 393; and RD Manes and MP Silver, *Solicitor-Client Privilege in Canadian Law*, Butterworths, 1993, p 207. As in the United States, waiver will not be imputed if privileged material is produced to a government regulator under compulsion of law.

157 Putting to one side its provision of Mr Tracey QC's advices and instructions and its briefings to the Australian Government, AWB disputed that the disclosures it made to the IIC and the Commission disclosed the gist or substance of legal advice that AWB obtained as a result of Project Rose or Project Water. It contended that these disclosures did no more than refer to the existence of legal advice, without disclosing its substance. Alternatively, AWB argued that the record of Lindberg's interview with the IIC, and the evidence given to the Commission by Lindberg, Cooper and Scales, cannot be related to any particular piece of legal advice, other than that provided by Mr Tracey QC.

158 The applicable principles are set out in my decision in *AWB v Cole* at [135]–[139]. The authorities draw a distinction between a mere reference to the existence of legal advice, which will not usually amount to a waiver, and cases in which the gist or substance of the legal advice has been disclosed: see *Maurice* at 481, 488 and 493; *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 70 ALJR 603 at 607; *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 40 NSWLR 12; *Adelaide Steamship Co Ltd v Spalvins* (1998) 81 FCR 360 at 376-377; and *Bennett v Chief Executive Officer of the Australian Customs Service* (2004) 140 FCR 101 ('*Bennett*') at 104-105 [6]–[9].

159 In *Bennett*, the Full Court (Tamberlin, Emmett and Gyles JJ) held that legal representatives of the Australian Customs Service had waived privilege in legal advice by stating openly that they had given advice to Customs that a particular regulation did not prohibit public comment by an officer on matters of public administration. The trial judge had held that a disclosure of the legal position or stance that a lawyer had advised a client to take was not inconsistent with the maintenance of confidentiality in the communication giving the advice. The trial judge also appeared to draw a distinction between statements which disclose the conclusion or logical result of legal advice, and statements which disclose the content of the legal advice and its reasoning: see Tamberlin J at 105 [10] and Gyles J at

118 [61]. The Full Court rejected this approach. Gyles J stated at 119 [65] that the voluntary disclosure of the gist or conclusion of the legal advice amounts to waiver in respect of the whole of the advice to which reference is made, including the reasons for the conclusion. Tamberlin J said at 104 [6]:

'In my view, it would be inconsistent and unfair, having disclosed and used the substance of the advice in this way, to now seek to maintain privilege in respect of the relevant parts of that advice which pertain to the expressed conclusion. It may perhaps have been different if it had been simply asserted that the client has taken legal advice and that the position which was adopted having considered the advice, is that certain action will be taken or not taken. In those circumstances, the substance of the advice is not disclosed but merely the fact that there was some advice and that it was considered. However, once the conclusion in the advice is stated, together with the effect of it, then in my view, there is imputed waiver of the privilege. The whole point of an advice is the final conclusion. This is the situation in this case.'

160 Subsequently, Tamberlin J was confronted with a case that was very similar to the one he hypothesised in *Bennett*. In *Nine Films and Television Pty Ltd v NINOX Television Ltd* (2005) 65 IPR 442, the applicant contended that the respondents had waived privilege in various legal advices because of the way in which the respondents had publicly referred to the advice. Tamberlin J held that there had been no waiver. He concluded that the mere assertion that advice had been taken, and the fact that action is then taken by the client, is not sufficient, unless the two are linked in such a way that it is apparent that the advice is that specified action should be taken. His Honour also made the following observations at 446-447 [26]:

'Whilst I accept that, in some circumstances, a clear disclosure of the "bottom line" of the advice, and the course of conduct taken thereafter, may be sufficient to amount to waiver of legal professional privilege, I do not think these matters have been established in the present case. On a fair and reasonable reading, the statement to the effect that senior counsel had been engaged and that he had reviewed matters in detail and that steps were being taken based on his recommendations is not sufficient to amount to a waiver of the legal advice. The substance or content of the advice is not disclosed with specificity or clarity. Questions of waiver are matters of fact and degree and, in this instance, I am not persuaded that the conduct, assertions or admissible evidence are sufficient to warrant the necessary implication that legal professional privilege has been waived.'

161 The principles discussed in *Bennett* were applied in *Seven Network Ltd v News Ltd* (No 12) [2006] FCA 348. The issue was whether a statement in a discovered document that

‘[o]ur legal advice is that the risk of damages being awarded against Optus is low’ had the consequence of waiving privilege in the legal advice that it referred to. Sackville J held that it did; the statement voluntarily disclosed the gist or conclusion of the legal advice: at [12].

162 In *Rio Tinto Ltd v Commissioner of Taxation* (2005) 224 ALR 299, the Commissioner of Taxation filed particulars with the Court stating that the Commissioner would be relying on specified grounds ‘which have been confirmed by Senior Tax Counsel... and supported by AGS... and opinions obtained from counsel’. The taxpayer contended that the Commissioner had thereby waived privilege in the legal advice of the Australian Government Solicitor and the opinions of counsel. Sundberg J held that these references voluntarily disclosed the conclusion or substance of the advice and consequently privilege had been waived. Sundberg J’s decision went on appeal to the Full Court, but the Full Court’s decision turned on the alternative ground of issue waiver: *Rio Tinto* at [72]. The Full Court considered that, in the particulars, the Commissioner had made an assertion that put the contents of the documents containing legal advice in issue, or necessarily laid them open to scrutiny, with the consequence that there was an inconsistency between the making of the assertion and the maintenance of the privilege.

163 AWB submitted that the reasoning in *Bennett* was unsound, particularly the holding that the disclosure of the conclusion stated in legal advice will amount to a waiver of the whole of the advice. AWB did not refer to any authorities that supported this submission and I reject it. In my view, it is well established that a voluntary disclosure of the gist, substance or conclusion of legal advice will amount to a waiver in respect of the whole of the relevant advice.

ASSOCIATED MATERIAL

164 Turning to the scope of any imputed waiver, it is well established that a voluntary disclosure of privileged documents can result in a waiver of privilege over those documents and associated material. The test applied to determine the scope of any waiver of associated material is whether the material that the party has chosen to release from privilege represents the whole of the material relevant to the same issue or subject matter: *Maurice* at 482 and 484 per Gibbs CJ, 488 per Mason and Brennan JJ, and 498–499 per Dawson J.

165

In *Maurice*, Gibbs CJ said at 482:

'... Similarly, where a party disclosed a document which contained part only of a memorandum which dealt with a single subject-matter, and then read the document to the judge in the course of opening the case, it was held that privilege was waived as to the whole memorandum: Great Atlantic Insurance Co v Home Insurance Co. In that case Templeman LJ said:

" ... the rule that privilege relating to a document which deals with one subject matter cannot be waived as to part and asserted as to the remainder is based on the possibility that any use of part of a document may be unfair or misleading, that the party who possesses the document is clearly not the person who can decide whether a partial disclosure is misleading or not, nor can the judge decide without hearing argument, nor can he hear argument unless the document is disclosed as a whole to the other side. Once disclosure has taken place by introducing part of the document into evidence or using it in court it cannot be erased."

The same test must be applied in deciding whether the use in legal proceedings of one document impliedly waives privilege in associated material. In Nea Karteria Maritime Co Ltd v Atlantic & Great Lakes Steamship Corporation [No 2] Mustill J dealt with this question and suggested the following test:

" ... where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood."

166

Dawson J discussed the authorities at 498-499:

'In Geo. Doland Ltd v Blackburn Robson Coates & Co waiver of privilege with respect to a conversation between solicitor and client, which took place before litigation was contemplated, was held to extend to any other communications in relation to the subject-matters of the conversation, although the implied waiver was held not to cover similar documents which came into existence for the purpose of prosecuting the litigation. This decision was not followed in General Accident Corporation Ltd v Tanter where a distinction was drawn between the waiver of privilege before a trial and the further waiver of privilege by calling evidence in a trial. In the latter situation the waiver was held to extend to the transaction constituted by the privileged communication but not to the subject-matter of that communication arising upon other privileged occasions. General Accident Corporation Ltd v Tanter has been criticized for the distinction which it draws between waiver by the tender of evidence of a privileged communication and waiver by the

disclosure of the communication in some other way and for the restriction which it places upon the extent of associative waiver: see Phipson on Evidence, par 15-20. In Nea Karteria Maritime Co Ltd v Atlantic & Great Lakes Steamship Corporation [No 2], a broader view was taken by Mustill J that “ ... where a party chooses to deploy evidence which would otherwise be privileged the court and the opposition must, in relation to the issue in question, be given the opportunity to satisfy themselves that they have the whole of the material and not merely a fragment”. This view was approved by the Court of Appeal in Great Atlantic Insurance Co v Home Insurance Co. In the United States it has been widely held that voluntary disclosure of the content of a privileged attorney communication constitutes waiver of the privilege with respect to all other such communications upon the same subject-matter: Weil v Investment/Indicators, Research and Management and the cases there cited; Diotima Shipping Corp v Chase, Leavitt & Co; United States v Aronoff; In re Sealed Case.’

167 AWB relied upon the way in which the principle was formulated by the Court of Appeal in *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524 at 564 [121]:

‘A reference in one letter of advice to an earlier letter of advice does not expose the latter to scrutiny by the other party to litigation merely because legal professional privilege is waived in relation to the former: implied waiver is not so generous a doctrine. As we apprehend it, where legal professional privilege is waived in relation to one piece (or part) of advice, the privilege is impliedly waived in relation to another if - and only if - that other is necessary to a proper understanding of the first. As established by the High Court (at least since Mann v. Carnell) the test in such cases is whether it would be “inconsistent” for a party to rely upon, and so to waive legal professional privilege in respect of, the one without also being taken to have waived privilege in respect of the other.’

It is no doubt correct that a mere reference to the existence of legal advice in a disclosed document will not be regarded as a waiver of its contents, albeit a different conclusion would follow if the gist, substance or conclusion of the legal advice is voluntarily disclosed. But, with great respect to their Honours, the proposition concerning waiver of associated material is expressed too narrowly and in a way that is not consistent with the test propounded by the High Court in *Maurice*. The principle propounded by the Court of Appeal may work adequately enough in some circumstances, particularly where privilege is sought to be maintained over one part of a single piece of legal advice, but in other circumstances it will not give effect to the principles explained in *Maurice*.

168 A common application of associated material waiver relates to the case where an

expert report has been prepared in reliance upon other documents. In *Australian Securities & Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438 at 441-442 [21], Lindgren J summarised the applicable principles:

1. *Ordinarily the confidential briefing or instructing by a prospective litigant's lawyers of an expert to provide a report of his or her opinion to be used in the anticipated litigation attracts client legal privilege: cf Wheeler v Le Marchant (1881) 17 Ch D 675; Trade Practices Commission v Sterling (1979) 36 FLR 244 at 246; Interchase Corp Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 1) [1999] 1 Qd R 141 (Interchase) at 151 per Pincus JA, at 160 per Thomas J.*
2. *Copies of documents, whether the originals are privileged or not, where the copies were made for the purpose of forming part of confidential communications between the client's lawyers and the expert witness, ordinarily attract the privilege: Commissioner of Australian Federal Police v Propend Finance Pty Ltd (1997) 188 CLR 501 (Propend)...; Interchase, per Pincus JA; Spassked Pty Ltd v Cmr of Taxation (No 4) (2002) 50 ATR 70 at [17].*
3. *Documents generated unilaterally by the expert witness, such as working notes, field notes, and the witness's own drafts of his or her report, do not attract privilege because they are not in the nature of, and would not expose, communications: cf Interchase at 161-2 per Thomas J.*
4. *Ordinarily disclosure of the expert's report for the purpose of reliance on it in the litigation will result in an implied waiver of the privilege in respect of the brief or instructions or documents referred to in (1) and (2) above, at least if the appropriate inference to be drawn is that they were used in a way that could be said to influence the content of the report, because, in these circumstances, it would be unfair for the client to rely on the report without disclosure of the brief, instructions or documents; cf Attorney-General (NT) v Maurice (1986) 161 CLR 475 at 481... per Gibbs CJ, CLR 487—488... per Mason and Brennan JJ, CLR 492-493... per Deane J, CLR 497—498... per Dawson J; Goldberg v Ng (1995) 185 CLR 83 at 98... per Deane, Dawson and Gaudron JJ, CLR 109... per Toohey J; Instant Colour Pty Ltd v Canon Australia Pty Ltd [1995] FCA 870...; Australian Competition and Consumer Commission v Lux Pty Ltd [2003] FCA 89... at [46].*
5. *Similarly, privilege cannot be maintained in respect of documents used by an expert to form an opinion or write a report, regardless of how the expert came by the documents; Interchase at 148—150 per Pincus JA, at 161 per Thomas J.*
6. *It may be difficult to establish at an early stage whether documents which were before an expert witness influenced the content of his or her*

report, in the absence of any reference to them in the report: cf Dingwall v Commonwealth of Australia (1992) 39 FCR 521; Tirango Nominees Pty Ltd v Dairy Vale Foods Ltd (No 2) (1998) 83 FCR 397 at 400;... ACCC v Lux at [46].'

169 In *Thomas v New South Wales* [2006] NSWSC 380 ('*Thomas*'), McClellan CJ at Common Law applied these principles to the documents which underpinned or supported the advice of counsel. His Honour stated at [17]:

'Although in the present case the primary document for which privilege was expressly waived was the advice of counsel, I can discern no difference in principle between such an advice and the advice or report of an expert retained for the purpose of the litigation. As I have indicated, I am satisfied that counsel relied upon instructions which they were given and, it would appear, relied upon medical reports in a way which influenced the content of the advice which they gave. Accordingly, insofar as there are documents which were relied upon in the preparation of the advice falling within categories 1, 2, 3 and 5 of the notice to produce, the service of the affidavit impliedly waived privilege in those documents.'

Later at [20] his Honour said:

'... In the present case the plaintiff disclosed the advice in these proceedings for the purpose of obtaining whatever assistance he could from that advice in pursuit of his claim. To my mind, that disclosure waived his privilege both in the advice itself and the documents which were used by counsel and which influenced the content of the advice. Waiver having occurred, the fact that the advice was not ultimately tendered is, to my mind, not relevant. Having sought an advantage, the plaintiff was bound by the course he had taken and accordingly is amenable to producing the relevant documents in response to an appropriate notice to produce.'

170 In *Newcrest Mining (WA) Limited v Commonwealth* (1993) 40 FCR 507, French J applied the principle of associated material waiver in a case where one joint venturer disclosed significant elements of legal advice it had obtained in relation to mining leases held by the joint venture partners. His Honour held that the disclosure brought about an implied waiver of other legal advices obtained by the other joint venturers in relation to the mining leases. His Honour said at 509 that it was significant that the disclosures were made for the benefit of the joint venture as a whole and, although there was no direct evidence on the point, he considered that it was difficult to imagine that the disclosures would have occurred against the wishes of the other joint venturers or indeed without their consent.

171 In England, the principle has been applied to documents which underpin or support expert evidence: see *Dunlop Slazenger International Ltd v Joe Bloggs Sports Limited* [2003] EDWCA Civ 901; *Mayne Pharma Pty Ltd v Debiopharm SA* [2006] EWHC 164 (Pat); and *L'Oreal SA v Bellure NV* [2006] EWHC 1503 (Ch).

172 Several English cases illustrate the practical operation of the principle. In *Nea Karteria Maritime Co Ltd v Atlantic & Great Lakes Steamship Corporation (No 2)* [1981] Com LR 138 (*'Nea Karteria'*), a lawyer gave evidence that he had conducted an interview on the basis of a list of questions prepared by the plaintiffs' lawyers. While privilege was waived with respect to the witnesses' answers, the plaintiffs sought to maintain privilege with respect to the list of questions: at 139-140.

173 Mustill J (as his Lordship then was) held at 140 that privilege over the list of questions had been waived by implication:

'It seems to me that the written questions were, so to speak, part of the meeting. They were in a sense an agenda for the meeting. They formed the basis for one-half of the exchange between the lawyer and [the witness]. Evidence to that effect having been given by the lawyer, it seems to me that privilege must have been waived for those questions. And I think the interests of justice, which I believe to underlie the authorities on this part of the case, demand that the opposition and the court should have an opportunity to satisfy itself as to the accuracy of the evidence given to the lawyer as to the way in which he conducted the interview.'

174 Mustill J drew a distinction at 140 between the instructions to the lawyer who carried out the questioning and the questions themselves; the instructions did not play a part in the meeting, did not form part of the body of events upon which the Court had to reach conclusions of fact, and were merely part of the prior history of those events.

175 In *R v Secretary of State for Transport; Ex parte Factortame* (1997) 9 Admin LR 591 at 599, Auld LJ made the following observations concerning the application of the test stated in *Nea Karteria*:

'Much depends on whether the party making partial disclosure seeks to represent by so doing that the disclosed documents go to part or the whole of an "issue in question", the expression used by Mustill, J in the passage from his judgment in Nea Karteria that I have cited. The issue may be confined to what was said or done in a single transaction or it may be more complex than

that and extend over a series of connected events or transactions. In each case the question for the court is whether the matters in issue and the document or documents in respect of which partial disclosure has been made are respectively severable so that the partially disclosed material clearly does not bear on matters in issue in respect of which material is withheld. The more confined the issue, for example as to the content of a single document or conversation, the more difficult it is likely to be to withhold, by severance, part of the document or other documents relevant to the document or conversation.'

176 In *Fulham Leisure Holdings Ltd v Nicholson Graham & Jones* [2006] 2 All ER 599 (*'Fulham'*) at 604 [11], Mann J suggested that it was helpful to approach the application of the test stated in *Nea Karteria* in three steps: first, identify the transaction in respect of which the disclosure has been made; secondly, ascertain from the nature of the disclosure or other evidence whether the transaction is wider than an advice given on a single occasion, if so, the whole of the wider transaction must be disclosed; and thirdly, the disclosure of the whole transaction may make it plain that further disclosure is necessary to avoid unfairness or misunderstanding of what has been disclosed. Mann J added at 607 [18] that once the transaction has been identified the cases show that the whole of the material relevant to that transaction must be disclosed. It is not open to a waiving party to say that the transaction is simply what the party has chosen to disclose; the court will determine objectively what the real transaction is so that the scope of the waiver can be determined. His Lordship also said that the application of these principles will be very fact sensitive and will vary from case to case: at 607 [19].

WAIVER HAS BEEN ESTABLISHED

177 At [70] to [126] above, I set out my findings as to the precise terms in which AWB disclosed the results of its legal reviews and legal advice it had obtained to the Australian Government, the IIC and the Commission.

178 Overall, I am satisfied that by means of these disclosures, AWB deployed the gist or substance of legal advice it had obtained. Moreover, I am satisfied that AWB made a conscious and voluntary decision to deploy this legal advice in its dealings with the Australian Government, the IIC and the Commission because it considered that it was in its commercial interests to do so. These actions are inconsistent with the maintenance of confidentiality in the legal advice. Having regard to the nature, purpose, terms and extent of

its disclosures, I am also satisfied that AWB acted inconsistently with the maintenance of confidentiality over the associated material which underpinned the legal advice.

179 While these overall conclusions are relevant and important, I have taken the view that it is necessary and appropriate for me to make specific findings as to the nature and consequences of each such disclosure. I turn to that task.

180 In his various statements to the Australian Government, Hargreaves did not merely refer to the existence of legal advice. Nor did he simply disclose the legal advice which had been obtained by AWB from Mr Tracey QC. He described in some detail the findings and conclusions that had been arrived at by AWB's own legal review. In my opinion, Hargreaves thereby disclosed to the Australian Government the gist or substance of legal advice that AWB had obtained (as at the relevant dates at which he made his disclosures) that there was no evidence of:

- corruption by AWB
- side payments or after sales payments by AWB to the former Iraqi regime
- any knowledge on the part of AWB that Alia was connected with the Iraqi regime or that payments were being channelled by Alia to that regime
- any conduct by AWB that resulted in breaches of the United Nations' sanctions
- any other wrongdoing or improper conduct by AWB in connection with the supply of wheat to Iraq under the OFF Programme.

181 When Hargreaves gave his briefings to officers of the Australian Government, he expressed himself in terms that were apt to refer, and which a reasonable listener would have understood as referring, to the combined effect of all of the legal advice that AWB had received as at the date of the relevant briefing. Hargreaves would not have been understood as referring only to a particular piece of historical advice, regardless of whether it was overtaken, or qualified, or supported by later advice. His assertions purported to represent the current state of affairs.

182 Hargreaves' memorandum of 25 June 2005 makes it quite clear that his statements to the Australian Government were based upon all of the legal advice AWB had obtained, and not simply the advice it had obtained from Mr Tracey QC. It cannot be disputed that

Hargreaves disclosed the substance of the legal advice which Blakes provided to AWB's board on 25 May 2004. AWB has already formed that view and acted on it by producing Blakes' power point presentation to the Commission. But in my view the consequence of Hargreaves' disclosures cannot be confined to Blakes' advice of 25 May 2004 and Mr Tracey QC's advices. Through the remainder of 2004 and until Hargreaves had his last meeting with Ms Carayanides in the period between 16 June 2005 and September 2005, Hargreaves met with Australian Government representatives several times and continued to make assertions that AWB's independent legal review had not identified any wrongdoing by AWB. The evidence shows that Blakes and Minters continued the legal review in 2004 and 2005 and provided ongoing legal advice to AWB. It is not open to a waiving party to say that the disclosures relate simply to one advice and not others, or that the relevant transaction is simply what the party has chosen to disclose; the Court will determine objectively what has been disclosed: see *Fulham* at 607 [18].

183 Hargreaves' memorandum of 25 June 2005 makes it plain that he deliberately deployed AWB's legal advice in his dealings with the Australian Government. He did so as part of AWB's strategy to secure the continued support of the Federal Government, both generally and in relation to AWB's dealings with the IIC and the United States Government. Hargreaves also deployed the advice in pursuit of the objectives that he set out in his memorandum; they included protecting and defending the reputation of AWB both within Australia and overseas, and minimising any attack by US wheat interests on AWB's position as the exclusive manager of wheat exports from Australia. Given these strategic objectives, it was important for AWB to disclose, indeed to stress, that it had conducted an extensive independent legal review which had found no evidence of any wrongdoing by AWB in connection with its exports of wheat to Iraq. By disclosing its legal advice to secure these objectives, AWB assumed the risk that it would be held to have waived legal professional privilege in connection with legal advices it obtained in the course of the legal review.

184 Having regard to the legal principles governing waiver, I consider that any legal advice that AWB obtained from Blakes or Minters prior to Hargreaves' last meeting with Ms Carayanides on any of the subject matters, or relating to any of the issues, described at [180] above, has been waived by reason of the disclosures made by Hargreaves. Those subject matters and issues are wide enough to encompass the Tigris transaction and the iron filings

claim. If AWB obtained legal advice during this period on those subject matters, or relating to those issues, from persons other than Blakes or Minters such as ABL, Mr Tracey QC or others, that advice has also been waived by Hargreaves' disclosures.

185 I am satisfied that the disclosures to the IIC involved a disclosure by AWB of the gist or substance of legal advice that it had obtained by 28 February 2005. The disclosure occurred at two points. First, when Lindberg was interviewed on 28 February 2005, the interview took place in the presence of AWB's legal representative. AWB had the ability to object to any statements by Lindberg that intruded into areas covered by legal professional privilege. No objection was raised to Lindberg's statement that the legal review conducted by Cooper had found nothing that would substantiate claims of fraud or corruption by AWB or payments by AWB to individuals in the Government of Iraq. Secondly, AWB was directly involved in providing the record of interview, as revised by Lindberg and AWB's lawyers, to the IIC. In my opinion, the record of interview describes the gist or substance of legal advice which AWB had obtained as a result of its legal review. As with Hargreaves, Lindberg's assertions purported to describe the current state of affairs, ie, as at 28 February 2005. There is no reason to read his assertions as if they were confined to legal advice obtained from Mr Tracey QC. It extends, in my view, to any legal advice obtained by AWB from Blakes, Minters and Mr Tracey QC, and any advice from others, prior to 28 February 2005 that deals with the same subject matters or relates to the same issues as the advice that Lindberg described.

186 I am satisfied that the disclosures to the IIC were made deliberately and consciously by AWB with a view to obtaining a finding from the IIC that AWB had not engaged, or at least had not knowingly engaged, in conduct that involved making payments to the Iraqi regime in breach of the United Nations' sanctions. Lindberg and AWB went out of their way to stress that the company had undertaken a legal review which had found nothing to substantiate claims of fraud, corruption or improper payments to the Iraqi regime. The disclosures were made with the knowledge and intention that they would be referred to by the IIC in its final published report. Accordingly, I find that AWB consciously and voluntarily deployed its legal advice with the object and intention of furthering the company's commercial and other interests.

187 AWB contended that the disclosures which Lindberg made at his meeting with the Minister for Foreign Affairs on 4 October 2005 were confined to the advice given by Mr Tracey QC. This is a possible interpretation of the Department's minute, but in my view Lindberg's statements are not to be read, and would not have been understood, so narrowly. Later in the meeting, Lindberg said that AWB had acted in accordance with the sanctions regime and that this had been supported by legal advice. This statement was expressed broadly and was not confined to 'independent legal advice'. In my view, Lindberg disclosed, and a reasonable listener would have understood that Lindberg was disclosing, the gist or substance of all of the legal advice that AWB had obtained up to 4 October 2005 in relation to the question whether AWB had acted in accordance with the sanctions regime. The disclosure extends to Mr Tracey QC's memorandum of advice dated 22 September 2005 and Professor Wippman's advice dated 27 September 2005.

188 At the meeting with the Minister for Foreign Affairs, Lindberg, Stewart and other representatives of AWB were providing AWB's answer to the IIC's draft findings, as communicated to AWB in the IIC's letter of 26 September 2005. The minute shows that AWB's representatives were very concerned to explain AWB's claims of innocence and to secure the Government's ongoing support. Lindberg told the meeting that the IIC had ignored AWB's explanations and that the so-called evidence relied on by the IIC did not support its factual findings. In support of these contentions, Lindberg asserted that AWB had legal advice confirming that AWB had not acted in contravention of the sanctions regime. I infer that AWB made a conscious and voluntary decision to deploy this legal advice at the meeting with the Minister so as to secure the ongoing support of the Australian Government. In doing so, it assumed the risk of any consequential waiver of legal professional privilege.

189 In my opinion, Blakes' presentation to AWB's board on 25 May 2004 constituted legal advice for the purposes of the doctrine of legal professional privilege. AWB withdrew its claim of privilege and produced the complete presentation to the Commissioner in April this year. The presentation not only discloses the substance of the legal advice from Blakes, but also some of its detail and foundations. In my opinion, one consequence of this disclosure is that AWB has waived privilege over any other legal advice that it obtained prior to 25 May 2004 in relation to the same subject matters or the same issues as Blakes addressed in its presentation.

190 AWB contends that Lindberg's evidence to the Commission on 17 January 2006 did not disclose the gist or conclusion of any legal advice. I disagree. In my opinion, it disclosed the gist or substance of legal advice that AWB had previously obtained as to whether AWB had engaged in conduct in breach of the United Nations' sanctions and whether AWB had paid inland transportation fees to Alia as a conduit for the payment of money to the Iraqi regime. In the course of his evidence, Lindberg went out of his way to assert that the legal review that Cooper had instituted, assisted by external legal advisers, had reported periodically and did not find any evidence to substantiate the allegations that AWB had made payments in breach of the sanctions. In one instance at least, Lindberg's assertions to this effect were not directly responsive to the question asked of him by counsel assisting the Commission. Lindberg gave these answers in the presence of counsel for AWB without any objection being raised on grounds of legal professional privilege. I am satisfied that, by means of this evidence, AWB voluntarily deployed the legal advice that it had obtained prior to 17 January 2006. I infer that it did so because it considered it was in its interests for it to be publicly known that AWB had conducted an extensive legal review which had found no evidence of any wrongdoing.

191 In his evidence, Lindberg specifically referred to a series of periodical reports from those undertaking the legal review: 'there were a number of reports, and the findings of those reports are recorded in the minutes and the basis of those findings has been communicated in letters that have been sent to the government and elsewhere'. I find that in his evidence to the Commission Lindberg was referring to the combined effect of all of the legal advice that AWB received during the course of the internal review as periodical reports were made to the boards of AWB and AWBI. It follows, in my view, that Lindberg's evidence has the consequence that AWB has waived privilege over any legal advice that it obtained in the course of the review that goes to the same subject matters, or relates to the same issues, as the legal advice that Lindberg described in the course of his evidence.

192 In relation to Mr Tracey QC's advices, AWB produced his written advices of 8 June 2004, 31 March 2005 and 12 August 2005 to the Commission early in April 2006. In my view, the consequence of this production is that AWB must be taken to have waived legal professional privilege in any other legal advices that it obtained prior to Mr Tracey QC's last advice of 12 August 2005 in relation to the same subjects or issues. As already mentioned, I

also consider that, quite separately, AWB has waived privilege over the advice it obtained from Mr Tracey QC on 22 September 2005 in relation to Resolution 661.

193 As a result of the Project Water investigations, the directors of AWB obtained legal advice from Cooper at the board meeting on 14 December 2004 that the Tigris transaction complied with all necessary laws and involved no breaches of law. A handwritten note of that advice has been produced to the Commission. AWB was entitled to claim that this note was protected from production to the Commission by legal professional privilege. It did not claim privilege. I infer that it did not do so because it wanted it to be known publicly that AWB had advice as of 14 December 2004 to the effect that the Tigris transaction complied with all necessary laws and involved no breaches by AWB. Having disclosed the gist or substance of its legal advice in this manner, it would be inconsistent to allow AWB to maintain confidentiality and privilege in any other legal advices that AWB obtained prior to 14 December 2004 dealing with the same subject matter or the same issues.

194 The advice that Cooper gave to AWB's board on 14 December 2004 related specifically to the Tigris transaction. However, I consider that the other disclosures that I have already discussed were expressed in such broad terms that they encompassed any advices concerning the Tigris transaction and/or the iron filings claim. As a result, I consider that there has been a waiver of other advices about the Tigris transaction, such as Mr Tracey QC's memorandum of 26 October 2004 (document 353A).

195 The cumulative effect of AWB's disclosures is that, down to 17 January 2006 when Lindberg gave evidence to the Commission, AWB was openly claiming that its legal advice showed that there was no evidence that it had engaged in any wrongdoing in connection with its supply of wheat to Iraq under the OFF Programme, including wrongdoing of the kind described at [180] above. I find that AWB made these claims to advance its commercial interests. AWB's conduct is inconsistent with the maintenance of confidentiality in any advices dealing with the same subjects or issues.

196 In addition, Lindberg, Cooper and Scales gave evidence to the Commission that AWB obtained legal advice that the proceeds of the inflated prices in contracts A1670 and A1680 should be disbursed to Tigris to the extent of approximately US\$7 million. That evidence was given in the presence of AWB's legal representatives without any objection being raised

on grounds of legal professional privilege. Again, I infer that AWB was content for it to be publicly known that it had obtained that legal advice. Having disclosed the gist or substance of that advice, AWB is bound to disclose any other legal advices it obtained in relation to the same subject or same issue.

197 AWB's revised list of privileged documents contains several advices relating to the Tigris payment. They include documents 337 and 385. Documents 1088, 1089, 1092, 1093 and 1094 record the substance of those advices in minutes of meetings held by the AWB and AWBI boards in December 2004 and February 2005 and the chairman's running sheets for the February 2005 meetings. The evidence which Lindberg, Cooper and Scales gave in public before the Commission is inconsistent with AWB's attempt to maintain privilege in these documents.

198 One question which remains to be dealt with is whether the scope of the waiver that must, in my view, be imputed to AWB is to be confined to any other legal advice that AWB obtained prior to the date of the relevant disclosures that addressed the same subject matters or issues as the advice that AWB voluntarily disclosed. In my opinion, the waiver is not so confined. It extends to the documents and information which were taken into account in formulating, or which otherwise underpinned or influenced, the legal advice that AWB has chosen to disclose.

199 The Commonwealth argued that AWB's disclosures are broad enough to encompass any legal advice which AWB obtained, and any documents which AWB's lawyers reviewed or created, in the course of the Project Rose and Project Water investigations. The difficulty with this way of approaching the boundaries of the waiver of associated material is that the terms 'Project Rose' and 'Project Water' have an indefinite and imprecise ambit.

200 According to the authorities discussed above, the limits of any waiver of associated material depend upon the nature of the advice that has been disclosed, what was represented by means of the disclosure, and the character of the transaction that gave rise to the disclosed legal advice. Regard must also be had to the way in which AWB's legal advice was described in the various disclosures. Essentially, by means of the disclosures, AWB was asserting that a detailed legal review had been undertaken, and that it had concluded that there was *no evidence* of any wrongdoing or other improper conduct by AWB in connection

with its sale of wheat to Iraq under the OFF Programme. In my opinion, the nature and character of this disclosure is inconsistent with the maintenance of confidentiality in those documents which were taken into account by AWB's legal advisers in arriving at the advice they gave. To adapt the language used by McClellan CJ at Common Law in *Thomas* at [17] and [20], AWB's disclosures of its legal advice effect a waiver of privilege in the documents which were reviewed for the purposes of that advice or which influenced its content. Furthermore, AWB emphasised the breadth of its internal review in its various disclosures. In my view, AWB thereby waived privilege in documents which define the scope of the review or which reveal what investigations were in fact undertaken in the course of the review.

201 Much the same answer follows if one asks what was the legal exercise or transaction that gave rise to the disclosed legal advice: see *Factortame* at 598-599; and *Fulham* at 604 [11] and 607 [18]. Having regard to the form of the legal advice disclosed by AWB, the relevant legal exercise or transaction encompassed a review of original documents and witness interviews, as well as summaries, chronologies or other analytical documents prepared by the lawyers, with a view to determining whether there was any improper or wrongful conduct by AWB. Material of this kind underpinned or influenced the legal advice which AWB has chosen to disclose, and it is not severable from that advice.

202 There is a certain symmetry in defining the boundaries of the waiver of associated material in this way. Documents brought into existence in the course of a lawyer's factual investigation are, prima facie, capable of attracting legal professional privilege where the investigation is being undertaken for the dominant purpose of providing legal advice. If the client voluntarily discloses the gist or substance of the legal advice that is founded upon such investigations, the rationale for according privilege to the investigative material will have disappeared.

203 While I would go further, the approach that I have described is not unlike the approach that AWB has already taken in connection with the production to the Commission of Mr Tracey QC's memoranda of advice and instructions. In the case of Mr Tracey QC's oral advice of 25 May 2004 and his confirmatory memorandum of 12 August 2005, AWB determined, correctly in my view, that the underlying documents supplied to Mr Tracey QC

must also be produced. AWB considered that the form of Mr Tracey QC's advice (ie there was no evidence of wrongdoing) meant that it was impossible to separate his legal advice from the copy documents that were supplied to him as part of his instructions.

204 The evidence before me does not reveal whether AWB adopted the same approach to Mr Tracey QC's advice of 31 March 2005. When he was asked to provide this advice, copy documents were supplied to Mr Tracey QC as part of his instructions but there is no evidence, one way or the other, as to whether those copy documents have been produced to the Commission. The substance of Mr Tracey QC's advice was that nothing in the documents supplied to him as of 31 March 2005 had caused him to vary his earlier advice of 25 May 2004. This advice cannot be separated from the documents that were supplied to him and, accordingly, AWB's express waiver of privilege in his advice extends to all of the documents and instructions supplied to him.

205 The applicable principle can also be illustrated by reference to the advice that Blakes gave in its presentation of 25 May 2004. The advice that there was no evidence of any wrongdoing by AWB that involved a breach of the United Nations' sanctions was explicitly founded upon a review of a large number of documents and interviews of AWB personnel. Having regard to the form of its advice, it is impossible to separate Blakes' advice from the underlying documentation and interviews. However, the witness interviews and other materials that Blakes relied upon to formulate its advice have not been produced to the Commission and are still the subject of claims for legal professional privilege. In my opinion, those claims of privilege are not maintainable; privilege has been waived by (inter alia) the production of Blakes' advice. The same approach must be adopted to any advices that Blakes provided after 25 May 2004 on the question whether any evidence had emerged of any wrongdoing or improper conduct on the part of AWB.

206 Another question which remains to be dealt with is the extent of any waiver that arises from AWB's production to the Commission of the instructions to Sir Anthony Mason. In its particulars setting forth its objections to AWB's privilege claims, the Commonwealth contended that these disclosures had brought about a waiver of legal professional privilege in relation to Project Rose. It tendered the instructions which ABL provided to Sir Anthony Mason on 16 September and 20 October 2005 and the expert opinion which

Sir Anthony Mason provided dated 24 October 2005. However, the Commonwealth did not direct any submissions to this aspect of its waiver case, either orally or in its written submissions. Nor did AWB address any oral or written submissions to the consequences which flowed from its production to the Commission of the instructions to, and the advice obtained from, Sir Anthony Mason.

207 It must be borne in mind that AWB is seeking a declaration that all of the documents set forth in its revised list of privileged documents are the subject of legal professional privilege. These documents include documents by which AWB obtained legal advice both in Australia and in the United States concerning the applicability of Resolution 661. The instructions to Sir Anthony Mason summarised the gist or substance of the very same legal advice. In these circumstances, I have concluded that the Court must take account of the evidence that has been placed before it. By disclosing the instructions given to Sir Anthony Mason, AWB has in my opinion disclosed the substance of legal advice it had obtained, as at 20 October 2005, both in Australia and in the United States, as to the applicability of Resolution 661. This disclosure encompasses Mr Tracey QC's memorandum of 22 September 2005 and Professor Wippman's advice of 27 September 2005.

208 Thus far, I have identified the principles which define the boundaries of the waiver that is to be imputed to AWB, including the boundaries of any waiver of associated material. The remaining task in disposing of the waiver arguments is to determine precisely what documents fall within these boundaries. I have carried out that task by inspecting the documents over which claims of privilege have been made, reviewing the evidence concerning each document, and applying the principles identified above.

209 As a result, I have determined that AWB has waived any legal professional privilege that would otherwise attach to the documents as listed under the heading 'Conclusions' below.

THE IRON FILINGS CLAIM

210 Communications between a lawyer and client which facilitate a crime or fraud are not protected by legal professional privilege. This principle is often referred to as the 'fraud exception' to legal professional privilege, but this does not capture its full reach: *Attorney-*

General (NT) v Kearney (1985) 158 CLR 500 ('*Kearney*') at 515; *Propend* at 546; *Clements, Dunne & Bell Pty Ltd v Commissioner of Australian Federal Police* (2001) 188 ALR 515 ('*Clements*') at 521-522 [30].

211 The principle encompasses a wide species of fraud, criminal activity or actions taken for illegal or improper purposes: see North J's review of the authorities in *Clements* at 522-526 [35]-[44]. The scope of conduct caught by the principle has been articulated in a variety of ways, often without particular precision: *Propend* at 545. Classic formulations have spoken of communications in furtherance of a 'crime or fraud': *R v Cox and Railton* (1884) 14 QBD 153 ('*R v Cox*') at 165; a 'criminal or unlawful proceeding': *Bullivant v Attorney-General (Vic)* [1901] AC 196 ('*Bullivant*') at 201; 'any unlawful or wicked act': *Annesley v Anglesea* (1743) 17 St Tr 1139 at 1229; and 'all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery, and sham contrivances': *Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd* [1972] Ch 553 at 565. In *Kearney*, the High Court applied the principle to deny legal professional privilege to legal advice obtained by the Northern Territory Government which was prima facie a 'deliberate abuse of statutory power' to defeat a land claim under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). In his reasons for judgment, Gibbs CJ (with whom Mason and Brennan JJ agreed) stated at 515 that 'legal professional privilege will be denied to a communication which is made for the purpose of frustrating the processes of the law itself, even though no crime or fraud is contemplated.' Some authorities have expressed the principle as applicable to prevent a 'fraud on justice' in a broad sense. The concept of a 'fraud on justice' was adopted by Lander J in *Gartner v Carter* [2004] FCA 258 ('*Gartner v Carter*') to deny protection to a communication between a lawyer and client for the purpose of the client putting assets beyond the reach of the legitimate claims of secured creditors: at [130] and [139]-[140].

212 The principle extends to 'trickery' and 'shams'. A 'sham' refers to steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any, legal consequences: *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471; see also *Beazley v Steinhardt* (1999) 106 A Crim R 21; affirmed on appeal in [1999] FCA 1255 ('*Beazley*'). The recent case of *Australian Securities & Investments Commission v Mercorella (No 3)* [2006] FCA 772 provides an example of the

denial of legal professional privilege to documents in furtherance of a sham transaction. In that case, creditors of a managed investment scheme claimed privilege over documents relating to securities obtained from the defendant and certain companies in the scheme. The transactions were allegedly entered into so as to advance those creditors' interests over the interests of other creditors to the scheme. Mansfield J found that the communications were prima facie in furtherance of a sham and, as such, were not privileged. After referring to Lander J's decision in *Gartner v Carter* and *Barclays Bank plc v Eustice* [1995] 4 All ER 511 (*'Barclays Bank'*), his Honour stated at [95]:

'It is a short step from those decisions to the present facts, as prima facie found. The [creditors] engaged in the transactions reflected in the Deed, and the granting of the securities within the structures it created, to secure or advance their interests over others who had advanced money to [the first defendant] or to the Scheme. There is a prima facie case that the "restructure" of the advances so that they appear as advances to the partnership of Ajay and Opey is a sham.'

213 Mansfield J drew a distinction at [96]-[100] between communications to obtain advice in relation to what, if anything, could lawfully be done to improve the prospects of being repaid or of obtaining the interest to which the client was entitled (which were privileged), and communications which have the effect of concealing the true nature of a transaction and which enable a client to present a picture which is not true (which were not privileged).

214 Where a client is engaged in fraudulent conduct, communications with his or her lawyer in furtherance of the fraud are not privileged, regardless of whether the lawyer is a party to the fraud or not: *Clements* at 562 [213]. The principle applies to communications passing between a client and lawyer where the lawyer is innocent of the fraud or improper purpose: *R v Bell*; *Ex parte Lees* (1980) 146 CLR 141 at 145. Further, the fraud need not be that of the client or the lawyer; it may be that of a third party: *Capar v Commissioner of Police* (1994) 34 NSWLR 715; *R v Central Criminal Court*; *Ex parte Francis & Francis* [1989] AC 346, cited with approval in *Clements* at 562-565 [217]-[218].

215 It is important to bear in mind that the fraud exception is based on public policy grounds. The principle is sufficiently flexible to capture a range of situations where the protection of confidential communications between lawyer and client would be contrary to the public interest: see *Kearney* at 514-515; *R v Cox* at 614. This aspect of the principle is

reflected in the statement that '[t]he privilege takes flight if the relationship between lawyer and client is abused': *Clark v United States* (1933) 289 US 1 at 15; see also *Kearney* at 514 and 524.

216 In *Barclays Bank*, communications between the client and his lawyer in relation to the setting up of transactions at an undervalue so as to prejudice the bank were held to be 'sufficiently iniquitous for public policy' to require those communications to be discoverable. Schiemann LJ (with whom Aldous and Butler-Sloss LJ agreed) stated at 524:

'If that view be correct, then it matters not whether either the client or the solicitor shared that view. They may well have thought that the transactions would not fall to be set aside ... either because they thought that the transactions were not at an undervalue or because they thought that the court would not find that the purpose of the transactions was to prejudice the bank. But if this is what they thought then there is a strong prima facie case that they were wrong. Public policy does not require the communications of those who misapprehend the law to be privileged in circumstances where no privilege attaches to those who correctly understand the situation.'

217 For the principle to apply, there must be more than a mere assertion or allegation of fraud or impropriety: *Bullivant* at 201, 203 and 204-205. In *Propend* at 514, Brennan CJ expressed the test as being one of 'reasonable grounds for believing' that the relevant communication was for an improper purpose. The requirement has also been described as one of a 'prima facie case': *Butler v Board of Trade* [1971] 1 Ch 680 ('*Butler*') at 689; cf *Baker v Evans* (1987) 77 ALR 565 at 574. In *Kearney* at 516, Gibbs CJ approved the test formulated in *O'Rourke v Darbishire* [1920] AC 581 at 604, namely that 'there must be something to give colour to the charge'; 'the statement must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact'. The High Court in *Propend* applied this test: at 514 per Brennan CJ, at 521 per Dawson J, 534 per Toohey J, 546 per Gaudron J, 556 per McHugh J, and 592 per Kirby J.

218 It is not necessary to prove an improper purpose on the balance of probabilities. The 'prima facie' test arguably reflects the fact that issues of legal professional privilege are usually dealt with in the interlocutory stages of a proceeding, but the authorities have not departed from that formulation where a declaration is sought in relation to privilege issues: *Butler*; *Propend*; *Beazley*. It must also be established, on the same prima facie basis, that the communication which is the subject of the claim for privilege was made in furtherance of, or

as a step preparatory to, the commission of the fraud or wrongdoing. In *Butler*, Goff J found at 687 that a letter written by the plaintiff's lawyer which volunteered a warning that the plaintiff may incur serious consequences if he did not take care was not shown to be 'in preparation for or in furtherance of or as part of any criminal designs on the part of the plaintiff': see also *Zemanek v Commonwealth Bank of Australia* (unreported, Federal Court, Hill J, 2 October 1997).

219 In *Propend*, the High Court considered whether a charge of improper purpose must be based on evidence that is admissible in the proceeding. The only evidence of alleged illegality before the trial judge in *Propend* was the sworn information which supported the issue of a search warrant for the relevant documents. The Court held that, while the sworn information was admissible to establish the basis upon which the warrant was issued, it was not admissible to show that the copy documents were not privileged: see at 514 per Brennan CJ, 557 per McHugh J, 576 per Gummow J, 547 per Gaudron J, and 593 per Kirby J.

220 The iron filings claim refers to a claim by GBI for a rebate of US\$2,016,133.00 on account of the fact that earlier shipments of wheat by AWB to GBI had been contaminated by iron filings. Lindberg agreed to pay this sum to GBI in settlement of the iron filings claim in about October 2002 during the course of a visit to Bagdad. An email dated 7 November 2002 from Chris Whitwell of AWB ('Whitwell') to Lindberg and others reporting on the trip to Iraq in October 2002 stated that the responsible Iraqi Minister had asked for repayment of the iron filings rebate through the 'inland transport mechanism'. The same email referred to the fact that the Iraqi Minister was seeking cabinet approval for repayment of the Tigris debt.

221 At the outset of this case, the Commonwealth contended that any legal advice that AWB obtained in connection with the Tigris transaction was waived by virtue of AWB's production to the Commission of a partly masked memorandum of 7 February 2003 dealing with the subject of the iron filings payment and Tigris petroleum fee. On the first day of the hearing, AWB announced that it was no longer seeking a declaration of privilege in respect of documents connected with the Tigris transaction which the Commonwealth sought to challenge on the basis of the fraud exception. Subsequently, AWB made it clear that this concession did not extend to six documents relating to the iron filings rebate payment.

222 During the course of the hearing in this Court, AWB produced an unmasked copy of the memorandum of 7 February 2003 and provided it to the Commonwealth. The Commonwealth tendered the memorandum as an exhibit in this proceeding, without any objection from AWB. The memorandum contains a fairly full description of the way in which AWB planned to pay the iron filings claim to GBI.

223 The memorandum, which was sent by Whitwell to Messrs Geary and Long, with copies to Scales, Johnson, Hogan, Johnstone, Cooper, Lyons, Hockey and Thomas, states:

PRIVATE AND CONFIDENTIAL

This memo is in respect to refunding the Grain Board of Iraq the quality rebate of approx USD 2,016,133 through the inland transport payments for the new contract as requested by the Minister of Trade, Iraq. In addition, for the record IS & M has negotiated (through an uplift in price] the recovery of a USD 8.375 million outstanding debt to Tigris by IGB through this contract. AWB will repay this debt back to Tigris less an agreed recovery fee of USD 500 K on a pro rata basis as tonnage is shipped.

Overview

Delegation led by Andrew Lindberg (August 2002) to Baghdad agreed to settle the contamination of the 'Iron Filings' vessels by paying them USD 6 pmt for each vessel total = USD 2,016,133

After being approached by Tigris Petroleum AWB and IGB have agreed to allow the new contract to be the conduit for a repayment of USD 8,375,000 owed to Tigris by IGB for a cargo of wheat shipped in 1996. IGB have agreed to raising the contract price by the debt amount and when payments are made under the Letter of Credit AWB will pay Tigris its debt less AWBs recovery fee.

We have suggested the following during our last two visits.

- *Offsetting the debt against the Outstanding debt to 'Tigris petroleum' (approx USD 8.35 million)*
- *Reducing the any new contract price [sic] by the amount of the rebate on a pmt basis*
- *Repaying the debt through the provision of aid in some form - Wheat, Health supplies etc.*

However, in discussion with the Minister of Trade he has continually insisted on repayment directly as an addition to the inland transport and said that this was his understanding of the agreement with Andrew Lindberg - Michael Long was present and confirms that this was discussed. Now that the new contract has been

concluded ISM need a sign off to organise this payment when shipments start.

Issues

- *Possible implications for AWB on a corporate governance basis ie/ direct payment to a company with links to the Iraqi regime may be construed to be in contravention of the UN Sanctions.*

The relevant UN Security Council Resolution is 661 (1990). This resolution provides at clause 4:

“...All States shall not make available to the Government of Iraq or to any commercial, industrial or public utility undertaking in Iraq any funds or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to that Government or to any such undertaking any such funds or resources and from remitting any other funds to persons or bodies within Iraq.... except payments exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs.”

In summary, this means that the Government of the Commonwealth of Australia would be obliged to prevent AWB Limited from making any remittance of funds to the IGB.

AWB Legal opinion in this regard is set out below.

This does not mean, however, that a payment might not be able to be made which will comply with the terms of the UN Resolutions. As a minimum, if AWB management determines to make the payment, then it should be made in the following circumstances:

- 1. The payment is made in installments over time and coincides with payments for future shipments of wheat (ie not a lump sum payment);*
- 2. The payments preferably be made to a company other than the IGB and in a jurisdiction other than Iraq; and*
- 3. The payments be recorded as being made as a part of a settlement reached between AWB and IGB, the terms of which contemplated that IGB would agree not to take any action against AWB for the alleged contamination of the 8 vessels in 2002 with iron filings AND would agree to enter into contracts for the purchase of Australian bulk wheat in the future in exchange for a renegotiation of the price on the 8 vessels.*

If we ensure that the above requirements are met, then Legal consider it will be at least arguable that we are not ‘making funds or financial resources available to the Iraqi Government’. Instead, we are repaying part of the contract price for the 8 vessels following a re-negotiation of the sale price due to a downgrading of the grain (which potentially contained iron filings).

In addition to the above the UN Security Council resolutions also require (resolution 986 (1995) clause 8) that the cost of food exports to Iraq must be met by draw down from the UN "escrow account". Furthermore draw down from the escrow account is only allowable under strict conditions. Those conditions include, at clause 8(a)(iii) that the goods to which payment is referable shall have arrived in Iraq. In this case, the goods have already arrived in Iraq and HAVE been paid for in full. However, the Resolutions are SILENT on the procedure for any repayment of part of the price in circumstances where there has been a quality complaint (and a subsequent renegotiation of price).

This may therefore give us more scope to make the repayment to IGB.

Even if we make payment as outlined above, there is still a risk that the Australian Government and/or the United Nations will take a contrary view on the interpretation of the above mentioned resolutions and declare that AWB has breached the terms of those resolutions by making the payment. This is a commercial and political issue, which AWB's management will need to consider.

- *According to an informal discussion with DFAT any repayment of a quality rebate should be either re-paid through UN ESCROW account or as a contract price reduction however they have not had a full legal argument put in front of them or been told officially. In Public affairs opinion as long as the repayment is legal and could not be seen to be breaking UN Sanctions then we should proceed (with the proviso that we have an independent legal opinion to that effect - see above legal opinion).*

Public Affairs also expressed concern that this would not be well received by the UN OIP office and that there was a reasonable chance of them finding out. IS & M on the other hand do not want them involved and feel confident that this issue could be handled without the need for the OIP to be consulted. It has been articulated to us and we have circumstantial evidence that other participants in the OIP program (Russian and Pakistani companies) have had to sort out quality problems in a similar way and it is unlikely either their national governments or the OIP were consulted

- *IS & M feel strongly that a failure to repay the IGB as discussed will lead to serious consequences for AWBs relationship with the IGB. IS & M also believe that failure to refund this agreed debt in this way would have serious implications for the execution of the new contracts. AWBI are aware of all the issues laid out above and in light of the commercial imperative of this situation agree with the recommendation as laid out below. They do however insist that the Managing Director is appraised of the situation.*

Actions

Whilst IS & M have received a number of different opinions from different

areas of AWB and an informal opinion from DFAT we still feel this issue is a grey area with no prescriptive answers. Based on the opinions we do have and the commercial circumstances surrounding this issue IS & M recommend and seek approval for the following:

- *IS & M is to repay debt as per method outlined in AWBs legal opinion (and requested by the Minister of Trade) directly to Alia Transport in Jordan in instalments. IS & M will also look to obtain written agreement from IGB to the payment in the format agreed by legal however it is not guaranteed.*
- *Managing Director only to convey our intentions to the Australian Government at the appropriate time prior to Shipment. The timing of such a disclosure is important and we would recommend that nothing be done until at least Letters of Credit are in place for these contracts. Given that this is unlikely to happen until after a war with Iraq it may allow us a further chance of renegotiation with a new regime.*
- *IS & M to finalise as soon as possible a written agreement with Tigris with regard to the settlement of their debt.’ [Original emphasis omitted]*

224 The evidence before me establishes to the requisite prima facie standard that the price in contracts A1670 and A1680 was inflated to cover both the amount of the iron filings claim and the repayment by GBI of the debt which it owed to Tigris. A surcharge of US\$8.375 pmt was added to each contract in respect of the Tigris debt, as shown by an email from Nigel Edmonds-Wilson to Scales and others at AWB dated 12 December 2002. The same email shows that in each contract the inland transportation fee was set at US\$51.15 pmt. At the Commission, Mr Geary of AWB gave evidence that the prices in these two contracts were inflated to cover a component for the Tigris debt and a component for the US\$2 million iron filings rebate. He also said that the United Nations was not advised at any stage that the prices for wheat in these two contracts had been inflated in this way so as to cover the Tigris debt and the iron filings claim. To adopt the words of Viscount Finlay in *O'Rourke*, the evidence gives ample 'colour to the charge' that the prices in these two contracts were falsely misrepresented.

225 The evidence shows that the prices in the two wheat contracts were inflated as a means of extracting money from the United Nations' escrow account. Having regard to the terms of the memorandum of 7 February 2003, there are reasonable grounds for believing that, having extracted approximately US\$2 million from the escrow account to meet the iron filings claim, AWB planned to pay that money in instalments to GBI via the mechanism of

inland transportation fees. The material before me, including Whitwell's email of 7 November 2002 and his memorandum of 7 February 2003, indicates clearly that AWB knew that paying inland transportation fees to Alia was a means of making payments to the Iraqi Government. This plan was concealed from the United Nations.

226 The planned payments of the iron filings claim were never carried into effect because the invasion of Iraq intervened. Scales gave evidence to the Commission that the iron filings money has never been paid and remains in AWBI's accounts. However, the fact that the payments were never made to the GBI will not prevent the application of the fraud exception so long as there is sufficient evidence that the communications were in furtherance of, or preparatory to, the commission of the fraud or impropriety in the broad sense described above: see *Butler*; and *Clements* at 562 [213].

227 In my view, the evidence establishes a more than adequate prima facie case that AWB knowingly and deliberately disguised the true nature of the prices in contracts A1670 and A1680. If it be relevant, I also consider that the evidence establishes the foregoing matters on the balance of probabilities and to a level of satisfaction commensurate with the seriousness of the allegation: see *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 per Dixon J. No question arises here of evidence which would not be admissible in a final hearing: cf *Propend*.

228 AWB argued that there was no evidence that the transaction furthered any particular fraud, iniquity or illegality. It submitted that it is common ground that the United Nations' resolutions were not in terms incorporated into Australian law. AWB submitted that, consequently, the fraud exception is not available to take the documents out of the operation of the doctrine of legal professional privilege. This narrow approach is at odds with the authorities that stress the wide range of fraudulent or iniquitous activities that fall within the principle.

229 I have inspected the six documents that were said to relate to the iron filings claim. My inspection of AWB's documents revealed a further four documents that fall within this category and are still the subject of a privilege claim. I am satisfied that these 10 documents are not privileged. The documents were, prima facie, brought into existence in furtherance of an improper and dishonest purpose, viz inflating the prices of contracts A1670 and A1680 so

as to extract payments out of the United Nations' escrow account that would then be utilised, in part, to satisfy a compensation claim by GBI. Prima facie, the evidence establishes that the transaction was deliberately and dishonestly structured by AWB so as to misrepresent the true nature and purpose of the trucking fees and to work a trickery on the United Nations. It would be contrary to public policy for the privilege to enure in communications of this kind.

230 The 10 documents in question are listed below in my conclusions.

231 There is an alternative basis for rejecting AWB's claim for privilege over the 10 iron filings documents. AWB's disclosure of the memorandum of 7 February 2003 and its tender by the Commonwealth as an exhibit in these proceedings, without any objection or claim to confidentiality by AWB, effects a waiver over the subject matter of the legal advice set out in the memorandum. My inspection of the 10 documents relating to the iron filings claim confirms my view that those documents relate to the subjects and issues that are canvassed in the memorandum of 7 February 2003. If, contrary to my view, any privilege subsisted in any of the documents, it has been waived by AWB.

232 When the Commonwealth tendered the unmasked version of the memorandum of 7 February 2003, I asked Mr Judd why AWB's production of that document did not waive any privilege that subsisted in documents relating to the iron filings claim. Mr Judd's response was that the Commonwealth did not put its case on that basis. I do not think that is entirely correct. In the particulars of its case, the Commonwealth contended that AWB's disclosure of the masked version of the memorandum of 7 February 2003 worked a waiver of any privilege in documents relating to Project Water and the Tigris transaction. The Commonwealth has never varied from the position that the iron filings claim was an integral part of the Tigris transaction. However, the Commonwealth did not in its closing address make any submission that privilege over the six documents had been waived by the production of the unmasked memorandum. To that extent, Mr Judd's response was correct.

233 Despite these matters, I have concluded that the Court cannot ignore the effect of the evidence before it, especially as AWB is seeking a declaration that the 10 documents are privileged.

CONCLUSIONS

234 It is not feasible in these reasons for judgment, when so many documents are at issue, to set out separate reasons for the decision I have reached on each particular document. I have reached the conclusions set forth hereunder after inspecting all of the documents in AWB's revised list of privileged documents and by applying the legal principles and factual findings identified above.

235 AWB has not made out its claim for privilege in respect of the following documents: 229, 245-247, 279, 280, 362B, 469A, 495, 542, 565, 586, 675, 784, 867, 872, 890AN, 1090, 1091, 1095, 1096, 1098, 1099, 1118 and 1262. These documents fall into the following categories:

- (a) documents for which there is no evidence of purpose to satisfy the dominant purpose test (documents 229, 469A, 542 and 565);
- (b) documents where the evidence does not satisfy the dominant purpose test, having regard to the nature and content of the document and the vague and formulaic evidence contained in the relevant segments of the affidavit evidence (documents 279, 280, 495, 675, 784, 867, 872, 890AN, 1095, 1096, 1098, 1099, 1118 and 1262);
- (c) a document that was provided to a third party and therefore was not a confidential communication for the dominant purpose of obtaining or giving legal advice (document 362B);
- (d) documents which are partly not proven and partly waived (documents 245-247, 586, 1090, 1091 which are discussed further below).

If, contrary to my view, privilege does attach to any of these documents, there has been a waiver of privilege in respect of all of them, other than documents 362B, 784, 872 and 1118. The waived documents are included in the list at [237] below.

236 In addition, there are 10 documents relating to the iron filings claims. They are as follows: 30, 31, 32, 32A, 33, 41, 594, 595, 595A and 596. Privilege does not attach to these documents as they were brought into existence in furtherance of a fraud or other impropriety. Alternatively, any privilege has been waived by AWB. These documents are included in the list at [237] below.

237 AWB has waived any legal professional privilege that subsisted in the following documents: 12, 301-33, 41, 56, 77-79, 81-85, 100-106, 110-117, 120-124, 126, 127, 129-132, 136, 137, 139, 140, 161, 213, 229, 235, 240, 241, 245-247, 250, 252, 253, 257-259, 263, 265-268, 271, 279, 280, 283, 284, 290, 292, 294-301, 308-310, 313, 326, 327, 330-333, 335A-342, 344, 348, 353A, 355-357, 359, 361, 362A, 365, 375, 377-380, 385, 386, 394, 422, 423, 424, 425, 432, 443, 445-449, 455, 461, 463, 465, 469A, 486, 487, 495, 507, 508, 513, 523, 524, 533, 534, 541-544, 547, 548, 553-555, 557, 563, 565, 568-579, 582-590, 592, 594-596, 599, 601-603, 675, 681, 681A, 689A, 689B, 699-704D, 704J-704P, 704T, 704X, 704AA, 704FF, 704KK, 711-715, 721, 722, 725, 729-733, 736-739, 749, 753, 755-757, 762, 771, 788, 794, 798, 815, 817, 820, 823, 824, 837, 840, 847, 867, 890AA, 890AD, 890AE, 890AH, 890AI, 890AJ, 890AK, 890AM, 890AN, 890AP, 890AQ, 1005, 1006, 1009, 1011-1013, 1025, 1026, 1028-1030, 1032, 1033, 1051, 1056, 1059, 1070, 1088-1096, 1098, 1099, 1119-1121, 1123, 1124, 1144-1152, 1161-1163, 1183-1187, 1221, 1222, 1262 and 1297.

238 In broad terms, the documents over which privilege has been waived comprise documents falling within the following categories: documents which define the scope of AWB's internal review or which identify what investigations were carried out; summaries, chronologies and other documents which record or analyse the results of those investigations; witness statements and other notes or records of interviews of AWB personnel; records of meetings and periodical reports concerning the findings of the review; and documents seeking advice, or comprising or recording advice provided to AWB, as to whether AWB or any of its employees engaged in wrongdoing in connection with wheat sales to Iraq under the OFF Programme, including any wrongdoing in connection with the Tigris transaction.

239 As I have explained, waiver does not turn on whether the documents attracted the description 'Project Rose' or 'Project Water'. On inspection, I determined that numerous documents marked 'Re: Project Rose' or the equivalent fall outside the scope of any waiver as they related to distinct matters about which AWB sought or obtained legal advice, such as the powers and jurisdiction of the PSI and IIC investigators, other US legal issues, the memorandum of understanding between the IIC and AWB, representation of AWB employees at IIC hearings, the powers of the Wheat Export Authority, and issues of directors' and officers' insurance and corporate governance.

240 There are a number of documents where, on inspection, I have determined that the document is only capable of attracting privilege as to part (the balance of the claim for privilege not having been proved), but that such privilege has been waived. These documents require some further explanation:

- (a) Documents 245 and 246 are drafts of an information paper dated 13 August 2004. Document 247 substantially replicates the draft information paper in a power point presentation format. AWB claims privilege in two parts of each of these documents, as indicated on the face of the documents. In substance, AWB contended that these parts attracted privilege because they recorded legal advice. On inspection I concluded that the claim is not established in respect of the first part of the documents. I have determined that the second part claimed attracts privilege but AWB has waived privilege in respect of that second part.
- (b) Document 586 is a table of various legal advices in the possession of Blakes. AWB contended that the table recorded legal advice. On inspection I concluded that this claim is not sustainable, save for the entries listed at 23, 24 and 25 of the table which disclose the substance of legal advice given by Mr Tracey QC. I have determined that AWB has waived privilege in respect of entries 23, 24 and 25 of the table.
- (c) Documents 1090 and 1091 are, respectively, the minutes of AWB and AWBI board meetings dated 22 February 2005. AWB claims privilege in two parts of each of these documents, as indicated on the face of the documents. It contended that these parts recorded legal advice. As to the first part claimed, this is not borne out by my inspection. I have determined that the second part claimed attracts privilege but AWB has waived privilege in respect of that second part.

241 There are also a number of documents which I have determined to be privileged only as to part of the claim made by AWB. After inspecting the documents and applying the principles I have discussed, I have determined that certain parts of the documents are privileged, while privilege in another part or parts of the documents has not been proved or it has been waived. It is necessary to deal with each of these documents:

- (a) Document 138 contains three pages of handwritten file notes. Privilege has not been established in respect of the first page of the document. If (contrary to my view) privilege is attracted, it has been waived. Privilege is established in respect of the

second page of the document. Privilege has not been established in respect of the third page of the document; or if privilege is attracted, contrary to my view, it has been waived.

- (b) Document 251 is a document consisting of a number of entries in a spreadsheet. AWB claims privilege in certain parts of the document, as indicated on the face of the document. AWB has waived privilege in respect of the parts claimed on pages 367, 368, 380, 390, and the first of the two parts claimed on each of pages 388 and 395. The page numbering refers to the system that AWB has adopted for its document control purposes. Otherwise, the document attracts privilege to the extent claimed.
- (c) Document 376 is a handwritten file note headed 'Iraq Report for JIS'. I have determined that the document attracts privilege, but that AWB has waived privilege in respect of the part of the document that relates to the Tigris transaction, namely the second entry commencing with the words 'completion of Iraq mkt. access arrangements' and concluding with the words 'confirm there is compliance'.
- (d) Documents 503, 520, 522, 526, 527 and 965 contain various drafts of a briefing paper initially prepared by ABL. I have determined that each of the documents attracts privilege, but that AWB has waived privilege in respect of the part of each document under the headings 'Legal Review' and 'Key Messages'.
- (e) Document 516 is another draft of the briefing paper referred to in the preceding subparagraph. I have determined that the document attracts privilege, but that AWB has waived privilege in respect of the part of the document under the heading 'Legal Review'.
- (f) Document 691 is a record of a meeting attended by various internal AWB employees and external lawyers. AWB said that the document attracted privilege in part. Dr Fuller gave evidence that it recorded legal advice of Leonie Thompson. I have determined that the passage on page 028 of the document opposite the entry 'Leonie T' is privileged. As to the remainder of the document, it does not record any legal advice and is not privileged.
- (g) Document 696 is a record of a meeting attended by various internal AWB employees and external lawyers. AWB claimed that the document was part privileged, and relied on Dr Fuller's evidence that it recorded legal advice given by Leon Zwier. I have determined that the passage on page 037 of the document opposite the heading 'Leon Zwier' (to the balance of the page) is privileged. Privilege has not been established in

respect of the remainder of the document. If any privilege attached to the remainder, it has been waived.

- (h) Document 704S is a record of various matters discussed between AWB's external and internal lawyers. I have determined that AWB has waived privilege over the six lines commencing with the entry which includes the words 'iron filings case'. The balance of the document is privileged.
- (i) Document 704II is a handwritten record of various conversations on 20 and 28 September 2004. On the face of the document, it appears that a claim for privilege is made only over the part of the document which is dated 28 September 2004. Privilege has been established over the entry dated 28 September 2004. However the evidence of Ms Peavey in relation to document 704II addresses the entry of 20 September 2004. If privilege is claimed over the part of the document which is dated 20 September 2004, it has not been established.
- (j) Document 1097 is the minutes of a meeting of the AWB and AWBI joint board committee. There are two parts of the document over which a claim for privilege is made on the ground that they record legal advice. On inspection I determined that the part of the document consisting of the first bullet point under the heading 'Project Rose' is privileged. However, privilege has not been established over the third bullet point. If privilege is attracted over that part of the document, it has been waived.

242 Document 1297 is a redacted copy of an email from Cooper to Lindberg and Scales, copied to Quennell, dated 16 November 2004. It appears that the redactions mask those parts of the document over which a claim for privilege is made. Prima facie, the document appears to be within the scope of the waiver I have identified and applied in these reasons for judgment. However, I propose to invite further submissions from the parties as to whether document 1297 is in contest and, if so, I will direct that an unredacted version of the document be filed with the Court for its inspection.

243 As for the remaining documents, AWB has in some instances claimed privilege over the entire document and in other instances it has only claimed privilege over a designated part or parts of the document. AWB has established that legal professional privilege attaches to the following documents to the extent claimed by it: 20, 21, 55, 89-98, 107, 108, 119, 133, 135, 143-146, 150-152, 154-160, 162-190, 194, 196, 197, 199-201, 204-211A, 215, 217-222, 224-228, 230-234, 237-239, 254-256, 260-262, 264, 269, 270, 273-278, 281, 282, 285, 286,

288, 293, 302-306, 311, 315-324, 334, 343, 345-347, 349-353, 354, 358, 362, 368, 374, 381, 382, 384, 387, 388-393, 395, 398-408, 410, 412-414, 416-421, 423A, 426-428, 430, 431, 433-442, 444, 450-454, 456, 457, 459, 460, 462, 464, 465A, 467, 468, 470-473, 475-485, 488, 490-494, 496-502, 504-506, 509, 510, 514, 515, 517-519, 521, 525, 529, 530, 536-540, 549-552, 556, 558-562, 564, 566, 567, 581, 591, 593, 600, 605, 671, 672, 673A, 679, 694, 696A, 704E – 704I, 704Q, 704R, 704U-704W, 704Y, 704Z, 704BB-704EE, 704GG, 704HH, 704JJ, 706-710, 724, 727, 740-745, 747, 748, 751, 752, 754, 758-761, 763-766, 768-770, 772, 773, 775, 777, 779-781, 785, 787, 790, 792, 797, 799-802A, 804, 806-814, 816, 818, 819, 821, 822, 826-831, 835, 849-852, 856, 857, 860, 861, 863, 865, 866, 868-870, 873, 876, 877, 879, 881-883, 885, 887-889, 890AB, 890AC, 890AG, 890AIA, 890AL, 890AR-AZ, 890BA-890BG, 937AJ, 937AP, 942, 947, 948, 950-953, 956-964, 966, 970-992, 994, 995, 997, 998, 1000-1004, 1071, 1073-1081, 1082A, 1083, 1086, 1087, 1112-1113A, 1114-1117, 1118A, 1152A, 1155, 1158-1160, 1190, 1195, 1196, 1200, 1206, 1213-1215, 1218, 1225, 1226, 1229, 1231, 1232, 1234, 1237, 1239, 1240, 1243, 1246-1250, 1252, 1255, 1256, 1260, 1261, 1293 and 1299-1301.

COPY DOCUMENTS

244 AWB has filed a list of duplicate privileged documents. The list is Exhibit JM5 to the affidavit of John Mitchell sworn 28 July 2002. Each document in the list is a duplicate of an identified document in AWB's list of privileged documents. The duplicates fill 17 lever arch folders. AWB has sought a declaration that the documents in this list are, or record, confidential communications that are protected from production to the Commissioner by legal professional privilege.

245 At the hearing, neither AWB nor the Commonwealth directed any substantive submissions to the status of these duplicate documents. In its written submissions, AWB referred to the principles enunciated in *Propend* as to the circumstances in which a copy of an unprivileged document can itself attract legal professional privilege. In those written submissions, AWB contended that the qualification which Brennan CJ expressed in *Propend* at 512 does not represent the law. The Chief Justice's qualification was that if the original unprivileged document is not in existence or its location is not disclosed or it is not produced, and if no unprivileged copy or other admissible evidence is available to prove the contents of the original document, then privilege cannot be maintained over the copy. However, AWB

did not make any submissions as to how, or why, this qualification might be relevant to its claims.

246 AWB adopted the position that the status of the duplicate documents depends on my decision as to the status of the corresponding original document. The Commonwealth did not make any submission to the contrary at the hearing, although its written submissions contended that AWB had failed to identify the purpose for which particular duplicates were created, or to establish that they were kept confidential. It would seem a harsh result if AWB were to lose the benefit of privilege in original documents simply because it has not explained or is unable to explain the circumstances in which copies were made. In large organisations and within law firms, it is hardly unexpected that multiple copies of privileged documents will be brought into existence and that, long after the event, it may be difficult to adduce evidence as to the circumstances in which the copies were made.

247 The submissions of the parties were so cursory that I did not gain any meaningful assistance from them. However, I have reached the following conclusions. Where I have held that specified original documents do not attract legal professional privilege, no case has been made out that duplicates of those documents are entitled to privilege. Where I have held that specified original documents attract legal professional privilege, I have concluded that privilege attaches to the duplicates. The duplicates come from the custody of AWB, and there is nothing to suggest that the duplicates were dealt with, or communicated, in ways that would deny the privilege claim. Furthermore, the material before me does not identify any specific grounds for concluding that the duplicates do not attract privilege.

248 A number of documents in AWB's revised list of privileged documents are said to be duplicates of other documents in the list. There is no evidence as to some of those documents (documents 291, 307 and 580) and others have been removed (documents 26 and 1031). Consequently, I have not made any findings about those documents; it is unclear whether they remain in contest. It is necessary to make specific reference to a number of other duplicate documents in the list:

- (a) Document 582 is a copy of document 140. I have determined that AWB has waived any privilege attaching to the documents.
- (b) Document 998 is a copy of document 995 and document 1001 is a copy of part of

document 1000. I have determined that the originals are privileged. For the reasons given at [247] above, privilege attaches to the copy documents.

- (c) Document 1006 is said by Chesterman to be a copy of document 1005. My inspection of the documents has revealed that this is not the case. There is therefore no evidence capable of supporting the claim for privilege in respect of document 1006. However, even if there were evidence that document 1006 attracted privilege, I am satisfied that AWB has waived the privilege.

RELIEF

249 I have determined that specified documents are not the subject of legal professional privilege and that other documents attract legal professional privilege. The Court has power to make declarations to this effect. I propose to give AWB and the Commonwealth an opportunity to make submissions as to the form of any declarations that should be made to give effect to these reasons for judgment.

250 AWB's second further amended application also sought declarations relating to the construction and validity of the Amending Act. In addition, AWB sought a declaration that the exercise of powers by the Commissioner under s 6AA(2) of the RCA, while these proceedings are pending before this Court, would constitute a contempt of Court, and injunctions restraining the Commissioner from making a decision under s 6AA(2) of the RCA. No live issues arise concerning these claims for relief: see *AWB Ltd v Honourable Terence Rhoderic Hudson Cole (No 2)* [2006] FCA 913. Neither AWB nor the Commonwealth put any submissions to me, whether orally or in writing, concerning these claims for relief. It is unnecessary to address them further.

251 Accordingly, the only orders I propose to make at this stage are as follows:

- (1) Within 3 business days AWB and the Commonwealth file an agreed minute of orders that give effect to these reasons for judgment. If AWB and the Commonwealth are unable to agree upon appropriate orders, within 3 business days AWB and the Commonwealth shall each file and serve a minute of the orders that it contends are necessary and appropriate to give effect to these reasons for judgment.

- (2) The proceeding be adjourned to Monday 25 September 2006 at 10.15am for any argument as to the orders.

I certify that the preceding two hundred and fifty-one (251) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Young.

Associate:

Dated: 18 September 2006

Counsel for the Applicant: J Judd QC, P Corbett and Dr S McNicol

Solicitor for the Applicant: Arnold Bloch Leibler

Counsel for the First Respondent: The First Respondent did not appear

Counsel for the Second Respondent: I Harrison SC, R Newlinds SC and NJ Beaumont

Solicitor for the Second Respondent: Australian Government Solicitor

Date of Hearing: 7, 9, 10, 11 August 2006

Date of Judgment: 18 September 2006



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10 December 2013

Dear Attorney

**GOVERNMENT OF THE DEMOCRATIC REPUBLIC OF TIMOR-LESTE
EXECUTION OF ASIO SEARCH WARRANTS**

We act on behalf of the Government of the Democratic Republic of Timor-Leste (**Government of Timor-Leste**).

We refer to the search warrants executed by officers of the Australian Security Intelligence Organisation (**ASIO**) on or around 3 December 2013 at the premises of Mr Bernard Collaery and a former ASIS officer to search and seize documents, data and other property which belongs to the Government of Timor-Leste and/or which the Government of Timor-Leste has the right to protect under international law (**Documents and Data**).

For the reasons that follow, on behalf of the Government of Timor-Leste, we request that the Attorney-General's Department forthwith, and in any event by no later than **5 pm Thursday, 12 December 2013**:

1. provide us with copies of the ASIO search warrants executed against the premises of both Mr Bernard Collaery and the former ASIS officer;
2. return the originals of all the Documents and Data seized from the premises of both Mr Bernard Collaery and the former ASIS officer together with a complete schedule of the seized Documents and Data; and

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3. confirm that it has destroyed beyond recovery any and all copies of the seized Documents and Data that have already been made.

Copies of ASIO Search Warrants

As to our first request, the ASIO search warrants apparently purport to authorise a search and seizure of materials at the premises of our client's legal representative (Mr Bernard Collaery) and key witness (the former ASIS officer) in arbitration proceedings currently on foot between the Government of Timor-Leste and the Government of the Commonwealth of Australia at The Hague.

Given this apparent targeting of our client's legal representative, and key witness, our client wishes to consider whether the Documents and Data removed from the subject premises were:

- (i) lawfully seized;
- (ii) Documents and Data to which our client is entitled to assert legal professional privilege; and
- (iii) Documents and Data our client has the right to protect under international law as a matter of State interest.

Accordingly, on behalf of our client, we request that your office urgently provide us with copies of the search warrants.

If it is asserted (as we understand it was asserted to the occupiers of the premises at the time of execution) that copies of the search warrants cannot be provided because the information contained therein pertains to matters of national security, we request that your office provide us with redacted copies of the search warrants.

In making this request, we make no concession that the warrants that purport to authorise what would otherwise be:

- (i) a trespass against the premises of our client's legal representative and its witness; and/or
- (ii) a trespass against our client's Documents and Data held at those premises;

could properly be subject to any claim of confidentiality from disclosure to our client, whether for national security or any other reason.

If you assert that those actions were authorised by the warrant that you apparently issued, it is for you and those who executed the warrants to produce that authority to our client.



Return of Documents

As to our requests two and three, as noted above, the Documents and Data seized under the search warrants will, in all likelihood, include documents that are subject to legal professional privilege. Moreover, the Documents and Data are likely to include material that the Government of Timor-Leste has the right to protect under international law as a matter of State interest.

Accordingly, we ask that you return the originals of all Documents and Data seized, together with a schedule of such material in order for our client to properly ascertain the nature of the Documents and Data seized.

We further ask that you destroy beyond recovery any copies of the Documents and Data that have already been made, pending the Government of Timor-Leste's agreement on the handling of the Documents and Data that it is entitled to protect.

If it is asserted that our client does not have a right of return to its Documents and Data (which we deny), we ask, as a minimum, that your office, forthwith (and in any event by the time outlined above, i.e., **5 pm Thursday, 12 December 2013**):

- (i) provide us with a schedule of the seized Documents and Data; and
- (ii) seal the seized Documents and Data (and provide a confirmation to us in relation to the same) pending an inspection of the material by us on behalf of our client to ascertain whether the Documents and Data are subject to legal professional privilege and/or include material that the Government of Timor-Leste has the right to protect under international law as a matter of State interest.

We look forward to hearing from you.

Yours sincerely

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16 December 2013

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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



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18 December 2013

By Email Only: irene.sekler@ags.gov.au

Dear Ms Sekler

**GOVERNMENT OF THE DEMOCRATIC REPUBLIC OF TIMOR-LESTE
EXECUTION OF ASIO SEARCH WARRANTS**

We refer to your letter dated 16 December 2013.

1. We note that your client refuses to provide us with copies of the search warrants.
2. We further note your refusal to provide this firm with copies of the property seizure records completed at the time of the execution of the warrants.
3. You have failed to address our requests for the return of the originals of all the Documents and Data seized and to confirm that your client has destroyed beyond recovery any and all copies of the seized Documents and Data that have already been made.
4. In these circumstances our client's Agent, Ambassador da Fonseca has, on 17 December 2013, submitted an application to the Registrar of the International Court of Justice for the initiation of proceedings against your client and made an urgent request that the Court indicate provisional measures to preserve its rights under international law, pending determination of the issues raised by the application.
5. Copies of both the Application initiating proceedings and the Request for the indication of provisional measures are enclosed, as a matter of professional courtesy.

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6. Please confirm that your client will continue to take no steps in relation to the Seized Material, pending the resolution of this matter by the International Court of Justice.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Scott McDonald'.

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A handwritten signature in blue ink, appearing to read 'Gitanjali Bajaj'.

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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

A handwritten signature in black ink, appearing to read 'Irene Sekler', with a long horizontal flourish extending to the right.

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21 December 2013

By Email Only: irene.sekler@ags.gov.au

Dear Ms Sekler

**GOVERNMENT OF THE DEMOCRATIC REPUBLIC OF TIMOR-LESTE
EXECUTION OF ASIO SEARCH WARRANTS**

We refer to your letter dated 19 December 2013.

1. It appears that you are advising us that if our client does not make a claim under domestic law for the material seized under the ASIO search warrants:
 - 1.1 in the manner set out by your client; and
 - 1.2 within the time set by your clientour client loses its entitlement to any such claim.
2. On 10 December 2013, we wrote requesting:
 - 2.1 copies of the ASIO search warrants, or, if more appropriate, redacted copies of the same;
 - 2.2 a schedule of the seized material;
 - 2.3 return of the originals of the seized material (or, at the very least, an opportunity to inspect the same); and
 - 2.4 a confirmation that all copies of the seized material are destroyed.
3. On 13 December 2013, by email, you asked for more time to respond to the request, albeit without giving a definite date.
4. On 16 December 2013, you responded essentially refusing to provide:
 - 4.1 copies of the search warrants;
 - 4.2 copies of the property seizure records; and
 - 4.3 the return of the originals and destruction of the copies of the seized material, instead stating, incorrectly, that our "*client has pointed to no legal entitlement which would warrant such return*".

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5. Your 16 December letter went on to outline (in paragraph 8) the manner in which our client should next proceed with its claim, so far as advising our client that if it "*wishes to make a claim in respect of the Seized Material, then by no later than 5:30pm on Thursday 19 December 2013, provide [you] with:*
- a. *details of the material over which each such claim is made;*
 - b. *details of the basis for each such claim; and*
 - c. *any draft proposed application or pleading."*
6. We responded on 18 December 2013 noting your client's refusal and providing you with copies of our client's Application to the International Court of Justice.
7. In your latest letter of 19 December 2013, you again appear to be advising our client how it should, and indeed can, run its claim. In particular, we note paragraph 4 of your letter in which you state:

"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 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." [our emphasis]

As to any claim under domestic law, our client reserves its rights. It is clear that our client has given your client the opportunity to return the seized material, or, at the very least, afford our client the opportunity to inspect it such that it can properly ascertain the nature of the material seized. Your client has refused to do so.

In the circumstances, our client has now initiated separate proceedings against your client in the International Court of Justice.

Please call us if you have any queries or wish to discuss.

Yours sincerely



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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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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

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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
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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;

Chapter 3 Admissibility of evidence

Part 3.10 Privileges

Division 1 Client legal privilege

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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.

125 Loss of client legal privilege: misconduct

- (1) This Division does not prevent the adducing of evidence of:
 - (a) a communication made or the contents of a document prepared by a client or lawyer (or both), or a party who is not represented in the proceeding by a lawyer, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or
 - (b) a communication or the contents of a document that the client or lawyer (or both), or the party, knew or ought reasonably to have known was made or prepared in furtherance of a deliberate abuse of a power.
- (2) For the purposes of this section, if the commission of the fraud, offence or act, or the abuse of power, is a fact in issue and there are reasonable grounds for finding that:
 - (a) the fraud, offence or act, or the abuse of power, was committed; and
 - (b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act or the abuse of power;the court may find that the communication was so made or the document so prepared.

- (3) In this section:

power means a power conferred by or under an Australian law.

126 Loss of client legal privilege: related communications and documents

If, because of the application of section 121, 122, 123, 124 or 125, this Division does not prevent the adducing of evidence of a communication or the contents of a document, those sections do not prevent the adducing of evidence of another communication or document if it is reasonably necessary to enable a proper understanding of the communication or document.

Note:

Example: A lawyer advises his client to understate her income for the previous year to evade taxation because of her potential tax liability "as set out in my previous letter to you dated 11 August 1994". In proceedings against the taxpayer for tax evasion, evidence of the contents of the letter dated 11 August 1994 may be admissible (even if that letter

SUMMARY OF MUNICIPAL 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, the Kingdom of Belgium, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Republic of India, the Republic of Indonesia, the United Mexican States, the Kingdom of Morocco, New Zealand, the Russian Federation, the Slovak Republic, the Swiss Confederation, the Democratic Republic of Timor-Leste, the Republic of Uganda, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

	State	Scope of privilege	Exceptions
1.	<u>Australia</u>	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.	<u>Kingdom of Belgium</u>	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.	<u>Kingdom of Denmark</u>	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,

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.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=186706080).

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
			this exception does not extend to information the lawyer has been provided with in order to conduct the proceedings on behalf of their client, or to information in respect of which the lawyer's advice has been sought. ⁷
4.	<u>French Republic</u>	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 <i>Conseil d'Etat</i> 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 <i>Conseil d'Etat</i> 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.	<u>Federal Republic of Germany</u>	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).

	State	Scope of privilege	Exceptions
6.	<u>Republic of India</u>	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.	<u>Republic of Indonesia</u>	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.	<u>United Mexican States</u>	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
9.	<u>Kingdom of Morocco</u>	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	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

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.riau.kemenag.go.id/file/file/.../lgkf1360853450.pdf>)

²¹ Federal Penal Code, Articles 210-211 (available at: <http://www.edomex.gob.mx/legistelfon/doc/pdf/cod/vig/codvig006.pdf>).

²² Federal Penal Code, Articles 210-211 (available at: <http://www.edomex.gob.mx/legistelfon/doc/pdf/cod/vig/codvig006.pdf>).

²³ Federal Penal Code, Articles 210-211 (available at: <http://www.edomex.gob.mx/legistelfon/doc/pdf/cod/vig/codvig006.pdf>).

	State	Scope of privilege	Exceptions
		disclose papers, documents or letters relating to a current investigation. ²⁴ The disclosure of such information is a punishable offence. ²⁵	woman. ²⁶
10.	<u>New Zealand</u>	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.	<u>Russian Federation</u>	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.	<u>Slovak Republic</u>	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
13.	<u>Swiss Confederation</u>	Lawyers are under an obligation not to disclose information learnt in the exercise of their profession. ³⁴ Lawyers may rely	The obligation (and ability to rely on that obligation to decline to testify or provide evidence) will not apply where

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).

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>).

	State	Scope of privilege	Exceptions
		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	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.	<u>Democratic Republic of Timor-Leste</u>	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.	<u>Republic of Uganda</u>	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 advice given by them to their client in the course and for the purpose of that employment. ⁴²	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 commencement of their employment. ⁴³

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: Canton of Zurich, Anwaltsgesetz of 17 November 2003 (OS Zurich Bd 59 S 144), s34(3) (available at: http://www.zh.ch/internet/de/rechtliche_grundlagen/gesetze/erlass.html?Open&Ordnr=215.1); 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>).

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>)

	State	Scope of privilege	Exceptions
16.	<u>United Kingdom of Great Britain and Northern Ireland</u>	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.	<u>United States of America</u>	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

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).



REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

GOVERNO

DECRETO-LEI N.º /2005

DE DE

APROVA O CÓDIGO DE PROCESSO PENAL

O compromisso assumido colectivamente por Timor-Leste, no sentido da sua afirmação como País independente, conduziu ao reclamar de um sistema jurídico próprio, no qual as soluções processuais penais assumem especial relevo.

A urgência na elaboração de uma codificação do direito processual penal fez-se sentir também dadas as opções nacionais que se encontram firmadas em instrumentos como a Constituição e o projecto de Código Penal cuja lei de autorização foi também já publicada, condicionando necessariamente a redacção do Código de Processo Penal.

Aliada a estas opções está também, naturalmente, a existência de condicionalismos derivados do rápido mergulhar de Timor-Leste nos compromissos internacionais que tem vindo a assumir, assim como das opções firmadas ao nível do sistema jurídico perflhado.

Por outro lado, tem-se em atenção a génese e a importância dos colectivos criados pela Administração Transitória das Nações Unidas em Timor-Leste (UNTAET) com competência para o tratamento dos processos relativos aos crimes graves cometidos entre 1 de Janeiro e 25 de Outubro de 1999 e que continuam em funções.

Assim:

No uso da autorização legislativa concedida ao abrigo dos artigos 1.º e 2.º da Lei n.º 15/2005, de 16 de Setembro, e nos termos do previsto no artigo 96.º da Constituição, o Governo decreta, para valer como lei, o seguinte:

Artigo 1.º
Aprovação do Código de Processo Penal

É aprovado o Código de Processo Penal publicado em anexo e que faz parte integrante do presente diploma.

Artigo 2.º
Revogação

1. São revogados:
 - a) O Regulamento da UNTAET n.º 2000/30, de 25 de Setembro, alterado pelo Regulamento da UNTAET n.º 2001/25, de 14 de Setembro, sobre regras provisórias de processo penal;
 - b) O n.º 1 do artigo 6.º e os artigos 1.º, 3.º, 4.º e 16.º do Decreto-Lei n.º 16/2003, de 1 de Outubro.
2. São também revogadas as normas constantes de legislação que consagre soluções contrárias às adoptadas pelo Código de Processo Penal, nomeadamente as do Regulamento da UNTAET n.º 2000/11, de 6 de Março, alterado pelos Regulamentos da UNTAET n.º 2000/14, de 10 de Maio, 2001/18, de 21 de Julho, e 2001/25, de 14 de Setembro.
3. Fica ressalvado o disposto no artigo seguinte.

Artigo 3.º
Crimes graves

Mantêm-se em vigor todas as normas que regulam os processos relativos aos crimes graves cometidos entre 1 de Janeiro e 25 de Outubro de 1999, nomeadamente as constantes:

- a) Dos números 1, 2 e 4 do artigo 9.º do Regulamento da UNTAET n.º 2000/11, de 6 de Março, na sua actual redacção;
- b) Do Regulamento da UNTAET n.º 2000/15, de 6 de Junho.

Artigo 4.º
Contravenções

Enquanto subsistirem contravenções no ordenamento jurídico timorense, aplicam-se subsidiariamente ao processo contravencional, com as devidas adaptações, as normas do Código aprovado por este diploma.

Artigo 5.º
Entrada em vigor

O presente diploma e o Código de Processo Penal entram em vigor em 1 de Janeiro de 2006.

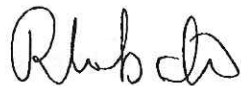
Aprovado em Conselho de Ministros de 20 de Outubro de 2005.

O Primeiro-Ministro,



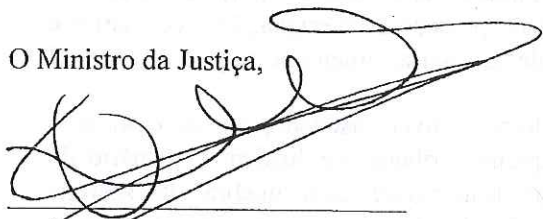
(Mari Bim Amude Alkatiri)

O Ministro do Interior,



(Rogério Tiago Lobato)

O Ministro da Justiça,



(Domingos Maria Sarmento)

Promulgado em 22 Nov 05

Publique-se.

O Presidente da República,



(Kárla Xanana Gusmão)

2. A entidade competente para receber o depoimento adverte, sob pena de nulidade, as pessoas referidas no número anterior da faculdade que lhes assiste de recusarem o depoimento.

Artigo 126.º
Segredo profissional

1. Os ministros de religião ou confissão religiosa, os advogados, os médicos, os jornalistas, os membros de instituições de crédito e demais pessoas a quem a lei permitir ou impuser que guardem segredo profissional podem escusar-se a depor sobre os factos abrangidos por aquele segredo.
2. Havendo dúvidas fundadas sobre a legitimidade da escusa, a autoridade judiciária perante a qual o incidente se tiver suscitado procede às averiguações necessárias e caso após estas conclua pela ilegitimidade da escusa, ordena ou requer ao tribunal que ordene a prestação do depoimento.
3. O tribunal superior àquele onde o incidente se tiver suscitado, ou, no caso de o incidente se ter suscitado perante o Supremo Tribunal de Justiça, o plenário do mesmo, pode decidir da prestação de testemunho com quebra do segredo profissional sempre que esta se mostre justificada face às normas e princípios aplicáveis da lei penal, nomeadamente face ao princípio da prevalência do interesse preponderante, sendo a intervenção suscitada pelo juiz, oficiosamente ou a requerimento.
4. O disposto no número anterior não se aplica ao segredo religioso.
5. Nos casos previstos nos n.º 2 e 3 a decisão do tribunal ou do Supremo Tribunal de Justiça é tomada ouvido o organismo representativo da profissão relacionada com o segredo profissional em causa, nos termos e com os efeitos previstos na legislação que a esse organismo seja aplicável.

Artigo 127.º
Segredo de funcionários

1. Os funcionários não podem ser inquiridos sobre factos que constituam segredo e de que tiverem tido conhecimento no exercício das suas funções.
2. É correspondentemente aplicável o disposto nos n.º 2 e 3 do artigo anterior.

Artigo 128.º
Segredo de Estado

1. As testemunhas não podem ser inquiridas sobre factos que constituam segredo de Estado.
2. O segredo de Estado a que se refere o presente artigo abrange, nomeadamente, os factos cuja revelação, ainda que não constitua crime, possa causar dano à segurança, interna ou externa, do Estado Timorense ou à defesa da ordem constitucional.
3. Se a testemunha invocar segredo de Estado, deve este ser confirmado por intermédio do Ministro da Justiça no prazo de 60 dias contados da data da comunicação oficial feita pelo tribunal ao Ministro.
4. Decorrido o prazo a que se refere o número anterior sem a confirmação ter sido obtida, o testemunho deve ser prestado.

English Translation: Decree Law No 13/2005, Approving the Criminal Procedure Code

Article 126

Professional secrecy

1. Church or religious ministers, lawyers, medical doctors, journalists, members of credit institutions and other persons allowed or required by law to maintain professional secrecy may refuse to give a deposition on facts covered by that secrecy.
2. In the case of reasonable doubts about the lawfulness of the refusal to give a deposition, the judicial authority before which the incident has been raised carries out the necessary investigations; and if, once such investigations have been completed, the refusal is considered to be unlawful, the judicial authority orders or requests the court to order that the deposition be given.
3. A court higher than that where the incident has been raised, or its full bench, if the incident has been raised before the Supreme Court of Justice, may decide 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; and the intervention is initiated by the judge, on a discretionary basis or at request.
4. Sub-article 126.3 does not apply to religious secrecy.
5. In the cases provided in sub-articles 126.2 and 126.3, a decision is made by the court or the Supreme Court of Justice after the agency representative of the profession related to the professional secrecy in question has been heard, under the terms of, and with the effects provided in, legislation applicable to that agency.



Intelligence Services Act 2001

Act No. 152 of 2001 as amended

This compilation was prepared on 29 March 2011
taking into account amendments up to Act No. 5 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

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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.

Section 41

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.



Crimes Act 1914

No. 12, 1914 as amended

Compilation start date: 29 June 2013

Includes amendments up to: Act No. 103, 2013

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

About this compilation

The compiled Act

This is a compilation of the *Crimes Act 1914* 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 11 July 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.

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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.



Criminal Code Act 1995

No. 12, 1995 as amended

Compilation start date: 1 January 2014

Includes amendments up to: Act No. 96, 2013

Prepared by the Office of Parliamentary Counsel, Canberra

About this compilation

This compilation

This is a compilation of the *Criminal Code Act 1995* as in force on 1 January 2014. It includes any commenced amendment affecting the legislation to that date.

This compilation was prepared on 1 January 2014.

The notes at the end of this compilation (the *endnotes*) include information about amending laws and the amendment history of each amended provision.

Uncommenced amendments

The effect of uncommenced amendments is not reflected in the text of the compiled law but the text of the amendments is included in the endnotes.

Application, saving and transitional provisions for provisions and amendments

If the operation of a provision or amendment is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

Modifications

If a provision of the compiled law is affected by a modification that is in force, details are included in the endnotes.

Provisions ceasing to have effect

If a provision of the compiled law has expired or otherwise ceased to have effect in accordance with a provision of the law, details are included in the endnotes.

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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.

Schedule The Criminal Code

Chapter 5 The security of the Commonwealth

Part 5.2 Offences relating to espionage and similar activities

Division 91 Offences relating to espionage and similar activities

Section 91.1

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.

Section 91.2

- (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).

MUNICIPAL OFFENCES FOR THE UNAUTHORISED DISCLOSURE OF CLASSIFIED INFORMATION

The following table extracts legislation criminalising the unauthorised disclosure of classified information of the following States: Australia, the Kingdom of Belgium, the Federative Republic of Brazil, the People’s Republic of China, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Republic of India, the Italian Republic, Japan, the United Mexican States, the Kingdom of Morocco, New Zealand, the Russian Federation, the Slovak Republic, the Swiss Confederation, the Democratic Republic of Timor-Leste, the Republic of 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	Offences for the Unauthorised Disclosure of Intelligence Information
1.	<u>Australia</u>	<p>Intelligence Services Act 2001 (Commonwealth)¹</p> <p>Section 39 - Communication of certain information—ASIS</p> <p>(1) A person is guilty of an offence if:</p> <ul style="list-style-type: none"> (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: <ul style="list-style-type: none"> (i) his or her being, or having been, a staff member of agent of ASIS; [...] and (c) the communication was not made: <ul style="list-style-type: none"> (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. <p>Section 41 - Publication of identity of staff</p> <p>(1) A person is guilty of an offence:</p> <ul style="list-style-type: none"> (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

¹ Available at: <http://www.comlaw.gov.au/Details/C2011C00145>.

State	Offences for the Unauthorised Disclosure of Intelligence Information
	<p>not of the Director-General or such other persons as the Director-General determines; or</p> <p>(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.</p> <p>Note: For <i>staff member</i> see section 3.</p> <p>(2) A prosecution for an offence against subsection (1) may be instituted only by the Attorney-General or with the Attorney-General's consent.</p> <p>Crimes Act 1914 (Commonwealth),² Section 70</p> <p>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.</p> <p>Criminal Code Act 1995 (Commonwealth),³ Section 91.1 of Schedule 1</p> <p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person communicates, or makes available: <ul style="list-style-type: none"> (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. <p>Penalty: Imprisonment for 25 years.</p> <p>(2) A person commits an offence if:</p>

² Available at: <http://www.comlaw.gov.au/Details/C2013C00369>.

³ Available at: <http://www.comlaw.gov.au/Details/C2014C00011>.

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	<p>(a) the person communicates, or makes available:</p> <ul style="list-style-type: none"> (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 <p>(b) the person does so:</p> <ul style="list-style-type: none"> (i) without lawful authority; and (ii) intending to give an advantage to another country's security or defence; and <p>(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.</p> <p>Penalty: Imprisonment for 25 years.</p> <p>(3) A person commits an offence if:</p> <p>(a) the person makes, obtains or copies a record (in any form) of:</p> <ul style="list-style-type: none"> (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 <p>(b) the person does so:</p> <ul style="list-style-type: none"> (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. <p>Penalty: Imprisonment for 25 years.</p> <p>(4) A person commits an offence if:</p> <p>(a) the person makes, obtains or copies a record (in any form) of:</p> <ul style="list-style-type: none"> (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 <p>(b) the person does so:</p> <ul style="list-style-type: none"> (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

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		<p>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.</p> <p>(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....</p>
2.	<u>Kingdom of Belgium</u>	<p>Penal Code, 8 June 1867⁴</p> <p>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).</p> <p>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).</p> <p>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.</p>
3.	<u>Federative Republic of Brazil</u>	<p>Act that establishes the Brazilian System of Intelligence and Creates the Brazilian Agency of Intelligence – ABIN, Law No 9.883/1999, 7 December 1999⁵</p> <p>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</p>

⁴ Available at : http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=1867060801

⁵ Available at: http://www.planalto.gov.br/ccivil_03/Leis/L9883.htm.

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		<p>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 were made to the Article by Provisionary Measure no 2.216-37 of 2001).</p> <p>Penal Code, Decree Law No 2.848, 7 December 1940⁶</p> <p>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...</p> <p>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</p> <p>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.</p> <p>(1) The same penalties that apply to this article apply to those who:</p> <p>(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.</p> <p>(ii) improperly take advantage of their restricted access.</p> <p>(2) If the action or omission results in harm to the Public Administration or to others:</p> <p>Penalty- imprisonment from 2 to 6 years, and a fine.</p>
4.	<u>People’s Republic of China</u>	<p>Law of the People’s Republic of China on Guarding State Secrets 1988⁷</p> <p>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</p>

⁶ Available at: http://www.planalto.gov.br/ccivil_03/decreto-lei/del2848.htm.

⁷ Available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383925.htm.

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	<p>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.</p> <p>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.</p> <p>State Security Law 1993⁸</p> <p>Article 19: Any citizen or organisation shall keep confidential the State secrets that have come to his knowledge or its possession regarding State security.</p> <p>Article 20: No individual or organisation may unlawfully hold any document, material or other articles classified as State secrets.</p> <p>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.</p> <p>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.</p> <p>Criminal Law of the People's Republic of China 1979⁹</p> <p>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</p>

⁸ Available at: http://www.gov.cn/ziliao/flfg/2005-08/05/content_20927.htm.

⁹ Available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384075.htm.

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		detention, public surveillance or deprivation of political rights.
5.	<u>Kingdom of Denmark</u>	<p>Penal Code Consolidation Act No 607, 6 September 1986¹⁰</p> <p>§ 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.</p> <p>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.</p> <p>§ 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.</p> <p>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.</p> <p>§ 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.</p> <p>Stk. 2 If these acts are done negligently, the penalty may be a fine or imprisonment for up to 3 years.</p>
6.	<u>French Republic</u>	<p>Penal Code of the French Republic¹¹</p> <p>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.</p> <p>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</p>

¹⁰ Available at: <https://www.retsinformation.dk/Forms/R0710.aspx?id=152827>.

¹¹ Available at: <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719>.

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		<p>detention and with a fine of 150 000 euros.</p> <p>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.</p>
7.	<p><u>Federal Republic of Germany</u></p>	<p>Criminal Code of 13 November 1998¹²</p> <p>Section 93 (Definition of state secret)</p> <p>(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.</p> <p>(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.</p> <p>Section 94 (Treason)</p> <p>(1) Whosoever</p> <ol style="list-style-type: none"> 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. <p>(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</p> <ol style="list-style-type: none"> 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. <p>Section 95 (Disclosure of state secrets with intent to cause damage)</p> <p>(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</p>

¹²Available at: http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf.

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	<p>Federal Republic of Germany, shall be liable to imprisonment from six months to five years unless the offence is punishable under section 94.</p> <p>(2) The attempt shall be punishable.</p> <p>(3) In especially serious cases the penalty shall be imprisonment from one to ten years. Section 94(2) shall apply.</p> <p>Section 96 (Treasonous espionage; spying on state secrets)</p> <p>(1) Whosoever obtains a state secret in order to disclose it (section 94) shall be liable to imprisonment from one to ten years.</p> <p>(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.</p> <p>Section 97 (Disclosure of state secrets and negligently causing danger)</p> <p>(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.</p> <p>(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.</p> <p>(3) The offence may only be prosecuted upon the authorisation of the Federal Government.</p> <p>Section 97a (Disclosure of illegal secrets)</p> <p>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.</p> <p>Section 98 (Treasonous activity as an agent)</p> <p>(1) Whosoever</p> <ol style="list-style-type: none"> 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

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		<p>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.</p> <p>(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.</p>
8.	<u>Republic of India</u>	<p>Official Secrets Act 1923¹³ Section 3 (Penalties for spying)</p> <p>(1) If any person for any purpose prejudicial to the safety or interests of the State-</p> <ul style="list-style-type: none"> (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 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. <p>(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</p>

¹³ Available at: www.archive.india.gov.in/allimpfrms/allacts/3314.pdf.

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		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.
9.	<u>Italian Republic</u>	<p>Intelligence System for the Security of the Republic and new Provisions Governing Secrecy, Law no 124 of 8 March 2007¹⁴</p> <p>Section 41 (Prohibition against relating facts having State-secret status)</p> <p>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.</p> <p>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.</p> <p>3. Should State-secret status be confirmed and should knowledge of the matters having State-secret status be shown to be essential for the conclusion of the proceedings, the judge shall state that he/she cannot proceed on account of the existence of a State secret.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p>

¹⁴ Available: <http://www.sicurezza nazionale.gov.it/sisr.nsf/english/law-no-124-2007.html>.

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		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.
10.	<u>Japan</u>	<p>Bill on the Protection of Specially Designated Secrets¹⁵</p> <p>Article 1, Clause 1: This law is designed to prevent the disclosure of information related to Japan's national security or information concerning the maintenance of Japan's or its peoples' safety.</p> <p>Article 22</p> <p>Clause 1: When a person, engaged in work involving the handling of specially designated secrets, leaks specially designated secrets which they have come to know through their work, they will be sentenced to no more than 10 years jail, or, according to the circumstances, be sentenced to no more than 10 years jail and fined no more than 10 million yen. The same will apply even after a person stops work involving the handling of designated secrets.</p> <p>...Clause 4: Those who commit the crime outlined in clause 1 (above) through negligence will be imprisoned for no more than 2 years jail or fined no more than 500,000 yen.</p>
11.	<u>United Mexican States</u>	<p>National Security Act, 31 January 2005¹⁶</p> <p>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.</p> <p>Federal Penal Code, 14 August 1931¹⁷</p> <p>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</p>

¹⁵ Available at: http://www.shugiin.go.jp/itdb_gian.nsf/html/gian/honbun/houan/g18505009.htm, see also: http://www.shugiin.go.jp/itdb_gian.nsf/html/gian/honbun/syuuseian/1_53D2.htm.

¹⁶ Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/LSegNac.pdf>.

¹⁷ Available at: <http://www.edomex.gob.mx/legistelfon/doc/pdf/cod/vig/codvig006.pdf>.

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		<p>hundred days of community service.</p> <p>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.</p>
12.	<u>Kingdom of Morocco</u>	<p>General Civil Service Regulation Act, Dahir No. 1-58-008 of 4 Shaban 1377, 24 February 1958¹⁸</p> <p>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.</p> <p>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.</p> <p>Penal Code, Dahir No. 1-59-413, 26 November 1962¹⁹</p> <p>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.</p> <p>Article 187: [Things that] Are considered national defence secrets for the application of the present code :</p> <p>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.</p> <p>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 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.</p> <p>3° military information of whatever nature, not previously published by the government, and not listed in the categories above, and</p>

¹⁸ Available at: <http://www.mmsp.gov.ma/ar/documents.aspx?t=3>.

¹⁹ 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>.

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		<p>whose publication, broadcast, disclosure or copying was prohibited by decree or a ministerial cabinet decree.</p> <p>...</p> <p>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.</p> <p>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....</p> <p>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.</p>
13.	<u>New Zealand</u>	<p>New Zealand Security Intelligence Service Act 1996²⁰</p> <p>Article 12A (Prohibition on unauthorised disclosure of information)</p> <p>(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.</p> <p>(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.</p> <p>(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.</p> <p>(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.</p> <p>Crimes Act 1961</p> <p>Section 78A (Wrongful Communication, Retention, or Copying of Official Information)</p>

²⁰ Available: <http://www.legislation.govt.nz/act/public/1969/0024/latest/whole.html>.

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	<p>(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,—</p> <ul style="list-style-type: none"> (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— <ul style="list-style-type: none"> (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— <ul style="list-style-type: none"> (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. <p>(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—</p> <ul style="list-style-type: none"> (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)— <ul style="list-style-type: none"> (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

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	<p>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</p> <p>official information—</p> <p>(a) means any information held by—</p> <ul style="list-style-type: none"> (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 <p>(b) includes any information held outside New Zealand by any branch or post of—</p> <ul style="list-style-type: none"> (i) a department; or (ii) an organisation; and <p>(c) includes any information held by an unincorporated body (being a board, council, committee, subcommittee, or other body)—</p> <ul style="list-style-type: none"> (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 <p>organisation means—</p> <ul style="list-style-type: none"> (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 <p>statutory officer means a person—</p> <ul style="list-style-type: none"> (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

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	<p>Summary Offences Act 1981²¹ Section 20A (Unauthorised disclosure of certain official information)</p> <p>(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 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—</p> <ul style="list-style-type: none"> (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— <ul style="list-style-type: none"> (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. <p>(2) No charging document may be filed against any person for—</p> <ul style="list-style-type: none"> (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,—

²¹ Available at: <http://www.legislation.govt.nz/act/public/1981/0113/latest/DLM53348.html>.

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		<p>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.</p> <p>(3) The Attorney-General may, before deciding whether or not to give his consent under subsection (2), make such inquiries as he thinks fit.</p>
14.	<u>Russian Federation</u>	<p>Criminal Code of the Russian Federation²² Article 283 (Disclosure of a State Secret)</p> <p>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.</p> <p>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.</p> <p>Russian Federation Federal Law No 5 on Foreign Intelligence, 8 December 1995²³ Article 8 (Protection of information about the Russian Federation foreign intelligence organs)</p> <p>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</p>

²² Available at: <http://www.genproc.gov.ru/documents/legal-base/document-597/>.

²³ Available at: http://svr.gov.ru/svr_today/doc02.htm.

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		<p>used by these organs are stored in the archives of the Russian Federation foreign intelligence organs.</p> <p>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...</p>
15.	<u>Slovak Republic</u>	<p>Protection of Classified Information, Act of 11 March 2004²⁴</p> <p>Article 38: Obligations of authorised persons An authorised person is obliged to</p> <ul style="list-style-type: none"> (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. <p>Article 78: Transgressions</p> <ul style="list-style-type: none"> (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 <ul style="list-style-type: none"> (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,

²⁴ Available at: http://www.nbusr.sk/ipublisher/files/nbusr.sk/english/215_2004_eng.pdf.

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		<p>(d) uses technical devices at variance with the provisions of this Act,</p> <p>(e) Performs unauthorised aerial photographing of the territory of the Slovak Republic, commits a transgression in the field of the protection of classified information.</p> <p>(3) A fine may be imposed for a transgression</p> <p>(a) pursuant to paragraph 1, of up to SKK 50 000 or the prohibition to conduct activities,</p> <p>(b) pursuant to paragraph 2(a) and (b), of up to SKK 15 000,</p> <p>(c) pursuant to paragraph 2(c), (d) and (e), of up to SKK 50 000.</p> <p>(4) Transgressions in the field of the protection of classified information shall be dealt with by the Authority.</p> <p>(5) Transgressions and their resolution shall be governed by a specific regulation.</p>
16.	<u>Swiss Confederation</u>	<p>Swiss Criminal Code, 12 December 1937²⁵</p> <p>Art. 267: Diplomatic Treason</p> <p>1. Whoever intentionally revealed or rendered accessible to a foreign State or one of its agents a secret that the Interests of the Confederation commanded to be kept,</p> <p style="padding-left: 40px;">Whoever has falsified, destroyed, wiped or stolen official documents or evidence relating to legal relations between the Confederation or a Canton and a foreign State and has thus intentionally compromised the interests of the Confederation or Canton,</p> <p style="padding-left: 40px;">Whoever, in their capacity as representative of the Confederation, has intentionally conducted negotiations with a foreign government to the detriment of the Confederation,</p> <p>will be punished by a custodial sentence of at least one year.</p> <p>2. Whoever intentionally revealed or rendered accessible to the public a secret that the Interests of the Confederation commanded to be kept, will be punished by a custodial sentence of a maximum of five years or a fine.</p> <p>3. The penalty will be a custodial sentence of a maximum of three years or a monetary penalty if the offender has acted negligently.</p> <p>Article 320: Violation of a public secret</p> <p>1. Whoever revealed secret information confided in them in their 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 or employment, will be punished by a custodial sentence of a maximum of three years or a fine. A breach of official secrecy remains an offence following termination of employment as a member of an authority or as a public official.</p> <p>2. Revealing the secret will not be punishable if it is done with the written consent of a superior authority.</p>

²⁵ Available at: <http://www.admin.ch/opc/fr/classified-compilation/19370083/index.html>.

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17.	<p><u>Democratic Republic of Timor-Leste</u></p>	<p>Penal Code, Decree Law No 19/2009²⁶ Article 200 - Breach of State secrets</p> <ol style="list-style-type: none"> 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. <p>National Intelligence Service, Decree Law No 3/2009²⁷ Article 21 - Disciplinary offences</p> <ol style="list-style-type: none"> 1. Disciplinary offence shall mean the violation, by SNI functionaries or agents, of their respective functional duties, namely: <ol style="list-style-type: none"> 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. <p>Article 29 - Security rules</p> <ol style="list-style-type: none"> 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. <p>Article 30 - Depositions or statements</p> <ol style="list-style-type: none"> 1. No member of SNI summoned to depose or to make statements before judicial authorities may disclose facts covered by the State

²⁶ Available at: <http://www.jornal.gov.tl/lawsTL/RDTL-Law/index-e.htm>.

²⁷ Available at: <http://www.jornal.gov.tl/lawsTL/RDTL-Law/index-e.htm>.

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		<p>Secrecy or be subjected to enquiries on the same matters.</p> <p>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.</p>
18.	<u>Republic of Uganda</u>	<p>Official Secrets Act 1964²⁸</p> <p>(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—</p> <ol style="list-style-type: none"> 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 (d) 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. <ol style="list-style-type: none"> 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, document or information was contrary to his or her desire. <p>Any person who—</p>

²⁸ Available at: <http://www.opm.go.ug/resource-center/legislation.html>.

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		<p>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</p> <p>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,</p> <p>commits an offence under this Act.</p>
19.	<u>United Kingdom of Great Britain and Northern Ireland</u>	<p>Official Secrets Act 1989²⁹ 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...</p>
20.	<u>United States of America</u>	18 USC (Crimes and Criminal Procedure)³⁰

²⁹ Available at: <http://www.legislation.gov.uk/ukpga/1989/6/contents>.

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	<p>Chapter 37 (Espionage and Censorship) Section 793 (Gathering, Transmitting or Losing Defense Information)</p> <p>(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</p> <p>(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</p> <p>(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</p> <p>(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</p>

³⁰ Available at: <http://www.gpo.gov/fdsys/pkg/USCODE-2009-title18/html/USCODE-2009-title18.htm>.

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	<p>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</p> <p>(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 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</p> <p>(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,</p> <p>(1) 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</p> <p>(2) 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—</p> <p>Shall be fined under this title or imprisoned not more than ten years, or both.</p> <p>(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.</p> <p>(h)</p> <p>(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.</p> <p>(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...</p>

State	Offences for the Unauthorised Disclosure of Intelligence Information
	<p>Section 794 (Gathering or Delivering Defense Information to Aid Foreign Government)</p> <p>(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.</p> <p>(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.</p> <p>(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.</p> <p>(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.</p> <p>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.</p> <p>(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</p>

State	Offences for the Unauthorised Disclosure of Intelligence Information
	<p>the United States all property described in paragraph (1) of this subsection...</p> <p>Chapter 47 (Fraud and False Statements)</p> <p>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...</p> <p>Chapter 93 (Public Officers and Employees)</p> <p>Section 1924 (Unauthorized Removal and Retention of Classified Documents or Material)</p> <p>(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.</p> <p>(b)For purposes of this section, the provision of documents and materials to the Congress shall not constitute an offense under subsection (a).</p> <p>(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</p> <p>50 USC (War and National Defense), Chapter 23 (Internal Security)³¹</p> <p>Section 783 (Offenses):</p>

³¹ Available at: <http://www.gpo.gov/fdsys/granule/USCODE-2011-title50/USCODE-2011-title50-chap23/content-detail.html>.

State	Offences for the Unauthorised Disclosure of Intelligence Information
	<p>(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.</p> <p>(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 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.</p> <p>(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.</p> <p>...</p> <p>(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)...</p>

	State	Offences for the Unauthorised Disclosure of Intelligence Information
		(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.



JORNAL da REPÚBLICA

PUBLICAÇÃO OFICIAL DA REPÚBLICA DEMOCRÁTICA DE TIMOR - LESTE

§ 3.00

Suplemento

DECRETO-LEI N.º 19/2009

de 8 de Abril

APROVA O CÓDIGO PENAL

Perante a necessidade de construção do sistema jurídico, a elaboração e aprovação do Código Penal de Timor-Leste foi erigida, pelos responsáveis políticos, como uma das prioridades legislativas para a garantia dos direitos e liberdades fundamentais consagrados na Constituição da República Democrática de Timor-Leste.

O presente diploma jurídico resulta do trabalho desenvolvido por uma comissão de técnicos timorenses e internacionais que actuou sob orientação governamental e em estrita observância dos limites e conteúdo estabelecidos na lei de autorização legislativa em matéria penal aprovada no Parlamento Nacional. As soluções normativas consagradas, para além de respeitarem as realidades sociais e culturais específicas da comunidade timorense, acolhem igualmente sugestões efectuadas por organizações nacionais e internacionais, contributos de diversos operadores judiciais actuantes em Timor-Leste, bem como ensinamentos recolhidos do direito comparado.

Salienta-se que o Código Penal agora aprovado, mais do que um ponto de chegada definitivo, constitui antes uma etapa fundamental na construção do ordenamento jurídico timorense, sempre aberto a futuros aperfeiçoamentos que, no futuro, a evolução do direito internacional, a prática judiciária e o ensino do direito vierem a aconselhar.

Assim,

No uso da autorização legislativa concedida ao abrigo dos artigos 1º e 2º da Lei n.º 13/2008, de 13 de Outubro e nos termos do previsto no artigo 96.º da Constituição, o Governo decreta, para valer como lei, o seguinte:

Artigo 1.º

Aprovação do Código Penal

É aprovado o Código Penal publicado em anexo e que faz parte integrante do presente diploma.

Artigo 2.º

Norma revogatória

1. É revogado o Código Penal Indonésio, em vigor no orde-

namento jurídico nos termos do disposto no art.1º da Lei 10/2003.

2. São revogadas todas as disposições legais constantes de legislação avulsa que:

- Prevêem e punem factos incriminados pelo Código Penal agora aprovado;
- Consagrem soluções contrárias às adoptadas na Parte Geral do Código Penal.

Artigo 3.º

Entrada em vigor

O presente diploma e o Código Penal entram em vigor no 60º dia posterior ao da sua publicação.

Aprovado em Conselho de Ministros em 18 de Março de 2009.

O Primeiro Ministro,

(Kay Rala Xanana Gusmão)

A Ministra da Justiça,

(Lúcia M. B. F. Lobato)

Promulgado em 30/03/09

Publique-se.

O Presidente da República,

(José Ramos Horta)

arrogando-se, expressa ou tacitamente, possuí-lo ou preenchê-las, quando, efectivamente, o não possui ou as não preenche.

3. Na mesma pena incorre quem continuar no exercício de funções públicas, depois de lhe ter sido oficialmente notificada a demissão ou a suspensão dessas funções.

CAPÍTULO II CONTRA A SEGURANÇA DO ESTADO

Artigo 196° Traição à Pátria

Quem, por meio de violência, ameaça de violência, usurpação ou abuso de funções de soberania, impedir ou tentar impedir o exercício da soberania nacional no território ou em parte do território de Timor-Leste ou puser em perigo a integridade do território nacional, como forma de submissão ou entrega a soberania estrangeira, é punido com pena de prisão de 15 a 30 anos.

Artigo 197° Serviço ou colaboração com forças armadas inimigas

1. O cidadão timorense que colaborar com país ou grupos estrangeiros ou com os seus representantes, ou que servir debaixo da bandeira do país estrangeiro durante guerra ou acção armada contra Timor-Leste, é punido com pena de prisão de 12 a 25 anos.
2. Os actos preparatórios relativos aos factos descritos no número anterior são punidos com pena de prisão de 5 a 15 anos
3. Quem, sendo timorense ou residente no território nacional, praticar actos adequados a ajudar ou facilitar qualquer acção armada ou guerra contra Timor-Leste por país ou grupo estrangeiro, é punido com pena de prisão de 10 a 20 anos.

Artigo 198° Sabotagem contra a defesa nacional

Quem, com intenção de prejudicar ou colocar em perigo a defesa nacional, destruir, danificar ou tornar não utilizável, total ou parcialmente:

- a) Obras ou materiais próprios ou afectos às forças armadas;
- b) Vias ou meios de comunicação ou de transporte;
- c) Quaisquer outras instalações relacionadas com comunicações ou transportes; ou
- d) Fábricas ou depósitos;

é punido com pena de prisão de 5 a 15 anos.

Artigo 199° Campanha contra esforço pela paz

Aquele que, sendo timorense ou residente em território na-

cional, em tempo de preparação ou de guerra, difundir por qualquer meio, de modo a tornar público, rumores ou afirmações, próprias ou alheias, que saiba serem, total ou parcialmente, falsas, para prejudicar o esforço pela paz de Timor-Leste ou para auxiliar o inimigo estrangeiro, é punido com pena de prisão de 5 a 15 anos.

Artigo 200° Violação de segredo de Estado

1. Quem, pondo em perigo o interesse do Estado timorense relativo à sua segurança exterior ou à condução da sua política externa, transmitir, tornar acessível a pessoa não autorizada ou tornar público facto, documento, plano, objecto, conhecimento ou qualquer outra informação que devessem, por causa daquele interesse, permanecer secretos em relação a país estrangeiro, é punido com pena de prisão de 3 a 10 anos
2. Quem colaborar com governo ou grupo estrangeiro com intenção de praticar os factos referidos no número anterior ou recrutar ou auxiliar outra pessoa encarregada de os praticar, é punido com a pena prevista no número anterior.
3. Se o agente que praticar os factos descritos nos números anteriores exercer qualquer função política, pública ou militar que, pela sua natureza, devesse inibi-lo de praticar tais factos mais fortemente do que ao cidadão comum, é punido com pena de prisão de 5 a 15 anos.

Artigo 201° Infidelidade diplomática

Aquele que, representando oficialmente o Estado timorense, com intenção de prejudicar direitos ou interesses nacionais:

- a) Conduzir negócio de Estado com governo estrangeiro ou organização internacional; ou
- b) Assumir compromissos em nome de Timor-Leste sem para isso estar devidamente autorizado;

é punido com pena de prisão de 5 a 15 anos.

Artigo 202° Alteração do Estado de Direito

1. Quem, por meio de violência, ameaça de violência ou incitamento à guerra civil, tentar destruir, alterar ou submeter o Estado de direito constitucionalmente estabelecido, é punido com pena de 5 a 15 anos de prisão.
2. Se o facto descrito anteriormente for praticado por meio de violência armada a pena é de 5 a 20 anos de prisão.
3. O incitamento público ou a distribuição de armas para a prática dos factos descritos anteriormente é, respectivamente, punido com a pena correspondente à tentativa.

Artigo 203° Atentado contra representante máximo de órgão de soberania

1. Quem atentar contra a vida, integridade física ou a liberdade

**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)

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.

THE STATUTE OF
THE INTERNATIONAL
COURT OF JUSTICE

A COMMENTARY

SECOND EDITION

EDITED BY

ANDREAS ZIMMERMANN

CHRISTIAN TOMUSCHAT KARIN OELLERS-FRAHM

CHRISTIAN J. TAMS

ASSISTANT EDITORS

MARAL KASHGAR DAVID DIEHL

OXFORD

The Statute of the International Court of Justice

A Commentary

Second Edition

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than procedure since it 'entail[s] the limitation of sovereign powers'.⁴² Thus, interim protection in international litigation has a dual character, which is the source of the difficulties surrounding this subject-matter.

II. Preservation of Rights

The essential purpose of provisional measures is clearly stated in Art. 41, namely 'to preserve the respective rights of either party' pending final decision. The rights concerned are the rights of both parties and therefore it is vital for the Court to consider what action is called for in order to ensure that none of the parties is put at a disadvantage⁴³ and that any impression of bias is avoided. In order to guarantee the equal treatment of both parties, the Court often indicated provisional measures to both sides although mostly in a general form calling for the prevention of any aggravation of the situation.⁴⁴ In general, one side only seeks interim protection and the other opposes the request; it is, however, also possible that both sides might make a request, as in the *Frontier Dispute case*, or that a counter-claim for provisional measures is filed, as in the (*Bosnian Genocide case*). In these cases, the danger of unequal treatment is fairly small.

The preservation of rights means, as the Court has stated in almost identical words constantly in its jurisprudence, 'that irreparable prejudice should not be caused to rights which are the subject of the dispute in judicial proceedings'.⁴⁵ As has been rightly pointed out, the term 'right' in this context is not very fortunate because the 'right' remains in existence even if it is infringed.⁴⁶ Thus, what is to be preserved is the subject-matter of the right, the factual use of the right which would be impossible if the subject-matter were irreparably destroyed. This may include the preservation of evidence, as the Court stated in the *Frontier Dispute case*, although orders explicitly including measures concerning the preservation of evidence are the exception.⁴⁷

1. Non-Aggravation of the Dispute

While the first provision concerning interim protection, namely Art. XVIII of the 1907 Washington Convention creating the Central American Court, aimed only at non-aggravation of the situation and conservation of the *status quo*, Art. 41 seems to require more, *i.e.* the preservation of rights. Thus, the question is whether the indication of provisional measures exclusively in order to avoid an aggravation of the dispute, without

⁴² Procès-Verbaux, *supra*, fn. 4, p. 735; cf. also Guggenheim, *Rec. des Cours* 40 (1932), pp. 649, 694-5; Oellers-Frahm, GLJ, *passim*.

⁴³ Cf. on this aspect in particular Greig, *passim*.

⁴⁴ Cf. *infra*, MN 22.

⁴⁵ Cf. e.g. *Icelandic Fisheries cases*, *supra*, fn. 21, ICJ Reports (1972), pp. 12, 16 (para. 21), pp. 30, 34 (para. 22); *Great Belt case*, *supra*, fn. 25, ICJ Reports (1991), pp. 12, 16 (para. 16); *Breard case*, *supra*, fn. 25, ICJ Reports (1998), pp. 248, 257 (para. 35); *Land and Maritime Boundary case*, *supra*, fn. 25, ICJ Reports (1996), pp. 13, 21-2 (para. 35); *Armed Activities case (DRC/Uganda)*, *supra*, fn. 25, ICJ Reports (2000), pp. 111, 127 (para. 39); *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo/Belgium)*, Provisional Measures, ICJ Reports (2000), pp. 182, 201 (para. 69); *Pulp Mills*, *supra*, fn. 25, ICJ Reports (2006), pp. 113, 129 (para. 61); *Certain Activities in the Border Area case*, *supra*, fn. 25, available at <<http://www.icj-cij.org>>, para. 53.

⁴⁶ Thirlway in *Interim Measures*, pp. 1, 7.

⁴⁷ *Frontier Dispute case (Burkina Faso/Mali)*, *supra*, fn. 25, ICJ Reports (1986), pp. 3, 12 (para. 32); *Land and Maritime Boundary case*, *supra*, fn. 25, ICJ Reports (1996), pp. 13, 25 (para. 49). Cf. also Garcia, T., 'Les mesures conservatoires rendues par la Cour internationale de Justice, le 15 Mars 1996, dans le différend frontalière entre le Cameroun et le Nigéria', *AFDI* 42 (1996), pp. 409-27, pp. 422 *et seq.*

within a system of consensual jurisdiction, to maintain on the General List a case upon which it appears certain that the Court will not be able to adjudicate on the merits would most assuredly not contribute to the sound administration of justice.⁹⁴

In the operative part of the Order, the Court consequently not only rejected the request for provisional measures but also ordered that the case be removed from the List. That the Court removes a case only where its jurisdiction is evidently lacking was demonstrated in the *Armed Activities case (New Application)* (DRC/Rwanda). Since Rwanda had not made a declaration under the optional clause, the Congo invoked eight international treaties as bases for the Court's jurisdiction, while Rwanda contended that none of these treaties could come anywhere near affording even a *prima facie* basis for jurisdiction and that the Court should remove the case from the List.⁹⁵ The Court, in fact, dismissed the request for lack of a sufficient jurisdictional basis; it did not, however, order the removal of the case from the General List because it found that there was manifest lack of jurisdiction only with regard to six of the instruments invoked, while two treaties which required negotiations prior to seising the Court might be a basis for jurisdiction if the negotiations failed.

4. Possible Interference with State Sovereignty

- 33 The fact that the Court exercises its power to indicate provisional measures when the substantive jurisdiction exists on a *prima facie* basis without being definitively certain makes it possible that provisional measures are indicated in a case where finally the substantive jurisdiction is denied. It has been generally accepted that the interference with the sovereignty of States may thus be the price for preserving the substantive rights if need be. To keep this risk as low as possible, the Court gives jurisdiction over the merits 'fullest consideration compatible with the requirement of urgency'.⁹⁶ In fact, only twice did the Court decline its jurisdiction on the merits after having indicated provisional measures.⁹⁷
- 34 Whether the question of the extent of certainty as to the jurisdiction on the merits needs to be reconsidered with reference to the aspect of non-interference with the sovereignty of States for the reason that the Court found in the *LaGrand case* that provisional measures are binding upon the parties,⁹⁸ will be examined in that context.⁹⁹

II. Existence of a *prima facie* Case

- 35 Provisional measures are designed to preserve the rights which might be adjudged on the merits; thus, as there must be at least a *prima facie* basis for substantive jurisdiction, there must also be some prospect of success on the merits of the case, for otherwise there would not be any necessity to indicate provisional measures.¹⁰⁰

⁹⁴ *Ibid.*, pp. 773 (para. 35) and p. 925 (para. 29), respectively.

⁹⁵ *Armed Activities case (New Application)* (DRC/Rwanda), *supra*, fn. 25, ICJ Reports (2002), pp. 219, 233–4 (paras. 33 *et seq.*).

⁹⁶ *Nicaragua case*, *supra*, fn. 25, ICJ Reports (1984), pp. 168, 179 (para. 25).

⁹⁷ *Anglo-Iranian Oil case*, *supra*, fn. 21, Preliminary Objections, ICJ Reports (1952), pp. 93 *et seq.*; *CERD case*, *supra*, fn. 25, Provisional Measures, ICJ Reports (2008), pp. 353, *et seq.*, and Preliminary Objections, Judgment of 1 April 2011, available at <<http://www.icj-cij.org>>.

⁹⁸ *LaGrand case*, *supra*, fn. 6, ICJ Reports (2001), pp. 466, 506 (para. 109).

⁹⁹ *Cf. infra*, MN 95–96.

¹⁰⁰ Dumbauld, p. 165. But *cf.* Rosenne, *Provisional Measures*, p. 72, who argues that the Court cannot speculate as to the merits of the case at the stage of provisional measures (citing the ICSID arbitration *Maffezini v. Kingdom of Spain*, Procedural Order No. 2, *ILR* 124 (2003), pp. 6, 8 (paras. 16–21); *cf.* also Saccucci, *passim*).

The aspect concerning the prospect of success of the application does not play an important role in the practice of the Court because inter-State disputes are usually complex so that the prospects of success are not easily evaluated. However, there are cases where this question was raised. Thus, in the *Nuclear Tests cases*, Judges Forster, Petrán and Ignacio-Pinto relied in their dissenting opinions on grave doubts as to the legal foundation of the substantive claims.¹⁰¹ The Court addressed this question explicitly for the first time in the *Great Belt case*,¹⁰² where Denmark argued 'that not even a prima facie case exists in favour of the Finnish contention'.¹⁰³ The Court found, however, that the right claimed by Finland, namely the right of passage through the Great Belt, existed and that only the extent of the right was disputed so that there was a case to decide upon.

As in the case of substantive jurisdiction, the question is again how far the success on the merits of the case has to be considered at the stage of interim protection without anticipating the judgment on the merits. The Court did not have to take a position on this item in the *Great Belt case*, but Judge Shahabuddeen analysed the question in detail in his separate opinion¹⁰⁴ and argued that the State requesting interim measures 'is required to establish the possible existence of the rights sought to be protected'.¹⁰⁵ A case which comes close to a denial by the Court of provisional measures for lack of a prospect of success on the merits is the *Legality of Use of Force case*,¹⁰⁶ where the Court declined to indicate provisional measures because the special intent to commit genocide did not, at the present stage of the proceedings, appear to exist.¹⁰⁷ Since the Convention on the Prevention and Punishment of the Crime of Genocide was invoked as the basis of jurisdiction, this case lies at the borderline between the denial of interim protection for lack of substantive jurisdiction or lack of prospect of success. The question was, however, raised explicitly in three recent cases.¹⁰⁸ In these cases the Court introduced as a new parameter a 'plausibility test', meaning that the indication of provisional measures presupposes that the Court is satisfied 'that the rights asserted by a party are at least plausible',¹⁰⁹ without, however, giving any definition of this term or referring to the *fumus bono juris* requisite applied by other courts. The term 'plausibility', which is not a legal term, appears, however, to a German lawyer as a tentative translation of the German legal

¹⁰¹ *Nuclear Tests cases*, *supra*, fn. 22, Diss. Op. Forster, ICJ Reports (1973), pp. 111, 114; *ibid.*, Diss. Op. Petrán, pp. 124, 126; *ibid.*, Diss. Op. Ignacio-Pinto, pp. 128, 131.

¹⁰² *Great Belt case*, *supra*, fn. 25, ICJ Reports (1991), pp. 12, 17 (para. 21).

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*, Sep. Op. Shahabuddeen, pp. 28 *et seq.*

¹⁰⁵ *Ibid.*, pp. 28, 36.

¹⁰⁶ *Supra*, fn. 25, ICJ Reports (1999), pp. 124 *et seq.*

¹⁰⁷ *Cf.* the *dictum* in the case against Belgium which is repeated in identical terms in the other cases: ICJ Reports (1999), pp. 124, 138 (para. 40).

¹⁰⁸ *Obligation to Prosecute or Extradite case*, *supra*, fn. 25, ICJ Reports (2009), pp. 139, 151–2 (paras. 56–61); *Certain Activities in the Border Area case*, *supra*, fn. 25, available at <<http://www.icj-cij.org>>, paras. 53–59 and *Preah Vihear case (Request for Interpretation)*, *supra*, fn. 25, available at <<http://www.icj-cij.org>>, para. 33.

¹⁰⁹ *Obligation to Prosecute or Extradite case*, *supra*, fn. 25, ICJ Reports (2009), pp. 139, 151 (para. 57); *Certain Activities in the Border Area case*, *supra*, fn. 25, available at <<http://www.icj-cij.org>>, para. 53. The term 'plausible case' was first introduced in the separate opinion of Judge Abraham in the *Pulp Mills case* (ICJ Reports [2006], pp. 113, 137 *et seq.*) who rightly stated that after the confirmation that provisional measures are binding any obligation imposed on a party must rest on solid legal grounds, especially when the party in question is a sovereign State. Judge Abraham considered 'plausibility' as equivalent to the requisite of *fumus bono juris* applied, *e.g.*, by the Court of Justice of the European Union; *cf.* also the separate opinion of Judge Bennouna, *ibid.*, pp. 142 *et seq.*

In the *Great Belt case*, the Court found that there was no urgency to indicate provisional measures since the obstruction of passage would not become relevant before the end of 1994 and 'the proceedings on the merits in the present case would, in the normal course, be completed before that time.'¹³⁶ Also in the *Arrest Warrant case*, the Court dismissed the request for provisional measures for lack of urgency as the person concerned in the disputed arrest warrant, Mr Yerodia, no longer exercised the functions of Minister of Foreign Affairs so that foreign travels had become less frequent.¹³⁷ In the *Obligation to Prosecute or Extradite case* the Court found that, with a view to assurances given by Senegal not to allow Mr Habré to leave Senegal while the case was pending, there was no urgency for the indication of provisional measures.¹³⁸ Consequently, urgency in its substantive aspect justifying the indication of provisional measures contains a time-factor and is to be understood in the sense 'that action prejudicial to the rights of either party is likely to be taken before such final decision is given'.¹³⁹ However, the time-factor is not the only element related to urgency, which depends also on circumstances such as the conduct of the requesting party, relating, *e.g.*, to delays caused by it.

46 Under the aspect of urgency, it is not relevant whether the situation complained of had already existed for a considerable time when the request was filed, for what is important is only the imminence of action prejudicial to the rights at stake. This was shown in a dramatic manner in the *LaGrand case*, where the violation of Art. 36, para. 1 (b) of the Convention on Consular Relations had been known to the German government since 1992, or at least, according to the German argument, since 24 February 1999, when it became fully aware of the facts. However, the application in the case and the request for provisional measures were filed only on 2 March 1999, while the execution of Walter LaGrand was scheduled for 3 March 1999. The Court granted the requested measures notwithstanding the late filing of the request and moreover, for the first time, indicated the measures without holding oral hearings due to the extreme urgency of the case.¹⁴⁰ Furthermore, this case holds the record in time needed for the indication of provisional measures. While in general, the decision on a request for provisional measures took, at that time, between four and six weeks (since then they take rather between four and fifteen weeks!), this case took only 23 hours¹⁴¹ and would have been unmanageable without

¹³⁶ *Great Belt case*, *supra*, fn. 25, ICJ Reports (1991), pp. 12, 18 (para. 27).

¹³⁷ *Arrest Warrant case*, *supra*, fn. 45, ICJ Reports (2000), pp. 182, 201 (para. 72).

¹³⁸ *Obligation to Prosecute or Extradite case*, *supra*, fn. 25, ICJ Reports (2009), pp. 139, 155 (para. 72); but *cf.* in this context the dissenting opinion of Judge Cancado Trindade, who pleads for determining urgency in relation to the 'legitimate expectations of the subjects of originally violated rights' (para. 52), namely that in cases of violations of human beings 'urgency' increases with the passing of time, so that the 'right to the realization of justice' becomes more urgent than in inter-State relations.

¹³⁹ *Avena case*, *supra*, fn. 25, ICJ Reports (2003), pp. 77, 90 (para. 50), referring to the *Great Belt case*, *supra*, fn. 25, ICJ Reports (1991), pp. 12, 17 (para. 23).

¹⁴⁰ *LaGrand case*, *supra*, fn. 6, Provisional Measures, ICJ Reports (1999), pp. 9, 14 (para. 21); *cf.* also *infra*, MN 48–50, 56–58.

¹⁴¹ For a timetable including all cases until 2003 *cf.* Rosenne, *Law and Practice*, vol. III, p. 1417. The cases brought since then took six days in the *Breard case*, *supra*, fn. 25, ICJ Reports (1998), pp. 248 *et seq.*; 23 hours in the *LaGrand case*, *supra*, fn. 6, Provisional Measures, ICJ Reports (1999), pp. 9 *et seq.*; three days in the ten *Legality of Use of Force cases*, *supra*, fn. 25, ICJ Reports (1999), pp. 124 *et seq.*; 12 days in the *Armed Activities case* (DRC/Uganda), ICJ Reports (2000), pp. 111 *et seq.*; six weeks in the new request for provisional measures as part of the new application of 2002 in the same case *Armed Activities case (New Application)* (DRC/Rwanda), *supra*, fn. 25, ICJ Reports (2002), pp. 219 *et seq.*; four weeks in the *Avena case*, *supra*, fn. 25, ICJ Reports (2003), pp. 77 *et seq.*; five weeks after the consent of France to the Court's jurisdiction in the *Case concerning Certain Criminal Proceedings in France* brought before the Court on 9 December 2002, *supra*, fn. 25, ICJ Reports (2003), pp. 102 *et seq.*; nine weeks for the first request in the *Pulp Mills*

the new means of communication which have contributed quite generally to reducing the time for decisions of the Court.

In the assessment of urgency, the fact that the parties to the dispute are actively pursuing a solution through other procedures, diplomatic ones or in the framework of the United Nations, may also play a role. However, as these procedures are political in character there is, in general, no obstacle to resorting also to legal means of dispute settlement; the case law of the Court, in particular in the *Nicaragua case*, the *Lockerbie case*, the *Frontier Dispute case* and the (*Bosnian*) *Genocide case*, where the dispute was also under review by a regional organization or the Security Council, supports this view. The simultaneous seising of political and legal instances is thus not *per se* an obstacle to the consideration of a case under Art. 41.¹⁴²

2. Procedural Aspects

The urgency of action claimed by the party requesting provisional measures also has consequences for the procedure, because notwithstanding the caseload, the Court, in order effectively to preserve the rights at stake, has to give priority to such requests. Although this may be self-evident, the Rules of Court have since 1931 contained special provisions in that regard. While in the Rules of 1922, the urgency of action was reflected only in the provision that the President of the Court could indicate provisional measures if the Court was not sitting, the Rules of 1931 provided not only that a request for provisional measures 'shall have priority over all other cases', but also that the decision on an application for provisional measures 'shall be treated as a matter of urgency'.¹⁴³ The Rules of 1936 to 1972 contained nearly identical provisions. The 1978 Rules approach the question slightly differently, providing in Art. 74, para. 2 that the Court shall be convened immediately for the purpose of proceeding to a decision on the request 'as a matter of urgency'. Accordingly, Art. 54, para. 2 of the Rules provides that in fixing the time-limits for oral proceedings 'the Court shall have regard to the priority required by Art. 74 of these Rules and to any other special circumstances, including the urgency of a particular case'.

The urgency of action is also reflected in the procedure which is less formal than in general, in that it does not require a written and an oral phase. According to Art. 74, para. 3 of the Rules, the Court will hear the parties and 'accept any observations presented before the closure of the oral proceedings'. Thus, it was common opinion¹⁴⁴ that oral proceedings had to be held when interim protection was requested. However, in the *LaGrand case*, the Court, for the first time, delivered its order without having held oral hearings. It based this decision not on Art. 74 of the Rules, but on Art. 75, para. 1, according to which the Court 'may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures' and that

case, *supra*, fn. 25, ICJ Reports (2006), pp. 113 *et seq.* and seven weeks for the second request, ICJ Reports (2007), pp. 3 *et seq.*; *Avena case (Request for Interpretation)*, *supra*, fn. 25, ICJ Reports (2008), pp. 311 *et seq.*; eight weeks in the *CERD case*, *supra*, fn. 25, ICJ Reports (2008), pp. 353 *et seq.*; 13 weeks in the *Obligation to Prosecute or Extradite case*, *supra*, fn. 25, ICJ Reports (2009), pp. 139 *et seq.*; 15 weeks in the *Certain Activities in the Border Area case*, *supra*, fn. 25, available at <<http://www.icj-cij.org>>; 11 weeks in the *Preah Vihear case (Request for Interpretation)*, *supra*, fn. 25, available at <<http://www.icj-cij.org>>.

¹⁴² Cf. Merrills, *ICLQ* 44 (1995), pp. 90, 125 *et seq.*; cf. also *infra*, MN 98–99.

¹⁴³ *Supra*, fn. 17.

¹⁴⁴ Cf., however, Guyomar, *Commentaire*, p. 485, who is of the opposite view.

H. Evaluation

- 104 The institution of provisional measures has undergone a significant development in the two World Courts during their nearly 90 years of existence. The provision in Art. 41 of the Statute which needed precision with regard to several fundamental aspects, *e.g.* the question of jurisdiction on the merits, the irreparability of the damage and the effect of the decision, has been fleshed out so that States are now better able to assess requests for provisional measures. This state of affairs is certainly a reason for the increasing use of provisional protection. However, the fact that compliance with the measures indicated by the Court is still not the rule gives rise to the question as to why States more frequently than ever before have recourse to provisional protection. There are certainly several reasons, one of the most important of which seems to be what has been called 'litigation strategy'.²⁸⁸ There is little doubt that States make use or sometimes rather abuse of the interim protection procedure for tactical reasons: be it in order to have a kind of psychological advantage in the litigation, be it to reach some first stage in the procedure which can take a long time, or be it, and this seems clearly to be an abuse of interim protection, to instrumentalize the Court as a forum to advance a State's opinions on a disputed situation even if it is evident that the Court is not competent to decide the case on the merits for lack of jurisdiction.²⁸⁹ However, misuse or even abuse of international procedures—and these are not restricted to provisional measures—should not lead one to call into question the whole instrument or the advantages it implies. It is for the Court to react to such abuses as it has done, *e.g.* in striking off the list cases already in its order dismissing provisional measures or in applying the limits set by the Statute and the Rules with utmost strictness, and as it has done with regard to very strict time-limits for the oral arguments on provisional measures.²⁹⁰ Possibly, the Court could be even more strict in reacting to misuses,²⁹¹ but in general, the increase in the use of interim protection and the development of this instrument by the Court can be evaluated in a more positive manner, namely as reflecting the development of international law in general and the status and acceptance of international jurisdiction in particular.
- 105 There is, however, a further aspect to be considered in evaluating interim protection, which refers to the fact of using interim protection as a factor in maintaining or restoring international peace. In cases such as the *Tehran Hostages case*,²⁹² the *Nicaragua case*,²⁹³ the *(Bosnian) Genocide case*,²⁹⁴ the *Legality of Use of Force cases*,²⁹⁵ the *Armed Activities case (DRC/UGanda)*,²⁹⁶ the *Armed Activities case (New Application) (DRC/*

²⁸⁸ Cf. Gill, T.D., *Litigation Strategy at the International Court—A Case Study of the Nicaragua v. United States Dispute* (1989).

²⁸⁹ *E.g.* in the *Legality of Use of Force cases*, *supra*, fn. 25, ICJ Reports (1999), pp. 124 *et seq.*; *cf.* in this context the critical remarks by several participants of the discussion in *Les procédures incidentelles devant la Cour internationale de Justice: Exercice ou abus de droits?* (Sorel, J.-M./Poirat, F., eds., 2000), pp. 38–44 and pp. 63–84 ('mesures conservatoires') and Oellers-Frahm in *Liber Amicorum Wolfrum*, Point B.

²⁹⁰ In this context reference has to be made to Practice Direction XI which reminds the parties to limit their oral pleadings to what is strictly necessary for the indication of provisional measures; *cf.* Rosenne, *Law and Practice*, vol. 1, p. 1416.

²⁹¹ Remark by A. Pellet, in Sorel, pp. 70–1.

²⁹² *Supra*, fn. 25, ICJ Reports (1979), pp. 7 *et seq.*

²⁹³ *Supra*, fn. 25, ICJ Reports (1984), pp. 169 *et seq.*

²⁹⁴ *Supra*, fn. 25, ICJ Reports (1993), pp. 3 *et seq.*, 325 *et seq.*

²⁹⁵ *Legality of Use of Force cases*, *supra*, fn. 25, ICJ Reports (1999), pp. 124 *et seq.*

²⁹⁶ *Supra*, fn. 25, ICJ Reports (2000), pp. 111 *et seq.*

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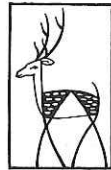
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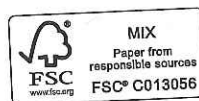
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measures of protection,¹⁷⁹⁶ that Council Resolution 748 took priority over the Montreal Convention, and that therefore the rights of Libya under that Convention had been derogated from. Given that the Court was not prepared at that stage to review the legality of acts of the Security Council, the case before it was bound to be deprived of its very object. Both the Respondent States and the minority judges naturally took note of this fact:¹⁷⁹⁷ what was the point of affirming the 'perpetual' nature of the jurisdiction if the jurisdiction's subject matter could be freely nullified? The Court retained the power to hand down its own decision, certainly, but its judgment on the merits could not be more than an empty gesture giving expression to the Council's decisions. This was and is, indeed, a delicate problem. From the judicial-legal perspective, the only really satisfactory response would be for the Court to be recognised as having the power, even if a very limited one, to review the legality of the Council's acts. Apart from that, the situation simply called for the Council to show a sense of its political and legal responsibilities. As an organ of the United Nations, it is bound by Article 2, paragraph 2 of the Charter, the principle of good faith. As a matter of institutional practice, that principle implies a duty on the part of UN organs to take account of the positions of fellow-organs, and to show mutual respect (*Organtraue*). The Council ought then to take into account the fact that the Court has been seized of a case and ought not to interfere with the exercise of the judicial function any more than is absolutely necessitated by the overriding objective of maintaining and re-establishing international peace. An obligation of this kind can never be an entirely sanctionable *lex perfecta*. There is no substitute for a mentality that is considerate, careful and attentive. The *Lockerbie* case was neither a good nor a reassuring example of that mentality.

Can the parties, by agreement, renounce the principle of the *forum perpetuum*? Is that principle derogable by this means, as certain commentators have claimed?¹⁷⁹⁸ The better view is that an agreement between the parties for the purpose of preventing the Court from applying the principle would not bind the Court. The underlying reasons for the existence of the principle, as explained at the beginning of this chapter, relate to the due administration of justice and to judicial integrity. The *forum perpetuum* therefore cannot be derogable because it is not in the category that affects only the 'private' interests of the parties to the case. An agreement between the parties, as described, might also be interpreted – *in favorem validitatis* – as a reminder of their right to withdraw the proceedings at any time, either by agreement between them, or by the applicant unilaterally. Perhaps one can go so far as to accept that, by such an agreement, the applicant is agreeing to discontinue the proceedings

¹⁷⁹⁶ *ICJ Reports* 1992, 15, §§ 39–41, where the Court stated that the legal situation of the parties had profoundly changed following the adoption of Resolution 748, the obligations arising from the latter having priority over those arising from the 1971 Convention, by virtue of Art 103 of the Charter.

¹⁷⁹⁷ As to the Court's arguments when faced with the pleas of the Respondent States, see *ICJ Reports* 1998, 26 *et seq.*, §§ 46 *et seq.* and 131 *et seq.*, §§ 45 *et seq.* Essentially, the Court took the view that the question was inextricably linked to the merits, so that it amounted to a 'defence on the merits' to be decided at the merits phase. As to the views of the minority judges, see in particular, the Dissenting Opinion of Judge Schwebel, *ibid.*, 68 *et seq.*, and that of Judge Jennings, *ibid.*, 108–109, which emphasised the danger that this jurisprudence might enable a State to delay or frustrate the action of the Security Council for the maintenance of peace. That argument seems to be at least rather singular. For the Court's reasoning to apply, the Court would have to have been seized *before* any binding action by the Security Council. Also, in the *Lockerbie* case, it was more the Security Council which was seeking to delay or frustrate the work of the Court, rather than vice versa. The position of the two Anglophone judges was designed above all to preserve the freedom of action of a Security Council dominated by the Powers of which they were citizens, and not the international rule of law of which the Court is the guardian. It is understandable that regrettable. It nevertheless remains true that the argument about the case's 'mootness' – independently of the application of the *forum perpetuum* principle – does present a genuine problem.

¹⁷⁹⁸ See G Morelli, *Stati sul processo internazionale* (Milan, 1963) 88.

if the respondent, even after the Court is seized, expresses the wish to discontinue. What we then have is an agreement *inter partes* to bring the case to an end. That is a matter exclusively affecting the parties themselves, and concerning the exercise of their rights in relation to the case. They would, however, have to comply with the procedural law of the Court as to discontinuance. The mentioned agreement would not be binding on the Court and will not concern it directly. Moreover, it is highly uncertain whether the Court would be obliged to sanction it under Article 38, paragraph 1(a) because a right on the part of the respondent to end the proceedings whenever it wants would be contrary to the spirit of the Statute and to the principle of the *forum perpetuum*. If the applicant freely agrees, it is exercising its own rights. If it does not, it will not be for the Court to give its sanction to an agreement which, at bottom, confers a unilateral right of discontinuance on the respondent, contrary to the Rules on discontinuance.

14. PROVISIONAL MEASURES OF PROTECTION¹⁷⁹⁹

a) General aspects

When a tribunal is seized of a case the question arises as to what extent it will be necessary to protect the substantive rights of the applicant *pendente lite*, that is while the case is under

¹⁷⁹⁹ There is an abundant literature on provisional measures of protection. For the PCIJ, see the synthesis of Hudson, above n 1771, §24 *et seq.*, and also E Dumbauld, *Provisional Measures of Protection in International Conventions* (The Hague, 1932); P Guggenheim, *Les mesures provisoires de procédure internationale et leur influence sur le développement du droit des gens* (Paris, 1931); P Guggenheim, *Les mesures conservatoires dans la procédure arbitrale et judiciaire* COHAIL, vol 40, 1932-II, 645 *et seq.*; HG Niemeyer, *Einstweilige Verfügungen des völkerrichtigen, ihr Wesen und ihre Grenzen* (Leipzig, 1932); A Putz, *Der Einfluss von einstweiligen Verfügungen durch den Ständigen Internationalen Gerichtshof* (Meyene, 1939); H Rolin, *Force obligatoire des ordonnances de la Cour permanente de justice internationale en matière de mesures conservatoires* in *Essays E Mahammi*, vol II (Paris, 1935) 280 *et seq.*; G Venturini, *Le misure cautelari nel diritto internazionale* (1938) 119 *Archivio giuridico Filippo Serafini* 40 *et seq.*, 152 *et seq.*; For the ICJ, see M Abad Castelot, *El Tribunal Internacional de Justicia y la protección cautelar de los derechos de los Estados* (Seville, 2002); G Barile, *Osservazioni sulla indicazione di misure cautelari nei procedimenti davanti alla Corte internazionale di Giustizia* (1952) IV *Comunicazioni e Studi*, 145 *et seq.*; PHF Bekker, *Provisional Measures in the Recent Practice of the ICJ* (2005) 7 *International Law Forum (Journal of the International Law Association)* 24 *et seq.*; R Bernhardt (ed.), *Provisional Measures Indicated by International Courts* (Berlin, 1994); A Cocatre-Zilgien, *Les mesures conservatoires en droit international* (1955) 11 *Revue égyptienne de droit international* 73 *et seq.*; A Cocatre-Zilgien, *Les mesures conservatoires décidées par le juge ou par l'arbitre international* (1966) 70 *RGDI* 5 *et seq.*; CH Crockett, *The Effects of Provisional Measures of Protection in the ICJ* (1977) 7 *California Western International Law Journal* 348 *et seq.*; L Daniele, *Le misure cautelari nel processo dinanzi alla Corte internazionale di Giustizia* (Milan, 1993); C Dominicé, *La compétence prima facie de la Cour internationale de justice aux fins d'indication de mesures conservatoires in Essays S Oda*, vol I (The Hague/London/New York, 2002) 383 *et seq.*; TO Elias, *The International Court of Justice and the Indication of Provisional Measures of Protection* in *G Ariand Memorial Lecture* (United Nations, Geneva, 1978); TO Elias, *The International Court of Justice and some Contemporary Problems* (The Hague/Boston/London, 1983) 67 *et seq.*; JB Elkind, *Interim Protection – A Functional Approach* (The Hague/Boston/London, 1981); A El Ashaal, *Non-Compliance with the Provisional Measures of the ICJ*, (1978) 34 *Revue égyptienne de droit international*, 313 *et seq.*; A El Ouali, *Effets juridiques de la sentence internationale* (Paris, 1984) 92 *et seq.*; MS Genalmaz, *Provisional Measures of Protection in International Law*, 1907–2010 (Istanbul, 2011); P Goldsworthy, *Provisional Measures of Protection in the ICJ* (1974) 68 *AJIL* 258 *et seq.*; DW Greig, *The Balancing of Interests and the Granting of Interim Protection by the International Court in Astridian Yearbook of International Law*, vol 11 (1991) 108 *et seq.*; E Harburo, *The Binding Character of the Provisional Measures of Protection Indicated by the ICJ in Essays H Wöhrberg* (Frankfurt-am-Main, 1956) 152 *et seq.*; R Kolb, *Note on New International Case-Law concerning the Binding Character of Provisional Measures* (2005) 74 *Nordic Journal of International Law*, 117 *et seq.*; VS Mani, *Provisional Measures of Protection: Article 41 of the ICJ Statute and Article 94 of the United Nations Charter*

way, until the tribunal's binding judgment finally governs the parties' rights and obligations. From the moment judgment is given, the respondent ceases to be in a position to do anything further contrary to the rights of the applicant as set out in the judgment. Quite the reverse, it is under a positive obligation to execute the judgment. Inherent in that obligation, a fortiori, is the negative obligation not to alter or destroy the subject matter of these rights. But, while the case is still pending, this positive obligation under a judgment does not yet exist, and therefore the inherent negative obligation is not provided for either.¹⁸⁰⁰

It is obvious that this state of affairs can lead to serious problems. Every dispute has a subject and there are related rights and obligations. Once a court is seized of a dispute, the respondent may very well be unhappy about being brought before the court. He might be tempted to alter the subject of the dispute, or even to destroy it. Once that happens, it may not be possible to execute the judgment as envisaged, in the case of the ICJ, in the Court's Statute, the subject matter having been profoundly altered or even destroyed.¹⁸⁰¹ The sim-

(1970) 10 *Indian Journal of International Law*, 359 *et seq.*; M. Manouvel, 'Méamorphose de l'Article 41 du Statut de la CIJ' (2002) 106 *RGDIP*, 103 *et seq.*; M. Mendelson, 'Provisional Measures of Protection in Cases of Contented Jurisdiction' in *BYIL*, vol. 46 (1972-73) 259 *et seq.*; J.G. Merrills, 'Provisional Measures of Protection and the Substantive Jurisdiction of the ICJ' (1977) 36 *Cambridge Law Journal* 66 *et seq.*; J.G. Merrills, 'Provisional Measures of Protection in the Recent Jurisprudence of the ICJ' (1995) 44 *ICQJ* 90 *et seq.*; S. Oda, 'The International Court of Justice Viewed from the Bench (1976-1993)' *CCHAL*, vol. 244, 1993-VIII, 63 *et seq.*; K. Oellers-Frahm, *Die einstweilige Anordnung in der internationalen Gerichtsbarkeit* (Berlin/Heidelberg/New York, 1975); K. Oellers-Frahm, 'Provisional Measures of Protection' (1995) II *EPIL*, 1027 *et seq.*; B.H. Oxman, 'Jurisdiction and the Power to Indicate Provisional Measures' in I. Danneberg (ed.), *International Court of Justice at a Crossroads* (New York, 1987) 323 *et seq.*; P. Pescatore, 'Les mesures conservatoires et les référés in Société française de droit international, Colloque de Lyon (1986), La juridiction internationale permanente' (Paris, 1987) 315 *et seq.*; P. Palchetti, 'L'indicazione di misure cautelari da parte della Corte internazionale di Giustizia in situazioni di estrema urgenza' (1999) 82 *RDI* 719 *et seq.*; P. Palchetti, 'The Power of the ICJ to Indicate Provisional Measures to Prevent the Aggravation of a Dispute' (2008) 21 *Leiden Journal of International Law*, 623 *et seq.*; S. Roseme, 'Provisional Measures in International Law: the International Court of Justice and the International Tribunal for the Law of the Sea' (Oxford, 2005); S.A. Saltevic, 'Les mesures conservatoires dans la procédure des deux cours de La Haye' *Mémoire IUIHEI* (Geneva, 1989); J. Struck, *Provisional Measures in the Hague Court* (Deventer, 1983); G. Tesaurio, 'Le misure cautelari della Corte internazionale di giustizia in *Essays G. Morelli* (Milan, 1975) 873 *et seq.*; H. Thimney, 'The Indication of Provisional Measures by the ICJ' in Benhardt, *op. cit. supra*, I *et seq.*; N.M. Toraldo-Serra, 'Le misure provvisorie internazionali: ricerca storico-giuridica' (Rome, 1973); A. Tzanakopoulos, 'Provisional Measures Indicated by International Courts: Emergence of the General Principle of International Law' (2004) 57 *RHDJ* 51 *et seq.*; N.I. Udombana, 'Provisional Measures: A Comparative Study of Selected International Judicial Institutions' (2003) 43 *Indian Journal of International Law* 479 *et seq.*; P. Weckel, 'Les mesures conservatoires devant les juridictions internationales de caractère universel' in G. Cohen-Jonathan and J.F. Plauss (eds.), *Measures conservatoires and droits fondamentalux* (Brussels, 2005); Roseme, *The Law and Practice of the International Court*, vol. III, above n. 1771, 1419 *et seq.*; Thimney, above n. 1771, 77 *et seq.*; Dubisson, above n. 1771, 223 *et seq.*; For a synthesis, see K. Oellers-Frahm, 'Article 41' in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm (eds.), *The Statute of the International Court of Justice, A Commentary* (Oxford, 2006) 923 *et seq.* See also Saraceo, above n. 1771, 259 *et seq.* For provisional measures in municipal law, see, eg. on Swiss law, S.V. Berti, *Die vororgischen Massnahmen im Zivilverfahrens- und Strafverfahren* (Basle, 1997).

¹⁸⁰⁰ In Roman law proceedings, parties were obliged, after the *litis contestatio*, to provide guarantees (*cautiones*) as to their conduct during the proceedings and after judgment. In some cases (action *in rem* in their own name), the defendant had to give three undertakings: (1) to execute the judgment (*de re iudicata*); (2) to perform all the duties of a defendant in this type of case (*de re defendenda*); and (3) to abstain from doing any harm, which included the obligation not to do any irreparable prejudice to the subject-matter of the dispute (*de dolo malo*). Cf. G. Pugliese, *Istituzioni di diritto romano* (Padua, 1986) 348.

¹⁸⁰¹ There is a very strong analogy here with Art. 18 of the 1969 Vienna Convention on the Law of Treaties, which endeavours to protect the essential contents of a treaty, between its signature and its entry into force, against acts tending to take away the purpose and objective of the treaty, so that, once in force, it could no longer be properly carried into effect. In both cases, moreover, this interim protection can be interrupted if, in relation to the Convention, a signatory State indicates to the others that it is not going to ratify, and, in the case of the ICJ, if the Applicant State discontinues the case. And, in both cases, what is at stake is essentially a matter of good faith. See R. Kolb, *La norme *in* droit international public* (Paris, 2000) 182 *et seq.*, 599 *et seq.*

plest example of this situation is a dispute about a person who has been condemned to death. If one imagines the tribunal forming the view that the sentence was procedurally arbitrary, or that a fresh trial should be ordered, that judgment would be senseless and devoid of any purpose if the condemned person had, in the meantime, been executed. There is obviously a need to ensure the effective protection of the applicant's rights, so that the proceedings are not turned, by such means, into little more than empty gestures, and also so as to preserve the binding character of the final judgment. This need makes it essential to have in place a mechanism that will ensure, *pendente lite*, that the subject matter of the dispute is preserved in such a state that the execution of the final judgment, if it goes in favour of the applicant, is not deprived of its proper effect.

That is the purpose of provisional measures (*mesures conservatoires*; *misure cautelari*; *medidas provisionales*; *einstweilige Anordnungen*). They are, as the name implies, measures of a provisional nature adopted by a tribunal at some stage between being seized of the case and delivering its final judgment. Their purpose is to enjoin the respondent not to do certain acts which might gravely affect or alienate the subject matter of the dispute.¹⁸⁰² Article 41, paragraph 1 of the ICJ Statute provides as follows: 'The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures that ought to be taken to preserve the respective rights of either party'; and paragraph 2 adds: 'Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.' Articles 73 to 78 lay down the procedure for provisional measures.

Provisional measures pose some difficult legal problems. For example:

- 1) The subject in dispute might be altered not only by deliberate acts of bad faith, but also by the passing of time and a wide range of events. Up to what point should a Respondent State be saddled with the obligation to adopt positive measures for the preservation of the subject in dispute? They could easily become excessively onerous. Must the Court then refuse all positive obligations of this kind and stick solely to the obligation to abstain (subject to a reservation in respect of positive acts of bad faith which indirectly result in an alteration to the subject matter of the dispute)?
- 2) In addition, will the Court have jurisdiction to indicate such measures? Given their often urgent nature and the need to indicate them at the start of the proceedings, the Court will not yet have had the opportunity to satisfy itself fully as to its jurisdiction over the merits. But if it were permissible to start a case without any real basis of jurisdiction and at once to seek provisional measures of preservation, possibly covering a very wide range, the potential for abuses and nuisance would be very considerable indeed. The respondent, which by definition would be a sovereign State, would find itself provisionally prohibited from a whole range of acts and behaviour, when the Court in reality did not even have jurisdiction over the applicant's claims. It is therefore necessary to carefully balance the urgency of provisional measures against a summary examination of the titles of jurisdiction, and of the Court's jurisdiction as to the merits at least, for example, requiring the applicant to prove *prima facie* subject-matter jurisdiction.

¹⁸⁰² According to the definition of J. Salmon (ed.), *Dictionnaire de droit international public* (Brussels, 2001) 698: 'A urgent measure for the purpose, while awaiting the settlement of disputed rights, to safeguard a right or a thing'; 'C. In the course of legal proceedings, a measure taken by the tribunal in order to avoid the possibility that, during the proceedings prior to the decision on the merits, the rights that are in issue will be compromised' (our translation).

- 3) It is also necessary to reach an understanding as to the precise objective of the provisional measures. Is the objective only to preserve the applicant's rights against acts which tend to *deprive them of all effect* when the judgment is given (the minimal version of provisional measures)? Or is there an additional purpose, namely to *facilitate the proceedings* by adopting measures calibrated to that end (the amplified version)?
- 4) Finally, how does one balance the respective rights of the parties when the provisional measures are being indicated by the Court in a 'delicate' context? If, for example, the dispute relates to the construction of a great bridge (the *Great Belt* case, 1991) or of large-scale factories (case of *Pulp mills on the River Uruguay*, 2010), and if the proceedings look likely to last a long time, can the Court simply issue a provisional prohibition against construction, thus considerably limiting the respondent's freedom of action and potentially causing it major economic loss? If the Court were to act in this way, would States still be inclined to accept the Court's jurisdiction when it carried with it weighty potentialities of this kind? Conversely, if the Court did not indicate such measures, would it not be allowing the situation to be *de facto* prejudiced or even prejudged? How could the Court subsequently, if it decided that the construction work would be unlawful, order in its judgment on the merits that the construction work should now be completely dismantled and demolished, potentially causing equally major economic loss? Will not the Court, in such cases tend to bend before *fait accompli*, and award only reparations? Conversely, if it indicates provisional measures, will it not tend thereby to also indicate that it *prima facie* considers the works as being unlawful? These are among the serious legal and practical problems posed by provisional measures.

b) Historical Aspects¹⁸⁰³

Until the beginning of the twentieth century, the peaceful settlement of disputes was not, from the legal perspective, a well-developed subject. It was rather diplomacy, treaties and war that were the decisive mechanisms. Also, almost until the creation of the PCIJ, international justice had still to be institutionalised; all that had been previously available was *ad hoc* arbitration. For these reasons, the distance between 'judge' and 'parties' was fairly minimal. Arbitrators were the agents of the parties, who nominated them and conferred upon them such powers as they had. There was no compulsory jurisdiction. Parties engaged in litigation only if both sides wished to use it as the means of resolving a particular dispute. In a context such as that, there was scarcely any need to make provision for provisional measures that would preserve parties' rights. Parties had every incentive to act in such a way as to give sense to the procedures, since the latter were in all respects agreed upon between them. Unsurprisingly, therefore, we find no provisions relating to Provisional Measures even in the Hague Conventions of 1899 and 1907 on the resolution of disputes by arbitration. Perhaps it is equally unsurprising that we find the first provision on Provisional Measures in Article 18 of the 1907 Convention establishing the Central American Court of Justice, which was the first permanent and institutional international tribunal. Subsequently, provisions on Provisional Measures were included in certain of the

Bryan Treaties of the years between 1910 and 1919, concerned with international commissions of enquiry.¹⁸⁰⁴

Article 41 of the Statute was the result of a proposal by the Brazilian jurist R Fernandes.¹⁸⁰⁵ He suggested to the consultative Committee of Jurists charged with drafting the Statute the inclusion of a provision on binding Provisional Measures to be reinforced by sanctions. The Committee did not consider it profitable to engage in prolonged debate on the binding character of such measures. It emphasised that the Court did not have power itself to proceed to the execution of its own decisions, and that therefore the sanctions proposed by Fernandes went beyond what was possible in the Statute. For the same reason, the term 'order' was dropped from the wording. In the English text, the expression used was 'suggest the Provisional Measures' and the rather different formulation in the French text used the words '*indiquer des mesures conservatoires*'. The Sub-committee appointed by the Third Commission of the first Assembly of the League of Nations, with the task of revising the Committee of Jurists' text, aligned the English text on the French one, replacing the word 'suggest' with the word 'indicate'. It also eliminated the words 'measures which should be taken' and replaced them with 'measures which ought to be taken', supposedly in line with the French text which read '*mesures [qui] doivent être prises*'. The result was a text that, although firmer, still did not clearly resolve the question as to the obligatory nature of Provisional Measures. Taken overall, the way the drafts evolved rather militates against the measures being binding. But that concerns only the views and intentions of the draftsmen of 1920. Also, there is some room to wonder whether sometimes the (non-)binding character of the measures was confused with their (non-)executory character. In the end, the Sub-Committee deleted the words 'acts already committed or about to be committed'. There was no need to enter into the nature of the dispute in order to affirm the Court's right to indicate Provisional Measures. Also, there was the fact that a dispute can relate to an omission as well as to an act. In 1945, the text of Article 41 was left unamended, apart from the substitution in paragraph 2 of a reference to the Security Council in lieu of the former reference to the Council of the League of Nations.

The Court has very frequently been presented with applications for the indication of Provisional Measures.¹⁸⁰⁶ The PCIJ received six, and by the end of 2009 the ICJ had received about 40. They seem to be used as part of the applicant's litigation strategy, with a view to obtaining a moral and legal 'victory' by putting pressure on the Respondent State. Either the latter complies with the Court's order so that the applicant gets what it wants, or it fails to comply and is then left in an uncomfortable position, the Court having the power to draw adverse consequences from its defiant attitude. It has by now become almost the rule for a unilateral application against a State to be accompanied, immediately or shortly afterwards, by a request for the indication of Provisional Measures. It will be helpful to analyse first the legal context in which the Court exercises its power to make such Orders and also their effects, and then examine a number of particular questions.

¹⁸⁰³ On these precursors of the Court's provisional measures, cf Oellers-Frahm, Article 41, above n 1799, 925. For an in-depth study of these precursors, see Genainaz, *Provisional Measures*, above n 1799, 3 *et seq*.

¹⁸⁰⁴ On these *travaux préparatoires*, cf the succinct view offered by Oellers-Frahm, *ibid*, 926 and the references there cited. See also Genainaz, *Provisional Measures*, above n 1799, 18 *et seq*.

¹⁸⁰⁵ A list of all these cases is to be found under the heading 'Provisional Measures' in the ICJ Yearbook, in a footnote. For a list of the cases between 1947 and 2005, cf Oellers-Frahm, Article 41, above n 1799, 963–66. The latter includes the PCIJ which received six such requests. For a commentary on the requests, cf Hudson, above n 1771, 428–30.

¹⁸⁰⁶ In Roman trials, the *interdicta* and sometimes the *stipulationes praetoriae* fulfilled functions which included those of Provisional Measures. cf Pugliese, above n 1800, 369 *et seq*.

c) The Purpose of Provisional Measures

The purpose of Provisional Measures is both to enable the Court to preserve the value of its judicial functions and to 'preserve the respective rights of the parties, pending the decision of the Court'.¹⁸⁰⁷ Corresponding to this dual function are the dual powers to indicate Provisional Measures *proprio motu*, and to do so in response to a party's request. On the one hand we have the objective interest in the effective functioning of the system and the proper administration of justice and, on the other, the subjective interests of parties seeking the protection of their rights *pendente lite*. The Court is the guardian of the objective interest, as a matter of judicial integrity. The subjective interests of parties are not so much matters of general interest as questions relating to the particular interests of the States concerned. However, the distinction between the two categories is not as simple as it might at first sight seem. The parties, like the Court, have an interest in the proper administration of justice. The Court, for its part, must seek to preserve the parties' essential rights against attitudes affecting the capacity of its judgment to have the necessary executive effects. Although there is a difference of emphasis here, the two aspects are in truth interwoven. Provisional Measures are, so to speak, fed from two teats, but the substance of the milk is similar, though not identical. The objective aspect essentially on the 'non-aggravation of the dispute' and the subjective one on the 'preservation of the parties' rights', especially those of the applicant.

Non-aggravation of the dispute. In the Court's jurisprudence, the objective aspect concerns the concept of 'non-aggravation of the dispute'.¹⁸⁰⁸ The principal reason for establishing a court of justice is to make provision for the peaceful resolution of disputes, that is, to reduce tensions and channel disputes towards a rational mode of settlement. This objective would obviously be undermined if the very efficacy of the final judgment were endangered, the parties, unable to request Provisional Measures for their own protection, being freely permitted to aggravate their dispute and drain the sense out of the rights that are being litigated about. Seising the Court would then be a purely formal event, the parties' hearts and spirits not being truly invested in the judicial proceedings. Obviously the Court cannot supply the spirit if it is lacking. It must, however, have power to try to calm the situation and to preserve the case's utility, because a deterioration in relations between the parties is not always the result of deliberate bad faith (about which the Court can do little), but is often the result of an unfortunate chain of circumstances. To this end, therefore, the Court, as the principal judicial organ of the United Nations, invested with an important function in relation to dispute resolution,¹⁸⁰⁹ must have inherent power to indicate Provisional Measures, independently of the parties' right to ask for them in light of their own objectives. Article 41 of the Statute is drafted sufficiently widely to enable the indication of Provisional Measures *proprio motu*. It provides that: 'The Court shall have the power to

indicate, if it considers that circumstances so require, any Provisional Measures which ought to be taken to preserve the respective rights of either party.' The words 'if it considers that circumstances so require' refer to the Court's power to form an appreciation of the situation; they thus open the way to the exercise of an autonomous competence. On the other hand, Article 41 of the Statute does say that it concerns Provisional Measures to 'preserve the respective rights of either party'. It is therefore uncertain whether the power we are now considering can be attached, as regards its object, to the power expressed in Article 41. Indeed, what we are considering here is an inherent power of the Court, resulting directly from its judicial functions and not a power incidental to the Court's jurisdiction over parties' substantive rights and obligations.¹⁸¹⁰ The difference is mirrored in its different objective, the protection of judicial integrity, as opposed to the protection of parties' rights. Legally, it is possible to attach these *proprio motu* measures for the protection of judicial integrity to Article 41, by a wide interpretation going beyond the express words used and emphasising the fact that the wide interpretation still remains within the typology of Provisional Measures. Alternatively, it is possible to treat measures of this kind as an inherent power of the Court arising from its need to have all the implied powers necessary for the proper exercise of its legal functions, that is, the preservation of its integrity and the integrity of its final judgments. In that case, the emphasis is on the different objective behind such measures compared with the objective behind parties' own unilateral requests for Provisional Measures. The Court has chosen to attach such measures to Article 41 of the Statute.¹⁸¹¹ By doing so it can shelter behind an express provision of the texts, instead of postulating an inherent power. This jurisprudential choice gives rise to no particular legal problems, provided one recognises that, in the last resort, what is concerned here is a right that the Court exercises not principally in order to preserve parties' rights, but primarily to preserve the essence of its own public interest rights, powers and duties.

The PCIJ had already opened the way to the *motu proprio* indication of Provisional Measures in order to avoid disputes growing more serious. In the case on the *Legal status of South-East Greenland* (1932), the Court had envisaged that it might be permissible for it to adopt such measures *motu proprio* 'for the sole purpose of preventing regrettable events and unfortunate incidents',¹⁸¹² adding, however, that there was no need in the circumstances to decide this question. It was, however, prepared to recall that the parties were already bound not to aggravate the dispute by virtue of Article 33, paragraph 3 of the 1928 General Arbitral Act, to which both sides were parties, and that the application of that provision was subject to the compulsory jurisdiction of the Court.¹⁸¹³ In the *Electricity Company of Sofia and Bulgaria* case (1939), the Court, while recalling that Article 61, paragraph 4 of the then Rules entitled it to indicate Provisional Measures other than those requested by the parties, said that the latter were obliged, under a universally accepted principle, to abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given, and in general, not allow any step of any kind to be taken, which might extend or aggravate the dispute'.¹⁸¹⁴ On this interpretation, the seising of the Court and indication of such measures result in a fairly major modification to the parties'

¹⁸⁰⁷ Case on the *Denunciation of the Sino-Belgian Treaty of 2 November 1865*, PCIJ, Series A, no 8, 6.

¹⁸⁰⁸ Oellers-Frahm, Article 41 above n 1799, 931; Szacki, *Provisional Measures in the Hague Court: An Attempt at a Scrutiny*, above n 1799, 74 *et seq*; Oda, 'The International Court of Justice Viewed from the Bench', above n 1799, 72-73; P. Palchetti, 'The Power of the International Court of Justice to Indicate Provisional Measures to Prevent the Aggravation of a Dispute' (2008) 21 *Leiden Journal of International Law* 623 *et seq*. See also Art 18 of the 1907 Convention establishing the Central-American Court of Justice.

¹⁸⁰⁹ This is a collective interest of the international community: see Art 2, § 3, and Chapter VI of the Charter, as also General Assembly Resolution 2625 of 1970.

¹⁸¹⁰ Cf H. Thirlway, 'The Indication of Provisional Measures by the ICJ' in Bernhardt, above n 1799, 14-15; Szacki, *Provisional Measures in the Hague Court: An Attempt at a Scrutiny*, above n 1799, 74 *et seq*, 127 *et seq*.

¹⁸¹¹ Case of the *Land maritime boundary between Cameroon and Nigeria*, ICJ Reports 1996-I, 22-23, § 41.

¹⁸¹² PCIJ, Series AB, no 48, 284.

¹⁸¹³ *Ibid.*, 288-89.

¹⁸¹⁴ PCIJ, Series AB, no 79, 199.

legal positions. They now become subject to quite sweeping obligations as to their conduct, implying that they are under a duty to adopt a whole series of positive measures to preserve the subject matter of the dispute against any kind of 'aggravation'. The Court did not indicate what measures were required. Potentially, any act or omission in the face of events or any acts which might lead to an aggravation of the dispute, and a fortiori any actually having that effect, would constitute breaches of the Court's Order. This means the imposition of a considerable burden on the States that are parties to the case, all the more onerous if one accepts that the measures indicated by the Court are legally binding.

Given the amplitude and considerable scope of such measures, the ICJ for a long time abstained from exercising this power. The cold war background was hardly conducive to it. Instead, the ICJ preferred to focus its Provisional Measures on the concept of 'irreparable prejudice' (as to which see further below). In a number of cases, the Court faced a very tense situation between the parties. Subsequently, it was faced with sporadic and more intense military operations that were taking place *pendente lite*. It seemed particularly difficult to pass over these facts in silence given that they were so utterly incompatible with the judicial process. The use of force is not only the complete opposite of peaceful dispute resolution, but risks so poisoning relations between the parties as to make peaceful resolution a vain hope. What is more, the prohibition by Article 2, paragraph 4 of the UN Charter against the use of force is one of the fundamental norms of modern international law. It was very difficult to imagine the Court being entirely silent when faced with such a violation *pendente lite*. The substantive issues before the Court in these cases were territorial claims, and not directly the issue of use of force. For this reason, it was not possible for the Court to confine itself to the protection of the parties' rights as determined by the issues in the case. There was also, and indeed above all, the need to contribute to the maintenance of peace, and to prevent any significant aggravation of the dispute. These are main aims of the UN Charter and the Court is the principal judicial organ of the UN. In such situations, the Court is often in part duplicating and reinforcing the efforts of the Security Council to keep the peace. Little by little, this jurisprudence was extended to other questions, such as respect for international humanitarian law.

The Court acted in such a way in the highly sensitive *Nuclear Tests* case (1973), where the relationship between the parties was a tense one. The Court received a request from Australia and New Zealand designed to have it prohibit, provisionally, any atmospheric test which might lead to fallout over the territories of Australia and New Zealand. The Court added *sponte sua* a measure obliging the States concerned to 'ensure that no actions taken which might aggravate or extend the dispute' or which 'might prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case'.¹⁸¹⁵ A similar precedent was set in the case of the *Diplomatic and consular personnel of the United States of America at Teheran* (1979)¹⁸¹⁶ and before that, as early as the *Anglo-Iranian Oil Co* case (1951).¹⁸¹⁷ Subsequently, in the *Territorial dispute* (Burkina Faso v Mali, 1986), the Chamber of the Court recalled that it 'possesses [independently of the parties claims and requests] by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require';¹⁸¹⁸ that this power ought particularly to be

exercised when there is recourse to force;¹⁸¹⁹ and the Court indicated measures accordingly.¹⁸²⁰ In the case on the *Land and maritime boundary between Cameroon and Nigeria* (1996), the Court confirmed this attitude.¹⁸²¹ It followed suit in the case on *Armed activities in the territory of the Congo* (2000);¹⁸²² In that case, the Provisional Measures indicated by the Court required the parties to respect, amongst other things, fundamental human rights and international humanitarian law, in the area of conflict. The Court went so far as to require the parties to take all steps necessary to ensure such respect.¹⁸²³

The tendency of Provisional Measures as regards the aggravation of disputes is thus progressively drawing away from the subject of the dispute (and the associated issues concerned with the proper administration of justice), in the direction of a kind of 'public interest' mission to protect and safeguard the fundamental norms of general international law, just as one has to approve the Court's autonomous indications of Provisional Measures in order to preserve judicial integrity and its competence to thus protect this integrity, one has also to recognise that such measures are increasingly remote from, and tenuous in their connections with, the substantive issues in dispute. This naturally gives rise to various legitimate questions which unfortunately cannot be explored in depth in the present context.¹⁸²⁴ It has been said that in this regard the Court has, since the turning point in 1990/1991, been getting farther away from the subjects in dispute and more and more exercising the typical prerogatives of the Security Council.¹⁸²⁵ It has also been said that such measures are of limited practical value given the precarious situations in which the Court indicates them. They usually need the active support of the Security Council.

It is not possible to provide a general analysis at this point of everything that might come under the heading of 'non-aggravation' of a particular concrete dispute. There is a good analogy here with the duty under general international law to preserve the subject matter of a treaty or the practical utility of a negotiation.¹⁸²⁶ The Court itself can give concrete expression to the requirement of non-aggravation by issuing specific injunctions to the parties, whether binding ones or merely by way of recommendation. These requirements can extend from respect for specifically identified norms of general international law to the creation of a surveillance commission. In legal terms, therefore, one must conclude that, in this field, the Court has a discretionary power. Given that at this stage in a set of proceedings, the Court's jurisdiction as to the merits has yet to be thoroughly examined; that the measures indicated can significantly constrain the sovereign freedom of action of the States concerned; and that States should not, except for good reason, be given reasons to withdraw from titles of jurisdiction; nevertheless the Court is well advised to fully exercise its

¹⁸¹⁵ Ibid. 9, § 19.

¹⁸¹⁶ Ibid. 11-12.

¹⁸¹⁷ ICJ Reports 1996-I, 22-23, § 41: 'Considering that, independently of the requests for the indication of provisional measures submitted by the Parties to preserve specific rights, the Court possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require'. See also the case on the *Application of the Convention on the prevention and punishment of the crime of genocide* (Bosnia-Herzegovina v Yugoslavia), ICJ Reports 1993, 23-24, 349-50.

¹⁸¹⁸ ICJ Reports 2000, 128, § 44.

¹⁸¹⁹ ICJ Reports 2000, 129, § 47, no 3.

¹⁸²⁰ See *Thirdway*, above n 1771, 110-11.

¹⁸²¹ This distancing from the subject of a dispute over which the Court has jurisdiction has been criticised by Schmidt, 'Case Concerning the Land and Maritime Boundary (Cameroon v Nigeria)', *Provisional Measures* (1997) 10 *Laiden Journal of International Law* 357-58.

¹⁸²² See the detailed analysis in Kolb, *La borne for en droit international public*, above n 1801, 182 *et seq*, 278 *et seq*, 586 *et seq*, with references to the literature and practice.

¹⁸¹⁵ ICJ Reports 1973, 106, 142.

¹⁸¹⁶ ICJ Reports 1979, 21, § 47, B.

¹⁸¹⁷ ICJ Reports 1951, 93, no 2.

¹⁸¹⁸ ICJ Reports 1986, 9, § 18.

powers to preserve the subject matter of disputes and to ensure the proper administration of justice, but not to go significantly beyond what is strictly necessary to achieve these objectives.

The Court's independence in the matter of indicating Provisional Measures *proprio motu* is enshrined in the Rules.¹⁸²⁷ Article 75, paragraph 1 provides that:

The Court may at any time decide to examine *motu proprio* whether the circumstances of the case require the indication of Provisional Measures which ought to be taken or complied with by any or all of the parties;

and paragraph 2:

When a request for Provisional Measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request.

The Court has often indicated different or supplemental measures to those actually requested by the parties, and examples are to be found in the cases on *Fisheries Jurisdiction* (1972),¹⁸²⁸ *Nuclear tests* (1973),¹⁸²⁹ *United States diplomatic and consular staff in Tehran* (1979),¹⁸³⁰ the *Boundary dispute case* (1986),¹⁸³¹ and the *Land and maritime boundary case* (1996).¹⁸³² One interesting precedent is the *Anglo-Iranian Oil case* (1951),¹⁸³³ in which not only did the Court not follow the applicant's request, but it recommended the establishment of a surveillance commission to oversee the exploitation of the company's resources inside Iran. The measures indicated by the Court of its own volition were unusually precise in the context of the Court's jurisprudence.

Preservation of the parties' rights. Such Provisional Measures are designed to preserve the parties' rights pending the final decision, so that the substance of such rights is not reduced to nothing or deprived of any useful value. Were it not for such Provisional Measures, the final judgment might become pointless, there being no real possibility of its being executed in any meaningful way.¹⁸³⁴ Here, applicants are seeking to link the measures to their substantive rights. The need for such measures will be very obvious if the absence of such protection might deprive the whole suit of its practical effects. Article 41, paragraph 1 of the Statute expresses this conception of protection in the words 'Provisional Measures... to preserve the *respective rights of either party*'¹⁸³⁵ (italics added). The Statute uses this reciprocal formulation in application of the principle that the parties are equal before the Court.¹⁸³⁶ However, in the present context, there is a practical limit to the scope of that principle. Usually, it is the applicant alone that seeks Provisional Measures and it is quite usual for the Court to indicate measures in line with the applicant's request. Unless the respondent has likewise sought Provisional Measures, the Court is not under any obliga-

tion to also indicate measures in the respondent's favour. The principle of equality is sufficiently provided for by the fact that both sides have an equal right to ask for such measures. One has to admit, however, that unless the respondent puts forward counterclaims on the substantive issues, accompanied by a request for Provisional Measures associated with such counterclaims,¹⁸³⁷ its request for Provisional Measures will not usually have a sufficiently clear underlying objective to satisfy the conditions for the Court to take action in its favour. Nevertheless, the Court is often able to temper the relative inequality between the parties, where only one side is seeking Provisional Measures protective of its substantive rights, by indicating measures *proprio motu*, in particular those enjoining both sides not to do anything to aggravate the dispute, and those that apply to both sides, such as, for example, the creation of a control commission.

The disputed rights are protected against actions working 'irreparable prejudice' (see below section (d)). Irreparable prejudice as a concept does not relate to the rights as legal positions. The latter, in giving rise to normative obligations, cannot per se be prejudiced by a unilateral action. A simple material fact cannot alter a norm if it is not recognised by the law as a fact which works a legal alteration. Rather, irreparable prejudice relates to the substance of the right. Every right is engrafted onto a subject in the real world. If that subject is destroyed, or gravely altered, the right can no longer be properly exercised. In the alternative, it will be excessively burdensome to reinstate the legal *status quo ante* so as to permit the exercise of the right. In such cases, if the judgment were to go in the applicant's favour, it would be largely ineffectual, given that its subject would effectively have been rendered sterile. Thus, if, for example, a State's substantive claim is that certain natural resources must not be ruined by some major type of pollution, it would be possible, in the absence of Provisional Measures, for the resources to have been irreparably damaged, or even to have completely disappeared, by the time of the judgment, as a result of the continuing effects of polluting agents being pumped out on a massive scale. If the substantive right to the benefit of these resources is not, *as a right*, affected by the actual pollution, the *de facto* right to the benefit of the resources certainly can be very seriously affected. Provisional Measures are designed to preserve the factual situation necessary to the meaningful exercise of the disputed rights. As can be seen, this 'subjective' aspect of Provisional Measures serves two interests: the interests of parties in preserving their rights (especially the interests of the applicant); and the interest of the Court in preserving the practical utility of proceedings before it and in making sure that the final decision will not have become illusory in its effects. In other words, to an *utilitas singularum* there is added an *utilitas publica*.

d) Material Conditions for the Indication of Provisional Measures

Certain conditions have to be satisfied before the Court can indicate Provisional Measures. This is so because such measures sometimes have a significant effect in limiting the freedom of action of a party to the case. The need for restrictions is all the more obvious since the parties are sovereign States.

- *Condition 1: the Court must be seized of a dispute.* Provisional Measures are a purely incidental procedure, engrafted onto a substantive case. They cannot, therefore, be sought

¹⁸²⁷ of Oellers-Frahm, Article 41; above n 1799, 931-32; Thirkway, above n 1771, 107 *et seq.*; G Guyomar, *Commentaire du Règlement de la Cour internationale de Justice, adopté le 17 avril 1978: Interprétation et pratique*, 2nd edn (Paris, 1983) 486 *et seq.*

¹⁸²⁸ ICJ Reports 1972, 12 *et seq.*, 30 *et seq.*

¹⁸²⁹ ICJ Reports 1973, 99 *et seq.*, 135 *et seq.*

¹⁸³⁰ ICJ Reports 1979, 7 *et seq.*

¹⁸³¹ ICJ Reports 1986, 3 *et seq.*

¹⁸³² ICJ Reports 1996-I, 13 *et seq.*

¹⁸³³ ICJ Reports 1951, 94, no 5, the constitution of the commission being left to agreement between the parties.

¹⁸³⁴ of Oellers-Frahm, Article 41; above n 1799, 930-31.

¹⁸³⁵ In the French text: 'les droits de chacun'.

¹⁸³⁶ See Greig, above n 1799, 108 *et seq.*

¹⁸³⁷ See the *Genocide Convention case* (Bosnia-Herzegovina v Yugoslavia), ICJ Reports 1993, 3 *et seq.*, 325 *et seq.*

outside the context of a case that is pending before the Court. The text of Article 41, paragraph 2 of the Statute seems to confirm this; in the words 'Pending the final decision' and 'parties'. These words make sense only if Provisional Measures are available only once the Court has been seized. From that point on, the parties are awaiting a definitive decision and there truly are 'parties' to the proceedings. Also, if it is a matter of preserving parties' rights, this can only be done during the course of proceedings. The Court does not have power to provide for the protection of rights of every description outside the context of proceedings before it. The contrary interpretation would result in the use of Provisional Measures to institute a kind of universal jurisdiction. The question was raised for the first time in the case on the *Legal status of the territory of South-East Greenland* (1932), but at that time the Court gave it no very clear answer.¹⁸³⁸ Since that case, such measures have been asked and ordered only vis-à-vis parties to cases. The question has thus been given a clear answer by the consistent practice of the Court. Whether Provisional Measures can also be indicated in advisory proceedings will be considered below.

— *Condition 2: the Court must have 'prima facie' jurisdiction over the merits of the dispute.*¹⁸³⁹ If, from the outset, both sides accept that the Court has jurisdiction over the merits (and if no problems of personal or material jurisdiction arise), there is then no problem as to its incidental jurisdiction under Article 41. The Court may, without further ado, indicate Provisional Measures. If, however, the Court's jurisdiction is disputed, the question presents itself in a rather different light. This generally happens when a unilateral application is made on the basis of the compulsory jurisdiction, the applicant affirming that jurisdiction to exist and the respondent denying it. It should also be noted that Provisional Measures are requested with particular frequency in such cases, either because the applicant fears that the respondent, not content to see the Court seized of the case, might develop 'hostile' designs, or because it wishes to push to the limit the advantages in terms of litigation strategy that can be derived from Provisional Measures of this type. The provisional recognition of rights can be claimed as an immediate victory, or can throw onto the respondent the opprobrium of refusing to comply with them. In such cases, the respondent will often be disputing the Court's jurisdiction. Given that Provisional Measures are an incidental procedure, in principle they can be ordered only if the Court has jurisdiction over the merits.¹⁸⁴⁰ Without jurisdiction, the Court can do

¹⁸³⁸ PCIJ, Series A/B, no 48, 283-84. Whereas it is in principle arguable that such a power on the part of the Court exists only in respect of a dispute already submitted to it but as the Court is not now called upon to decide this question concerning the interpretation of its powers, since there has already been regularly submitted to it.

¹⁸³⁹ See the succinct comments in Cellers-Frahn, Article 41, above n 1799, 934-37; Thibwaïy, above n 1771, 78 et seq.; Gamañaz, *Provisional Measures*, above n 1799, 155 et seq.

¹⁸⁴⁰ Certain judges have taken the view that Provisional Measures can, and must, be indicated by the Court as an inherent power, based directly on Art 41 of the Statute, itself interpreted as an autonomous provision and not as one providing for an incidental procedure. In other words, the Court's power to indicate Provisional Measures would not depend on its jurisdiction over the merits, but solely on its inherent power under Art 41 of the Statute, the Court being in a position to exercise that power if, in its view, the 'circumstances so require'. However, it is not disputed that the prospect of having jurisdiction over the merits continues to be a highly relevant circumstance when the Court is deciding whether the circumstances do in fact require the indication of Provisional Measures. The Independent Opinion of Judge E Jiménez de Aréchaga, in the case on the *Aegean Sea continental shelf*, ICJ Reports 1976, 15-16. The Court has taken the view that the circumstances never do require the indication of Provisional Measures unless the Court has at least a semblance of jurisdiction. The Court has thus given concrete application to the words 'circumstances so require' in Art 41 by laying down a general doctrine going beyond any particular case. The need to carefully balance competing interests, as discussed at the beginning of this chapter, seems to justify the Court's approach.

nothing, not even indicate Provisional Measures. At this point, however, a second element comes into play. Provisional Measures under Article 41 are an urgent matter. The preservation of the real value of the possible substantive rights of parties calls for rapid action. If they have to wait for the Court to carry out a full examination of a jurisdiction issue, which can be an extremely complex matter, this would mean a long wait without any protection. The risk of a true denial of justice if and when, at a later stage, the Court's jurisdiction is finally established would exist. These two conflicting interests — not to act without first establishing jurisdiction *versus* the urgent nature of measures requiring immediate action — need to be carefully balanced. The only possible way to do this was to neither require the maximum (the positive establishment of jurisdiction), nor to permit the minimum (to allow the indication of measures without any kind of demonstration of the Court's jurisdiction). An intermediate position was necessary. If the Court's jurisdiction had to be fully demonstrated, Provisional Measures would be almost useless. If no kind of demonstration were required at all, the situation would be ripe for abusive applications by States that had no basis on which to show that the Court had jurisdiction, with a view at least to inflicting on their opponents the temporary nuisance of Provisional Measures and obliging them to deal with the Court.

The PCIJ never had to concern itself with this problem, since Provisional Measures were never requested in a case where its jurisdiction was in dispute (except precisely where the jurisdiction question had already been ruled upon¹⁸⁴¹). The ICJ itself first had occasion to focus on this question in the *Anglo-Iranian Oil* case (1951). There, the Court laid down the broad lines of the 'prima facie competence test'.¹⁸⁴² In reality, that test has two limbs, one negative, namely the absence of 'manifest want of jurisdiction', the other positive, namely a balance of probability that the Court does have jurisdiction. This dual test reflects the summary nature of the decision which needs to be taken in urgent procedures of this kind. The Court has to make up its mind swiftly, often at a very preliminary stage of the proceedings, before it has been able to acquire an in-depth knowledge of the case. It has, therefore, to act on what, at first sight (*prima facie*), seems to it to be the most likely view. The in-depth analysis comes later. If, at that later stage, it were to appear that the Court does not after all have jurisdiction, the Provisional Measures already indicated would cease *ipso facto* and *ipso jure* to be applicable, as shown by the *Anglo-Iranian Oil* case.

The above requirement, as outlined in the 1951 *Anglo-Iranian Oil* case, has been followed ever since, despite a certain amount of retouching of the actual phraseology used by the Court. In 1951 the Court put the point as follows: '[I]t cannot be accepted a priori that a claim based on such a complaint falls completely outside the scope of international jurisdiction', that is, the Court's jurisdiction.¹⁸⁴³ This was still a rather imprecise formulation. In the words 'falls completely outside the scope of international jurisdiction', the Court was apparently suggesting that the question's international character was more decisive than the concrete titles of jurisdiction. But that is not so. The most modern and precise formulation is to be found in various cases, including in the *Fisheries Jurisdiction* case (1972): 'Whereas the above-cited provision in an instrument emanating from both parties to the dispute appears, prima facie, to afford a possible basis on which the jurisdiction of the

¹⁸⁴¹ Case of the *Electricity Company of Sofia and Bulgaria* (1939), judgment on Preliminary Objection, 4 April 1939, Order on Provisional Measures 5 December 1939, cf PCIJ, Series A/B, nos 77 and 79.

¹⁸⁴² ICJ Reports 1951, 93.
¹⁸⁴³ ICJ Reports 1951, 93.

Court might be founded.¹⁸⁴⁴ The Court has sometimes decided that it manifestly has no prima facie jurisdiction, and has therefore refused Provisional Measures.¹⁸⁴⁵ In its jurisprudence, the Court has almost invariably begun by analysing its jurisdiction on a prima facie basis. Except in one case,¹⁸⁴⁶ it has never, until 2010, refused Provisional Measures on the ground that some other condition for issuing them has not been satisfied. In reality, jurisdiction takes priority over other questions. However, the order of things can be adjusted if the economy of the process requires it. This would be the situation in the improbable event that not only jurisdiction over the merits, but even prima facie jurisdiction, were, for some reason, an excessively complicated question, but the application could easily be rejected on some other ground. In the case where the Court rejected a request for Provisional Measures without examining the question of prima facie jurisdiction, it did so because the applicant was asking that the measures be deferred. The Court was able to agree, because it took the view that the element of urgency, required for the indication of Provisional Measures, was manifestly lacking in the circumstances of the case.¹⁸⁴⁷

The Court therefore normally looks into the question of its prima facie jurisdiction (no obvious lack of jurisdiction, and jurisdiction existing on balance of probabilities). Does the Court have also to consider prima facie admissibility? There can be no doubt that the Court needs to give full consideration – not just prima facie consideration – to the general admissibility of the request for Provisional Measures, since this goes to the integrity of the judicial function. What, then, about special admissibility, protecting the interests of the parties? In the case on the *Land and maritime boundary between Cameroon and Nigeria* (1996), the Court held that prima facie admissibility was established, without going so far as to say that it must always be established before Provisional Measures can be indicated.¹⁸⁴⁸ Leading commentators have suggested that, in any event, the Court must refrain from indicating interim measures if there is a real and substantial possibility that the request may be inadmissible.¹⁸⁴⁹ From the point of view of the balancing of interests (see above), it is not essential to know whether the Court is risking bringing the proceedings to an end by taking the view that it lacks jurisdiction, or that the request is inadmissible. Either way, the case will cease, and Provisional Measures might be an excessive constraint on the liberty of the party or parties affected by them. *Ubi eadem ratio, idem ius*. What is more, as we have already seen, the distinction between the grounds of want of jurisdiction and inadmissibility can, in some circumstances, be a particularly tenuous one. That is another reason to extend the prima facie test to the admissibility question as well. From another perspective, however, one might say that arguments as to inadmissibility are generally of a less intensely preliminary nature than those going to jurisdiction. They are very varied, and are intimately connected with the merits. The old practice of ‘joining to the merits’, and nowadays the declaration that an objection is not, in the circumstances of the case, exclusively prelimi-

nary in nature, are eloquent testimony to this difficulty. For these reasons, the evaluation of arguments as to special inadmissibility is often very difficult at such an early stage of the proceedings as the indication of Provisional Measures. This might militate against the extension of the prima facie test to objections as to admissibility. The answer might simply be that, in situations where the legal answer is unclear, there is manifestly no prima facie inadmissibility, and so the Court can indicate Provisional Measures. One might also distinguish between objections to admissibility on a peremptory basis and those that are merely timing questions. The latter may concern only a relatively transitory period of the case, possibly making it valuable to indicate Provisional Measures even before the probable resumption of the case, so that the subject matter of the proceedings is preserved. The proceedings ought in such a case to be suspended rather than terminated, since termination would put an end both to the measures and to their utility. To sum up, the Court can be required to refuse Provisional Measures on the basis that there is prima facie inadmissibility only in those rather infrequent cases where the prima facie inadmissibility is well demonstrated. Since the grounds for special inadmissibility are many and various, often depending on the free choice of a party as to whether or not to raise them, the Court cannot be expected to elaborate them or even to speculate on their possible existence. Either the question is a live one, whether objectively or subjectively, because a party has raised the point, in which case the Court can refuse the measures; or it is not, in which case the Court will indicate the measures unless some other condition for doing so is unfulfilled.

*Condition 3: a sufficient nexus between the measures required and the substantive rights of the parties.*¹⁸⁵⁰ The Provisional Measures requested by parties must be designed to preserve the rights invoked in the substantive claim, that is, those that are to be the subject of the final judgment. One cannot seek the protection of rights other than those that are the subject of the main dispute. Indeed, it is the capacity of the judgment to rule correctly and efficaciously on these rights, and the ability to execute the judgment properly, that the Provisional Measures are designed to protect. As the PCIJ stated in the case on *Polish agrarian reform and the German minority* (1933): ‘[S]uch measures should have the effect of protecting the rights forming the subject of the dispute submitted to the Court’.¹⁸⁵¹ This functional and causal aspect also limits the scope of the Provisional Measures that the Court may indicate *proprio motu*. ‘Not to aggravate the dispute’ and to protect the procedure against external challenges are two elements that are sufficiently connected to the very subject matter of the dispute. At the same time, given their rather wider aim, measures indicated by the Court of its own volition can be slightly further removed from the subject matter of the dispute than measures to protect disputed substantive rights. On the one hand, it is possible to protect concrete rights that are in dispute; on the other, it is necessary to protect the Court’s procedure itself, since damage to the procedure will unfailingly, albeit indirectly, affect the parties’ substantive rights too. Measures in the former category directly protect such rights; measures in the latter category protect all rights relating to the proceedings, of whatsoever nature, the purpose of the measures being to safeguard the proper conduct of the proceedings themselves. The Court needs to take care that its inherent power to indicate Provisional Measures remains sufficiently connected to the needs of the Court’s procedure and does not degenerate, for example, into a general police power

¹⁸⁴⁴ *ICJ Reports 1972*, 16, § 17 and 34, § 18.

¹⁸⁴⁵ Case on *Armed activities in the territory of the Congo* (new Application, DRC v Rwanda); *ICJ Reports 2002*, 249, § 89.

¹⁸⁴⁶ Case on the *Trial of Pakistani prisoners of war*, *ICJ Reports 1973*, 330, § 14.

¹⁸⁴⁷ Ibid. The priority of jurisdiction was the subject of a reservation at § 16.

¹⁸⁴⁸ *ICJ Reports 1996-I*, 21, § 33: ‘Whereas without ruling on the question whether, faced with a request for the indication of provisional measures, the Court must, before deciding whether or not to indicate such measures, ensure that the Application of which it is seized is admissible prima facie, it considers that, in this case, the consolidated Application of Cameroon does not appear prima facie to be inadmissible in the light of the preliminary objections raised by Nigeria.’

¹⁸⁴⁹ *Thirdway*, above n 1771, 86.

¹⁸⁵⁰ See the comments and synthesis in Oellers-Frahm, *Article 41*, above n 1799, 938–39; *Thirdway*, above n 1771, 87 *et seq.*; Gemmalanz, *Provisional Measures*, above n 1799, 238 *et seq.*

¹⁸⁵¹ PCIJ, *Series A/B*, no 58, 177.

designed to ensure the maintenance of peace or the settlement of disputes.¹⁸⁵² Recent jurisprudence, already referred to above, has somewhat stretched these connections.

The Court is not, at this stage of a case, concerned with whether the substantive rights exist or are well founded. For example, if the dispute concerns the suspension or extinction of a right and it is not *prima facie* manifest whether the suspension or extinction is justified, the Court can, and if necessary must, indicate Provisional Measures. It will refuse only if these rights are manifestly non-existent, for in such a case it will lack *prima facie* jurisdiction over the subject matter of the dispute. If the alleged rights do seem to exist but for one reason or another, cannot be exercised, there will normally be no place for adopting Provisional Measures to preserve their substance. Indeed, rights cannot be adversely affected by material acts and therefore do not need protection by the Court.¹⁸⁵³ The protection is for the substance of the right, the matter to which the concrete exercise of the right relates. But, in the hypothesis we are considering, it is precisely this concrete exercise which is prevented. This happens, for example, if the exercise of a treaty right is suspended *in die* by collective security measures decided upon by the Security Council and taking priority under Article 103 of the Charter. For this reason, the Court refused to indicate Provisional Measures in the *Lockerbie* cases (1992).¹⁸⁵⁴ Such measures under the treaty law which was the subject of the proceedings would have damaged the efficacy of the Security Council's binding resolution. This was so because the Court's Order, in so far as binding, would also have enjoyed the protection of Article 103 of the Charter, and to the extent not binding, would at the very least have created a degree of contrariety between injunctions of two of the United Nations' main bodies. The Court takes the view that it must not interfere with the Security Council's powers on the maintenance of the peace. Might it be otherwise if the Court thought the Security Council was intervening in an illegitimate way in a case before the Court? That is not a legal impossibility but, in the perspective of judicial policy, is surely unlikely to happen.

The measures parties request are, however, not always adequately aligned with the substantive rights in dispute. In the case on the *Polish agrarian reform and the German minority* (1933), the Court refused the Provisional Measures that were requested, on the basis that they 'would result in a general suspension of the agrarian reform in so far as concerns Polish nationals of German race, and cannot therefore be regarded as solely designed to protect the subject of the dispute and the actual object of the principal claim'.¹⁸⁵⁵ The fundamental German complaint was that Polish citizens of German origin were being subjected to discrimination in the process of agrarian reform. The German government had asked for interim measures going beyond non-discrimination, for example, requiring Poland not to register other members of the German minority on their expropriation lists, and not to expropriate members of the German minority who were already on the lists. There was a link, in the broad sense of the term, with the claims before the Court, but the Court thought them too tenuous. The violation of a substantive right was in the discrimination, not in the illegality of the expropriation itself. A similar situation arose in the case

on the *Arbitral award of 31 July 1989* (1990). Guinea-Bissau asked that Senegal abstain, in the disputed area, from any act or action of whatsoever nature, while the proceedings were pending, until the Court's final decision.¹⁸⁵⁶ But the question before the Court was not about the delimitation of the areas in question, which had already been decided by the arbitral tribunal. It was a new dispute, limited to the validity or nullity of the arbitral award. The Court drew the consequences by refusing Provisional Measures, on the basis that 'the alleged rights sought to be made the subject of provisional measures are not the subject of the proceedings before the Court on the merits of the case'.¹⁸⁵⁷

In some other cases, where the Court has been impressed by the extreme urgency and the object of the principal claim, the Court has allowed a certain extension of the link between the measures requested and the substantive issues in dispute in the proceedings. In the cases of *Breard*,¹⁸⁵⁸ *LaGrand*¹⁸⁵⁹ and then *Avena*,¹⁸⁶⁰ the subject of the principal claim was a violation of the 1963 Vienna Convention on Consular Relations, by the US 'authorities failure to inform foreign nationals being prosecuted for serious crimes of their right to contact their countries' consular representatives. The States concerned complained of this violation of their citizens' and of their own rights, asking the Court to indicate, as an interim measure, that the death penalty should not be carried out against their citizens. Otherwise, they argued, full reparation would be impossible. It is not certain that this request was entirely well founded in law. The dispute related only to the violation of the 1963 Vienna Convention. The carrying out of the death sentences was the political subject of the dispute, but not its legal subject. That said, the Court had the right to indicate Provisional Measures, not for simple humanitarian reasons (as to which it had no power), but under the heading of 'non-aggravation of the dispute', that is, as a measure indicated *proprio motu*. To go beyond that consideration, it would be necessary for the Court to get into a detailed analysis of the Provisional Measures indirectly 'necessary' to the preservation of the subject of the dispute. Such measures could be considered reasonable on the basis of judicial reasoning that is in all respects analogous to the implicit powers of an international organisation. Finally, there is also the *Pulp mills* case (2007),¹⁸⁶¹ in which the Court had to examine the relationship between some of the measures requested and the substantive rights that were in issue in the case.

As can be seen, the question gives rise to certain difficulties, which the Court resolves on a case-by-case basis. Going beyond the analogy with implicit powers, it is difficult to formulate a general and precise rule as to the degree of closeness between the measures requested and the subject of the dispute, simply because the situations of fact and law are so very variable. The only thing that can reasonably be asserted is that the measures requested by the parties must be *directly designed* to safeguard the substantive rights in dispute, or else must be designed by the Court, *motu proprio*, with a view to protecting the proceedings against *significant damage or prejudice* in consequence of the aggravation of the dispute. The Court has more latitude under the second limb than under the first. Although the causality or link must be direct under the first limb, it can be indirect under the second one.

¹⁸⁵² Individual Opinion of Judge Jiménez de Aréchaga, case on the *Continental shelf in the Aegean Sea*, ICJ Reports 1976, 16. The Court's specific power under Article 41 of the Statute is directed to the preservation of rights 'sub judice' and does not consist in a police power over the maintenance of international peace nor in a general competence to make recommendations relating to peaceful settlement of disputes.

¹⁸⁵³ It is not impossible that the Court might indicate Provisional Measures for the time when such right applicability revives. It is therefore necessary that this particular objective of the measures be clearly indicated.

¹⁸⁵⁴ ICJ Reports 1992, 15, §§ 39–40 and 126–27, §§ 42–43.

¹⁸⁵⁵ PCIJ, Series A/B, no 58, 178.

¹⁸⁵⁶ ICJ Reports 1990, 65, § 3.

¹⁸⁵⁷ *Ibid.*, 70, § 26.

¹⁸⁵⁸ ICJ Reports 1998, 248 *et seq.*

¹⁸⁵⁹ ICJ Reports 1999, I, 9 *et seq.*

¹⁸⁶⁰ ICJ Reports 2003, 77 *et seq.*

¹⁸⁶¹ ICJ Reports 2007, I, 10–11, §§ 27–30.

— *Condition 4: a risk of irreparable prejudice*¹⁸⁶² to the substance of the rights invoked in the proceedings.¹⁸⁶³ In its jurisprudence, the ICJ has developed a key condition for the indication of Provisional Measures, namely that the prejudice that a party's rights might suffer in the absence of Provisional Measures must on any reasonable view be such as to lead to 'irreparable prejudice' to the applicant. This means that the prejudice is not capable of being repaired or that merely financial reparation would be inadequate. The Court gave a particularly memorable indication as to this criterion in the *Anglo-Iranian Oil*¹⁸⁶⁴ and *Interhandel* cases,¹⁸⁶⁵ and has consistently insisted on it from the *Fisheries Jurisdiction* cases,¹⁸⁶⁶ through cases including cases on *Trials of Pakistani prisoners of war*,¹⁸⁶⁶ *Nuclear Tests*,¹⁸⁶⁷ *Aegean Sea continental shelf*,¹⁸⁶⁸ *United States diplomatic and consular staff at Tehran*,¹⁸⁶⁹ *Military and paramilitary activities in and against Nicaragua*,¹⁸⁷⁰ *Boundary dispute (Burkina Faso v Mali)*,¹⁸⁷¹ *Arbitral award of 31 July 1989 (Guinea-Bissau v Senegal)*,¹⁸⁷² *Passage through the Great Belt*,¹⁸⁷³ *Lockettie*,¹⁸⁷⁴ *Application of the Convention for the prevention and punishment of the crime of genocide (Bosnia-Herzegovina v Yugoslavia)*,¹⁸⁷⁵ *Land and maritime boundary between Cameroon and Nigeria*,¹⁸⁷⁶ *Vienna Convention on consular relations (Paraguay v United States of America)*,¹⁸⁷⁷ *LaGrand*,¹⁸⁷⁸ and *Armed activities in the territory of the Congo*.¹⁸⁷⁹ A classic formulation was delivered in the *Genocide* case (1993). 'Whereas the power of the Court to indicate provisional measures under Article 41 of the Statute has as its object to preserve the respective rights of the parties pending the decision of the Court, and presupposes that *irreparable prejudice* shall not be caused to rights which are the subject of dispute in judicial proceedings.'¹⁸⁸⁰ However, the Court no longer applies this criterion as regards measures adopted by it *proprio motu*: these can be indicated 'autonomously' in order to prevent the 'aggravation or extension of the dispute'.¹⁸⁸¹

¹⁸⁶² See the succinct views in Oellers-Frahm, Article 41, above n 1799, 939–40; Thirlway, above n 1771, 91, et seq. For a more detailed analysis, see the literature on Provisional Measures cited in the bibliography, especially Schuck, *Interim Measures in the Hague Court* (Kluwer, 1983), 104 et seq.; and Gemalmaz, *Provisional Measures*, above n 1799, 223 et seq.

¹⁸⁶³ ICJ Reports 1951, 93.

¹⁸⁶⁴ ICJ Reports 1957, 112.

¹⁸⁶⁵ ICJ Reports 1972, 16–17, 34–35.

¹⁸⁶⁶ ICJ Reports 1973, 330.

¹⁸⁶⁷ ICJ Reports 1973, 103 et seq., 139 et seq. cf the commentaries of H. Falasfi, *L'affaire des essais nucléaires devant la Cour internationale de Justice*, (thesis, Neuchâtel University, 1978) 39 et seq.; P. Cot, *Demandes en indication de mesures conservatoires* (1973) 19 *AFDI* 252 et seq. On the position of the French government, cf S. de Lacharrière, *Commentaires sur la position juridique de la France à l'égard de la licéité de ses expériences nucléaires* (1973) 19 *AFDI* 235 et seq.

¹⁸⁶⁸ ICJ Reports 1976, 9, 11 et seq.

¹⁸⁶⁹ ICJ Reports 1979, 19–20.

¹⁸⁷⁰ ICJ Reports 1984, 180 et seq. cf ME Labouz, *Affaire des activités militaires et paramilitaires au Nicaragua et contre celui-ci*, *Ordonnance en indication de mesures conservatoires* (1984) 30 *AFDI* 340 et seq.; LA Siciliano, *Les mesures conservatoires dans l'affaire des activités militaires et paramilitaires au Nicaragua et contre celui-ci* (1984) 37 *RHDI* 209 et seq.

¹⁸⁷¹ ICJ Reports 1986, 8 et seq.

¹⁸⁷² ICJ Reports 1990, 69–70.

¹⁸⁷³ ICJ Reports 1991, 16 et seq.

¹⁸⁷⁴ ICJ Reports 1992, 14–15.

¹⁸⁷⁵ ICJ Reports 1993, 19 et seq.; and ICJ Reports 1993, 346 et seq.

¹⁸⁷⁶ ICJ Reports 1996, 21–23.

¹⁸⁷⁷ ICJ Reports 1998, § 35 et seq.

¹⁸⁷⁸ ICJ Reports 1999-I, 15.

¹⁸⁷⁹ ICJ Reports 2000, 127–28.

¹⁸⁸⁰ ICJ Reports 1993, 19, § 34 (italics added).

¹⁸⁸¹ Case on *Armed activities in the territory of the Congo*, ICJ Reports 2000, 127–28, especially § 44.

It is not necessarily an easy matter to decide what constitutes 'irreparable prejudice' in a given case. The dominant criterion remains to preserve the 'executability' of the Court's eventual final judgment. This is a matter both of safeguarding the rights of the parties and of protecting the due and proper administration of justice. Even minimal hindrance to executability can, and must, if it is of sufficient gravity, be countered by preventive action in the form of Provisional Measures. The first-order importance of this criterion arises from the functional and incidental character of Provisional Measures: the aim is to preserve substantive rights in all situations where the final judgment would not otherwise ensure full and complete (or at least adequate) reparation. Also, the Court will adopt such measures whenever it thinks that the prejudice to the applicant's rights is intolerable because of the gravity of the resulting consequences, and that it would be inadequate for the Court to allow it to occur *pendente lite*.¹⁸⁸²

On this point, the Court's jurisprudence has evolved. In the days of the PCIJ, the irreparability of the prejudice was sometimes defined according to a very strict legal criterion that gave it a greatly restricted field of application. The Court did not think in terms of Provisional Measures unless the irreparable prejudice was of a *legal nature*. Following the formula used in the case on *Denninication of the Sino-Belgian treaty of 2 November 1865* (1927), the prejudice consisted in this, that the effects of acts and facts contrary to substantive rights 'could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form'.¹⁸⁸³ But, in the great majority of cases – if not all of them from the narrowest legal perspective – such reparation, by the payment of an equivalent, does remain possible. It would follow that requests for interim measures must always be refused. Understandably, the PCIJ did not stick rigorously to this jurisdiction. In the very same year, it required that a sum of money be paid over on a provisional basis, 'seeing that, unless payment be immediate, the amount of the damage and the compensation would considerably increase, and seeing that the prejudice caused by a further delay would be actually irreparable'.¹⁸⁸⁴ There is no doubt that the Court thought that in that case the loss would be excessive and, in that sense, irreparable. A certain backsliding was noticeable here. Also, some years later, the PCIJ widened its concept of irreparable loss to include *prejudicial facts*. In the case on the *Legal status of South-East Greenland* (1932), the Court used the formula that the prejudice must be 'irreparable in fact or in law'.¹⁸⁸⁵ This new line, which was later followed by the ICJ, opened the way to the assessment of irreparable prejudice in light of all the circumstances of the case, and in particular of concrete expectations as to the gravity of the situation that would arise if Provisional Measures were not indicated.

Where it is a matter of facts independent of the will of the parties, the Court has to take account of how probable it is that events will occur contrary to the parties' substantive rights, and of the most probable consequences of such events. If, on the other hand, the question concerns facts that depend on the wills of the parties, it will be necessary to examine the particular relationship between the parties, the undertakings given, and the tension or harmony between them, since these factors will be decisive in giving form to the probabilities of various facts actually occurring and as to the assessment of the consequences that can be expected. Obviously, if the damaging acts or facts have already occurred, the

¹⁸⁸² Oellers-Frahm, Article 41, above n 1799, 940.

¹⁸⁸³ PCIJ Series A, no 8, 7.

¹⁸⁸⁴ Case on the *Factory at Chorzów* (1927), Series A, no 12, 6.

¹⁸⁸⁵ PCIJ Series A/B, no 48, 284.

Court can confine itself to an examination of their effects on the disputed rights, and to the indication of Provisional Measures of a positive nature so as to oblige the State in question to re-establish the *status quo ante*, to the extent that this is possible. From an early stage, the PCIJ had accepted that Provisional Measures could, in an appropriate case, involve positive obligations to take steps rather than negative ones to abstain from steps. In the *Factory at Chorzów* case (1927), the Court said that: 'The origin of the provisions of Article 41 of the Statute shows that not only an omission by the Parties but also a definite act was considered as the subject of a measure of protection.'¹⁸⁸⁶

— *Condition 5: urgency*.¹⁸⁸⁷ It is inappropriate to indicate Provisional Measures unless there is some urgency about it, that is, if otherwise the substance of the disputed rights would, or very probably might, suffer irreparable prejudice. If that is not the position, then Provisional Measures are not justified. The Court is exercising a power which can be described as in a sense inordinate, in that it consists of indicating, in advance, certain obligations, which may well be onerous ones, to be complied with by a sovereign State, moreover doing this at a time when the Court is not yet certain either that it has jurisdiction, or that the claim is well founded. For these reasons, a restrictive interpretation is required. The Court must indicate Provisional Measures whenever it is necessary to do so; but it must refrain from doing so where it is unnecessary. If the measures are not urgent, they cannot be legally necessary. An Applicant State still has the right to re-present its request later in the proceedings, as and when the factual situation changes and becomes urgent. Balanced in this way, the law is able to achieve its objective of minimal damage. It respects sovereign freedom of action unless and until there is some valid reason to restrict it. Incidentally, it is of no importance in law that the situation making it necessary to give protection to the disputed rights may have already been in existence for some time. What is essential is to assess the urgency at the time when the request for Provisional Measures is presented to the Court.

The urgency is most obvious in cases where a person is likely to suffer capital punishment while a case concerning him is still pending at the ICJ. One thinks here of the cases, cited above, of *Brenard, Avena and LaGrand*. In the last of these cases, the situation was truly dramatic. The request for Provisional Measures to stop the execution of the convicted person (a German citizen) was received by the Court on 2 March 1999; the execution was scheduled for the next day. The Court was obliged to indicate Provisional Measures through the action of the President (after consulting the judges by telephone), there being no time for public hearings.¹⁸⁸⁸ This was obviously a case of extreme urgency. Conversely, the Court has more than once refused to indicate Provisional Measures on the basis that the case was not urgent. In the *Trial of Pakistani prisoners of war case* (1973), the government of Pakistan, having asked for Provisional Measures, requested the Court to defer them while direct negotiations took place with India. The Court concluded that it no longer has before it a request for interim measures which is to be treated as a matter of urgency.¹⁸⁸⁹ It therefore refrained from indicating the measures initially requested. Legally, one could analyse this situation as either a sort of withdrawal, or at least the suspension, of

the request for Provisional Measures. In the *Great Belt case* (1991), the Court took the view that there was no urgency about indicating Provisional Measures concerning the construction of a bridge, given that obstacles to the passage of the Belt, the subject of the applicant's plaint, would not take concrete shape until 1994, by which date the Court hoped to have decided the merits.¹⁸⁹⁰ The actions or events prejudicial to the substance of the disputed rights must be expected to occur before the prospective date of the judgment on the merits, in order to give urgency to the Provisional Measures requested. In the case on the *Arrest warrant of 11 April 2000* (2000), the Court again refused to indicate Provisional Measures because of a lack of urgency, on the basis that Mr Yerodia, named in the arrest warrant, was no longer Minister of Foreign Affairs at the time of the Court's decision on the application for Provisional Measures. Consequently, he was travelling much less and it seemed less urgent to provisionally annul the arrest warrant requested by the DRC.¹⁸⁹¹ In other words, the DRC could always renew its request for interim measures – perhaps including the suspension of the arrest warrant rather than its annulment – if and when Mr Yerodia had to contemplate a journey which would expose him to the risk of arrest. Finally, in the *Pulp mills case* (2007), the Court took the view, in the context of the construction of factories and of claimed Argentine barrages blocking the stream between the two States, that an imminent risk of irreparable prejudice had not been made out.¹⁸⁹² In this sense there was again no urgency.

Various factors particular to the circumstances of the particular case are relevant to the assessment of urgency. The decision is more contextual, and more a matter of appreciation, than might at first sight seem to be the case. Any guarantee the respondent is able to give are obviously important; so are the general and special relations between the two disputing States, whether peaceful and happy or tense and mistrustful. The same goes for the pursuit (or non-pursuit) of other parallel procedures for resolving the dispute, whether diplomatic or institutional, especially the existence or otherwise of other provisional measures arising from such other procedures, and also whether or not such other measures are binding. In short, the Court has to assess the whole context, and form an appreciation of it. It is not in the abstract, but very much in the concrete context, that the urgency of the situation has to be judged.

The urgency factor means that requests for Provisional Measures take priority over other hearings. The Court deals with them very swiftly. Article 74, paragraph 1 provides as follows: 'A request for the indication of Provisional Measures shall have priority over all other cases. Article 74 paragraph 2 adds: 'The Court, if it is not sitting when the request is made, shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency.' Article 54, paragraph 2 reflects the same idea: 'When fixing the date for, or postponing, the opening of the oral proceedings the Court shall have regard to the priority required by Article 74 of these Rules and to any other special circumstances, including the urgency of a particular case.' Provisional Measures procedure is more flexible than procedure in main hearings. In cases of extreme urgency, as in *LaGrand* (see above), the Court can dispense with an oral hearing, on the basis of Article 75, paragraph 1: 'The Court may at any time decide to examine *proprío motu* whether the circumstances of the case require the indication of Provisional Measures which ought to be taken or complied with

¹⁸⁸⁶ PCIJ, Series A, no 12, 6.

¹⁸⁸⁷ Oellers-Frahm, Article 41; above n 1799, 940–42. See also Gemalmanaz, *Provisional Measures*, above n 1799, 223 *et seq.*

¹⁸⁸⁸ ICJ Reports 1999, 14, § 21.

¹⁸⁸⁹ ICJ Reports 1973, 330, § 14.

¹⁸⁹⁰ ICJ Reports 1991, 18, § 27.

¹⁸⁹¹ ICJ Reports 2000, 201, § 72.

¹⁸⁹² ICJ Reports 2007-I, 13, § 42. 'Whereas, moreover, it has not been shown that were there such risk of prejudice to the rights claimed by Uruguay in this case, it is imminent.'

by any or all of the parties.¹⁸⁹³ The expression 'at any time' gives it the right to act immediately and *sponte sua*. This provision also seems to indicate that the parties can renounce the requirement for an oral hearing. If the Court can of its own volition examine the question of Provisional Measures without an oral hearing, then, a fortiori, it ought to be possible for the parties to reach an agreement to the same effect, referring the question of adopting Provisional Measures to the Court. This will be most likely to happen if the case is urgent and the respondent is being cooperative. One should also remember that the Rules allow oral hearings to be bypassed if speed and flexibility are more important, as evidenced by Article 92, paragraph 3 relating to Chambers of the Court. 'Oral proceedings shall take place unless the parties agree to dispense with them, and the Chamber consents.' There is no reason why this *ratio legis* should not be applied, by analogy, in the field of Provisional Measures. But such agreements between the parties will, of course, be very unusual.

— *Condition 6: a certain expectation of success on the merits*¹⁸⁹⁴ In order for the Court to indicate Provisional Measures, must the applicant establish to the satisfaction of the Court — or must the Court itself be satisfied — that the Court probably has jurisdiction over the merits? Does it suffice to establish prima facie jurisdiction, or must the Court also be satisfied, likewise prima facie, that the substantive application has a sufficient and reasonable chance of succeeding? If a case comes to the Court, one which the Court considers it probably has jurisdiction over, but where it has also to admit that the claim is manifestly ill-founded, must (or can) the Court indicate Provisional Measures restrictive of the respondent's freedom of action, when it is very unlikely (perhaps almost unthinkable) that the applicant can succeed on the merits? If prima facie jurisdiction is required, it could also be reasonable to require that the rights invoked are not manifestly unfounded or inapplicable in the circumstances of the case.¹⁸⁹⁵ However, we have only a little jurisprudence on this point. The complexity of international cases is generally so considerable that it is usually difficult to say that an application is manifestly ill-founded. What is more, the Court does not like to go down that route. It would, after all, have to indicate in advance that in all probability it is going to dismiss the substantive claim. This would give the impression that it had already made up its mind, and was no longer sufficiently neutral. The diplomatic aspect of the Court's activities and the necessary tact to be used with the sovereign States that are before it, make it desirable for the Court to behave with great circumspection in this regard. Consequently, it is necessary for the Court to refuse Provisional Measures on this ground only in cases where the absence of any proper basis for the claim is absolutely obvious. This was the position of the Serbian claims against the NATO States following the attack on Kosovo in the cases on the *Legality of the use of force*. Serbia and Montenegro claimed that the NATO bombardments were contrary to the 1948 Genocide Convention. They alighted on this argument because the Convention was the only basis for establishing the Court's jurisdiction, under the compromissory clause in Article IX. Legally, however, it was obvious that the conditions for establishing the crime of genocide were lacking, if only because the specific intention to destroy all or part of a protected group was manifestly missing. The Court therefore refused, on this basis, to order the measures requested of it.¹⁸⁹⁶ On proper analysis, that conclusion can be seen to have been based as much on the

absence of prima facie jurisdiction (the Genocide Convention being inapplicable) as on the absence of any substantive basis (no genocide was committed). It is therefore unsurprising that the Court prefers to insist on the absence of prima facie jurisdiction, as it did in paragraph 41 of its 1999 Order. This certainly leaves room for the development of clearer jurisprudence on this condition relating to the chances of success on the merits, which remains a somewhat dormant question in the jurisprudence.

e) Procedure for the Indication of Provisional Measures¹⁸⁹⁶

The procedure is governed by Articles 73 to 78. There are several procedural aspects that call for brief analysis.

Any party to a case before the Court can ask it to indicate Provisional Measures. Article 73, paragraph 1 provides as follows: 'A written request for the indication of Provisional Measures may be made by a party at any time during the course of the proceedings in the case in connection with which the request is made.' This means that such measures can be requested not only by the applicant, but also by the respondent, for example in the context of a counterclaim. In respect of its request for Provisional Measures, such a respondent becomes, for these purposes, the applicant. It is normal for Provisional Measures to be particularly demanded in cases where the jurisdiction is compulsory and the case is begun unilaterally. In such cases, it is more likely that the respondent may be tempted to do some harm or prejudice to the subject of the dispute. However, in formal terms, it is equally possible to ask for Provisional Measures in a case begun on a non-compulsory basis, for example, under a special agreement. This happened, for example, in the case of the *Frontier dispute* (Burkina Faso v Mali, 1986), in which, after the Court had been seized by special agreement, both sides asked the Court to indicate such measures.¹⁸⁹⁷ Also, it should be remembered that, under Article 38, paragraph 5 a case brought before the Court on the basis that the other side's consent to jurisdiction is being requested (the *forum prorogatum*) is not thereby yet begun, and is not entered on the Court's list until the other side's consent has been given. It follows that requests for Provisional Measures cannot be presented to the Court until then. This seems to make sense, since otherwise it would be too easy to use the Court on an abusive basis, as a means to bring pressure and make propaganda against the opposing State.

Under paragraph 1, the request must be 'written'. The PCIJ rules contained no such condition. Oral requests were thus possible in those days, although in practice all requests to the PCIJ were in writing. The Rules impose no temporal time limit for such requests. They can be made at any time between the seising of the Court and the final judgment. However, if a party were to ask for Provisional Measures at a very late stage, it is likely that the Court would find that, if there is no real urgency, it is inappropriate to indicate them. Final judgment is about to be given, and this will provide for definitive measures rather than provisional ones. Also, if a party delays excessively in seeking such measures, it thereby at least imperils, if not actually harms, the due and proper administration of justice and, on this basis, the Court might refuse to consider the request.¹⁸⁹⁸

¹⁸⁹³ Oellers-Frahm, Article 41, above n 1799, 938.

¹⁸⁹⁴ In this sense, see Oellers-Frahm, *ibid.*, and the Independent Opinion of Judge Shahabuddeen, in the *Grand* *Belt* case, *ICJ Reports* 1991, 36.

¹⁸⁹⁵ See, eg *ICJ Reports* 1999-I, 138, §§ 40–41.

¹⁸⁹⁶ See the short account in Oellers-Frahm, Article 41, above n 1799, 943 *et seq.*; Gnyomarc, above n 1827, 468 *et seq.*; Gamañaza, *Provisional Measures*, above n 1799, 267 *et seq.*

¹⁸⁹⁷ *ICJ Reports* 1986, 3 *et seq.*

¹⁸⁹⁸ See the *LaGrand* case, *ICJ Reports* 1999-I, 14, § 19.

The request must provide certain information. Article 73, paragraph 2, reads: 'The request shall specify the reasons therefor, the possible consequences if it is not granted and the measures requested. A certified copy shall forthwith be transmitted by the Registrar to the other party.' Notification to third parties is carried out under the same rules as apply to the notification of new cases. So, for example, the Security Council and the UN Member States are all notified, which nowadays means, in practice, almost all the States in the world.¹⁸⁹⁹ The Court can further request the parties to provide any clarification necessary so that, in exercising its protective functions, it has full knowledge of the issues. Article 78 reads: 'The Court may request information from the parties on any matter connected with the implementation of any Provisional Measures it has indicated.' The Court made such a request in 1972 regarding the regulation and control of catches in the area concerned in the *Fisheries Jurisdiction* cases.¹⁹⁰⁰

Under Article 74, paragraph 1: 'A request for the indication of Provisional Measures shall have priority over all other cases.' It is an urgent procedure – since a State is claiming that there is a threat of irreparable prejudice to it – and therefore deserves to be heard ahead of all other matters. This subject has already been considered in the subsection on urgency as a condition for the indication of Provisional Measures. It also follows that as provided in Article 74, paragraph 2: 'The Court, if it is not sitting when the request is made, shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency.' The urgency may be such as to necessitate the President of the Court's calling upon the parties to act, or abstain from acting, in certain ways, as a kind of preliminary provisional measure. Article 74, paragraph 4 provides in this regard that: 'Pending the meeting of the Court, the President may call upon the parties to act in such a way as will enable any order the Court may make on the request for Provisional Measures to have its appropriate effects.' The expression 'call upon' (in the French version 'inviter') does not connote the idea that such 'preliminary provisional measures' have legally binding force.

It is for the Court to decide on the appropriate Provisional Measures, as provided in Article 41 of the Statute. In situations of extreme urgency, can the President of the Court who is obliged to sit at The Hague, or in his absence the Vice-President indicate Provisional Measures on their own authority? In the early days of the PCIJ, this was possible.¹⁹⁰¹ The President of the Court indicated Provisional Measures in the case on the *Denunciation of the Sino-Belgian treaty* (1927), under Article 57 of the 1922 Rules.¹⁹⁰² However, since this power was incompatible with Article 41 of the Statute, it was revoked in the 1931 Rules. In the *Prince of Pless* case (1933),¹⁹⁰³ it did, however, become apparent that, in cases of extreme urgency, the President did need power to take action on his own. In that case the President successfully exercised such a power without there being any text he could rely upon as authority to do so. As a result, the Rules were amended again. Finally, in the 1978 Rules a new formula was adopted. It allows the President simply to 'suggest' measures. In cases of extreme urgency, such as the *LaGrand* case (1999), cited above, in which the death penalty was to be exacted a day after the request for Provisional Measures, the President will have

short time to consult the Court – if necessary by telephone – so that an Order can be issued immediately, without an oral hearing.

The refusal of a request for Provisional Measures does not mean that the requesting party cannot subsequently present a fresh request. Provisional Measures address urgent situations that are usually in constant flux, sometimes changing with extreme rapidity. For this reason, a party is allowed to make a fresh request which must, of course, be adapted to the new circumstances (since otherwise it will be faced with a *res judicata* argument). Rule 75, paragraph 3 provides as follows: 'The rejection of a request for the indication of provisional measures shall not prevent the party which made it from making a fresh request in the same case based on new facts.' The Rule clearly stresses the need to raise 'new facts'. The negative implication here is that the Order originally refusing Provisional Measures is a *res judicata*. A party which has previously had its request for Provisional Measures refused does sometimes make a second request. There have not been many applications of this kind. One was made in the case on *Military and paramilitary activities in and against Nicaragua* (1986)¹⁹⁰⁴ (fresh application after the original one had been refused); and in the case on the *Application of the Convention for the prevention and punishment of the crime of genocide* (Bosnia-Herzegovina v Yugoslavia, 1993) (a case in which additional requests were made after a first set of Provisional Measures had already been indicated).¹⁹⁰⁵ The only real restriction on this undisputed right to ask for further measures relates to the abuse of process by repeated and manifestly ill-founded requests. But in any event, a litigation strategy of that kind would be ill-advised. It is not in a party's interest to annoy the Court and present itself in an unfavourable light. Also, the Court can always refuse to consider a request it considers purely abusive or vexatious. The legal basis for that power rests on the prohibition of abuse of procedure, derived from the material principles prohibiting the abuse of law and the abuse of good faith. These are principles of general international law, applicable before the Court, and are also enshrined in the UN Charter (Article 2, § 2), applicable to all UN organs including the ICJ.

Rule 76, paragraph 1 provides that: 'At the request of a party, the Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures, if, in its opinion, some change in the situation justifies such revocation or modification.' Paragraph 2 provides that: 'Any application by a party proposing such revocation or modification shall specify the change in the situation considered to be relevant.' Finally, paragraph 3 adds that: 'Before taking any decision under paragraph 1 of this Article, the Court shall afford the parties an opportunity of presenting their observations on the subject.'¹⁹⁰⁶ The parties by agreement, or the applicant, can ask the Court to suspend or revoke Provisional Measures for example, with a view to direct negotiations between them. This happened in the case on the *Denunciation of the Sino-Belgian treaty* (1927), the Court having accepted a request to that end by the claimant.¹⁹⁰⁷ Under these texts, the Court cannot of its own volition modify the Provisional Measures requested by a party. Rule 76, paragraph 1 does indeed presuppose the 'request of a party'. If, however, measures have either lapsed or no longer serve the purposes for which they were designed, and if no party takes the initiative to have them amended, the Court might use the principle of the proper administration of justice to adjust them *proprio motu*. In addition, it goes without

¹⁸⁹⁹ Article 77: 'Any measures indicated by the Court under Articles 73 and 75 of these Rules, and any decision taken by the Court under Article 76, paragraph 1 of these Rules, shall forthwith be communicated to the Secretary-General of the United Nations for transmission to the Security Council in pursuance of Article 41, paragraph 2, of the Statute.'

¹⁹⁰⁰ *ICJ Reports* 1972, 18, § 1(f) and 35, § 1(f).

¹⁹⁰¹ *G. Hudson*, above n 1771, 427–28.

¹⁹⁰² PCIJ, Series A, no 8, 6 *et seq.*

¹⁹⁰³ PCIJ, Series A/B, no 54, 150 *et seq.* and Series C, no 70, 430.

¹⁹⁰⁴ *ICJ Reports* 1986, 144, § 287, Nicaragua not pursuing its second request.

¹⁹⁰⁵ *ICJ Reports* 1993, 349, § 59.

¹⁹⁰⁶ See, eg. the *Fisheries Jurisdiction* cases, *ICJ Reports* 1973, 303, §§ 2–3 and 314, §§ 2–3.

¹⁹⁰⁷ PCIJ, Series A, no 8, 11.

saying that the Court can itself modify any and all measures it has indicated *motu proprio*. However, it should not do so if there are no good reasons.

A decision by which the Court declares that it has no jurisdiction or that the claim is inadmissible, *eo ipso* abrogates any outstanding provisional measures which will therefore have no valid object. Normally the judgment will say so. If the Court were to overlook the point, one would have to consider that the abrogation, although not expressed, is nevertheless implicit under the general principles of procedure. Incidental procedures are always extinguished with the ending of the main case.

Ad hoc judges can participate in provisional measures proceedings, but the Court is competent even without them. The question turns essentially on the degree of urgency.¹⁹⁰⁸ If there is time for them to nominate *ad hoc* judges, the States concerned can exercise their right to do so; if not, not. Is it then possible to palliate the problem by nominating provisional or special *ad hoc* judges, to participate only in the Provisional Measures proceedings until the States concerned nominate *ad hoc* judges for the main proceedings? Until now, there has been no such provision in the Rules. It is nevertheless possible that an *ad hoc* judge who has participated in the Provisional Measures proceedings might retire at the end of that phase, paving the way for the nomination of a replacement *ad hoc* judge. In any event, the Court can indicate Provisional Measures even if *ad hoc* judges are not sitting.¹⁹⁰⁹ A party's failure to appear before the Court does not prevent the latter from indicating Provisional Measures. Since Article 53 of the Statute provides that the Court is not prevented, by such a failure to appear, from pronouncing on the merits, then a fortiori the Court must be able to pronounce on Provisional Measures. The Court does not, however, refer in this regard to Article 53, which is concerned solely with the principal procedure. One reason is that, unlike the situation under Article 53, where the Court must carefully satisfy itself as to its jurisdiction, in this case it need decide only whether it has *prima facie* jurisdiction. The Court provided a summary of the applicable law in the *Fisheries Jurisdiction* cases (1972): 'Whereas . . . the non-appearance of one of the parties cannot by itself constitute an obstacle to the indication of provisional measures, provided the parties have been given an opportunity of presenting their observations on the subject'.¹⁹¹⁰ However, one may say that Article 53 is applied by some sort of analogy albeit with some modifications.

Provisional Measures are indicated by means of an Order, not a Judgment. This reflects their provisional nature, the fact that they are incidental matters, and the fact that, for a long time, it was uncertain whether they were legally binding. Also, a judgment could not be adopted *proprio motu* by the Court, whereas such a power to act *ex officio* does exist in relation to Provisional Measures.¹⁹¹¹ It must be said that neither the Statute nor the Rules contain a provision requiring the making of an Order rather than the giving of a Judgment. The form of the Bench's pronouncement is thus purely jurisprudential in origin. So, in a particular case, there is nothing insurmountable to stop the Court making a Judgment out of it, especially since it has been indicated that Provisional Measures are legally binding. The giving of a Judgment might have consequences for the jurisdiction of the Security

Council, under Article 94, paragraph 2 of the Charter, to take steps to enforce the Provisional Measures indicated by the Court. It must be noted, however, that so far, the Court has never issued an actual Judgment on Provisional Measures.

The content of Provisional Measures is not subject to the principle *ne eat iudex ultra petita partium* (that the Court must stay within the terms of the parties' claims). Given that the Court is free to indicate Provisional Measures *proprio motu*, the *petitum* (that which the parties request of the Court) does not represent the outer limit of what the Court can decide. Rule 75, paragraph 2, already cited above, therefore provides that:

When a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request.

Sometimes the Court stays within the parameters of the parties' requests;¹⁹¹² sometimes, however, it goes further, indicating additional ones, particularly as regards the non-aggravation of the dispute.¹⁹¹³ The Court possesses a fairly wide merging of appreciation, given that a significant part of its Provisional Measures are indicated by it *motu proprio*. Here, then, there is room for the development of a judicial policy.

Provisional Measures are deemed neither to anticipate nor to prejudice the merits phase.¹⁹¹⁴ Since the old *Prinec of Pless* case (1933), the Court unfailingly repeats a ritual formula in this respect:

Whereas . . . the present Order must in no way prejudice either the question of the Court's jurisdiction to adjudicate upon the German Government's Application instituting proceedings . . . or that of the admissibility of that Application.¹⁹¹⁵

This formula was enlarged in the *Nuclear Tests* cases (1973) so as to read:

Whereas the decision given in the present proceedings in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case, or any questions relating to the admissibility of the Application, or relating to the merits themselves.¹⁹¹⁶

In an additional formula, the Court also insists that the Provisional Measures must not and do not anticipate its judgment.¹⁹¹⁷ Obviously, the Court is not bound by the views it takes in the Provisional Measures Order, if only because its pronouncements in the Order are made only on the basis of a *prima facie* view of the case. It is entirely possible for the Court to decline to exercise jurisdiction, or to form the view that the alleged substantive rights do not exist or do not mean what parties say they mean. At the same time, parties can glean from the Court's reaction to requests for Provisional Measures certain implicit indications of how the Court sees the case. If, for example, the Provisional Measures are designed to prevent the construction of certain allegedly pollutive industrial plant in breach of obligations of international law; if the Court refuses to indicate measures designed to freeze the construction; if, at the date of the final judgment, the plant will be finished and in service; and if it is unlikely that the Court will order the complete dismantling of the plant given the

¹⁹⁰⁸ See the case on the *Legal status of South-East Greenland* (1933), PCIJ, Series A/B, no 48, 280.

¹⁹⁰⁹ See the case on the *Factory at Chorzow* (1927), PCIJ, Series A, no 12, 10.

¹⁹¹⁰ ICJ Reports 1972, 15, § 11 and 32, § 11. See also the case on the *Continental shelf in the Aegean Sea*, ICJ Reports 1976, 6, § 13-14 and the case on *United States diplomatic and consular staff at Tehran*, ICJ Reports 1979, 13, § 13.

¹⁹¹¹ See PCIJ, Series E, no 7, 293 (English language text), 283 (French language text), the power only exists after hearing the parties.

¹⁹¹² See, eg the *Anglo-Iranian Oil* case, ICJ Reports 1951, 93-94, concerning anti-British propaganda.

¹⁹¹³ See, eg the case on *United States diplomatic and consular staff in Tehran*, ICJ Reports 1979, 12, 21, § 12, 47.

¹⁹¹⁴ Oellers-Fabam, Article 41, above n 1799, 937-33. See also Szmucki, *Interim*, above n 1862, 93 *et seq*.

¹⁹¹⁵ PCIJ, Series A/B, no 54, 153.

¹⁹¹⁶ ICJ Reports 1973, 105, § 33 and 142, § 34. See also, eg the case of the *United States diplomatic and consular staff in Tehran*, ICJ Reports 1979, 20, § 45, where the Court evoked only the merits.

¹⁹¹⁷ See, eg the *Fisheries* cases, ICJ Reports 1972, 16, §§ 21 and 34, § 22.

considerable impact that would result; in such a case it is possible to suppose, even at the preliminary stage of Provisional Measures, that the Court does not consider the construction to be contrary to substantive (rather than procedural) obligations of international law.¹⁹¹⁸ So, if the Provisional Measures do not, as a matter of law, prejudice the merits, the same cannot altogether be said as regards the facts.

Sometimes the Provisional Measures requested are in substance identical to the substantive claims in the case, for example, requests for the cessation of nuclear testing, for the freeing of hostages, the freezing of a death sentence and so on. Such requests can perfectly properly be made as requests for Provisional Measures, if they are necessary to preserve the subject matter of the dispute from irreparable damage. Obviously, the carrying out of a death sentence places a considerable restriction on the Court's options in its final judgment, *restitutio in integrum* (a return to the previous *status quo*) having thereby been made impossible. Equally, it is obvious that nuclear testing can cause irreparable radiation damage of precisely the kind the Applicant States may be substantively seeking to prevent through the principal proceedings. Even so, such Provisional Measures do not anticipate the merits decision – they remain truly provisional. Equally, it is not decisive that the Provisional Measures sought are materially different from the substantive claims made in the case. The single decisive point is that the request is a provisional one made to protect the situation as regards the substantive dispute. If that decisive element is lacking, the request is not truly provisional, and the Court must refuse it. Thus, in the case of the *Factory at Chorzów* (1927), the PCIJ considered the German request that the Court direct the Polish government to make a provisional payment to Germany of 30 million reichsmarks could not be granted:

Considering that the request of the German Government cannot be regarded as relating to the indication of interim measures of protection, but as designed to obtain an interim judgment in favour of a part of the claim formulated in the Application mentioned above.¹⁹¹⁹

f) Effects of Provisional Measures¹⁹²⁰

The great and vexed question about Provisional Measures has been, at least until 2001, whether they were legally binding on the parties.¹⁹²¹ For many years, leading commentators were divided on this question, and at the same time the Court avoided giving it a straight answer. State practice, however, did not indicate that such measures were held in high respect. Throughout, the whole question was bathed in a mysterious and disquieting half-light, provoking such a strange sense of nervous expectation that the only true comparison is with the feelings aroused at certain artistic moments: by, for example, the opening bars of Beethoven's Ninth Symphony.

¹⁹¹⁸ This was the position in the case of the *Pulp factories on the Uruguay River*, ICJ Reports 2006 (Provisional Measures) and 2010 (merits).

¹⁹¹⁹ PCIJ, Series A, no 12, 10.

¹⁹²⁰ For a succinct analysis, see Oellers-Frahm, Article 41, above n 1799, 953 *et seq*. More detailed observations drawn from leading commentators are included in that text. In general, see also Gemma, *Provisional Measures* above n 1799, 579 *et seq*.

¹⁹²¹ Oellers-Frahm, Article 41, above n 1799, 953; K Oellers-Frahm, *Die einstweilige Anordnung in der internationalen Gerichtsbarkeit* (Berlin/Heidelberg/New York, 1975) 109; L Delbecq, *Les principes généraux du contentieux international* (Paris, 1962) 118.

The *travaux préparatoires* on the Statute show that this deep ambiguity was present even then.¹⁹²² On the one hand, the word 'indicate' (the French text reads '*indiquer*'), used instead of the more usual word 'order', seems to place emphasis on an intention that the measures should not be binding on the parties. The word 'indicate' was borrowed from older treaties between the USA and China, and the USA and France. It was used so as to avoid upsetting the susceptibilities of States. In 1920, people were more restrained than they are now about the idea of limiting States' sovereign powers. Ambiguous formulae, leaving all possibilities open, were often welcome in those days. In addition, it was, of course, realised that in any event the Court had no power to enforce its judgments – even though that realisation was not really relevant, the same point applying just as much to substantive decisions as to orders on Provisional Measures. The binding nature of Provisional Measures orders should really not be confused with the modalities for enforcing them. Be that as it may, that fallacious argument did have a certain influence on the adoption of the word 'indicate'. Paragraph 2 of the English language text of Article 41 of the Statute also includes the expression 'measures suggested', likewise connoting the lack of a binding obligation. The original draft, however, was in French, and it did not contain any equivalent term, simply referring to the 'indication' of such measures. On the other hand, the words 'ought to be taken/*doivent être prises*' seem markedly more like the language of obligation. But even there, the text was far from clear. The draftsmen do not seem to have placed any great weight – at any rate not any very exact weight – on these expressions.

The one point that is certain is that these *travaux préparatoires* do not give us any clear answers, and that far from doing so, they are equivocal. It is often said that they are unfavourable to the idea that Provisional Measures are binding, on the basis not only of what was actually said and done during the drafting, but also that such an important limitation upon States' sovereign rights would have needed clear language. But that is not a decisive argument. Indeed, nothing obliges the Court, in following its own procedural law, to conform to views expressed in 1920, and not to adapt the law to modern conditions. The interpretation of the institutional law of which the law of the Court is a part pays more attention to objective and evolutive modalities of interpretation than to historical and subjective ones.¹⁹²³

Given that, for such a long time, the question remained in great doubt, leading commentators had recourse to conceptions that were so ingenious as to justify our giving some space to them in the present manual, even though the Court has since affirmed that Provisional Measures are (or at least *can be*) legally binding. On the one hand, the old thinking had sketched out various concepts as to the correlative effects (sometimes relatively minor in nature) that Provisional Measures should have in the absence of a fully obligatory character.¹⁹²⁴ In this way, the old thinking did not necessarily concede that the measures were simply recommendations. But it spelled out those minor legal effects on the basis that it had accepted, as a hypothetical or real premise, that there was such an absence of binding force. On the other hand, another set of commentators produced a series of arguments to the effect that Provisional Measures were indeed legally binding.

¹⁹²² For a detailed analysis, of Szucki, *Interim*, above n 1862, 263 *et seq*; L Daniele, *Le misure cautelari nel processo dinanzi alla Corte internazionale di giustizia* (Milan, 1993) 141 *et seq*.

¹⁹²³ of G Res, 'The Interpretation of the Charter' in B Simma, *The Charter of the United Nations – A Commentary*, 1st edn, vol I (Oxford, 2002) 13 *et seq*.

¹⁹²⁴ See the remarks of Judges Fromageot, Hurst and Rolin-Jacquemyns, PCIJ, Series D, no 2, Add 2, 183–84; and Szucki, *Interim*, above n 1862, 293.

The minor legal effects. In the first instance, some commentators put forward the idea of a specific constraint, which in truth did not confine the effect of Provisional Measures to a non-binding set of indications. A State subjected to such measures, it was claimed, would not be under any legal obligation to comply with them, but might nevertheless, if it failed to do so, find itself subjected by the Court to certain procedural sanctions.¹⁹²⁵ Other commentators amplified the scope of such 'constraint' by arguing that a State which failed to comply with Provisional Measures would be exposed to counter-measures by the opposing party.¹⁹²⁶ In his course on the ICJ at the Hague Academy of International Law, Judge Oda brought up the idea of an obligation that was deferred or conditional. The measures themselves would carry no formal imposed duty to comply, but if the later judgment on the merits is rendered in favour of the applicant State, the respondent State may be made responsible for any action taken in defiance of the Provisional Measures.¹⁹²⁷ To the extent that sanctions are provided for, the legal system no longer leaves the parties with the right to make their own free appreciation of what course of conduct to adopt. The measures require the State or States concerned to comply with what, properly speaking, should then be termed an injunction. Responsibility gives rise to the obligation. It is thus impossible to speak of reprisals, as Sznucki does,¹⁹²⁸ while yet retaining the optional character of preliminary measures, for the purpose of reprisals is to respond to unlawful acts that have already occurred. If the non-execution of the Provisional Measures is not an unlawful act, then *causit quaestio*: no reprisal would be admissible, though there might nevertheless be 'retaliation' of some other kind. Conversely, an example of a legal effect that is truly subsidiary or accessory, or in other words does not indirectly have a bearing on the obligatoriness of the Provisional Measures, is provided by the arbitration case concerning the *Air services agreement* (USA v France, 1978). Can one consider that counter-measures remain lawful as between the parties even after the Court is seised of the case? That depends on whether Provisional Measures are adopted:

To the extent that the tribunal has the necessary means to achieve the objectives justifying the counter-measures, it must be admitted that the right of the Parties to initiate such measures disappears. In other words, the power of a tribunal to decide on Provisional Measures of protection... leads to the disappearance of the power to initiate counter-measures.¹⁹²⁹

The legal effect in such case is a corollary matter, to the extent that the indication of Provisional Measures, whatever their own legal value, modifies the parties' legal situations. The power to take counter-measures thus becomes a function of the (non-)indication of (binding, or perhaps even non-binding) Provisional Measures.

¹⁹²⁵ H Lauterpacht, *The Development of International Law by the International Court* (London, 1958) 253-54. MH Mendelson, 'Provisional Measures of Protection and the Use of Force by States', in A Cassese (ed), *The Current Legal Regulation of the Use of Force* (Dordrecht/Boston/London, 1986) 347. Dumbauld, *Provisional Measures of Protection in International Controversies*, above n 1799, 173. Contha, Sznucki, *Interim*, above n 1862, 267. See also L Daniele, 'L'apport de la deuxième ordonnance de la ICJ sur les mesures conservatoires dans l'affaire Bosnie-Herzégovine contre Yougoslavie (Serbie et Monténégro)' (1994) 98 *RGDIP* 947.

¹⁹²⁶ Sznucki, *Interim*, above n 1862, 299 *et seq*. A Pütz, *Der Erlaß von einstweiligen Verfügungen durch den Ständigen Internationalen Gerichtshof* (Naimz, 1939) 42.

¹⁹²⁷ S Oda, 'The International Court of Justice Viewed from the Bench (1976-1993)' *CCHAIL*, vol 244, 1993-VII, 75.

¹⁹²⁸ Sznucki, *Interim*, above n 1862, 299 *et seq*.

¹⁹²⁹ *HR*, vol 54, 340-41 or *RSA*, vol XVIII, 445-46, *cf also* Art 5 of the III Resolution of 1934: *IDI [III]*, 187-1956, *Tableau général des résolutions* (Basle, 1957) 169.

Arguments for binding force. The main argument for binding force was the need to preserve the final subject matter of the decision the Court was to take, and thus to preserve the value of the entire proceedings. Provisional Measures are, above all other considerations, designed to preserve the subject of the proceedings from irreparable prejudice. This teleological argument was developed with finesse and precision by the UK representative at the Security Council, Sir Gladwyn Jebb. He was concerned about the consequences of Iran's failure to comply with the Provisional Measures indicated by the Court in the *Anglo-Iranian Oil* case (1951). He put the point as follows:

The whole object of Provisional Measures... is to preserve the respective rights of the parties pending the final decision; in other words, to prevent a situation from being created in which the final decision would be rendered inoperative or impossible of execution because of some step taken by one of the parties in the meantime with the object of frustrating that decision. Now it is established that a final judgment of the Court is binding on the parties; that, indeed, is expressly stated by Articles 59 and 60 of the Statute and Article 94, paragraph 1, of the Charter. But, clearly, there would be no point in making the final [judgment] binding if one of the parties could frustrate that decision in advance by actions which would render the final judgment nugatory. It is, therefore, a necessary consequence, we suggest, of the bindingness of the final decision that the Provisional Measures intended to preserve its efficacy should equally be binding.¹⁹³⁰

This line of argument has received considerable support from among leading commentators;¹⁹³¹ others, however, have challenged it.¹⁹³² Those seeking to refute it have claimed that there is no necessary symmetry between the final judgment on the one hand and Provisional Measures on the other, or in other words that a failure to comply with Provisional Measures, or their lack of binding force, will not necessarily render the final judgment in some way illusory. It was also argued that other jurisdictions, such as the European Court of Human Rights, did not have the power to order Provisional Measures.¹⁹³³ But if we focus on the jurisprudence of the ICJ, it does appear that the Court (unlike some other tribunals) indicates Provisional Measures only for the gravest reasons - specifically relating to the risk of prejudice that may be *irreparable*. That is one of the formal conditions for the indication of such measures at the request of a party. As Judge Weeramantry has said, the teleological construction takes on its full form

when one looks at the gravity of causes for which the provisional measures jurisdiction of the Court is used - prevention of irreparable prejudice or injury, of action in a manner so as to render the final judgment nugatory; of destruction of the subject-matter; and of aggravation of the dispute.¹⁹³⁴

Measured in this balance, the symmetry between the efficacy of the final judgment and the Provisional Measures exists by *definition*. L Daniele has devoted a carefully crafted passage to this subject, and the point could not have been better made:

¹⁹³⁰ *Security Council, Official Records*, 6th Year, 559th Meeting (1951) 20, § 94.

¹⁹³¹ *cf eg* GG Fitzmaurice, 'The Law and Procedure of the ICJ' (1951-1954): Questions of Jurisdiction, Competence and Procedure' in *BYIL*, vol 34 (1958) 122; Dubisson, above n 1771, 229; A El Onali, *Effets juridiques de la sentence internationale* (Paris, 1984) 98-99; E Hambrø, 'The Binding Character of the Provisional Measures of Protection Indicated by the ICJ' in *Essays in Honour of H Wehberg* (Frankfurt-am-Main, 1956) 167; MO Hudson, 'The Twentieth Year of the World Court' (1952) 46 *AJIL* 22-23; Individual Opinion of Judge Weeramantry, *ICJ Reports* 1993, 379.

¹⁹³² Sznucki, *Interim*, above n 1862, 263, 287.

¹⁹³³ *Ibid.*, 263.

¹⁹³⁴ Independent Opinion of Judge Weeramantry, *ICJ Reports* 1993, 379.

There is no doubt that this objective [the protection of the parties' rights] would be entirely frustrated if the obligatory character of the Court's measures were denied and the parties were left complete freedom of action. If this happened, the parties, by their conduct, might completely destroy, while the case is pending, the very subject-matter of the disputed rights and thus prevent them, once recognised in the final judgment, from being reinstated. . . . (our translation).¹⁹⁵⁵

The application of Article 94 of the Charter might itself be rendered illusory.

A party, by its own action *pendente lite*, might make the final judgment no longer possible to execute, thus failing properly to comply with the obligation, provided for in Article 94(1) of the United Nations Charter, to comply with the Court's decision. (our translation)¹⁹⁵⁶

It follows that 'the teleological link between the decision, which is indubitably binding, and the provisional measures cannot be doubted, and it seems logically to follow that even Provisional Measures are binding and obligatory for the parties' (our translation).¹⁹⁵⁷ An obligation to preserve the object and purpose of a joint action is typically an obligation of good faith.¹⁹⁵⁸ Since this is recognised, as regards pre-treaty negotiations, under customary law and Article 18 of the 1969 Vienna Convention on the law of treaties, a fortiori it must apply in the context of legal proceedings.¹⁹⁵⁹ That is also L Daniele's view:

After all, one can also invoke, in support of the arguments presented here, the principle of good faith . . . From the moment a State agrees . . . to recognise the Court's jurisdiction to resolve disputes in which the State is involved, the principle of good faith requires that State also to assume certain accessory, but necessary obligations so as to enable the Court to fully discharge its mission . . . (our translation)¹⁹⁶⁰

In this sense, the binding force of Provisional Measures rests on the general principle of good faith.

¹⁹⁵⁵ Non v'è dubbio che tale scopo sarebbe del tutto frustrato qualora si negasse il carattere obbligatorio delle indicazioni della Corte e si lasciasse alle Parti completa libertà d'azione. Se così fosse, le Parti, con il loro comportamento, potrebbero addirittura distruggere, nelle more del giudizio, l'oggetto stesso dei diritti controversi e così impedire che tali diritti, una volta riconosciuti dalla sentenza finale, vengano reintegrati: Daniele, *Le misure cautelari*, above n 1922, 150.

¹⁹⁵⁶ Una Parte, attraverso la propria azione *pendente lite*, potrebbe rendere non più eseguibile la stessa sentenza finale, con ciò venendo meno all'obbligo previsto dall'articolo 94.1 della Carta delle Nazioni Unite, di conformarsi alla decisione della Corte: *ibid.*, 150.

¹⁹⁵⁷ Il legame finalistico fra la sentenza, sulla cui obbligatorietà non vi sono dubbi, e le misure cautelari sembra logicamente imporre che anche queste ultime siano obbligatorie per le Parti: *ibid.*, 150. P Pescatore, 'Les mesures conservatoires and les référés' in *Société française de droit international, Colloque de Lyon* (1986), *La juridiction internationale permanente* (Paris, 1987) 350 expresses the same idea in more laconic style, saying that provisional measures must be obligatory because that is the condition necessary for them to fulfil their function.

¹⁹⁵⁸ K Oellers-Trähm, *Die einseitige Anordnung in der internationalen Gerichtsbarkeit*, above n 1921, 110 envisages the possibility of deducing directly, from a general principle of law requiring the parties to abstain from any act designed to or having the effect of depriving existing procedures of their objective and purpose, the obligation to comply with Provisional Measures indicated by the Court.

¹⁹⁵⁹ To make an explicit link with good faith, Switzerland expressed itself as follows in the *Interhandel* case (1959): 'The Federal Council is convinced that the Government of the United States of America will . . . uphold the principles of the law of nations, whereby good faith demands that all action be avoided during the course of procedure which might prejudice the execution of the decisions of an arbitration court. . . . Therefore, in the sense of these principles of good faith, as laid down in numerous arbitration treaties, and which underlie the authority of the International Court of Justice to take appropriate precautionary measures. . . .' (Annex n 13 to the Application, ICJ, *Pleadings, oral arguments and documents* (1959) 45, *of also*, *ibid.*, 69, 74).

¹⁹⁶⁰ Infine, a conforto della tesi qui sostenuta, può invocarsi anche il principio della buona fede . . . Nel momento in cui uno Stato accetta . . . di riconoscere la competenza della Corte a risolvere controversie in cui esso è coinvolto, il principio della buona fede comporta che questo Stato assuma anche alcuni impegni accessori, ma necessari a permettere che la Corte possa svolgere pienamente la sua missione: . . . Daniele, *Le misure cautelari*, above n 1922, 152.

There were various other, subordinate arguments in favour of binding force:

- 1) Some commentators based their arguments on the fact that Provisional Measures are indicated by an *Order* of the Court.¹⁹⁶¹ A similar line of argument was based on the wording of Article 94, paragraph 1 of the UN Charter, providing that every Member of the United Nations undertakes to comply with the 'decisions' of the Court, whereas Article 94, paragraph 2, dealing with the measures that the Security Council can adopt in cases of non-compliance, is confined to 'judgments'; it was inferred that binding force attached not only to judgments, but also, given the terminology of Article 94, paragraph 1 to Orders indicating Provisional Measures.¹⁹⁶²
- 2) Some commentators argued from the fact that Provisional Measures must be notified to the relevant political organs – now to the Security Council¹⁹⁶³ – which is not the case for judgments on the merits.¹⁹⁶⁴ This argument was prayed in aid of the idea that Provisional Measures are legally binding. But it is equally possible that what was intended was simply to keep the Security Council informed of any measures that might be less sure of receiving publicity than a judgment would be.
- 3) It was also argued that the binding character of Provisional Measures resulted from a general principle recognised by civilised nations and transposed into international law.¹⁹⁶⁵ This argument depended on the degree of comparability between international and municipal jurisdictions.
- 4) A rather similar approach involved the argument that the power to indicate Provisional Measures was inherent in any tribunal deciding the law.¹⁹⁶⁶ On this basis, a denial of the measures' binding force amounted to saying that instead of deciding, the Court was issuing a mere advice or recommendation. But the Court is a fully-fledged jurisdiction; Article 92 of the Charter states that it is the principle legal organ of the UN. The function of a judicial organ in contentious matters is not to give advice that is purely optional for the parties, but to hand down binding decisions. It was impossible to suppose, in the absence of any clear provision to that effect, that it was intended to make an exception to that principle, particularly in so narrowly jurisdictional a field as the indication of Provisional Measures. This led L Daniele to conclude that: 'It would be contrary to all logic to suppose that it was intended, in this context, to introduce into the proceedings an incidental phase of a merely consultative or exhortatory nature' (our translation).¹⁹⁶⁷
- 5) E Hambro put forward a fortiori argument.¹⁹⁶⁸ He argued that the Orders issued by the Court on such relatively minor questions as the forms of pleading and the time limits for it are indubitably executive in character, under Article 48 of the Statute.

¹⁹⁶¹ TO Elias, 'The International Court of Justice and the Indication of Provisional Measures of Protection' in *Gamado Memorial Lecture*, United Nations (Geneva, 1978) 11.

¹⁹⁶² E Hambro, above n 1931, 168–69; Individual Opinion of Judge Weeramantry, *ICJ Reports* 1993, 383–84. On this question, *cf.* Szucki, *Interim*, above n 1862, 285–86; Daniele, *Le misure cautelari*, above n 1922, 165 *et seq.*

¹⁹⁶³ Art 41, § 2 of the Statute.

¹⁹⁶⁴ G Scelle, 'Regles générales du droit de la paix' *CCHAIL*, vol 46, 1933–IV, 589. *cf also* Szucki, *Interim*, above n 1862, 288.

¹⁹⁶⁵ *cf.* Elinor, *Interim Protection: A Functional Approach* (The Hague, 1981) 162; Hambro, above n 1931, 168; Individual Opinion of Judge Weeramantry, *ICJ Reports* 1993, 377–79.

¹⁹⁶⁶ Individual Opinion of Judge Weeramantry, *ICJ Reports* 1993, 376.

¹⁹⁶⁷ Sarebbe contrario ad ogni logica pensare che si sia voluto inserire in questo ambito una fase incidentale a carattere meramente consultivo o esortatorio: Daniele, *Le misure cautelari*, above n 1922, 150–51. *cf also* Hambro, above n 1931, 164–65; and G Perrin, 'Les mesures conservatoires dans les affaires relatives à la compétence en matière de péchésés' (1973) 77 *RGDIP* 34.

¹⁹⁶⁸ Hambro, above n 1931, 170. Individual Opinion of Judge Weeramantry, *ICJ Reports* 1993, 382–83.

Consequently, much more significant Orders indicating Provisional Measures must a fortiori have the same character. However, one can argue this the other way, namely that although one may readily grant binding force to Orders on minor and procedural questions, this is not the case when it comes to Orders disposing, even on a provisional basis, of the parties' substantive rights and thus impinging directly on their sovereignty.

On this question, then, as to whether Provisional Measures are binding, there was a profound divergence in the views of authoritative commentators. Against their binding nature were ranged Anzilotti,¹⁹⁴⁹ Schücking,¹⁹⁵⁰ Guggenheim,¹⁹⁵¹ Venturini,¹⁹⁵² Cocatre-Zilgien,¹⁹⁵³ Malinoppi,¹⁹⁵⁴ Toraldo-Serra,¹⁹⁵⁵ Szucki,¹⁹⁵⁶ Thirway,¹⁹⁵⁷ Hammarskjöld,¹⁹⁵⁸ Cot¹⁹⁵⁹ and probably Cahier.¹⁹⁶⁰ Those in favour of the binding nature included Schindler,¹⁹⁶¹ Becker,¹⁹⁶² Rolin,¹⁹⁶³ Niemeyer,¹⁹⁶⁴ Dumbauld,¹⁹⁶⁵ Hudson,¹⁹⁶⁶ Elias,¹⁹⁶⁷ Fitzmaurice,¹⁹⁶⁸ Hambro,¹⁹⁶⁹ Roseme,¹⁹⁷⁰ Oellers-Frahm,¹⁹⁷¹ Dubisson,¹⁹⁷² Carretero Perez,¹⁹⁷³ Goldsworthy,¹⁹⁷⁴ Crockett,¹⁹⁷⁵

¹⁹⁴⁹ PCIJ, Series D, no 2, Add 2, 182-83.

¹⁹⁵⁰ *Ibid.*, 183, 199.

¹⁹⁵¹ P Guggenheim, *Les mesures provisoires de procédure internationale et leur influence sur le développement du droit des gens* (Paris, 1931) 54. P Guggenheim, 'Les mesures conservatoires dans la procédure arbitrale étatique' CCHAIL, vol 49, 1932-II, 678.

¹⁹⁵² G Venturini, 'Le misure cautelari nel diritto internazionale' (1938) 119 *Archivio giuridico Filippo Serafini* 179 *et seq.*

¹⁹⁵³ A Cocatre-Zilgien, 'Les mesures conservatoires en droit international' (1955) 11 *Revue égyptienne de droit international* 107. A Cocatre-Zilgien, 'Les mesures conservatoires dédaignées par le juge ou par l'arbitre international' (1966) 70 *RGDIP* 45-46.

¹⁹⁵⁴ A Malinoppi, *Le raccomandazioni internazionali* (Milan, 1958) 284-85.

¹⁹⁵⁵ NM Toraldo-Serra, *Le misure provvisorie internazionali* (Rome, 1973) 83 *et seq.*

¹⁹⁵⁶ J Szucki, *Provisional Measures in the Hague Court: An Attempt at a Scrutiny*, (Dordrecht, 1983) 287 *et seq.*

¹⁹⁵⁷ H Thirway, 'Indication of Provisional Measures by the ICJ', above n 1810, 29 *et seq.*

¹⁹⁵⁸ A Hammarskjöld, in *Ann IDJ*, vol 31 (1934) 674.

¹⁹⁵⁹ JP Cot, *La bonne foi en droit international public*, *Cours de l'Institut de Hautes Etudes internationales* (Paris, 1968/1969) 24-25.

¹⁹⁶⁰ P Cahier, 'Cours général: Changements et continuité du droit international' CCHAIL, vol 195, 1985-V, 354. '[The word "indicateur"] does not seem to contain an element of obligation.'

¹⁹⁶¹ D Schindler, 'Les progrès de l'arbitrage obligatoire' CCHAIL, vol 25, 1928-V, 349-50.

¹⁹⁶² E Becker, 'Les questions d'intérêt général au point de vue juridique dans la jurisprudence de la PCIJ' CCHAIL, vol 50, 1934-IV, 286.

¹⁹⁶³ H Rolin, 'Force obligatoire des ordonnances de la Cour permanente de Justice internationale en matière de mesures conservatoires' in *Essays of McMahon*, vol II (Paris, 1935) 295 *et seq.*

¹⁹⁶⁴ HG Niemeyer, *Einstweilige Verfügungen des Weigerichtshofs - Ihr Wesen und ihre Grenzen*, *Frankfurter Abhandlungen zum modernen Völkerrecht*, vol 28 (Leipzig, 1932) 55.

¹⁹⁶⁵ Dumbauld, *Provisional Measures of Protection in International Controversies*, above n 1799, 173 *et seq.*

¹⁹⁶⁶ Hudson, above n 1771, 425-26. In the 1934 edition (415), the author still held the contrary view.

¹⁹⁶⁷ TO Elias, 'The International Court of Justice and the Indication of Provisional Measures of Protection', *Garnado Memorial Lecture*, United Nations (Geneva, 1978) 11.

¹⁹⁶⁸ Fitzmaurice, above n 1931, 122.

¹⁹⁶⁹ Hambro, above n 1931, 152 *et seq.*

¹⁹⁷⁰ S Roseme, *The Law and Practice of the International Court*, 2nd edn (Dordrecht/Boston/Lancaster, 1985) 125.

¹⁹⁷¹ Oellers-Frahm, *Die einstweilige Anordnung in der internationalen Gerichtsbarkeit*, above n 1921, 109 *et seq.*

¹⁹⁷² Dubisson, above n 1771, 228-29.

¹⁹⁷³ A Carrandero Perez, 'Las medidas cautelares en el proceso internacional' (1958/59) 32 *Anales de la Universidad de Valencia* 49.

¹⁹⁷⁴ PJ Goldsworthy, 'Provisional Measures of Protection in the ICJ' (1974) 68 *AJIL*, 274-75.

¹⁹⁷⁵ CH Crockett, 'The Effects of Provisional Measures of Protection in the ICJ' (1977) 7 *California Western International Law Journal* 351, 355, 357.

Tunçel,¹⁹⁷⁶ Mami,¹⁹⁷⁷ Nantwi,¹⁹⁷⁸ Elkind,¹⁹⁷⁹ Jessup,¹⁹⁸⁰ El Ouali,¹⁹⁸¹ Pescatore,¹⁹⁸² Schachter,¹⁹⁸³ Stone,¹⁹⁸⁴ Cavare,¹⁹⁸⁵ Haver,¹⁹⁸⁶ Thierry,¹⁹⁸⁷ Schwarzenberger,¹⁹⁸⁸ Henkin,¹⁹⁸⁹ Daniele,¹⁹⁹⁰ Weeramantry¹⁹⁹¹ and Ajibola.¹⁹⁹²

In its jurisprudence prior to 2001, the Court hesitated to take a clear position on the point. Its general if timid tendency, however, was in the direction of giving Provisional Measures binding force. The judgment of 2001, in which their binding nature was affirmed, had been long in preparation. For its detractors, it was like gathering clouds announcing the coming of a storm; for its admirers like a rosy sunset foreshadowing a fine day to come. One of the intermediate links in the chain leading to this decision of 2001 is to be found in the two Orders relating to Provisional Measures in the case on the *Application of the Convention for the prevention and punishment of the crime of genocide* (Bosnia-Herzegovina v Yugoslavia, 1993). Bosnia had requested new Provisional Measures¹⁹⁹³ after obtaining an Order that already gave it such protection.¹⁹⁹⁴ The Court rejected the new request. This rejection was closely connected to the non-execution of the measures already indicated. The Court added that the measures already indicated must immediately be complied with, and that there was no need for new ones.¹⁹⁹⁵ The Court had never previously come so close to an explicit affirmation of the obligatory character of Provisional Measures. As L Daniele notes, 'if the Court is endeavouring to find the means to sanction non-execution by the parties of the measures it has indicated to them, it is because the Court itself is convinced that the measures have binding force'.¹⁹⁹⁶ This was also the opinion of Judge Weeramantry.¹⁹⁹⁷ The order was even more peremptory in the case on the *Vienna Convention on consular relations* (Paraguay v USA, Provisional Measures, 1998). The Court's order twice used the formula 'the United States should [in the French text *doivent/must*] . . .'.¹⁹⁹⁸ This,

¹⁹⁷⁶ E Tunçel, *Exécution des décisions de la Cour internationale de Justice selon la Charte des Nations Unies* (Netherlands, 1960) 51.

¹⁹⁷⁷ VS Mami, 'Provisional Measures of Protection: Article 41 of the ICJ Statute and Article 94 of the United Nations Charter' (1970) 10 *Indian Journal of International Law* 362-63.

¹⁹⁷⁸ EK Nantwi, *The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law* (Laden, 1966) 153.

¹⁹⁷⁹ Elkind, *Interim Protection*, above n 1945, 162.

¹⁹⁸⁰ P Jessup, in Elkind, *ibid.*, xiii.

¹⁹⁸¹ El Ouali, above n 1931, 98-99.

¹⁹⁸² Pescatore, 'Les mesures conservatoires et les référés', above n 1937, 350.

¹⁹⁸³ O Schachter, *International Law in Theory and Practice* CCHAIL, vol 178, 1982-V, 223.

¹⁹⁸⁴ I Cavare, 'Les sanctions dans le cadre de l'Organisation des Nations Unies' CCHAIL, vol 80, 1952-I, 269.

¹⁹⁸⁵ P Haver, 'The Status of Provisional Measures of the International Court of Justice after the Iran Hostages Crisis' (1981) 11 *California Western International Law Journal* 526.

¹⁹⁸⁶ H Thierry, 'L'évolution du droit international' CCHAIL, vol 222, 1990-III, 94.

¹⁹⁸⁷ G Schwarzenberger, *International Law - As Applied by International Courts and Tribunals*, vol IV (London, 1966) 552.

¹⁹⁸⁸ L Henkin, 'Provisional Measures, United States Treaty Obligations, and the States' (1998) 92 *AJIL*, 679-81.

¹⁹⁸⁹ Daniele, *Le misure cautelari*, above n 1922, 137 *et seq.*, especially 149-53, on good faith.

¹⁹⁹⁰ Individual Opinion of Judge Weeramantry, *ICJ Reports 1993*, 374 *et seq.*

¹⁹⁹¹ Individual Opinion of Judge Ajibola, *ibid.*, 406.

¹⁹⁹² As also counter-requested by Yugoslavia.

¹⁹⁹³ *ICJ Reports 1993*, 325 *et seq.*

¹⁹⁹⁴ *ICJ Reports 1993*, 3 *et seq.*

¹⁹⁹⁵ Daniele, 'L'apport de la deuxième ordonnance' above n 1925, 947.

¹⁹⁹⁶ Individual Opinion of Judge Weeramantry, *ICJ Reports 1993*, 374 *et seq.*

¹⁹⁹⁷ *ICJ Reports 1998*, 258, § 41: 'The United States should [in the French text *doivent*] take all measures to ensure that Angel Francisco Breard is not executed pending . . . and should [doivent] inform the Court of all the measures taken in implementation of this Order.' (italics added)

particularly the French version, is plainly the language of obligation, and indeed it is difficult to imagine a clearer indication than the French text provides that the obligation is legally binding.¹⁹⁹⁹

In the *LaGrand* case (2001), the Court finally said explicitly that Provisional Measures indicated under Article 41 were legally binding. Having found that there was a discrepancy between the English and French language versions of the Statute, the Court thought it necessary, as suggested by Article 33 of the Vienna Convention on the Law of Treaties, to attempt to reconcile the two texts, in particular by taking account of the object and purpose of the provision in question. The relevant paragraphs of the judgment merit citation *in extenso*.²⁰⁰⁰

102. The object and purpose of the Statute is to enable the Court to fulfil the functions provided for therein, and, in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.

103. A related reason which points to the binding character of orders made under Article 41 and to which the Court attaches importance is the existence of a principle which has already been recognized by the Permanent Court of International Justice when it spoke of the 'principle universally accepted by international tribunals and likewise laid down in many conventions... to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of

¹⁹⁹⁹ The USA did not comply with the Order – Mr Breard was executed shortly thereafter. Problems of constitutional law seem to have been decisive here. The Federal Government had demanded that the execution be postponed out of respect for the Court's Order. On this case, see the contributions in (1998) 92 *AJIL* 666 *et seq.*

²⁰⁰⁰ *ICJ Reports* 2001, 502 *et seq.* On this decision of the Court, cf especially Oellers-Frahm, Article 41 above n 1799, 996–58; PY Ben Hammadi, 'La question du caractère obligatoire des mesures conservatoires devant la Cour internationale de Justice – l'arrêt LaGrand du 27 juin 2001' (2001) 114 *Revue québécoise de droit international*, 53 *et seq.*; K Oellers-Frahm, 'Die Botscheidung des IGH im Fall LaGrand – Eine Stärkung der internationalen Gerichtsbarkeit und der Rolle des Individuums im Völkerrecht' (2001) 28 *Europäische Grundrechtezeitschrift*, 265 *et seq.*; C Tams/M Memmeke, 'The LaGrand Case' (2002) 51 *ICLQ* 449 *et seq.*; JA Brownin, 'Provisional Measures by the International Court of Justice – The LaGrand Case' (2002) 62 *ZaBRY* 55 *et seq.*; M Manouel, 'Métamorphose de l'article 41 du Statut de la CIJ' (2002) 106 *RGDP* 103 *et seq.*; J Kammerhofer, 'The Binding Nature of Provisional Measures of the International Court of Justice: the Settlement of the Issue in the LaGrand Case' (2003) 16 *Leiden Journal of International Law* 67 *et seq.*; Thirway, above n 1771, 111 *et seq.*; Gemalin, *Provisional Measures*, above n 1799, 595 *et seq.* See also R Kolb, 'Note on New International Case-Law Concerning the Binding Character of Provisional Measures' (2005) 74 *Nordic Journal of International Law* 117 *et seq.* Two years later, the European Court had likewise moved its jurisprudence towards giving Provisional Measures binding force, in the case of *Mamatkulov v Turkey*. As to that case, see K Oellers-Frahm, 'Verbindlichkeit einstweiliger Massnahmen: Der EMGR vollzieht – endlich – die erforderliche Wende in seiner Rechtsprechung' (2003) 30 *Europäische Grundrechtezeitschrift* 689 *et seq.*; GS Landau, 'International Human Rights and the Binding Force of Provisional Measures' (2003) 5 *European Human Rights Law Review* 527 *et seq.*; H Tigroufou, 'La force obligatoire des mesures provisoires indiquées par la Cour européenne des droits de l'homme' (2003) 107 *RGDP* 601 *et seq.* Already in 2000, the UN Committee on Human Rights under Covenant II of 1966 had affirmed the power to indicate binding Provisional Measures, which was the more remarkable given that the Committee's final opinions are not in themselves binding: see the case of *Plandong et al v the Philippines* (Communication No 869/1999, 15 June 1999, Doc CCPR/C/70/D/869/1999, § 5.1–5.4). The trend towards binding obligation is thus a general one.

any kind to be taken which might aggravate or extend the dispute' (*Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, PCI J series A/B no 79, p 199*). Furthermore measures designed to avoid aggravating or extending disputes have frequently been indicated by the Court. They were indicated with the purpose of being implemented (see *Nuclear Tests (Australia v France), Interim Protection, Order of 22 June 1973, ICJ Reports 1973, p 106*...).

104. Given the conclusions reached by the Court above in interpreting the text of Article 41 of the Statute in the light of its object and purpose, it does not consider it necessary to resort to the preparatory work to determine the meaning of that Article. The Court would nevertheless point out that the preparatory work of the Statute does not preclude the conclusion that Orders under Article 41 have binding force.

The Court thus adopted the substance of the teleological argument already considered above: the proceedings could be rendered illusory if it were permissible for parties to commit acts irreparably prejudicial to the substantive rights in issue during the period while the proceedings are pending. This general line of argument has its echoes in other tribunals and quasi-judicial bodies which have stated that their Provisional Measures have binding force in the absence of an explicit textual provision on the point. In the case of the ICJ, there was also a reason of judicial policy pointing in this direction. The Court was, of course, aware that tribunals existed such as the International Tribunal for the Law of the Sea at Hamburg: the latter having an express power under the UN Convention of 1982 on the Law of the Sea to indicate binding Provisional Measures.²⁰⁰¹ The Court could reasonably have been anxious about being placed at a disadvantage and so losing part of its 'clinché', since parties might have chosen their forum in light of the advantage of being immediately able to request binding Provisional Measures. By stating explicitly that it had that power under its Statute, the Court was able to avoid this danger.

The Court stated in general terms that 'the' Provisional Measures indicated by it under Article 41 of the Statute are binding. It made no distinction between measures indicated to avoid irreparable prejudice, where the teleological argument has place in its fullest extent, and other measures such as those designed to avoid the aggravation of the dispute, in which respect the argument is less persuasive. The scope of the Court's powers was thus increased beyond what was strictly necessary to ensure the preservation of the value of proceedings before it. By 2001 the 'international community' was thus a world away from the 1920 *Louis* case. However, it does not follow that the Court must necessarily indicate binding Provisional Measures. It remains possible for the Court to indicate conservative measures that are no more than simple recommendations, which may or may not involve real pressure on the parties. If you can do more, then by implication you can also do less: if you can give orders, you can also issue recommendations. The legal presumption since the 2001 judgment is, however, that Provisional Measures are legally binding. If the Court intends otherwise, it will be essential for it to say so clearly.

In the *LaGrand* case, the Court's jurisdiction was not disputed. However, the Court nowhere suggested in its judgment that the obligatory character of the Provisional Measures was connected to that fact. So it would be strange to argue that Provisional Measures are binding only when the Court's jurisdiction is undisputed, and indeed would deprive the Court's teleological reasoning of its practical effects. Indeed, if to dispute the jurisdiction, even by artificial arguments, were sufficient to avoid binding Provisional Measures, respondents would always have to hand a very simple mechanism for avoiding binding Provisional

²⁰⁰¹ Art 280, § 6 of the 1982 UN Convention on the Law of the Sea.

Measures and thus depriving the procedure of its efficacy. Even before the Judgment of 2001, parties could always, acting by agreement, request the Court to indicate binding measures. If the respondent's acquiescence were, in effect, required before measures could be binding, this would amount to a return to the pre-2001 position. That would be completely contrary to the objectivist logic of the *LaGrand* decision.

Although most leading commentators welcomed the new jurisprudence of 2001, there were some who disagreed with it, to a greater or lesser extent. There was, for example, the chain of argument that is usually brought out whenever the Court takes a line that is not entirely submissive to the sovereign States before it. It is to the effect that States disaffected by what they saw as an accretion to the Court's powers would respond by withdrawing their acceptances of its jurisdiction.²⁰⁰² As on so many other occasions, this argument was not borne out by the event. By 2012, the number of optional declarations had not significantly changed. In fact it was virtually the same. Possibly one might argue that the decision of 2001 dissuaded certain States that were not yet parties to the system from making declarations, but that can only be an unverifiable speculation. If indeed it were the case, it would have been better, anyway, to keep out of the system States which might have agreed to participate in it only on the basis that they could deprive it of its sense by remaining free to do irreparable prejudice to the substantive rights invoked against them. Such experience as this author has had of acting as counsel to States shows that, in general, they are far from being concerned by detailed questions of this kind when deciding whether or not to make an optional declaration.

Another line of thinking holds that the Court's interpretation was mistakenly based on the object and purpose of Article 41, that is, anchored in the objective efficacy of the process.²⁰⁰³ According to this view, the Court ought to have been more deferential to the wishes of the States that drafted the Statute, and to the object and purpose of Article 41 as perceived back in 1920. This line of thinking is buttressed by the argument that the subsequent practice of States clearly shows the absence of any belief in the binding character of Provisional Measures, so that the Court's decision of 2001 amounted to a modification of the applicable law by an act of 'naked judicial legislation'. This led the particular author concerned to write, in lapidary terms, that:

The *LaGrand* case, with its ruling that Provisional Measures create a binding obligation, will perhaps be hailed as a progressive step in the system of international judicial jurisdiction. On the contrary, it is submitted that it could well prove to have been a disaster for that system.²⁰⁰⁴

This amounts to saying that it is a simple and easy matter to choose between the efficacy of the Court's procedures and deference to State sovereignty. For present purposes we can perhaps confine ourselves to noting that such a 'disaster' has, once again, failed to materialise, and that the interpretation of a text such as the Statute cannot be frozen forever in the petrified lens of the year 1920; that the *travaux préparatoires* are in truth much less clear than has been suggested; and that the subsequent practice of States broadly speaking reflected only the dominant view of the time, that Provisional Measures were not binding, or at least that the question was sufficiently doubtful that States could feel themselves at

liberty not to comply. In our view, therefore, this whole critique amounts to little more than prejudice of a highly dubious kind.

What, then, are the legal consequences of the fact that Provisional Measures (or, strictly speaking certain Provisional Measures) are legally binding? The most immediate consequence is that a failure to comply constitutes an internationally unlawful act. Given the existence of a general duty not to aggravate the situation while the case is pending, States do not have the right to take counter-measures (that is, reprisals) *pendente lite*, in reaction against violations of Provisional Measures indicated by the Court. One of the conditions for the adoption of counter-measures, namely necessity, is lacking here. 'Anarchic' counter-measures are a right of last resort (*ultima ratio*),²⁰⁰⁵ in situations where there is no other means of responding. But here, the Court itself can react to any non-compliance with its Order, and take it into account in its final judgment. Unless a State presents it with particular pleas in this regard, the Court might give it simple satisfaction – by finding that there had been a breach or violation – in the sense of Article 37 of the Articles on State Responsibility (2001). This is particularly likely if the State breaching the Provisional Measures Order also loses on the merits, and a fortiori if the Provisional Measures were on the same subject as the substantive issues (such as cessation of nuclear tests, the freeing of hostages and so on). The *ne ultra petita* principle must not, however, be used to set limits to the Court's power to react to breaches of its Orders indicating Provisional Measures. Such breaches not only violate the subjective rights of the opposing party (and also of all States parties to the Statute *erga omnes*), but are also an outrage upon the Court's authority. The Court therefore has to have power to order such binding measures of reparation as it considers necessary in the circumstances of the case. From the legal point of view, it would even have the right to require reparation to be made to the Court itself. Until now, however, the Court has never made a separate Order consequential upon the breach of a Provisional Measure. No doubt this is because it has not wanted to add to its allegedly presumptuous decision of 2001 an additional layer of pretension to judicial authority. There are good reasons for the Court to behave with such prudence, but it should not be carried so far as to make the binding character of Provisional Measures effectively illusory.

In the case on *Armed activities in the territory of the Congo* (DRC v Uganda, 2005), the Court was faced, for the first time since 2001, with a judgment on the merits that was concerned with violations of Provisional Measures it had previously indicated. The DRC expressly claimed that Uganda had breached the Court's Order on Provisional Measures. The Court reaffirmed that Provisional Measures Orders were legally binding (§ 263). But from 2000 to 2003, that is, between the date of the Order and the withdrawal of Uganda's troops, that country had failed to comply. It had thereby incurred legal responsibility (§ 264). The Court confined itself to a finding to that effect, without ordering reparation to be made or any other action to be taken (§ 345, no 7). A question could have arisen as to the protection of Uganda's legitimate expectations (but were they in fact legitimate?): at the time the Provisional Measures Order was made in 2000, it had not been established that the Court's Provisional Measures were binding. The question of legitimate trust, and thus of good faith, was relevant at least for the period between the Orders of 2000 and 2001. A powerful collection of leading commentators thought at the time that Provisional Measures were not binding and the question was on any view a debatable one. In those

²⁰⁰² Manouvel, above n 2000, 135.

²⁰⁰³ This view, above n 1771, 77–78, 111 *et seq*.

²⁰⁰⁴ Ibid, 126. For a diametrically opposite (and in our view much more convincing) view, see K Oellers-Fähm, 'Die Entscheidung des IGH im Fall LaGrand – Eine Stärkung der internationalen Gerichtsbarkeit und der Rolle des Individuums im Völkerrecht' (2001) 28 *Europäische Grundrechte Zeitschrift* 265 *et seq*.

²⁰⁰⁵ See Art 52, § 3(b) of the Arts on States responsibility for internationally illegal acts (2001).

circumstances, would it have been right to punish Uganda for having endorsed the view that they were not binding? Possibly it would, if one postulates that in such cases responsibility is strict, as indeed the Court seems to do. But of course since 2001 such a view has no longer been tenable.

In the case on the *Application of the Convention for the prevention and punishment of the crime of genocide* (Bosnia-Herzegovina v Serbia and Montenegro, merits, 2007), the question of failure to comply with Provisional Measures came up again. The binding character of Provisional Measures had been affirmed by the Court in 2001, that is, after the indication of Provisional Measures in the *Genocide* case, back in 1993. However, that made no legal difference, since in its 2001 judgment the Court confined itself – according to its own words – to endeavouring to attribute to the provisions of the Statute the meaning and scope they had always had (§ 452). Broadly speaking, Serbia had failed to comply with the preventive obligations indicated in 1993. The question of reparations for such a violation was bound up with the same question resulting from the violation of Article 1 of the 1948 Convention, and the Court dealt with it in that context (§ 458). The Court once again opted for a simple form of ‘satisfaction’. It took the view that even a symbolic indemnity to Bosnia for violating the Provisional Measures was not required, since the violation was the same as the violation of the 1948 Convention. The Court therefore confined itself to a separate declaration, in its judgment, that the respondent had breached its duty to comply with the Provisional Measures (§ 469). One notes in this regard that the Court confined itself here to the relatively serene plane of giving ‘satisfaction’ to Bosnia’s claims, without imposing any heavier penalty. One may well ask whether this approach is sufficient to inculcate a sense of respect for Provisional Measures.

The case of the *Pulp mills on the River Uruguay* (2006) shows that the decision that Provisional Measures are binding on the parties to a case may well have contributed to the Court’s developing a more restrictive approach towards indicating them in the first place. Knowing that Provisional Measures are binding, and that they may give rise to claims of responsibility for violations, which in turn may make cases more complicated than they already are, the Court was a little less forthcoming about indicating them. It felt constrained to seek reassurance by paying greater attention to the substantive issues: if it thinks the substantive claim ill-founded, it will avoid the complication of indicating Provisional Measures; if, on the other hand, it thinks the substantive claim likely to prove justified, it can afford to be a little less restrained. The binding nature of Provisional Measures – welcome in itself – is thus a modifying element in the parallelogram of forces to be taken into account in the law of Provisional Measures.

g) Provisional Measures in Advisory Opinion Cases²⁰⁰⁶

The PCIJ had contemplated the possibility of making provision in its Rules for the indication of Provisional Measures in advisory as well as contentious cases. Its draft Rule 57, paragraph 1 of 1936 provided that: ‘A request for the indication of interim measures of protection may be filed at any time during the contentious or advisory proceedings to

which it relates’ (our translation of the original French).²⁰⁰⁷ The fact that this provision was not adopted in relation to advisory opinion cases reflects less a wish to reject such measures in this context, than a refusal to state, in every specific Article on contentious proceedings, the extent to which it was also applicable to advisory cases. The Court preferred to adhere to the general principle, a more flexible and more economical approach, under which the procedure in advisory cases was to follow as closely as possible, by analogy, the rules applicable to contentious cases.²⁰⁰⁸ The present Rules likewise contain no specific rule as regards Provisional Measures in advisory proceedings.

In practice, the question has arisen only once, in the case on the *Applicability of the obligation to arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (1988). The subject of the advisory opinion related to the closing of the Palestinian representative office at the United Nations, by virtue of the host State’s (USA’s) anti-terrorism legislation. The UN rightly argued that this step was contrary to the Headquarters Agreement between the UN and the USA. A request for an advisory opinion was lodged with the Court, by means of Resolution 42/229B of the General Assembly. The Resolution indicated the urgency of the question and the need to take immediate steps to begin procedures for settling the dispute. Given these facts, and the danger that the PLO office would be closed, the Court vaguely suggested a possibility of indicating Provisional Measures, but in the absence of any formal request for such measures, decided not to pursue the point.²⁰⁰⁹ The Court did at least suggest that, if it had been seized of a request for Provisional Measures by the body requesting the advisory opinion, it would have been in a position to respond positively.

Leading commentators have advanced the following arguments against the existence of a right to indicate Provisional Measures in advisory proceedings. First, it has been argued that Provisional Measures must be concerned with the protection of the ‘rights’ of either party (the English language text) or of each (*chacun*) of them (the French text). But, in advisory proceedings, there are no parties’ rights to be protected because there are no ‘parties’. Second, advisory proceedings lead to an opinion not to a binding judgment. Also, it is unnecessary to make provision for Provisional Measures of protection, since there is nothing to ‘protect’. It would be extremely strange to order binding Provisional Measures in order to ensure the ‘executability’ of a decision which is to be only advisory.

Neither of the two arguments against the power to indicate Provisional Measures in advisory proceedings is decisive. As to the first argument, the lack of formal ‘parties’ in a position to request Provisional Measures does not affect the fact that there are nevertheless, on the one hand, a requesting body capable of applying for Provisional Measures and, on the other, the Court itself, which has the capacity to indicate measures *motu proprio* under its inherent powers. As to the second objection, it might indeed seem strange to indicate binding measures in an advisory proceeding not destined to lead to a binding decision. But this overlooks the point that the Court’s Provisional Measures need not necessarily be binding in character. The Court can confine itself to recommending appropriate Provisional Measures with regard to the subject matter of the proceedings, or with a view to avoiding any aggravation of the situation. Furthermore, if in such a case, there is no binding judgment whose ‘executability’ Provisional Measures would be designed to preserve and protect, the Court’s advisory opinion will nevertheless encompass a legal

²⁰⁰⁶ See Oellers-Frahm, Article 41; above n 1799, 951–52; Thiniway, above n 1771, 126–28; Szuchta, *Interim*, above n 1862, 136 *et seq.*; Gemalmaz, *Provisional Measures*, above n 1799, 377 *et seq.*

²⁰⁰⁷ PCIJ, Series D, no 2, Add 3, 801, 875.

²⁰⁰⁸ Art 82 of the 1936 Rules.

²⁰⁰⁹ ICJ Reports 1988, 4.

recommendation. It is perfectly possible to seek to protect the subject matter of that recommendation against the (deliberate) creation of a situation in which the Court's advice would no longer be of any practical utility. All proceedings before the Court have an object and purpose. The protection of that object and purpose is always a question that can arise, whether in contentious or in advisory proceedings. Finally, there is the point that Provisional Measures are issued not only to ensure that the Court's eventual judgment will still, when it comes, have a minimal degree of 'actuality', but also to avoid the aggravation of the dispute or situation during the course of the intervening period. One might add that this question will present itself in different ways, depending on the type of advisory opinion that is being requested. Some such opinions relate to abstract or general questions, such as, for example, the case on the *Legality of the use of nuclear weapons* (1996).²⁰¹⁰ Others relate, in a mediated way, to current disputes between States or other bodies; this was a commonplace at the PCIJ and is still frequently the case at the ICJ, as shown by opinions on such cases as the *Peace Treaties* (1950),²⁰¹¹ *Western Sahara* (1975),²⁰¹² or *Construction of a wall* (2004).²⁰¹³ Obviously, the question is not put in the same manner in these two different types of case. Provisional Measures may be more urgently needed in the second type of case than in the first. The Court undoubtedly has the inherent power to indicate such measures. It is the master of its own procedure, and can take any step necessary to safeguard the practical value and utility of its proceedings. For present purposes, one need say no more than that, until now, the Court has not felt the need to exercise this power. One might conclude that it is a less urgent issue in advisory proceedings, and therefore a dormant question, at least for the time being.

h) The Role of the Security Council in the Context of Provisional Measures²⁰¹⁴

The question of the relationship between the Court and the Security Council comprises, as regards Provisional Measures, two aspects: *first*, the situation following the seising of both Court and Council in parallel; *second*, the duty to notify Provisional Measures to the Council, and its powers to take action in respect of them.

Concurrent seisin of Court and Security Council. Where both the Court and the Security Council are seised in parallel, it is possible that both may contemplate the indication of Provisional Measures. The Court can take this step under Article 41 of the Statute; the Security Council can do so under Article 40 of the Charter. The Council can also directly exercise its power to adopt binding resolutions under Chapter VII and/or Article 25 of the Charter. *First question:* if the Security Council has already indicated binding measures, can or should the Court indicate further measures? One should note that the pre-existence of a Security Council Resolution might prove to be a decisive argument for saying that the 'circumstances' envisaged by Article 41 of the Statute do not necessitate the indication of further measures. The Court might take the view that the conditions as to urgency or irre-

parable prejudice are not satisfied in the particular case in question. In that case it would, in effect, be saying that, for the time being, the Security Council's own measures are sufficient, and must be complied with. Alternatively, the Court might take the view that the Security Council measures were insufficient. This view could be the result of the different objectives being pursued by the two bodies (in one case maintenance and re-establishment of the peace, in the other, the resolution of the dispute) or of the different purposes of their respective procedures. In this case, the Court might indicate measures additional to those indicated by the Council. The Court's measures would apply solely to the case before it. That being so, the Court would have to take account of the impact of its own measures on those of the Council, given that the law of the UN recognises the principle of mutual respect between the UN's principal organs (the *Organisational* principle, deriving from the broader principle of good faith under Article 2, § 2 of the Charter). Each principal organ is under the obligation to take account of the other, and to do its best not to undermine its statutory action. This also works in reverse, when the Court is seised first. It is a matter of regret that the Council was not sufficiently concerned about this when dealing with the *Lockettie* case. One notes that, until the present time, the Court has never considered that the seising of the Security Council, and action by it, made it superfluous for the Court to take action of its own under Article 41.²⁰¹⁵ The Court's conclusions do not reflect any kind of empire-building wish on its part to mark the independence of the Court's sphere of action. Rather, they have tended to recognise the fact that the two bodies' respective procedures, one political, the other legal, are not identical, either in objective or in method.

Second question: can either the Court or the Council adopt measures that derogate from those indicated by the other body? And in the event of conflict between the respective obligations arising from their measures, what is the legal position? Until now, this question has come up only in relation to the *Lockettie* case (1992-98). Even that case shed little light on the matter, given that the proceedings before the Court were discontinued. Legally, each of these principal organs of the UN is independent of the other, and neither is subordinate to the other. This means that each can adopt measures, and take decisions, from its own particular perspective, its independence uncompromised by its duty to take account of the action of the other body, and to respect that action so far as it is possible to do so. What, then, would happen if the two bodies were actually to impose contradictory obligations on a Member State? First of all, it would be necessary to try to resolve (or at least reduce) the contradiction by an interpretation of the measures, designed, so far as possible, to harmonise them. It would be quite wrong to assume that the two organs had both wished to undermine the activity of the other or make the other's activity more difficult. If that does not eliminate the contradiction, then of course, the question becomes more difficult. Article 103 of the Charter provides no solution: the Statute is an integral part of the Charter,²⁰¹⁶ and therefore the priority of Article 103 does not apply as between the Charter (in the narrow sense) and the Statute. Absent any answer in the practices or texts of the UN, various other solutions might be explored. First, it is possible to say that, on a teleological reading of the Charter, action by the Council for the purpose of maintaining or re-establishing the peace (though perhaps not in other contexts) must take priority over the action of the Court. The cornerstone of the Charter is the maintenance of peace: that is its

²⁰¹⁰ ICJ Reports 1996-1, 226 *et seq.*

²⁰¹¹ ICJ Reports 1950, 65 *et seq.*

²⁰¹² ICJ Reports 1975, 12 *et seq.*

²⁰¹³ ICJ Reports 2004-I, 136 *et seq.*

²⁰¹⁴ See Oellers-Frahm, 'Article 41', above n 1799, 959-62; and Gemalman, *Provisional Measures*, above n 1799, 427 *et seq.*

²⁰¹⁵ See, eg the case on *Armed activities in the territory of the Congo* (DRC v Uganda), ICJ Reports 2000, 127-28, ¶ 39 *et seq.*

²⁰¹⁶ Art 92 of the Charter.

supreme object and purpose,²⁰¹⁷ overriding all others.²⁰¹⁸ It confers upon the Security Council the most extensive powers in that regard, and endeavours to eliminate all legal obstacles to the exercise of those powers. The Council acts here as a matter of supreme urgency, and so its mission has priority. It also acts on the basis of a broad overview of the conflict, not of a view reduced to the terms of a purely legal dispute. Finally, and unlike the League of Nations Covenant, the orientation of the Charter is, plainly, more political than legal. All these factors would militate in favour of the Council and of giving priority to its activities under Chapter VII, in the event of a conflict with the powers of the Court under the Statute. Such a solution would in truth amount to the partial, temporary and surreptitious reintroduction of the idea of non-justiciable disputes, on the basis of the maxim '*le maximis non curat lex*'; and also some superiority of the Security Council over the Court. As a natural extension of this line of thinking, one catches fleeting glimpses of the idea that the Court's activities ought to be capable of being suspended by the Council, if and when the latter is seized of a case and feels that it might be hampered by the activities of the Court. Although it is difficult to agree fully with arguments leading in that direction, it has nevertheless to be recognised that they do, at some levels, carry a real measure of persuasive force.

Next, it is possible to argue that, when faced with two series of legally equivalent obligations in a situation where the law does not indicate which has priority, the State concerned would be free to choose between compliance with the Council's measures, and those of the Court. The State would, as a necessary consequence, be automatically breaching the measures ordered by the other body. There are two possible consequences of this. Either the State incurs international liability for its 'illegal' acts (though it would probably be able to avoid the imputation of illegality, by pleading *force majeure* as a circumstance precluding wrongfulness), or alternatively it would be accepted right away that compliance with one of the two sets of measures automatically freed it from any obligation to comply with the other set (*ad impossibile nemo tenetur*).

According to yet another point of view, it is impossible to give any State the freedom to choose the measures it will comply with. Such freedom might perhaps be permissible in minor matters, but not in matters of real moment, concerning the maintenance of international peace and the resolution of international disputes. In that case, it would be necessary to concede that a dysfunctional legal situation had arisen. Each set of measures would be holding the other in check, so that positive law would provide no answer to resolve the conflict. The two bodies whose measures conflicted ought, in such a case, to consult together, in order to find a viable solution. Theoretically, one could even imagine taking the point for an ultimate decision to the General Assembly, whose competence covers all questions relating to the powers of the United Nations.²⁰¹⁹ But, in most cases, such a course might well be ill-advised, given the risk of the question's getting bogged down in interminable and highly-politicised debates.

It is difficult to choose between these points of view. Probably, if the situation were ever actually to arise, the legal and political attitudes adopted would depend on the concrete circumstances in which the two bodies' relationship came to be affected by such a difference. Legally, the surer response seems, at least for the time being, to lie in some combination of the second and third approaches. Provisionally, the State affected would be free to

choose which measures to comply with, and the two UN organs would have to consult together to find a solution. Admittedly, it is difficult to see a conflict as likely to occur in relation to measures relating to the essential aspects of a dispute. If the Council orders a ceasefire, for example, under Article 40 of the Charter, then obviously the Court is not going to indicate measures under Article 41 of the Statute that require the parties to keep on fighting while the case is pending!

Notification to, and action by, the Security Council. Article 41, paragraph 2 of the Statute provides that: 'Pending the final decision, notice of the [provisional] measures suggested shall forthwith be given to the parties and to the Security Council.' Article 77 adds:

Any measures indicated by the Court under Articles 73 and 75 of these Rules, and any decision taken by the Court under Article 76, paragraph 1, of these Rules, shall forthwith be communicated to the Secretary-General of the United Nations for transmission to the Security Council in pursuance of Article 41, paragraph 2 of the Statute.

Both measures requested by the parties (Article 73), and those indicated by the Court *pro-prio motu* (Article 75), must be communicated to the Security Council. The Council is informed because the Court's Order may affect its own activities. For example, it may require the State concerned to comply with the Court's Order, doing so either under Chapter VI, or Chapter VII. This was done in the case on the *United States diplomatic and consular staff at Tehran* (1979),²⁰²⁰ in the case on the *Application of the Convention for the prevention and punishment of the crime of genocide* (Bosnia-Herzegovina v Yugoslavia, 1993)²⁰²¹ and then in the case of the *Land and maritime boundary* (Cameroun v Nigeria, 1996).²⁰²² It is equally possible for the State benefiting from the measures to bring them to the attention of the Security Council, with a request for action to ensure compliance by the respondent. This happened in the *Anglo-Iranian Oil* case (1951). On that occasion, the Council suspended its action, both because of the situation's political sensitivity and because it was not obvious that the Court in fact had jurisdiction over the merits. Indeed, the Court subsequently decided it had no jurisdiction, thus depriving the Provisional Measures question of continuing current significance.²⁰²³

Finally, there is the question whether the Security Council could take action under Article 94, paragraph 2 of the Charter, in order to enforce an Order indicating Provisional Measures. This provision reads as follows:

If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

The Council will be able to take such action only if the Order embodies binding Provisional Measures. As we have seen, the Court stated, in the *LaGrand* case (cited above), that Provisional Measures can be legally binding. However, there is nothing to stop the Court, if so minded, from indicating Provisional Measures purely as recommendations. Such recommendations can be based on ordinary conditions, or can go beyond them: for example, the Court might indicate, by way of a simple recommendation, measures going beyond the

²⁰¹⁷ See the Preamble and Art 1 of the Charter.

²⁰¹⁸ M Bedjaoui, Article 1, Commentaire général' in P Cor, A Pellet and M Forteau (eds), *La Charte des Nations Unies, Commentaire Article par Article*, 3rd edn, vol 1 (Paris, 2005) 314.

²⁰¹⁹ Art 10 of the Charter.

²⁰²⁰ Resolution 461 of 1979.

²⁰²¹ Resolution 819 of 1993.

²⁰²² Doc NUL/S/1996/391 of 29 May 1996.

²⁰²³ See Rosemary, *The Law and Practice of the International Court* vol 1, above n 1771, 260–65.

simple prevention of irreparable prejudice or aggravation of the dispute. Such measures, remaining no more than suggestions, could not be the subject of enforced execution by the respondent. On the other hand, when the Provisional Measures *are* legally binding, can the Security Council then base itself on Article 94, paragraph 2 of the Charter, and proceed to take steps to enforce the Order? Two main and interrelated arguments have been deployed against that proposition.²⁰²⁴ The first is that Article 94, paragraph 2 deliberately uses the word 'judgment' (in French, *arrêt*), whereas Provisional Measures are indicated in the form of an Order. The second is that the choice of the word 'judgment' shows that the draftsmen of the Charter wanted to confine the role of the Security Council, in relation to execution, to final judgments of the Court.

Neither of these arguments is really convincing. As to the first one, the Court is perfectly entitled to embody Provisional Measures in a full Judgment if it thinks appropriate to do so. If, until now, it has always chosen to use the form of an Order, that is for the reasons we have already mentioned, and has nothing to do with Article 94 of the Charter. It would be wrong to attach consequences under Article 94 to a contingent choice made by the Court for other reasons. It is not the formal word 'order' or 'judgment' which should be taken as decisive. As to the second argument, it reflects the idea that judicial pronouncements that are not 'decisions' (*arrêts*) are not binding, and that those few that, exceptionally, *are* binding are concerned with questions relating purely to the Court's internal procedures and not such as to need external execution. It is surely right to bear in mind that, back in 1945, most commentators thought an Order indicating Provisional Measures was not legally binding. In those days, therefore, there was no apparent reason to use an expression other than 'judgment' in Article 94, paragraph 2 of the Charter, since a 'judgment' was the only type of pronouncement that was then contemplated to require execution. But, since then, the legal position has changed. Orders indicating Provisional Measures must ordinarily be treated as binding. Therefore the Security Council is free to re-interpret Article 94, paragraph 2 in light of the Court's recent jurisprudence. It can take steps to enforce binding Provisional Measures indicated by the Court.

It is one thing to conclude that the Council has the power to act. But is it under a positive *duty* to do so? This is more doubtful. If the Court asks or suggests the Council to take action, the Council *may* do, but the Court cannot force it to do so, since the Council retains its own discretionary powers ('if it deems necessary' in the words of Article 94, § 2). If the approach to the Security Council comes from one of the parties, the Council needs to consult the Court. If it took action without first doing that, the Council might interfere with the Court's own activities. The Court might prefer the Council to leave it provisionally to the Court to manage the issue of compliance with the Provisional Measures. The Court does have certain tools at its command, and can, for example, draw the necessary conditions and consequences from non-compliance when it comes to give judgment on the merits. On the other hand, action by the Security Council might perhaps aggravate the dispute and make it even more bitter than before. The duty to consult is not spelled out in the texts, because questions of this kind were not posed by the circumstances of 1945. The duty derives from the principle mentioned above – requiring mutual respect (*Organieme*) to be shown between the various principal organs of the UN. The principle itself derives from Article 2, paragraph 2 of the Charter, and is, incidentally, also a general principle of federative law.

1) 'Positive' or 'Negative' Derogation from the Power under Article 41 of the Statute?

It is possible for a treaty that makes provision for the ICJ to have jurisdiction, to indicate specifically that the Court may issue Provisional Measures. If that is all the treaty text says on the subject, the clause in question will be legally unnecessary, in that it will add nothing to what is already provided for in Article 41 of the Statute, and will add nothing to the Court's powers. But what if the treaty terms give the Court powers to indicate Provisional Measures that are framed in different terms from Article 41 of the Statute? There are two ways in which this situation might arise, and they require separate legal analyses. The first possibility is that the parties go *beyond* the limits laid down in the Statute, that is, that they confer upon the Court the power to indicate Provisional Measures, in the particular proceedings contemplated by the treaty, when, say, there is no urgent need for them, or even if the effects of the Provisional Measures are wider than contemplated in the Statute, for example, going beyond the substantive rights at issue in the proceedings. In such a case, the parties are giving the Court *additional* powers. If this is, in a sense, 'derogation' from the Statute, it is positive, and hence indeed no derogation at all in the legal sense of the term. The second possibility is that the treaty seeks to *farther restrict*, for the purposes of the proceedings contemplated by the treaty, the powers of the Court, under the Statute, to indicate Provisional Measures. In its extreme form, this approach could result in a clause purporting to deny the Court any power at all to indicate Provisional Measures. Alternatively, the clause could provide that the parties will not recognise that any Provisional Measures indicated by the Court are legally binding, and that they will be treated by the parties as simple recommendations. One can also envisage a treaty providing that there can be no Provisional Measures unless and until the Court first issues a definite ruling on its substantive jurisdiction over the case, so that, in effect, the parties refuse to accept Provisional Measures indicated on the basis of a merely *prima facie* jurisdiction. This second possibility (or set of possibilities) does indeed involve a real derogation from the Statute, a derogation of a 'negative' character. So far, these possibilities have been largely academic.

From the legal perspective, there is nothing to stop the Court exercising powers specially conferred upon it by a legal instrument, provided that those powers are compatible with the Statute. In such a case, the Court's jurisdiction would be based on the treaty provisions (that is, obligations arising from the relationship between Court and parties) taken in conjunction with the inherent powers the Court claims the right to exercise, even though they are not directly provided for in the Court's constitutive texts. The latter texts would then amount to a permissive basis for the action by the Court. Obviously the Court is not *obliged* to exercise these special powers; it can refuse to do so. The parties can bind themselves to exercise these powers; but such agreements are not binding on third parties. If the Court were obliged to conclude, either generally or in the context of a particular case, that the exercise of such supplemental powers was ill-advised as a matter of the good and proper administration of justice – if, for example, the exercise might initiate a tendency towards a *la carte* procedure that would damage the Court's judicial functioning as an institutional body – this would be sufficient to justify a refusal to exercise the supplemental powers, either wholly or in part. Similarly, if the Court considered that the powers in question, although not contrary to an express provision of its Statute or of its Rules, were contrary to their spirit, it would be obliged to refuse to exercise them, either wholly or in part. In such circumstances the Court might either refuse to exercise its inherent power to accept the

²⁰²⁴ Oellers-Frahm, Article 41, above n 1799, 961.

'invitation' of the parties, or it might simply insist that their agreement is not binding upon it; or it might declare their application inadmissible, as a matter of general admissibility.

The situation is different if there is a derogation in the true ('negative') sense of the term. In such a case the parties are seeking to deprive the Court of powers it enjoys by virtue of its Statute and Rules, and/or that it has developed in its jurisprudence. Not only would the exercise of specially conferred powers risk resulting in a broken-up and a la carte functioning of the Provisional Measures jurisdiction, but here the parties are also seeking to deprive the Court of at least some of the powers that exist to ensure its proper functioning and the due administration of justice. The law on Provisional Measures is, in a way, the 'necessary minimum' required to safeguard the rights of parties *pendente lite* and to ensure that the Court itself can in practice conduct its *sub judice* proceedings without their being prejudiced by grave damage to the subject matter of disputes before it. In other words, it is the efficacy of the Court's procedure, and ultimately the Court's prestige, that are at stake. The public interest in the proper functioning of the system is as much affected as the subjective legal positions of the parties. Thus, a derogation from the rules applicable to Provisional Measures under the Statute, the Rules and the jurisprudence of the Court is incompatible with the law of the Statute. Not only is the Court not obliged to apply such special rules; it is under a positive obligation to refuse to do so.

15. COUNTERCLAIMS²⁰²⁵

a) Concept and General Aspects

A counterclaim is defined as an 'incidental claim in which a party to a case seeks, in addition to the dismissal of the claim made against it, satisfaction from its opponent in respect of a claim connected to that opponent's claim'.²⁰²⁶ Some of the key elements of this legal

mechanism are thrown into sharp relief by this quite precise definition. *First*, a counterclaim is essentially (but not wholly) an incidental proceeding. It is, so to speak, engrafted onto existing proceedings. In other words, it is not an independent proceeding, and is thus dependent upon the fate of the principal claim. If the principal claimant discontinues its proceedings, satisfying the requisite conditions for so doing, the counterclaim is automatically extinguished, although it does remain open to the counterclaiming State to renew its application in separate proceedings of its own. That, however, will be possible only if the title of jurisdiction continues to be available to it.

Second, a counterclaim is not necessarily just a simple 'reflex-action' against the principal claim. It is more than just a request that the principal claim be dismissed, which indeed is implicit in an ordinary defence. A counterclaim goes further – for example, either in seeking to totally eliminate the principal demand through the mechanism of compensation, or by mounting a positive counter-attack on the claimant, claiming a greater amount of compensation than the principal claim; or alternatively it may claim a lesser compensation. In the first case, the counterclaiming State is seeking to balance the game so as to reach a zero sum: if the principal claimant is seeking an indemnity of one million, the counterclaim will be for the same amount. In the second and third cases, the counterclaimant seeks more (two million) or less (half a million) than the principal claim. In relation to the claimant's concrete claims, the counterclaim is thus independent.

Third, a counterclaim is connected to the subject of the principal claim. It is not here an independent claim in its subject matter, but it is independent in what it seeks from the Court; for example, by way of monetary compensation (see above). On the contrary, it is subordinate or accessory in this respect, to the claims advanced by the claimant itself; this is another way of putting the point that a counterclaim is an *incidental* proceeding. The counterclaim is admissible only because it is based on the same complex of fact and law. If it were not, the respondent would have to present its claims via a completely separate case. If in that case, it were subsequently to appear that the two claims were so closely connected that it would make sense to treat them in unity, the Court has power to join them together and treat them as a single case. This requirement of a 'direct connection' to which we shall return is, so to speak, the spinal column of counterclaim law and practice. The requirement makes it possible to distinguish between claims which are truly 'incidental' and those that are separate, requiring separate proceedings. The Court has summarised these essential features of counterclaims as follows:

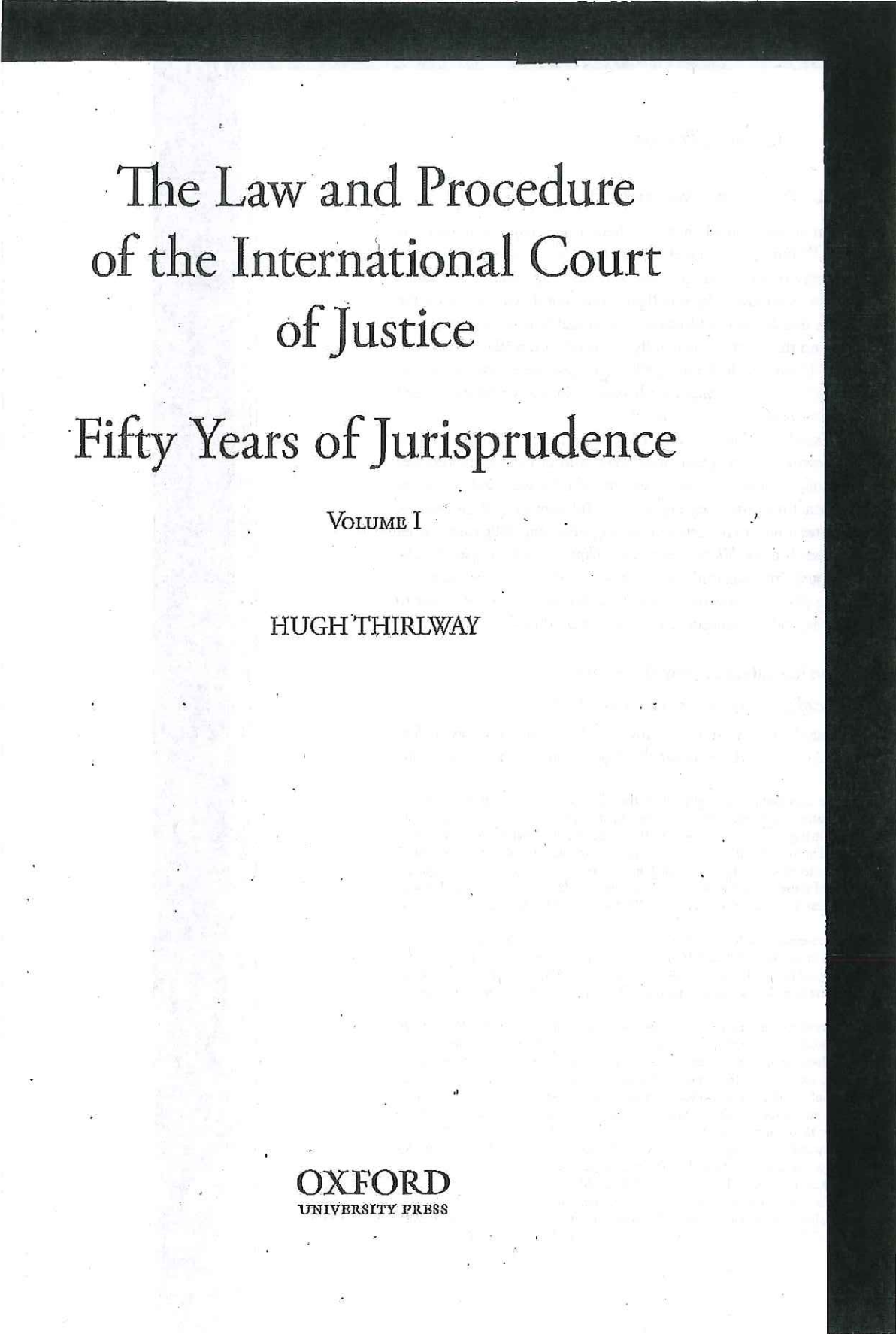
Whereas it is established that a counter-claim has a dual character in relation to the claim of the other party; whereas a counter-claim is independent of the principal claim in so far as it constitutes a separate 'claim', that is to say an autonomous legal act the object of which is to submit a new claim to the Court, and, whereas at the same time, it is linked to the principal claim, in so far as formulated as a 'counter' claim, it reacts to it; whereas the thrust of a counter-claim is thus to widen the original subject-matter of the dispute by pursuing objectives other than the mere dismissal of the claim of the Applicant in the main proceedings – for example, that a finding be made against the Applicant; and whereas, in this respect, the counter-claim is distinguishable from a claim on the merits.²⁰²⁷

From the perspective of the fundamental principles informing the Court's procedure, counterclaims require a careful balance to be struck between several of these principles. On

²⁰²⁵ See S Yee, 'Article 40' in A Zimmermann, C Tomuschat and K Oellers-Frahm (eds), *The Statute of the International Court of Justice, A Commentary* (Oxford, 2006) 907 *et seq*; G Guyomar, *Commentaire du Règlement de la Cour internationale de Justice, adopté le 17 avril 1978. Interprétation et pratique*, 2nd edn (Paris, 1983) 518 *et seq*; M Dubisson, *La Cour internationale de Justice* (Paris, 1964) 235–56; IF Shinaha, *The Power of the International Court to Determine Its Own Jurisdiction, Compétence de la Compétence* (The Hague, 1965) 262–64; S Rosema, *The Law and Practice of the International Court, 1920–2005*, vol III, 3rd edn (Leiden, 1997), 1272–77; H Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989' in BYIL, Part Twelve, vol 172 (2001), 174 *et seq*. See also, A Mañá de la Muela, 'La reconvenção ante el Tribunal Internacional de justicia' (1975) 8 *Boletín Mexicano de Derecho Comparado* 737 *et seq*; M Arcari, 'Domanda riconvenzionale nel processo di fronte alla Corte Internazionale di giustizia' (1998) 81 *RDI* 1042 *et seq*; Y Nouvel, 'La recevabilité des demandes reconventionnelles devant la Cour internationale de justice à la lumière de deux ordonnances récentes' (1998) 44 *AFDI* 334 *et seq*; F Salerno, 'La demande reconventionnelle dans la procédure de la Cour internationale de justice' (1999) 103 *RGDIP* 329 *et seq*; H Thirlway, 'Counterclaims before the International Court of Justice: the Genocide Convention and Oil Platforms Decisions' (1999) 12 *Leiden Journal of International Law* 197 *et seq*; L Savadogo, 'La renaissance de la procédure des demandes reconventionnelles' (1999) 32 *RBDI* 237 *et seq*; S Rosema, 'Counter-Claims in the International Court of Justice Revisited' in *Essays JM Ruda* (The Hague, 2000) 457 *et seq*; F Rigaux, 'Les demandes reconventionnelles devant la Cour internationale de justice' in *Essays S Oda*, vol II (The Hague, 2002) 935 *et seq*; G Distefano, 'La demande reconventionnelle au fil des textes régissant le fonctionnement de la Cour de la Haye et de sa jurisprudence' (2008) 18 *RSDIE* 45 *et seq*. On the PCIJ, see D Anzilotti, 'La demande reconventionnelle en procédure internationale' (1930) 57 *DIJ* 857 *et seq*; R Genet, 'Les demandes reconventionnelles et la procédure de la CPIJ' (1938) 19 *RDIIC* 145 *et seq*; MO Hudson, *The Permanent Court of International Justice, 1920–1974. A Treatise* (New York, 1943) 430.

²⁰²⁶ J Salmon (ed), *Dictionnaire de droit international public* (Brussels, 2001) 316 (our translation).

²⁰²⁷ Case on the Application of the Convention for the prevention and punishment of the crime of genocide (Counterclaims), *ICJ Reports* 1997, 256, § 27.



The Law and Procedure
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Fifty Years of Jurisprudence

VOLUME I

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1. Provisional Measures^{142*}

Requests for the indication of provisional measures have been frequent during the period under consideration,¹⁴³ but one fundamental question has remained without an authoritative answer until very recently: the question whether a decision of the Court indicating provisional measures imposes a legal obligation to comply with them on the State or States to which the decision was addressed. It is probably true to say that the weight of scholarly opinion on the point was generally to the effect that there is no such binding legal obligation.¹⁴⁴ However, the Court gave a the opposite answer to this in its Judgment of 27 June 2001 in the *LaGrand* case between Germany and the United States, and found that such an obligation does exist.

The decision in the *LaGrand* case, being so much out of harmony with much of the doctrine and (as will be shown) with the practice of States and of the Court, requires examination here. In addition, a number of other questions which have arisen in respect of the indication of provisional measures may appear in a different light if an order of the Court indicating measures is now to be seen as imposing a binding obligation, rather than an obligation, as expressed in the *Military and Paramilitary Activities* case, 'to take the Court's indications seriously into account'. Before coming to the specific question of the binding or non-binding effect of measures, however, other aspects of the power to indicate provisional measures, and the procedure therefore, should be dealt with.

(1) Requirements for the indication of provisional measures

(a) *The probable existence of jurisdiction over the merits*¹⁴⁵

The power of the International Court to indicate provisional measures in a case before it is expressly conferred by Article 41 of the Statute.¹⁴⁶ A point on which however more

¹⁴² There has been a change in terminology in English since the adoption by the Court of the revised Rules of Court of 1978. In the Statute, '*mesures conservatoires*' are rendered 'provisional measures' (Art. 41); in the 1946 Rules of Court (following the example of the PCIJ) the heading '*Des mesures conservatoires*' is rendered 'Interim protection', and in Art. 61 of the Rules the phrase 'interim measures of protection' is used. In the 1978 Rules, the heading 'Interim Protection' is retained, but the rules themselves (Arts. 73–78) use 'provisional measures', which is also used in the various Orders made since that date. Decisions between 1972 (*Fisheries Jurisdiction*), the first for a number of years, and 1978 use both 'interim measures of protection' and 'provisional measures'.

* The subject of this section is re-examined, in the light of later case-law, at p. 1770 below.

¹⁴³ There is a useful tabulation of all cases (PCIJ and ICJ) up to 1993 in Oda, 'Provisional Measures: the Practice of the International Court of Justice' in Lowe and Fitzmaurice (eds.), *Fifty Years of the International Court of Justice* (1996), p. 541; there have however been a number of further requests for measures since that publication.

¹⁴⁴ The most thorough and authoritative survey is that of Sztucki, *Interim Measures in the Hague Court* (1983); until the *LaGrand* case, nothing had occurred in the period since the publication of that work to affect the author's conclusions. These were, broadly, that measures do not have obligatory binding force, but an 'intermediate' legal status (*op. cit.*, p. 292). The opposite view is taken, for example, by Mani, 'Interim Measures of Protection: Art. 41 of the ICJ Statute and Art. 94 of the UN Charter', 10 *Indian Journal of International Law* (1970), p. 362, and Luigi Daniele, *Le misure cautelari nel processo dinanzi alla Corte internazionale di Giustizia* (1993), but their contentions are, for the present writer, less convincing. There is, it may be said, a certain amount of wishful thinking and confusion of the *sollen* and the *sein* in the arguments in favour of obligatory measures (as Sztucki does not fail to observe: *op. cit.*, p. 289).

¹⁴⁵ This question has already been touched on in this series: [1998] *BYBIL* 22–3.

¹⁴⁶ Whether Art. 41 is the sole source of this power, or is the expression of an incident of the jurisdiction of all international tribunals is unsettled: Fitzmaurice, after presenting the arguments for and against, regarded this as an 'open question' (1958) *BYBIL* 116; *Collected Edition*, ii, p. 543. Sir Ian Sinclair, in the

than one view was possible was the relationship between this power and the establishment of the jurisdiction of the Court to entertain the merits of the case. The *Anglo-Iranian Oil Co.* case had demonstrated that if the Court indicated measures at a stage of the proceedings at which its jurisdiction over the merits had not yet been conclusively established, it might subsequently appear that such jurisdiction had never existed. Could a Court without merits jurisdiction nonetheless indicate provisional measures?

Three views were possible. At one extreme, jurisdiction to indicate measures might be regarded as preconditioned by the establishment of jurisdiction over the merits; that is to say that if the Court has jurisdiction over the merits, it has jurisdiction to indicate provisional measures; but if not, not. This is an over-simple view, and one that obviously has practical implications, since a complete examination of the question of jurisdiction would be required before measures—by definition, urgent measures—could be indicated. On this basis, the *Anglo-Iranian Oil Co.* Order, having been made by a Court without merits jurisdiction, was an error. This view has been advanced doctrinally,¹⁴⁷ and was supported by two members of the Court in the *Nuclear Tests* cases.¹⁴⁸ The situation was complicated in those cases (and in the *Fisheries Jurisdiction* cases) by the fact that the respondent State was not participating in the case in the normal way, so that, according to one view, Article 53 of the Statute, on non-appearance, was applicable, and that text requires the Court to 'satisfy itself that it has jurisdiction. It could also be argued, however, that even if Article 53 was applicable at the provisional measures stage, the Court was only required to satisfy itself that it has jurisdiction to indicate measures, the prospect of jurisdiction being found to exist over the merits being no more than one of the circumstances to be taken into account.

At the other extreme, Article 41 of the Statute might be regarded as having conferred an independent jurisdiction, based simply on the consent of States to the text of the Statute evidenced by their becoming parties to it, and that therefore it is unnecessary to enquire into the existence of merits jurisdiction in order to make an order on a request for provisional measures.¹⁴⁹ On this basis, the *Anglo-Iranian* decision was perfectly proper, and the subsequent demonstration that the Court had never possessed merits jurisdiction did not rob the Order indicating measures of whatever legal effect the Statute gave it.¹⁵⁰

course of a comparative discussion of the exercise of the power by a number of permanent tribunals, indicated that he was 'not convinced' by the thesis that this is an inherent power of all tribunals: Bernhardt (ed.), *Interim measures Indicated by International Courts* (1993), p. 133. For the opposite view, see Weeramantry in the *Genocide Convention* case, *ICJ Reports*, 1993, p. 379.

¹⁴⁷ See for example Rodriguez Iglesias in Bernhardt (ed.), *Interim measures Indicated by International Courts* (1993), p. 144.

¹⁴⁸ Opinions of Judges Forster and Gros, *ICJ Reports*, 1973, pp. 111, 118, 148, 153.

¹⁴⁹ Judge Oda has mentioned the existence of a school of thought to the effect that 'since the possession of jurisdiction [over the merits] is not required by the Statute' as a condition for the indication of measures, 'it is not a condition which the Court may impose upon itself: Provisional Measures: the Practice of the International Court of Justice' In Lowe and Fitzmaurice (eds.), *Fifty Years of the International Court of Justice*, (1996), p. 561; but none of the judicial opinions in the jurisprudence seem to go as far as this.

¹⁵⁰ The Order did of course cease to have effect as soon as the judgment was given finding that there was no merits jurisdiction; but on this interpretation of the texts, it had had effect during the inter-venient period. Since Iran declined to pay any attention whatever to the Order, the question remained academic. Fitzmaurice attached importance to the fact that the judgment specifically stated that the measures indicated were to lapse as from the date of the judgment: '[t]he lapse was not therefore retroactive, which further emphasizes the fact that the Court's jurisdiction to indicate interim measures is independent of its substantive jurisdiction in respect of the merits' [1958] *BYBIL* 107; *Collected Edition*, ii, p. 534; emphasis original.

The third view, which seems now to have prevailed, is that, while the establishment of merits jurisdiction is not legally a precondition to the indication of measures, yet the Court is bound to consider the question of its merits jurisdiction, on a *prima facie* basis, before, and for the purpose of, indicating measures, and to take into account, when deciding whether to indicate them, the strength or otherwise of the case in favour of merits jurisdiction.¹⁵¹ This condition has been expressed in a number of different ways, and much argument has been devoted to the question whether it is met in each individual case, but the essential idea is clear enough. Sir Gerald Fitzmaurice, on the basis of the *Anglo-Iranian* precedent—the only one existing at the time he was writing—suggested that there should be a refusal to indicate measures not only in 'those cases in which it is clear that the Court has not, and never could, in the extant circumstances, have jurisdiction', but also in 'cases where the possibility that there is, or may be, jurisdiction, is too remote or hypothetical to justify the indication of interim measures'.¹⁵²

The matter arose in 1972, for the first time since the *Anglo-Iranian Oil Co.* decision, in the *Fisheries Jurisdiction* cases, and shortly afterwards in the *Nuclear Tests* cases. The first of these pairs of cases gave no great difficulty, as the jurisdictional title relied on was *prima facie* solid, and was indeed only attacked by the Respondent by means of a rather half-hearted appeal to the *rebus sic stantibus* doctrine.¹⁵³ The second pair of cases faced the Court with more acute problems: there was much more doubt about the jurisdictional titles asserted, and, as already noted, two Members of the Court were prepared to press the argument that jurisdiction to indicate measures was entirely conditional on the existence of jurisdiction over the merits, so that no measures could be indicated until merits jurisdiction was established.

The formula which the Court employed to express its position on this question in the *Fisheries Jurisdiction* cases, and which has been used with little change in all subsequent cases, was the following:

Whereas on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to act under Article 41 of the Statute if the absence of jurisdiction on the merits is manifest.¹⁵⁴

It is difficult to see however how a lapse could be retroactive; though if Iran had suffered loss through implementing the measures, it is an interesting question whether it could claim compensation. See the discussion, in section 4 below (text and n. 292), of the 'undertaking in damages'.

¹⁵¹ In the *Nuclear Tests* cases, Judge Jiménez de Aréchaga made the interesting suggestion that the Court, as such, does not have to make, at the provisional measures stage, a 'collective determination' of the question of merits jurisdiction, but that it is for each Member of the Court to make up his mind individually, having satisfied himself that the issue 'has received the fullest possible attention which one is able to give it within the limits of the time and materials available for the purpose': *ICJ Reports*, 1973, p. 107; the thinking seems to be that a subsequent decision, as in *Anglo-Iranian Oil Co.*, that the Court does not have merits jurisdiction will not involve the Court itself in contradiction, since it is the individual members who have found it necessary to change their initial views. In view however of the collective responsibility of the Court for all its decisions, and the fact that individual judges will have voted, one way or the other, on the provisional measures decision, it is not evident that this really resolves the intellectual difficulty.

¹⁵² [1958] *BYBIL* 113; *Collected Edition*, ii, p. 540. In cases in which Art. 38, para. 5, of the 1978 Rules applies, those in which there is an admitted absence of merits jurisdiction, it would obviously be out of the question for the Court to exercise its power to indicate measures: see Bernhardt (ed.), *Interim Measures Indicated by International Courts*, n. 147 above, pp. 129–30 (Zemanek) and 135 (Thielway).

¹⁵³ See an earlier art. in this series: [1992] *BYBIL* pp. 77 ff.

¹⁵⁴ *Fisheries Jurisdiction (United Kingdom v. Iceland)*, *Order of 17 August 1972*, *ICJ Reports*, 1972, p. 15, para. 15; same formula in the Federal Republic of Germany's case, *ibid.*, p. 33, para. 16.

It has followed this up by a citation of the jurisdictional instrument in fact relied on in each case, and concluded that the relevant provision 'appears, *prima facie*, to afford a possible basis on which the jurisdiction of the Court might be founded'.¹⁵⁵

In the successive cases in which measures have been requested, there have been numerous glosses on this formula in the separate and dissenting opinions. It may however be more interesting to consider *in concreto* in what circumstances the Court has found that the test is satisfied. Until the group of cases concerning *Legality of the Use of Force* brought by Yugoslavia against the member States of NATO in 1999, the Court did not reject any request for provisional measures purely on jurisdictional grounds. Thus it did not find that there was any manifest lack of jurisdiction notwithstanding the following objections (presented here in very summary form):

- In the *Anglo-Iranian Oil Co.* case, Iran relied at the preliminary measures stage on the 'legal incompetence of the complainant and... the fact that exercise of the right of sovereignty is not subject to complaint'.¹⁵⁶ Since this is only the vaguest of foreshadowings of the ground on which the Court eventually held that it was without jurisdiction,¹⁵⁷ it is not really material for this discussion.
- In *Fisheries Jurisdiction*, it was argued that the jurisdictional title was obsolete on grounds approximating to *rebus sic stantibus*¹⁵⁸ (jurisdiction was later upheld).¹⁵⁹
- In *Nuclear Tests*, the multilateral treaty invoked as the basis of jurisdiction was said to be invalid through desuetude; a relevant reservation to an optional-clause declaration was also invoked¹⁶⁰ (the question of jurisdiction was never determined).
- In *Arbitral Award of 31 July 1989*, the Court refused measures on other grounds, but in the course of its Order it found that there was a *prima facie* basis of jurisdiction in the optional-clause declarations of the two parties. Senegal had reserved the right to challenge this basis of jurisdiction at a later stage, but 'does not wish to broach the issue of jurisdiction at this stage'.¹⁶¹ This can hardly be classified as *forum prorogatum*, since the jurisdiction to indicate measures was not in issue; the Court seems to have reasoned that a concession of this kind by a party, relating to one of the conditions required for the indication of measures, could be given effect, so as to dispense the Court from enquiring further into the point.
- In *United States Diplomatic and Consular Staff in Tehran*, it was asserted that the dispute was only part of a wider dispute, being dealt with by the Security Council¹⁶² (jurisdiction was later upheld).¹⁶³
- In *Military and Paramilitary Activities in and against Nicaragua*, it was claimed that there was no valid acceptance of reciprocal optional-clause jurisdiction by the Applicant; the 'multilateral treaty reservation' in the US acceptance of jurisdiction under the optional clause was invoked; and the Treaty of Amity also relied on as a basis of jurisdiction was said to be inapplicable¹⁶⁴ (jurisdiction was later upheld, after one of the jurisdictional objections had first been reserved to the merits).

¹⁵⁵ *Ibid.*, p. 16, para. 17; p. 34, para. 18. ¹⁵⁶ *ICJ Reports*, 1951, p. 92.

¹⁵⁷ *ICJ Reports*, 1952, p. 93. ¹⁵⁸ *ICJ Reports*, 1972, pp. 12 and 30.

¹⁵⁹ *ICJ Reports*, 1973, pp. 3 and 49.

¹⁶⁰ *Ibid.*, pp. 99 and 135. ¹⁶¹ *ICJ Reports*, 1990, p. 69, para. 21.

¹⁶² *ICJ Reports*, 1980, pp. 18-20, paras. 33-38. ¹⁶³ *ICJ Reports*, 1979, p. 7.

¹⁶⁴ *ICJ Reports*, 1984, p. 169.

- In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the convention relied on as jurisdictional title was said to be inapplicable on a number of grounds (jurisdiction later upheld).
- In *Land and Maritime Boundary between Cameroon and Nigeria*, eight preliminary objections were filed, of which three to jurisdiction (abuse of the optional-clause system and lack of reciprocity; agreement to use bilateral machinery rather than ICJ proceedings; exclusive jurisdiction of another body); these objections were before the Court at the time of the request for measures, but were not regarded as 'such as to exclude [prima facie] jurisdiction';¹⁶⁵ all these objections were later rejected.¹⁶⁶
- In *Vienna Convention on Consular Relations*, the United States made an objection to jurisdiction, not however asserting that the dispute was not a dispute to which the jurisdictional title applied, but as regards the relief claimed by Paraguay, which in the view of the United States would be beyond the Court's jurisdiction; the Court considered that that was a question that could only be determined at the merits stage.¹⁶⁷
- In the *Legality of Use of Force* cases, all the measures requested were refused on jurisdictional grounds; this group of cases requires to be examined separately.

In the cases of *Interhandel*, *Aegean Sea Continental Shelf* and *Questions of Interpretation and Application of the 1971 Montreal Convention arising out of the Aerial Incident at Lockerbie*, measures were refused on other grounds, so that the Court's attitude to the jurisdictional issue cannot be ascertained. The *Anglo-Iranian Oil Co.* case was the only case in which the Court, after having indicated provisional measures, found that it had no jurisdiction. The *Aegean Sea* case was the only other case prior to 1999 in which the Court found it was without jurisdiction in a case in which it had earlier been asked to indicate provisional measures. It should perhaps be re-emphasized that the jurisdictional question arising in these cases was not the existence of jurisdiction to indicate measures, but the probable existence of jurisdiction over the merits; accordingly, there was no absolute logical priority in the jurisdictional issue, such that measures could not be refused on other grounds without first dealing with jurisdiction. Of the cases in which measures were indicated, the *Nuclear Tests* cases perhaps presented the least satisfactory grounds of jurisdiction; but the Court never ruled on the jurisdictional issues, having decided to dispose of the case as moot or 'without object'.

Generally it may be said, on the basis of the survey above of cases prior to 1999, that the Court is satisfied, at the stage of a request for provisional measures, with something very far short of certainty in the demonstration of the existence of a jurisdictional title, even if in nearly all cases it has not subsequently had to come to a negative conclusion on the jurisdictional issue. This indeed is suggested by the wording of the standard recital on the question of jurisdiction in provisional measures orders, limiting refusal on jurisdictional grounds to cases where the absence of jurisdiction is 'manifest'. The above collation of the decisions on requests for provisional measures with the eventual finding (if any) on jurisdiction may however be slightly misleading in one respect: the material available for decision at the measures stage will be less complete, sometimes much less complete, on the jurisdictional issue as on other questions, than it is when the Court has to take a definitive decision.

¹⁶⁵ *ICJ Reports*, 1996, p. 21, para. 31.

¹⁶⁶ *ICJ Reports*, 1998, p. 275.

¹⁶⁷ *Order of 9 April 1998*, *ICJ Reports*, 1998, paras. 28, 31-3.

The Court has however suddenly, in a recent set of cases, shown itself more demanding on the question of jurisdiction, or at least readier to investigate possible defects in the jurisdictional title advanced. In the *Use of Force* cases, the series of cases brought by Yugoslavia against the member States of NATO in respect of the bombings carried out on Yugoslav territory, the principal jurisdictional title relied on was Article XI of the Genocide Convention. In the cases in which the Respondent was a party to that Convention without having made any reservation to Article XI, the Court was able to find that:

Article IX of the Convention accordingly appears to constitute a basis on which the jurisdiction of the Court might be founded to the extent that the subject-matter of the dispute relates to 'the interpretation, application or fulfilment' of the Convention, including disputes 'relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III' of the said Convention.¹⁶⁸

However, the Court drew attention to the essential quality of genocide as involving the intention to destroy a national, ethnical, racial, or religious group, and continued:

in the opinion of the Court, it does not appear at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application 'indeed entail the element of intent, towards a group as such, required by the provision quoted above' (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 240, para. 26).¹⁶⁹

Whereas the Court is therefore not in a position to find, at this stage of the proceedings, that the acts imputed by Yugoslavia to the Respondent are capable of coming within the provisions of the Genocide Convention; and whereas Article IX of the Convention, invoked by Yugoslavia, cannot accordingly constitute a basis on which the jurisdiction of the Court could prima facie be founded in this case.¹⁷⁰

Against some of the respondent States, Yugoslavia was able to rely on an acceptance of jurisdiction by the Respondent under the optional clause, and it had itself deposited such a declaration shortly before commencing proceedings. The Court refused to find in favour of jurisdiction on this basis, however, basing its refusal on an interpretation of the Yugoslavian declaration that was, to say the least, controversial.¹⁷¹

In the cases brought against Belgium and the Netherlands, Yugoslavia cited an additional ground of jurisdiction at a late stage in the proceedings (during the second round of oral argument on the request for provisional measures). The Court's ruling on this point has already been quoted;¹⁷² on grounds of 'procedural fairness and the sound administration of justice', it decided that it could not take into account the additional title of jurisdiction. This casts an interesting light on the relationship, for purposes of provisional measures, between the need to preserve substantive rights and respect for the Respondent's procedural rights, and that between urgency and the establishment of the required conditions for the indication of measures. Assuming that the threat of irreparable prejudice was a continuing one, so that measures indicated after a longer delay

¹⁶⁸ Order in the *Yugoslavia v. Belgium* case, *ICJ Reports*, 1999-I, p. 137, para. 37; similar text in the Orders in the other cases.

¹⁶⁹ *Ibid.*, para. 40.

¹⁷⁰ *Ibid.*, para. 41.

¹⁷¹ The Court held, in effect, that Yugoslavia had deposited an optional-clause declaration that did not cover the dispute which it was, at the time of the drafting of the declaration, preparing to submit to the Court; contrast the finding in *Fisheries Jurisdiction (Spain v. Canada)* that an optional-clause declaration is to be interpreted 'having due regard to the intention of the State concerned at the time when it accepted the jurisdiction of the Court' (*ICJ Reports*, 1998, p. 454, para. 49).

¹⁷² Text before n. 102 above.

would still serve a purpose, even though measures indicated forthwith would be better still, the reasonable course of action might be thought to be to give the Respondent such time as was appropriate to consider and respond to the new allegation of jurisdiction, and then to consider whether measures should be indicated in the light of the probable existence of jurisdiction under all titles alleged.¹⁷³

It may not be over-cynical to see this unusually intensive enquiry into the alleged title of jurisdiction,¹⁷⁴ together with the refusal to give more time for examination of an additional title tardily introduced, as a means of avoiding the necessity to indicate the measures requested. The political background was of course such that for the Court to order a suspension of the NATO campaign would have been seen internationally as a victory for Yugoslavia. To suggest that the reasoning on the jurisdictional point was not entirely convincing is not to attribute any genocidal intent to the NATO States; but one can imagine without difficulty that in another case, one of simple inter-State conflict, the Court would have been ready to apply a sort of 'precautionary principle', and to say that so long as the allegation of genocidal intent was not manifestly unreasonable, the conflict should be stayed by preliminary measures.

Before leaving the question of the relevance of jurisdiction over the merits, we may note that there is clearly a link between questions of jurisdiction and questions of the rights to be protected. Measures cannot be indicated, as we shall see in section (c) below, except to protect rights in issue in the proceedings between the parties; it is jurisdiction to determine the existence and extent of those rights that the Court must possess if it is to entertain the case on the merits; and accordingly, in order to indicate measures, it is that jurisdiction which must not be manifestly lacking. This interconnection however breaks down if, or as soon as, it is accepted that the Court enjoys an independent power to indicate measures in order simply to prevent exacerbation of the dispute, or to prevent 'incidents'. It is difficult to see how this jurisdiction can be an element of the jurisdiction to entertain the merits. Ignoring for the moment the Court's power to indicate measures, could it, in its decision on the merits of a case, make rulings designed to prevent incidents, or exacerbation of the dispute, rather than simply stating the rights and obligations of the parties? We shall return below to the question whether the Court, when considering whether or not to indicate measures directed purely to non-escalation of the dispute, is under any obligation to consider whether there might be a manifest lack of merits jurisdiction.

(b) Admissibility of the claim

It would be logical for the Court, when considering, on a request for provisional measures, the likelihood that jurisdiction will be established over the merits to consider also questions of admissibility,¹⁷⁵ particularly if its attention has been drawn to a specific consideration which might imply an ultimate finding of admissibility. The Court has only explicitly referred to this aspect in one decision: the Order indicating provisional measures in the *Cameroon/Nigeria* case. As noted above, Nigeria had raised a number of

¹⁷³ As Judge Vereshchetin observed in his dissenting opinion, the Respondent was given the opportunity to submit counter-arguments, and could also have asked for a prolongation of the hearings: *ICJ Reports*, 1999-I, p. 214 (*Yugoslavia v. Belgium*).

¹⁷⁴ To be contrasted, for example, with the treatment of the Nigerian preliminary objections at the preliminary measures stage of the *Cameroon/Nigeria* case; see above.

¹⁷⁵ And, indeed, the likelihood that the rights claimed by the Applicant, and sought to be protected, will ultimately be shown to exist: on this see the separate opinion of Judge Shahabuddeen in the *Passage through the Great Belt* case, *ICJ Reports*, 1991, pp. 31 ff.

preliminary objections, some to jurisdiction and others to admissibility, including the alleged absence of a legal dispute, and prejudice to the rights of a third State. The Court's comment on this was delphic:

Whereas without ruling on the question whether, faced with a request for the indication of provisional measures, the Court must, before deciding whether to indicate such measures, ensure that the Application of which it is seised is admissible *prima facie*, it considers that, in this case, the consolidated Application of Cameroon does not appear *prima facie* to be inadmissible in the light of the preliminary objections raised by Nigeria.¹⁷⁶

The use of the expression '*prima facie*' draws a parallel with the treatment of jurisdictional questions; otherwise, the terms of the ruling are oddly rigorous. It would not, it is suggested, be necessary for the Court to 'ensure' (*s'assurer*) that the application is admissible; but it should presumably not indicate measures if there was a real possibility of a finding of inadmissibility. In his separate opinion, Judge Ranjeva referred to 'a possible additional condition for the indication of provisional measures, that is, the *prima facie* admissibility of the principal Application',¹⁷⁷ however, he saw this as unnecessary in the case of measures indicated purely for the non-aggravation of the dispute.

In the case concerning *Armed Activities on the territory of the Congo*, the Court in its Order on the request of the Congo for provisional measures 'noted' an argument by Uganda that the request for measures (not the Application) was inadmissible, as well as moot, but apparently did not accept this argument.¹⁷⁸ Judge Oda, in a declaration, expressed the view that the Court was not in a position to grant measures because the case 'is,—and has from the outset been, *inadmissible*.'¹⁷⁹

(c) *The rights to be protected*

The definition of provisional measures in Article 41 of the Statute is 'provisional measures which ought to be taken to preserve the respective rights of either party'.¹⁸⁰ Nothing is said about what rights may be protected; but the fact that the measures are *provisional*, i.e. intended to operate pending the final decision of the Court, implies that it is the rights which are asserted in the proceedings, and which a party seeks to have confirmed by the Court in its eventual judgment, that can be protected by measures. A textbook illustration of this was provided by the request of Guinea-Bissau for the indication of measures in the case concerning the *Arbitral Award of 31 July 1989*. The Award challenged had dealt with the question of the maritime boundary between Guinea-Bissau and Senegal, and the proceedings brought before the Court by Guinea were for a declaration that the Award was in-existent or null and void, for reasons not here material. Guinea-Bissau made a request for the indication of measures whereby

In order to safeguard the rights of each of the Parties, they shall abstain in the disputed area from any act or action of any kind whatsoever, during the whole duration of the proceedings until the decision is given by the Court.¹⁸¹

¹⁷⁶ *Order of 15 March 1996*, ICJ Reports, 1996, p. 21, para. 33.

¹⁷⁷ ICJ Reports, 1996-I, p. 29.

¹⁷⁸ *Order of 1 July 2000*, ICJ Reports, 2000, pp. 126-7, paras. 36 and 38.

¹⁷⁹ *Ibid.*, p. 131, emphasis original.

¹⁸⁰ The terms of the Article exclude measures being indicated to protect the rights of States not before the Court as parties; for an attempt to extend *de facto* protection to other States by asserting the *erga omnes* nature of the rights to be protected, see the dissenting opinion of Judge Schwebel in *Military and Paramilitary Activities*, ICJ Reports, 1984, pp. 195 ff.

¹⁸¹ ICJ Reports, 1990, p. 65, para. 3.

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State that has the initiative and the corresponding burden of explanation and proof. The sentence is however too obscure for any firm conclusion to be drawn as to the Court's meaning.

1. Provisional measures

The previous article contained an initial summary of the cases in which the Court had been asked to indicate provisional measures, usually in face of the existence of jurisdictional or other objections, with an indication of the action taken, and the ultimate ruling on the objections. To bring this survey up to date, the following cases may first be briefly recalled; where appropriate, more detailed analysis will be made later, on specific aspects:

- *Armed Activities on the Territory of the Congo (DRC v. Uganda)*: the title of the case sufficiently indicates the nature of the claim, and of the measures requested. The existence of jurisdiction under optional clause declarations was undisputed, but Uganda argued for the inadmissibility of the application on grounds similar to those advanced in the *Lockerbie* cases, i.e. that the same matter was concurrently before the Security Council;¹⁷² the Court did not accept this as a reason for refusing measures.¹⁷³
- *Arrest Warrant of 11 April 2000 (DRC v. Belgium)*: The DRC complained that the issue by a Belgian judge of an international warrant for the arrest of Mr. Yerodia, Minister for Foreign Affairs of the DRC was a violation of immunity, and of the principle that a State may not exercise its authority on the territory of another State. It submitted a request for, by way of provisional measure, 'an order for the immediate discharge' of the warrant.¹⁷⁴ Jurisdiction over the merits was provisionally recognized on the basis of the parties' optional clause declarations.¹⁷⁵ As a result of a change of circumstances since the filing of the Application, urgency and a risk of irreparable prejudice had not been shown.¹⁷⁶
- *Certain Criminal Proceedings in France (Republic of the Congo v. France)*: the Congo complained of the institution of criminal proceedings in France against Congolese officials entitled to immunity; France accepted jurisdiction by *forum prorogatum*, but urged that no risk of irreparable prejudice being caused had been shown, and the Court accepted this view;¹⁷⁷
- *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*: jurisdiction was established by a 1975 treaty. When Argentina submitted a request for the indication of measures, Uruguay argued that some of the rights protection of which was sought by Argentina were not covered by that instrument; the Court decided that it did not need to go into that issue at the provisional measures stage;¹⁷⁸ it further decided that the circumstances were not such as to require indication of measures.

¹⁷² Order of 1 August 2000, [2000] ICJ Rep 121, para. 26

¹⁷⁴ Order of 8 December 2000, [2000] ICJ Rep 182, 185, para. 11.

¹⁷⁶ *Ibid.*, 201, para. 72; 202, para. 78 (2).

¹⁷⁷ Order of 17 June 2003, [2003] ICJ Rep 109–111, paras. 30–37.

¹⁷⁸ Order of 13 July 2006, [2006] ICJ Rep 129, para. 58.

¹⁷³ *Ibid.*, 123–127, paras. 35–38.

¹⁷⁵ *Ibid.*, 200, para. 68.

Subsequently a request for the indication of measures was submitted by the respondent State, Uruguay; a request from a respondent clearly raises special problems, in particular as regards the jurisdictional requirement, unless the basis of jurisdiction invoked by the applicant is bilateral and general, or consists, for example, of two interlocking acceptances of the optional clause without reservations. The Court found that no risk of 'irreparable prejudice' justifying measures had been shown to exist.¹⁷⁹

- *Application of the Convention on Racial Discrimination (Georgia v. Russia)*: jurisdiction was asserted on the basis of Article 22 of the Racial Discrimination Convention, but contested; at the provisional measures stage the Court found it had jurisdiction 'to the extent that the subject-matter of the dispute relates to the "interpretation or application" of the Convention',¹⁸⁰ and indicated measures.¹⁸¹
- *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*: jurisdiction was asserted on the basis of Article 30 of the Convention against Torture, and found provisionally to exist; but on the basis of the assurances given by Senegal to Belgium, the Court found that the circumstances were not such as to require the indication of measures.¹⁸²
- *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*: jurisdiction was asserted under the Pact of Bogotá and the parties' optional-clause declarations, and not contested; measures were indicated,¹⁸³ and the case continues.

In addition, two requests for the indication of provisional measures have been made in the context of proceedings on a request for interpretation, and such measures have been granted,¹⁸⁴ these raise special problems, to be discussed in section (c) (ii) below.

(1) Requirements for the indication of provisional measures

The jurisprudence of the Court has established something of a pattern for the examination of requests for the indication of provisional measures, in the sense that the various requirements for such an indication are usually examined *seriatim*; the request has in effect to overcome a series of hurdles in order to be capable of being granted. These are: the existence, or at least probable existence, of jurisdiction in the Court to deal with the merits of the claim; the *prima facie* admissibility of the claim; the relationship between the request and the rights claimed, in the sense that the rights to be protected must be rights claimed in the main proceedings, not rights 'at large'; the *prima facie* existence of those rights; and the probability of imminent 'irreparable prejudice' being caused to such rights unless the measures are granted. Each of these is usually examined by the Court in turn, but some recent decisions¹⁸⁵ have prompted the question: to what extent is it necessary to follow any particular sequence or pattern, if it is clear that a matter

¹⁷⁹ Order of 23 January 2007, [2007] ICJ Rep 3.

¹⁸⁰ Order of 15 October 2008, [2008] ICJ Rep 388, para. 117.

¹⁸¹ *Ibid.*, 398–399, para. 149.

¹⁸² Order of 28 May 2009, [2009] ICJ Rep 156, para. 76.

¹⁸³ Order of 8 March 2011.

¹⁸⁴ *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, Order of 16 July 2008, [2008] ICJ Rep 311; *Request for interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Order of 18 July 2011.

¹⁸⁵ In particular the *Arrest Warrant of 11 April 2000*, Order of 8 December 2000 and *Questions relating to the Obligation to Prosecute or Extradite*, Order of 28 May 2009, [2009] ICJ Rep 139.

that might otherwise be examined at a late stage of the process will constitute a ground on which the request must necessarily fail? The question is principally one of judicial economy, but may also involve wider considerations. In particular the point is frequently this: does the question of probable existence of jurisdiction over the merits have any logical or other priority? The cases involving questions of priority as between the different requirements for the indication of measures will therefore be examined under the heading of the jurisdictional requirement.

(a) *The probable existence of jurisdiction over the merits*

To avoid confusion, the distinction should perhaps be emphasized between the jurisdiction of the Court to indicate provisional measures, which derives directly from Article 41 of the Statute,¹⁸⁶ and the jurisdiction of the Court to determine the case before it, which is relevant in proceedings on a request for the indication of provisional measures inasmuch as the probable existence of such case-jurisdiction is a condition for the exercise of the statutory measures-jurisdiction. This aspect is examined further in subsection (i) below.

(i) *Must prima facie jurisdiction be established before the other requirements for the indication of measures are considered?*

In the previous article, it was noted that of three possible analyses of the relationship between the power of the Court to indicate provisional measures and the question of the existence of jurisdiction over the merits of the case, the practice of the Court had followed the approach whereby,

while the establishment of merits jurisdiction is not legally a precondition to the indication of measures, yet the Court is bound to consider the question of its merits jurisdiction, on a *prima facie* basis, before, and for the purpose of, indicating measures, and to take into account, when deciding whether to indicate them, the strength or otherwise of the case in favour of merits jurisdiction.¹⁸⁷

This implies that, since jurisdiction to *indicate* measures is independent, being conferred by Article 41 of the Statute, and the probable existence of merits jurisdiction is merely one of the considerations relevant to deciding whether to exercise it, this jurisdictional issue has no logical or necessary priority.¹⁸⁸ It would follow that if there is a clear enough reason of a non-jurisdictional nature to refuse measures, the merits-jurisdiction point can be left open.¹⁸⁹ There seems however to be a certain judicial reluctance to proceed

¹⁸⁶ And is normally therefore to be taken for granted; but it has been questioned (in the case of the *Temple of Preah Vihear (Interpretation)*) whether it exists when the 'main' proceedings are merely a request for interpretation of a previous judgment under Article 60 of the Statute; see the view of Judge Donoghue examined in section (c) (ii) below. ¹⁸⁷ (2001) 72 *BYIL* 37, 79-80

¹⁸⁸ It also signifies that measures indicated by a Court which subsequently finds that it is without jurisdiction over the merits are not therefore to be regarded as automatically without foundation; when indicating them, the Court was exercising an independent jurisdiction under Article 41 of the Statute, preconditioned by the *apparent* existence of jurisdiction over the merits. However, there remains a question of the effect, if any, of measures indicated in the context of a case with which the Court had, as it now discovers, no right to concern itself: see further section (4) below.

¹⁸⁹ Cf. in particular *Aegean Sea Continental Shelf*, Order of 11 September 1976, [1976] ICJ Rep 13, para. 14, and Separate Opinion of President Jiménez de Aréchaga, *ibid.*, 16; *Aerial Incident at Lockerbie (Libya v. United Kingdom)*, Order of 14 April 1992, [1992] ICJ Rep 15, para. 42; (*Libya v. United States*) 127, para. 45.

in this fashion, perhaps because of the normally prior nature of a jurisdictional question in relation to the merits.¹⁹⁰

The hypothesis we are considering is that the Court is faced with issues, perhaps complicated ones, concerning both the existence of its jurisdiction over the merits and such matters as the extent of the rights to be protected and the likelihood of 'irreparable prejudice'. If the Court finds that on one of these latter issues there is a clear bar to the indication of measures (or rather, perhaps, a clear insufficiency of demonstration), the problem, perhaps equally or more intractable, of jurisdiction can, it is suggested, be left aside.

This consideration does not have the same force if the existence of jurisdiction is evident—a *fortiori* when it is conceded by the respondent State.¹⁹¹ This was so in a number of recent cases, now to be examined. It was also the situation, but for a different reason, in the two recent cases in which a request for measures has been made in the context of proceedings seeking interpretation of a judgment—the *Avéna (Interpretation)* and *Temple (Interpretation)* cases. Independent jurisdiction to interpret a judgment is provided for in Article 60 of the Statute,¹⁹² and the interpretation thus constitutes, as it were, the 'merits' of the case.

Is it appropriate for the Court, in the context of proceedings which are by definition for urgent relief,¹⁹³ to devote time, and space in its Order, to issues which it is not necessary to determine, even on the provisional level appropriate to an interlocutory stage? Three recent cases in particular prompt this reflection.

In the Order of 8 December 2000 in the case concerning the *Arrest Warrant of 11 April 2000*, on the request of the DRC for the indication of provisional measures, the actual decision was that 'the circumstances [of the case], as they now present themselves to the Court, are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures'.¹⁹⁴ The reason for this was that it had 'not been established that irreparable prejudice might be caused in the immediate future to the DRC's rights nor that the degree of urgency is such that those rights need to be

¹⁹⁰ A recent study, Z He, 'The ICJ's Practice on Provisional Measures', *Kölner Schriften zu Recht und Staat*, (Peter Lang, Frankfurt 2010) No. 40, takes the view that 'the existence of prima facie jurisdiction over the merits is the precondition for the Court to touch on the merits and examine whether the "circumstances" justify provisional measures, rather than one of the circumstances' (p. 47). It is difficult on this approach to explain the *Aegean Sea* and *Lockerbie* cases, and entails a rejection of the practice there exemplified of basing a refusal of a request on the simplest available ground.

¹⁹¹ In this sense Judge Greenwood, declaration in the case of *Certain Activities carried out by Nicaragua in the Border Area*, Order of 8 March 2011, para. 3.

¹⁹² The relationship of that jurisdiction to the jurisdiction to indicate provisional measures to 'preserve' rights under Article 41 of the Statute, and whether there are any such 'rights' in the context of interpretation proceedings, may be more controversial matters.

¹⁹³ There is here something of a paradox: once a request has been made for the indication of measures, it would be an unusual and bold step for the respondent State to take action, while the Court is dealing with the request, inconsistent with the measures requested, particularly since the well-known decision in *LaGrand* that measures give rise to binding obligations. The mere filing of the request therefore to some extent removes the urgency from the proceedings, so that the Court may feel that it is not itself under great pressure of time. On the other hand, by the same token, the existence of the request will be hampering the respondent State in the exercise of what it claims to be its rights, and therefore transferring the desire for a rapid solution from the applicant to the respondent. For this reason, it is suggested that the proceedings should continue to be handled as rapidly—and as economically in terms of the decision—as possible.

¹⁹⁴ *Arrest Warrant*, Order of 8 December 2000, [2000] ICJ Rep 202, para. 78 (2).

protected by the indication of provisional measures.¹⁹⁵ The factual finding on which this was based was that the DRC Minister, M. Yerodia, against whom an arrest warrant had been issued in Belgium, had ceased to be Foreign Minister, and become Minister of Education, functions (as the Court observed) 'involving less frequent foreign travel'.¹⁹⁶ However, before reaching this conclusion the Court had examined the jurisdictional basis pleaded, which was not entirely a straightforward issue, and decided that there was a *prima facie* basis for jurisdiction.¹⁹⁷ Could the Court not have issued a simple Order containing the finding of lack of urgency, and reserving all other questions, in particular that of its jurisdiction?

In the second case, that of *Questions relating to the Obligation to Prosecute or Extradite*, Belgium, in reliance on the 1984 Convention against Torture, complained of the failure of Senegal to prosecute the former President of Chad, M. Habré, who was resident on Senegal's territory, for crimes of torture and crimes against humanity committed during his period of office; and it asked the Court for provisional measures 'requiring Senegal to take all the steps within its power to keep M. H. Habré under the control and surveillance of the judicial authorities of Senegal' so that, and until, he could be prosecuted. In the course of the proceedings on the request, Belgium indicated that 'a solemn declaration made before the Court by the Agent of Senegal, in the name of his Government' that M. Habré would not be permitted to leave Senegal before the Court delivered its final judgment in the case 'could be sufficient for Belgium to consider that its Request for the indication of provisional measures had no further *raison d'être*'.¹⁹⁸ and such a declaration was given on behalf of Senegal.¹⁹⁹ In a 76-paragraph Order, the Court finally concluded, on the basis of these statements, that there did not exist 'in the circumstances of the present case, any urgency to justify the indication of provisional measures by the Court'.²⁰⁰ However, before reaching this stage, the Court had established the existence of its *prima facie* jurisdiction over the merits (and indeed of the link between the rights to be protected and the measures requested), before turning to the risk of irreparable prejudice and urgency. Again, was this necessary? Could the Court have 'cut to the chase', and simply reserved these issues, on the basis that both parties were agreed that no measures were, in the event, required at that stage?

In the proceedings on the second request for provisional measures in the *Pulp Mills* case, the Court stated the view that

'in establishing the Court's *prima facie* jurisdiction to deal with the merits of the case, the question of the nature and extent of the rights for which protection is being sought in the request for the indication of provisional measures has no bearing',²⁰¹ and explained that the latter question 'will only be addressed once the Court's *prima facie* jurisdiction over the merits of the case has been established'. This finding however needs to be seen in the context of the circumstances of the case, discussed further below.²⁰²

¹⁹⁵ Ibid, 201, para. 72.

¹⁹⁶ Ibid,

¹⁹⁷ Ibid, 199-200, paras. 62-68.

¹⁹⁸ *Provisional Measures*, Order of 28 May 2009, [2009] ICJ Rep 139, para. 33

¹⁹⁹ Ibid, para. 38.

²⁰⁰ Ibid, 155, para. 73. The decision to this effect was all but unanimous, only Judge Cançado Trindade voting against, for reasons explained in a lengthy dissenting opinion; essentially he would have wished the Court to remain more closely concerned to see that Senegal did not drag its feet in the matter. The Court expressly reserved the possibility for Belgium to submit a fresh request for measures 'based on new facts': ibid. 155-156, para. 75.

²⁰¹ Order of 23 January 2007, [2007] ICJ Rep 10, para. 25.

²⁰² Section (c)(i)

The simpler course, of dealing only with one particular issue that, in the circumstances, was decisive, had been followed by the Court in the *Lockerbie* cases.²⁰³ The jurisdiction asserted by Libya under the Montreal Convention was disputed by the two respondent States, but the Court, without going into the question of jurisdiction, found that binding decisions of the Security Council had imposed obligations that overrode those of the Montreal Convention, so that 'the rights claimed by Libya under the Montreal Convention cannot now [since the Security Council had acted] be regarded as appropriate for protection by the indication of provisional measures.'²⁰⁴ Furthermore, the Court then declared that

in order to pronounce on the present request for provisional measures, the Court is not called on to determine any of the other questions which have been raised before it in the present proceedings, including the question of its jurisdiction to entertain the merits of the case.²⁰⁵

An earlier decision, that in the *Aegean Sea Continental Shelf* case, is still more specific: after finding that the parties had accepted recommendations of the Security Council aimed at defusing the dispute, the Court stated that in order to pronounce on the request for measures, it was 'not called upon to decide any question of its jurisdiction to entertain the merits of the case.'²⁰⁶

The question bears some resemblance to the question of the content of a judgment and the controversy over judicial economy, and the need seen by some commentators (and judges) for the Court to deal with all arguments presented to it, whether or not these are necessary for the decision.²⁰⁷ One approach to this problem saw advantage in the Court's resolving issues of general interest raised in a case, even if this was not necessary to dispose of it. In the context of provisional measures, a similar philosophy appears in the separate opinion of Judge Abraham appended to the Order of 13 July 2006 refusing provisional measures in the *Pulp Mills* case. He drew attention to a point, which he considered important, on which he did not find the reasoning in the Order 'sufficiently explicit'. The matter was not one of jurisdiction, but of the extent to which the existence of the rights to be protected had to be demonstrated, a matter to be examined in subsection (c) below. He explained that:

I am well aware that the Court was not required to address this much-debated issue in detail, since the circumstances of the case are such that it could base its decision in law on grounds which were both necessary and sufficient, without the need to decide a point which, while argued by the Parties, could be deferred without impairing the coherence or completeness of the reasoning adopted in reaching the decision rendered. I am of course not opposed to a certain economy of reasoning, and I do not think it within the Court's duties to propound a general theory on each and every issue argued in the cases before it. Yet I think that the Court, without departing too far from the sound rule mandating good husbandry of resources, could in the present case have seized the opportunity presented by this Order to shed some light on a question which—it must be admitted—remains quite abstruse.²⁰⁸

²⁰³ *Aerial Incident at Lockerbie*, Orders of 14 April 1992, [1992] ICJ Rep 3, 114

²⁰⁴ *Ibid.* (UK case) 15, para. 40; (USA case) 126–127, para. 43.

²⁰⁵ *Ibid.* (UK case) 15, para. 42; (USA case) 127, para. 45.

²⁰⁶ [1976] ICJ Rep 13, para. 44.

²⁰⁷ See the discussion of the point in the separate opinion of Judge Jessup in the *Barcelona Traction* case, [1970] ICJ Rep 161–164, paras. 2–9, and the precedents there cited.

²⁰⁸ *Pulp Mills*, Order of 13 July 2006, [2006] ICJ Rep 137, para. 2.

The point in question however concerned the relationship between the merits of a case (in general, not of the specific case in hand) and the requirements for provisional measures; it is therefore arguable that if it was to be raised at all, it was appropriate to do so at the provisional measures stage; though 'good husbandry of resources' should perhaps include, or give way to, considerations of urgency.

Inasmuch as provisional measures jurisdiction is, as indicated in the previous article, and regularly stated by the Court, essentially independent of the establishment of merits jurisdiction, the Court could, in the *Arrest Warrant* and *Obligation to Prosecute* cases, have left the whole jurisdictional issue aside, and simply stated that the measures requested were not needed. But would this have corresponded to the wishes and expectations of the Parties? While they could not expect from the Court a definitive ruling on jurisdiction, an indication in this respect might, for example, have been valuable to the Applicant in deciding whether to press on with the case.²⁰⁹ However, the mere fact that the parties had argued the jurisdictional issue does not of course demonstrate that they wanted it resolved at that stage; the respondent opposing a request for provisional measures is normally bound to play the jurisdictional card unless the existence of jurisdiction is an open-and-shut issue.²¹⁰

It is suggested that, among the considerations relevant to the indication of measures, there is no single one that can be measured against the others on any pre-established scale of values, except possibly that of urgency and 'irreparable prejudice'. The ultimate test, according to the Statute is whether the Court 'considers that circumstances so require'; this could be read as merely referring to the factual circumstances, which means in effect the same as the 'risk of irreparable prejudice'; but this would lead to the conclusion that there is no textual support for balancing these issues against the legal circumstances, in particular the requirement for the apparent existence of the rights to be protected, and for their relationship with the claim in the main proceedings. On that basis it would be consistent with the logic of the provisional measures system, and with the overall presumption of urgency, for a refusal of a request for measures to be made on the basis of the single strongest ground, or the ground which attracts the most support within the Court, and for any other issues, including that of merits jurisdiction, to be left open.

The discussion above has been on the basis that what is requested is the indication of measures of the traditional kind, designed to protect the rights claimed in the main proceedings. It is however established that measures may be indicated that are designed simply to prevent the escalation of the dispute, though whether this may be done only as a supplement to measures of the traditional kind, or independently, is less clear. This aspect is examined in sub-section 2 below; but at this point we may note that if the existence of prima facie jurisdiction over the merits is also a condition for the indication of 'non-aggravation' measures (as to which the jurisprudence seems divided), jurisdiction

²⁰⁹ It should also not be overlooked that the drafting of a collective judgment cannot follow the same direct logical progression as it might were it the expression of a single judge's view. A Member of the Court, while agreeing with his colleagues on the single decisive issue, may have preferred that the decision turn on different ground, and press for that matter to be dealt with also in the decision, particularly if he wishes to comment on it in a separate opinion.

²¹⁰ As in, for example, the case of *Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures*, Order of 15 March 1996, [1996] ICJ Rep 13, or the most recent case of *Certain Activities Carried out by Nicaragua in the Border Area*, Order of 8 March 2011.

may have to be examined with that end in view, even if protective measures are clearly unnecessary or inappropriate for other reasons.

(ii) The extent to which prima facie jurisdiction must be established

The degree of exigence to be shown by the Court when satisfying itself of the probable existence of jurisdiction over the merits tends, probably unavoidably, to vary from case to case; it may well be impossible for a judge to disentangle this question mentally from the question of the probability and seriousness of the prejudice threatened, even though strictly these are independent issues. One judge *ad hoc* in a recent case—Judge Sur in the Senegal/Belgium case—has suggested that the Court is generally over-exigent in its ‘concern to take the greatest possible account of State consent to its jurisdiction’.²¹¹ He suggested substituting a negative for a positive criterion; if the Court were, he suggested, to

limit itself to a simple, summary analysis, rejecting the possibility of ordering provisional measures only if it deemed itself manifestly without jurisdiction or the Application manifestly inadmissible, the Court would also be able to devote more time and attention to all of the circumstances, legal and factual, which might make such measures essential, thereby fully meeting the requirements of Article 41...²¹²

He conceded, however, that a procedure of this kind ‘would not necessarily differ much from current practice’.²¹³

However, in recent cases the Court has included, in its standard paragraph on the question of jurisdiction, a specific indication that it ‘need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case’.²¹⁴ Similarly, if the insufficiency of the demonstration of the existence of jurisdiction over the merits itself to lead the Court to refuse the measures requested, this finding also remains preliminary, and does not normally involve a dismissal of the claim on grounds of lack of jurisdiction. Entirely exceptional in this respect were the decisions on the requests of the FRY for the indication of provisional measures against Spain and the United States as members of NATO in the *Use of Force* cases, where the lack of jurisdiction was so evident (and virtually admitted by the applicant) that the Court made orders for the removal of the cases from the list.²¹⁵ Similarly, in the exceptional circumstances of a request for the indication of measures made in the context of an application for interpretation²¹⁶ of the judgment in the *Avena* case, three members of the Court, in a dissenting opinion, were so satisfied of the lack of merits of the application that they were able to take these questions in the opposite order. For them, the applicant had ‘not satisfied [the] requirement of Article 60 of the Statute that it demonstrate the existence of a dispute about the meaning or scope’ of the judgment, so that the application ‘should be dismissed’; they continued, ‘[a]s a consequence, the request for provisional measures which is designed to protect rights asserted in [the] Application would no longer have a purpose and should also be dismissed’.²¹⁷

²¹¹ *Questions relating to the Obligation to Prosecute or Extradite*, Order of 28 May 2009, Separate Opinion of Judge ad hoc Sur, [2009] ICJ Rep 204, para. 6.

²¹² *Ibid.*, 206, para. 12

²¹³ *Id.*

²¹⁴ *Obligation to Prosecute or Extradite*, Order of 28 May 2009, [2009] ICJ Rep 147, para. 44; *Certain Activities in the Border Area*, Order of 8 March 2011, para. 49.

²¹⁵ Orders of 2 June 1990, [1990] ICJ Rep 761, 916.

²¹⁶ On this class of cases, see further subsection (ii) below.

²¹⁷ *Avena (Interpretation), Provisional Measures*, Order of 16 July 2008, Joint dissenting opinion of Judges Owada, Tomka and Keich, [2008] ICJ Rep 341, 348, paras. 20–21.

In the *Armed Activities* case, both parties had made declarations under Article 36 of the Statute, without material reservations; after the usual recital to the effect that the Court did not need to make a final determination on jurisdiction before indicating measures, the Court indicated that it considered that these declarations 'constitute a prima facie basis upon which its jurisdiction in the present case might be founded'.²¹⁸ In the case of *Certain Criminal Proceedings in France* the Court's jurisdiction was in principle clearly established, France having accepted a proposal for jurisdiction on the basis of *forum prorogatum*. While the dismissal of the request for measures was based on the absence of proof of any likely 'irreparable prejudice',²¹⁹ it was therefore still appropriate to begin the Order with a reference to the jurisdictional requirement for the indication of measures, and to recall the existence of established jurisdiction.²²⁰ In both cases the standard paragraph to the effect that the decision on the request 'in no way prejudices the jurisdiction of the Court to deal with the merits of the case' was nonetheless included.²²¹

Similarly, in the Order on the first request for provisional measures in the *Pulp Mills* case (that submitted by Argentina), the existence of jurisdiction under the 1975 Statute of the River Uruguay was essentially uncontested. Argentina requested provisional measures aimed (broadly) at suspending the construction of the pulp mills, which were allegedly polluting the river, in breach of the 1975 Statute, Uruguay conceded that the Court had jurisdiction under that instrument, but contended that such jurisdiction did not extend to all aspects of the request made for provisional measures, and in particular was excluded as regards 'any alleged consequential economic and social impact' of the construction of the pulp mills, 'including any impact on tourism'.²²² In its 2006 decision on Argentina's request, the Court simply indicated that it did 'not need at this stage of the proceedings to address this ... issue',²²³ before going on to decide that no measures were required.

A further case in which the jurisdiction over the merits was regarded as not in issue was that of *Certain Activities carried out by Nicaragua in the Border Area* (jurisdiction under the parties' optional-clause declarations and the Pact of Bogotá). As in the *Certain Criminal Proceedings in France* case, the Court disposed briefly of the jurisdictional issue at the outset of its Order.²²⁴

Where there is a dispute over the existence of merits jurisdiction, the Court may be in something of a dilemma. On the one hand, it is only making a preliminary and provisional determination for an immediate purpose, and is constrained by considerations of urgency.²²⁵ On the other, it is conscious, since the *LaGrand* ruling, that it is making an order with binding force: that, without having complete judicial certainty that it has the power to deal with the case on the merits, it is *compelling* a party to take, or refrain from taking, certain action. In the *Pulp Mills* case, Judge Abraham drew attention to

²¹⁸ Order of 1 August 2000, [2000] ICJ Rep 123, para. 34.

²¹⁹ Order of 17 June 2003, [2003] ICJ Rep 111–112, paras. 37, 41.

²²⁰ *Ibid.*, 106–107, paras. 20–21.

²²¹ Order of 1 August 2000, [2000] ICJ Rep 128–129, para. 46; Order of 17 June 2003 [2003] ICJ Rep 112, para. 40.

²²² Order of 13 July 2006, [2006] ICJ Rep 129, para. 58.

²²³ *Ibid.*, para. 59.

²²⁴ Order of 8 March 2011, paras. 49–51.

²²⁵ In this sense, see Judge Greenwood in para. 2 of his declaration attached to the Order of 8 March 2011, *Certain Activities carried out by Nicaragua in the Border Area*.

the need, for this reason, to 'give more thought' to the problem of determining that the rights claimed, and for which protection is sought, actually exist.²²⁶ To what extent does the same reasoning apply to the question of the Court's jurisdiction over those merits? This would seem an *a fortiori* case. Before the *LaGrand* watershed, it was accepted that the jurisdiction of the Court to indicate provisional measures is not dependent on the existence of jurisdiction over the merits, which is usually determined *ex post facto*, and indeed often can only be so determined;²²⁷ but the Court did in practice pay some attention to the question of jurisdiction before deciding whether to indicate measures. Presumably, it must now 'give more thought' to this question, to borrow the expression of Judge Abraham.

(b) *Admissibility of the claim*

To what extent is the Court, when faced with a request for the indication of provisional measures, bound to concern itself, not only with the establishment of prima facie jurisdiction over the merits, but also with the question whether the claim on the merits will be, or is likely to be, found admissible? Questions specifically presented as relating to admissibility have not often been raised at the provisional measures stage. An example already mentioned in the previous article²²⁸ was the argument of Uganda in the *Armed Activities* case that the request for measures was 'inadmissible' inasmuch as 'as a matter of law the Court is prevented from exercising its powers under Article 41 of the Statute' by reason of the concurrent existence of proceedings before the Security Council;²²⁹ a contention that the Court did not accept. In the case of *Questions relating to the Obligation to Prosecute or Extradite*, Senegal argued for the inadmissibility of Belgium's request for measures, on the ground of lack of compliance with the procedural conditions of the Convention against Torture.²³⁰

The standard closing formula in an order on a request for the indication of provisional measures is to the request that the decision 'in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves'.²³¹ Earlier versions mention only jurisdiction and merits.²³²

(c) *The rights to be protected*

(i) *In general*

As noted above, the jurisdiction of the Court to indicate provisional measures under Article 41 of the Statute only empowers the Court to indicate measures in the context

²²⁶ Order of 13 July 2006, Separate opinion of Judge Abraham, [2006] ICJ Rep 139–140, para. 8.

²²⁷ Thus in the first example of measures indicated by the post-war Court, the *Anglo-Iranian Oil Co.* case, the fact that the Court ultimately found that it had no jurisdiction did not signify that the measures it had indicated (which were not in fact complied with) had had no validity, even if such validity was only as recommendations. See generally the previous article, (2001) 72 *BYIL* 78 ff.

²²⁸ (2001) 72 *BYIL* 37, 86. ²²⁹ Order of 1 July 2000, [2000] ICJ Rep 121, para. 26.

²³⁰ Order of 28 May 2009, [2009] ICJ Rep 145, para. 28.

²³¹ Eg *Certain Activities carried out by Nicaragua in the Border Area*, Order of 8 March 2011, para. 85.

²³² Eg *Armed Activities*, Order of 1 July 2000, [2000] ICJ Rep 128–129, para. 46. See also the special formula adopted for cases involving a request for interpretation of an earlier judgment: *Avena (Interpretation)*, *Provisional Measures*, Order of 16 July 2008, [2008] ICJ Rep 331, para. 79; *Temple (Interpretation)*, Order of 18 July 2011, para. 68.

of a case before it,²³³ and does not comprise a power to protect rights 'at large' on the application of a State which considers that its rights are threatened. The exercise of such jurisdiction must be authorized by the existence, or presumed existence, of threatened 'rights' which are in issue in the case. Accordingly, the existence of such rights is a condition on the use of the jurisdiction; and it could be contended that there are proceedings possible in which, from the nature of those proceedings, there are no disputed rights that could be protected,²³⁴ so that the jurisdiction in such circumstances is not exercisable, or may even not exist: such, it has been argued, is the case of proceedings on a request for the interpretation of an earlier judgment.²³⁵

It would in fact seem axiomatic that the Court cannot indicate provisional measures to protect rights that are not the subject of the proceedings in the context of which those measures are requested; when the Statute refers to the protection of 'the respective rights of either party', it must mean the rights which it asserts as a party to the case, i.e. those which are claimed in the proceedings, and not other rights it may possess and which in principle the other party may be legally bound to respect. As regards the applicant, these rights are easily identifiable from the pleadings; but what if provisional measures are requested by the respondent? Are its rights to be deduced simply from the terms of its defences to the applicant's claims?

This was the problem that arose on the second set of proceedings on provisional measures in the *Pulp Mills*, when a request for measures was made by the respondent Uruguay. The matter was handled as in some sense a question of jurisdiction. Essentially the basis of jurisdiction relied on by Argentina was the compromissory clause in an international treaty, Article 60 of the 1975 Statute of the River Uruguay concluded between Argentina and Uruguay.²³⁶ When Argentina requested provisional measures aimed (broadly) at suspending the construction of the pulp mills, which were allegedly polluting the river, in breach of the 1975 Statute, Uruguay conceded that the Court had jurisdiction under that instrument, but contended that such jurisdiction did not extend to all aspects of the request made for provisional measures, and in particular was excluded as regards 'any alleged consequential economic and social impact' of the construction of the pulp mills, 'including any impact on tourism'.²³⁷ In its 2006 decision on Argentina's request, the Court simply indicated that it did 'not need at this stage of the proceedings to address this... issue',²³⁸ and since it decided that no measures were required, the point was in effect a moot one.

However, when Uruguay in its turn presented a request for the indication of measures calling on Argentina to restrain actions by its citizens blocking roads and bridges between the two countries, by way of protest against the building of the mills, the

²³³ It is the rights of 'either party' that may be protected, the word 'party' clearly signifying a party to a case, and not merely to a dispute.

²³⁴ It is possible to bring proceedings in which no specific rights are asserted by way of submission, but the Court is merely asked to declare the law governing a particular situation: see for example the *North Sea Continental Shelf* case [1969] ICJ Rep 46, para. 84. A request for the indication of measures would be unlikely in such a context, but might also be excluded by the nature of the claims before the Court. Note also the case of *Application of the Interim Accord of 13 September 1995*, in which the nature of the claims made was such that provisional measures would not seem relevant: Judgment of 5 December 2011.

²³⁵ See subsection (c) below.

²³⁶ Any dispute concerning the interpretation or application of the Treaty [the Montevideo Treaty of 7 April 1961 concerning the boundary constituted by the River Uruguay] and the Statute which cannot be settled by direct negotiations may be submitted by either party to the International Court of Justice.

²³⁷ Order of 13 July 2006, [2006] ICJ Rep 129, para. 58.

²³⁸ *Ibid.*, para. 59.

jurisdictional issue became more delicate. Argentina contended that the request had no 'link with the Statute of the River Uruguay', the sole basis of jurisdiction, nor with Argentina's application instituting the proceedings, and pointed out that if Uruguay's complaints had been made by instituting separate proceedings, there would have been no jurisdiction, since those complaints were 'completely unrelated to the 1975 Statute'.²³⁹ Uruguay argued that the acts were breaches of international law, but conceded that they fell 'outside of the jurisdiction of this Court inasmuch as they are not covered by the Statute of the River Uruguay', and that it followed that 'the arbitration clause in Article 60 of the Statute simply cannot be invoked in that regard'.²⁴⁰ Its contention was however that the roadblocks constituted 'unlawful acts' which 'violate and threaten irreparable harm to the very rights defended by Uruguay' in the case, and argued that '[t]he blocking of international roads and bridges... is a matter directly, intimately and indissociably related to the subject-matter of the case before the Court'. For Uruguay, the Court 'most certainly has jurisdiction in respect of breaches by Argentina of its obligations as a Party to this dispute'.²⁴¹

On this occasion, the Court's treatment of the jurisdictional issue was strikingly far-reaching in its expression: after reciting the usual mantra to the effect that in dealing with a request for provisional measures the Court need not finally satisfy itself that it has jurisdiction on the merits of the case but will not indicate such measures unless there is, *prima facie*, a basis on which the jurisdiction of the Court might be established,²⁴² the Court continued with the finding quoted above, to the effect that 'the question of the nature and extent of the rights for which protection is being sought in the request for the indication of provisional measures has no bearing' on the question of *prima facie* jurisdiction.²⁴³ It then recalled that in its previous Order, on the Argentinian request for measures, it had concluded that 'it [had] *prima facie* jurisdiction under Article 60 of the 1975 Statute to deal with the merits [of the case]'. It noted that as a result of the Argentine contention,

the link between the alleged rights the protection of which is the subject of the provisional measures being sought, and the subject of the proceedings before the Court on the merits of the case has to be examined.²⁴⁴

On this point, in paragraph 28 of its Order, it made the general finding that

... Article 41 of the Court's Statute authorizes it 'to indicate... any provisional measures which ought to be taken to preserve the respective rights of either party'; and... the rights of the respondent are not dependent solely upon the way in which the applicant formulates its application[.]²⁴⁵

Read literally, this could mean that the 'respective rights of either party' referred to in Article 41 are not limited to the rights being claimed in the proceedings, but could therefore theoretically be at large, and could include rights arising under, for example, a totally different treaty. The point was, however, that Uruguay, being the respondent in the case, was not directly asserting its rights, but by denying the validity of Argentina's claims, inconsistent with its own rights, was making a claim of the existence of those

²³⁹ Order of 23 January 2007, [2007] ICJ Rep 8, para. 20.

²⁴⁰ *Ibid.*, 9, para. 22.

²⁴¹ *Ibid.*

²⁴² *Ibid.*, 10, para. 24.

²⁴³ *Ibid.*, para. 25.

²⁴⁴ *Ibid.*, para. 27.

²⁴⁵ *Pulp Mills*, Order of 23 January 2007, 10, para. 28.

rights, and calling for their protection. Thus the next step in the Court's reasoning was that

any right Uruguay may have to continue the construction and to begin the commissioning of the Botnia plant in conformity with the provisions of the 1975 Statute, pending a final decision by the Court, effectively constitutes a claimed right in the present case, which may in principle be protected by the indication of provisional measures; and whereas Uruguay's claimed right to have the merits of the present case resolved by the Court under Article 60 of the 1975 Statute also has a connection with the subject of the proceedings on the merits initiated by Argentina and may in principle be protected by the indication of provisional measures[.]²⁴⁶

Then came the key finding:

the rights which Uruguay invokes in, and seeks to protect by, its request... have a sufficient connection with the merits of the case for the purposes of the current proceedings; whereas Article 60 of the 1975 Statute may thus be applicable to the rights which Uruguay invokes in the present proceedings[.]²⁴⁷

The broad finding in paragraph 28, quoted above, is therefore apparently to be read in this way: the 'respective rights of either party' referred to in Article 41 of the Court's Statute are the rights which that party asserts *as a party*. In a situation in which the rights claimed by one party involve a contradiction or diminution of rights which otherwise be asserted by the other party, the assertion of such rights may be implicit, and not spelled out in the application or, in the case of a respondent, in its formal or other pleadings in the case.

The reasoning, so understood, is convincing. If the proceedings had been instituted, not by Argentina but by Uruguay, asking (for example) for a declaration that it was entitled to construct the mills without breach of the 1975 Statute, and Argentina had started blockading the roads and bridges to interfere with the construction, there would seem to be no reason why Uruguay should not seek to have this activity restrained by provisional measures. The same legal issues were raised by the proceedings instituted by Argentina, so that the measures fell, there also, within the ambit of the case.

More delicate is the question to what extent the Court should satisfy itself, before contemplating the indication of measures, not merely that the measures requested are directed to protecting rights claimed in the proceedings, but that there is some probability that those rights exist as claimed—what is sometimes referred to as the *fumus boni juris*. As pointed out by Judge Abraham in the *Pulp Mills* case, this is a distinction that has become of greater importance since the finding in the *LaGrand* case that provisional measures indicated by the Court impose a binding obligation on the State to which they are addressed. If provisional measures are no more than non-binding recommendations, as was widely thought to be the case before the *LaGrand* decision, 'there is hardly any need to ensure that [the Court] is not liable to trespass upon the sovereign rights of the State; the recipient of the recommendation is free to act upon it as it deems appropriate...'²⁴⁸ All this changed with the *LaGrand* decision; as Judge Abraham observes:

It is now clear that the Court does not suggest: it orders. Yet, and this is the crucial point, it cannot order a State to conduct itself in a certain way simply because another State claims

²⁴⁶ Ibid, [2007] ICJ Rep 10–11, para. 29.

²⁴⁷ Ibid, 11, para. 30

²⁴⁸ Order of 13 July 2006, Separate opinion of Judge Abraham, [2006] ICJ Rep 139–140, para. 8.

that such conduct is necessary to preserve its own rights, unless the Court has carried out some minimum review to determine whether the rights thus claimed actually exist and whether they are in danger of being violated—and irreparably so—in the absence of the provisional measures the Court has been asked to prescribe: thus, unless the Court has given some thought to the merits of the case.²⁴⁹

The general question remains: in giving 'some 'thought' to the merits of the case, how far should the Court go? Judge Abraham in the *Pulp Mills* case²⁵⁰ referred to what he regarded as the widespread view, which he rejected, that the Court should, and in fact does, refrain from considering the merits, and

confine itself to ascertaining whether the circumstances are such that the rights claimed, the existence or non-existence of which cannot be determined until the conclusion of the main action, are in danger of irreparable injury in the absence of measures for their interim protection pending the final decision. In other words, the Court should proceed on the basis that the claimed rights do in fact exist and it should consider solely whether, on the assumption that it will ultimately uphold them in its decision on the merits, they are liable to be violated in the interim in such way that the final judgment will be rendered ineffective, at least in part.²⁵¹

This view Judge Abraham considered to be wrong, inasmuch any separation between 'issues as to the existence and extent of the disputed rights' to be reserved to the merits phase, and 'questions as to the need for provisional measures' was, in his view, illusory, and even if it were possible it would be undesirable.

A formula that appears to be becoming part of the Court's linguistic armory is that of the 'plausible character' of the rights the protection of which is sought. In its Order of 28 May 2009 in the case concerning the *Obligation to Prosecute or Extradite*, the Court stated as, apparently, a guiding principle that 'the power of the Court to indicate provisional measures should be exercised only if the Court is satisfied that the rights asserted by a party are at least plausible';²⁵² its decision on the specific rights asserted was that, 'being grounded in a possible interpretation of the Convention against Torture', they 'appear[ed] to be plausible'.²⁵³ In its Order of 8 March 2011 in the case of *Certain Activities in the Border Area* it used this phrase in two successive headings, and made a finding that 'the title to sovereignty claimed by Costa Rica over the entirety of Isla Portillos is plausible', and that since 'the continuation or resumption of the disputed activities by Nicaragua on Isla Portillos would be likely to affect the rights of sovereignty which might be adjudged on the merits to belong to Costa Rica', measures should be ordered to protect those rights.²⁵⁴ The term is perhaps not entirely a happy one, since as Judge Koroma pointed out in this case, 'the word "plausibility" is ambiguous in English and can refer to an assertion that has the outward appearance of truth, but is in fact specious or false'.²⁵⁵

²⁴⁹ Ibid, 140

²⁵⁰ In which the point was also discussed by Judge Bennouna; ibid, 145–146, paras 11–15.

²⁵¹ Separate opinion of Judge Abraham, ibid, 138, para. 4.

²⁵² Order of 28 May 2009, [2009] ICJ Rep 151, para. 57.

²⁵³ Ibid, 152, para. 60.

²⁵⁴ Order of 8 March 2011, paras, 58, 60.

²⁵⁵ Ibid., Separate opinion of Judge Koroma, para. 2; see also the comments of Judge *ad hoc* Dugard, separate opinion, para. 2. Is it over-pedantic to point out also that since the word means, essentially, believable, it is the claim that the title exists that may be plausible rather than the title?

In the jurisprudence of the Court, the text that sparked off the debate appears to be paragraph 22 of the Order of 29 July in the *Passage through the Great Belt* case.²⁵⁶ Provisional measures were in fact refused in that case, essentially on grounds of lack of urgency;²⁵⁷ however the Court did consider what were the rights of Finland which that State claimed were likely to be infringed, and summed up, in paragraph 22:

Whereas it is the purpose of provisional measures to preserve 'rights which are the subject of dispute in judicial proceedings' (*United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1979, p. 19, para. 36; see also *Frontier Dispute*, I.C.J. Reports 1986, p. 8, para. 13); whereas the Court notes that the existence of a right of Finland of passage through the Great Belt is not challenged, the dispute between the Parties being over the nature and extent of that right, including its applicability to certain drill ships and oil rigs; whereas such a disputed right may be protected by the indication of provisional measures under Article 41 of the Statute if the Court 'considers that circumstances so require' [.]²⁵⁸

Judge Shahabuddeen thought that this did not go far enough: for him, 'Finland was obliged to show a *prima facie* case in the sense of demonstrating a possibility of the existence of the specific right of passage claimed', i.e. for drill ships and oil rigs of a clearance height of more than 65 metres.²⁵⁹ The problem as he saw it was this:

is it open to the Court by provisional measures to restrain a State from doing what it claims it has a legal right to do without having heard it in defence of that right, or without having required the requesting State to show that there is at least a possibility of the existence of the right for the preservation of which the measures are sought? The Court has never pronounced on the question. Scholarly opinion is divided on it.²⁶⁰

It is not however clear that this question was necessarily raised by the decision in the case (in favour of which Judge Shahabuddeen voted); the Court did not expressly find that it could indicate measures *in the case before it* despite the fact that the 'nature and the extent of the right' was disputed. It considered that, in general, 'a disputed right may be protected... if the Court "considers that the circumstances of the case so require"', but did not go on, as would have been logically required, to consider whether the circumstances of the case did so require: it was dispensed from doing so by the finding that there was, in any event, no urgency requiring the indication of measures.²⁶¹

To return to the opinion of Judge Abraham in the *Pulp Mills* case, he points out that, as is evidently correct, there are two sides to any legal dispute.

When acting on a request for the indication of provisional measures, the Court is necessarily faced with conflicting rights (or alleged rights), those claimed by the two parties,

²⁵⁶ Judge Abraham indicated that he 'could nearly confine [him]self' to referring the reader to the opinion of Judge Shahabuddeen in that case: Order of 13 July 2006, Separate opinion of Judge Abraham, [2006] ICJ Rep 138 para. 3, citing *Great Belt*, Order of 29 July 1991, Separate opinion of Judge Shahabuddeen, [1991] ICJ Rep 28-36. ²⁵⁷ *Great Belt*, Order of 29 July 1991, [1991] ICJ Rep 18, para. 27

²⁵⁸ *Ibid.*, 16. ²⁵⁹ *Ibid.*, 28.

²⁶⁰ *Ibid.*, a number of writers, including, in this *Year Book*, MH Mendelson, "Interim Measures of Protection in Cases of Contested Jurisdiction", (1972-73) 46 *BYIL* 259, 315-316, 321.

²⁶¹ As Judge Abraham observed in the later case, 'where urgency has not been shown, it does not matter [at the provisional measures stage] whether the respondent is violating the applicant's rights...'. *Pulp Mills*, Order of 13 July 2006, Separate opinion of Judge Abraham, [2006] ICJ Rep 141, para. 13. Judge Shahabuddeen agreed with the Court's finding of lack of urgency, but also found that Finland *had* shown the *prima facie* existence of the right it claimed: *Great Belt*, Order of 29 July 1991, Separate Opinion of Judge Shahabuddeen, [1991] ICJ Rep 36.

and it cannot avoid weighing those rights against each other. On one side stands (stand) the right (rights) asserted by the requesting party, which it claims to be under threat and for which it seeks provisional protection, and on the other the right(s) of the opposing party, consisting at a minimum in every case of the fundamental right of each and every sovereign entity to act as it chooses provided that its actions are not in breach of international law. Yet the measure sought by the first party from the Court often—as in the present case—consists of enjoining the other party to take an action which it does not wish to take or to refrain—temporarily—from taking an action which it wishes, and indeed intended, to take. In issuing such injunctions, the Court necessarily encroaches upon the respondent's sovereign rights, circumscribing their exercise. . . . I find it unthinkable that the Court should require particular action by a State unless there is reason to believe that the prescribed conduct corresponds to a legal obligation (and one predating the Court's decision) of that State, or that it should order a State to refrain from a particular action, to hold it in abeyance or to cease and desist from it, unless there is reason to believe that it is, or would be, unlawful.²⁶²

This of course makes very good sense, and corresponds to the terms of Article 41 of the Statute, which refers to preservation of 'the respective rights of either party'; to the extent that it may have been argued in the past that the applicant for measures had only to allege the existence of a right, and offer nothing in support of the allegation, such a contention must be rejected. As Judge Shahabuddeen in fact showed in the earlier case by an analysis of both the decisions and the arguments presented to the Court in provisional measures cases, such an extreme view cannot be said to have been espoused by the Court, nor does Judge Abraham suggest otherwise.

Judge Abraham suggests that, once again, the decision in the *LaGrand* case that provisional measures ordered by the Court create a binding obligation on the State to which they are addressed may have altered the parameters of the problem:

the doctrine as to a clear separation of the issues on the merits from those concerning provisional protection, which I have always found to be misguided, might conceivably have been seen as in keeping with the widespread belief, before the *LaGrand* Judgment, that the Court's orders were not binding.²⁶³

Whether or not such a link was significant in the past, recognition of the binding force of measures means that since the *LaGrand* decision it has been the duty of the Court to weigh up with increased attention all the factors relevant to the decision to indicate or not to indicate measures, including the 'plausibility' of the rights claimed to be protected. It is perhaps not possible to define in a formula the extent to which the Court should be satisfied on this head: as Judge Abraham indicates, to refrain from any investigation on the point would normally be unacceptable; but it would be unrealistic to demand full investigation, and this would in most cases frustrate the purpose of an interim proceeding designed to afford temporary relief *pendente lite*.

This consideration raises the question: what role do considerations of urgency play? If there is sufficient urgency demonstrated to avoid irreparable prejudice to rights merely asserted but not yet proved, even *prima facie*, to exist does this justify the Court in being less exigent in its requirements as to establishment of the existence of the rights? The death penalty cases (*Breard*, *LaGrand*, *Avena*) suggest that, at least in extreme circumstances this must be so: in the first two cases at least the Court acted with very little

²⁶² Ibid, 139, para. 7.

²⁶³ Ibid, 140, para. 8.

notion of exactly what rights of the applicant were threatened with infringement, so evident was it that irreversible prejudice was about to be caused to an individual.²⁶⁴ In those cases there was no time at all available to enquire more fully into the existence of the rights claimed; had the executions been scheduled for, say ten days later, allowing time for argument by the parties, would the Court have been justified in indicating measures on the basis of such degree of satisfaction as it might have reached, *however slight*, of the existence of a threatened right in the hands of the applicant, on the basis that by the time it could become sufficiently satisfied (one way or the other) on the point, a human life would have been lost?

(ii) Rights to be protected in interpretation proceedings

An unusual situation arose, and one which was perceived later to have jurisdictional implications, when Mexico applied, under Article 60 of the Statute of the Court, for the interpretation of the judgment given in the *Avena* case, and then asked for the indication of provisional measures in the context of that request for interpretation. At first sight, such a request does not seem an appropriate context for provisional measures.²⁶⁵ Article 60 provides that a judgment 'is final and without appeal', and continues: 'In the event of dispute as to the meaning and scope of the judgment, the Court shall construe it upon the request of any party'. The relief sought in the proceedings for interpretation does not in principle consist in the requirement that the respondent State take any particular action, nor even (or not necessarily) a judicial statement that that State is under any particular obligation: the Court is simply asked to say what was meant by a particular provision in its earlier decision. That provision in itself may have imposed, or declared the existence of, a legal obligation; but does this make it appropriate for the position of the applicant to be safeguarded by provisional measures?²⁶⁶ The purpose of such measures is declared by Article 41 of the Statute to be 'to preserve the respective rights of either party'. Essentially the question to be asked (though this did not become clear until the matter was raised by a dissenting judge in a later case) was whether the Court has jurisdiction to indicate provisional measures at all in the context of a request for interpretation. Even if it has, there is the further question whether there are limits on the kind of measures that may be indicated, deriving from the nature of interpretation proceedings.

In the *Avena (Interpretation)* case, the Court did deal with its jurisdiction to entertain a request for interpretation, and held that such jurisdiction is independent, and 'not preconditioned by the existence of any other basis of jurisdiction as between the parties to the original case', so that, 'even if the basis of jurisdiction in the original case lapses, the Court, nevertheless, by virtue of Article 60 of the Statute, may entertain a

²⁶⁴ This was a point that worried Judge Oda, who voted 'with great hesitation' for the measures Order in *LaGrand* but, with his usual relentless judicial integrity, attached an opinion to it pointing out that it is the right of States that may enjoy protection by provisional measures: *LaGrand*, Order of 3 March 1999, *Declaration of Judge Oda*, [1999-1] ICJ Rep.19.

²⁶⁵ In this sense, S Torres Bernárdez, 'À propos de l'interprétation et de la révision des arrêts de la Cour internationale de justice', P L Zanardi *et al.*, *Le droit international à l'heure de sa codification, Études en l'honneur de Roberto Ago*, vol. III, (Giuffrè, Milan 1987) 443, 487.

²⁶⁶ Another way of looking at the matter is to ask whether measures can add anything to the legal effect of the original judgment: that judgment is what it is, and since no interpretation judgment can add to it, neither can provisional measures in the context of a request for interpretation—which would mean that such measures would have no *raison d'être*. See the joint dissenting opinion of Judges Owada, Tomka and Keith in *Avena (Interpretation), Provisional Measures*, Order of 16 July 2008, [2008] ICJ Rep 341, para. 2.

request for interpretation.²⁶⁷ This finding was already implicit in the handling of previous interpretation requests, and in fact represents the only possible interpretation of the jurisdiction conferred by Article 60 of the Statute. It is of course well established, similarly, that the jurisdiction to indicate provisional measures is also independent of the jurisdiction over the merits of the case, at least to the extent that it is not necessary to determine conclusively that merits jurisdiction exists in order to indicate measures. In *Avena (Interpretation)* no attention was given (by the parties or the Court) to the question whether, nevertheless, jurisdiction to indicate measures may be dependent on the existence of merits jurisdiction, in the sense that if the principal jurisdiction invoked is itself limited in nature (specifically, to a request for interpretation or revision), then jurisdiction to indicate measures is absent, or at least limited in scope.

The Court did deal with the contention of the United States that Article 60 of the Statute was inapplicable, inasmuch as there was no 'dispute as to the meaning and scope of the judgment' given in the original *Avena* case; but the majority of the Court did not accept this.²⁶⁸ Powerful dissents on the point were recorded by Judge Buergenthal, Judge Skotnikov, and jointly by Judges Owada, Tomka and Keith, but that aspect of the decision is not here our concern. The Court then came close to the basic jurisdictional point when it noted its dictum in the *Cameroon/Nigeria* case that a request for provisional measures 'must be concerned to preserve... the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent'.²⁶⁹ The United States had argued that the measures requested by Mexico did not satisfy the *Cameroon/Nigeria* case test, 'because they go beyond the subject of the proceedings before the Court on the Request for interpretation'.²⁷⁰ Citing previous case-law, the Court noted that in proceedings on interpretation, it was 'called upon to clarify the meaning and scope of what the Court decided with binding force in a judgment'.²⁷¹ It continued:

whereas Mexico seeks clarification of the meaning and the scope of paragraph 153 (9) of the operative part of the 2004 Judgment in the *Avena* case, whereby the Court found that the United States is under an obligation to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals, taking into account both the violation of the rights set forth in Article 36 of the Vienna Convention and paragraphs 138 to 141 of the Judgment; whereas it is the interpretation of the meaning and scope of that obligation, and hence of the rights which Mexico and its nationals have on the basis of paragraph 153 (9) that constitutes the subject of the present proceedings before the Court on the Request for interpretation; whereas Mexico filed a request for the indication of provisional measures in order to protect these rights pending the Court's final decision;... Whereas, therefore, the rights which Mexico seeks to protect by its request for the indication of provisional measures... have a sufficient connection with the Request for interpretation[.]²⁷²

²⁶⁷ Ibid, 323, para. 44.

²⁶⁸ Ibid, 326, para. 57.

²⁶⁹ *Land and Maritime Boundary between Cameroon and Nigeria*, Order of 12 March 1966, [1966] ICJ Rep 22, para. 35.

²⁷⁰ *Avena (Interpretation)*, Provisional Measures, Order of 16 July 2008, [2008] ICJ Rep 327-328, para. 62.

²⁷¹ Ibid, 328, para. 63, citing: *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia v. Peru)*, [1950] ICJ Rep 402; *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya)*, [1985] ICJ Rep 223, para. 56.

²⁷² Ibid.

What seems to be missing in this analysis is any indication that the indication of measures would preserve 'the rights which may *subsequently* be adjudged by the Court to belong to the Applicant.' The function of provisional measures is to preserve rights which are in dispute until the Court has been able to rule on their existence or extent; but in this case Mexico's rights had already been clearly determined and declared. The last sentence of the passage quoted applies a different test from that stated in the *Cameroon/Nigeria* case, invoked earlier in the decision. As Judge Skotnikov pointed out, the measures indicated by the Court 'add nothing to the obligations of the United States under the [*Avena*] Judgment and therefore serve no purpose', and '[t]he real issue is compliance with the Judgment rather than its interpretation.'²⁷³

In his dissenting opinion, in the context of the jurisdictional issue, Judge Buergenthal indicated the reason why the case had been brought at all: Mexico could no longer bring fresh independent proceedings to protect its nationals threatened with execution in the United States, because the United States had withdrawn from the jurisdictional instrument on which the original *Avena* case had been based.²⁷⁴ It had therefore hit upon this ingenious (and entirely commendable²⁷⁵) expedient to try to prevent the planned execution of its citizens. The majority of the Court was of course influenced by concern to protect human life to the extent that they were willing to stretch, it is suggested, the requirements of the Statute.²⁷⁶

In the *Temple of Preah Vihear (Interpretation)* case, when a request was made for the indication of provisional measures, the same problem arose: whether in proceedings seeking interpretation of a previous judgment, there were any rights capable of protection by this means. There was also the more fundamental question whether provisional measures, and in particular measures going beyond the scope of the interpretation proceedings, can be indicated at all in context of such proceedings. The Court in its Order indicating provisional measures made no specific mention of this point, even though it had been raised in a powerful dissenting opinion by Judge Donoghue, who voted against all elements of the Order.²⁷⁷ It was therefore impliedly adopting the position that the jurisdiction to indicate provisional measures does exist and is exercisable in the context of a request for interpretation; that such measures may include measures (directed to non-aggravation of the dispute) going beyond the scope of the interpretation proceedings; and that it was appropriate to indicate measures of this kind in the case before it. Judge Donoghue expressed doubt at the premise of the Order 'that the Statute of the Court contemplates the imposition of provisional measures in an Article 60 interpretation proceeding', and even

²⁷³ Ibid, 151, paras. 10–11.

²⁷⁴ The Optional Protocol to the Vienna Convention on Consular Relations: see Judge Buergenthal, *ibid.*, 334, para. 7.

²⁷⁵ See the comments of Judges Owada, Tomka and Keith, *ibid.*, 348, para. 24.

²⁷⁶ As in the original *Avena* case, and before that in the *LaGrand* case (see the previous article, (2001) 72 *BYIL* 126), the Court was in the unenviable position of being exposed to a charge of inhumanity if it failed to take action, whether or not it was legally in a position to do so.

²⁷⁷ *Temple (Interpretation)*, Order of 18 July 2011, Dissenting Opinion of Judge Donoghue. Judge Donoghue did not make this aspect the central plank in her dissent; she did begin by stating that she had 'doubts about a key premise of today's Order—that the Statute of the Court contemplates the imposition of provisional measures in an Article 60 interpretation proceeding'.

accepting that premise, believed 'that the measures imposed today exceed the Court's jurisdiction'.²⁷⁸

On the more general point, it does indeed seem unlikely that when the Statute was drafted it was considered necessary that provisional measures should be indicated in such a phase of proceedings as a request for interpretation.²⁷⁹ Furthermore, as Judge Donoghue points out, the 'relatively summary and expeditious character intended for interpretation and revision proceedings'²⁸⁰ makes it less appropriate to anticipate a need for provisional measures in such proceedings than in perhaps long-drawn out merits proceedings. However it is not inconceivable that such measures might serve a useful purpose in that context: for example, if a party, on the basis of a disputed interpretation of the earlier judgment, was proposing to take steps that would irrevocably compromise the rights which the other party claimed on the basis of an alternative interpretation.²⁸¹ Even there, however, there would remain the question, discussed above, whether what would be being preserved would be 'the rights which may subsequently be adjudged by the Court to belong to the Applicant', in the terms used in the *Cameroon/Nigeria* decision, rather than the rights which had already been so adjudged. The Statute, however, is less specific, referring simply to the protection of 'the respective rights of either party'. These must be primarily the rights claimed in the proceedings in the course of which the measures are requested, i.e., in an interpretation proceeding, the rights secured by the interpretation judgment rather than by the judgment interpreted; but a reading of the Statute on the lines implied in the *Avena (Interpretation)* case is defensible where any related rights are threatened with irreversible infringement. As Judge Donoghue observed of the *Avena (Interpretation)* decision, 'the link between the pending interpretation... and the measures requested was... clear to the Court: an execution prior to its interpretation decision would render it impossible to order the relief sought in the interpretation proceeding'.²⁸²

Judge Donoghue was on stronger ground in contending that the Court should not have acted as it did in the *Temple* case; and in respect of one specific measure indicated, she was not alone in so thinking. On the decision to declare a demilitarized zone, from which both parties were to withdraw any military presence, the division of votes was

²⁷⁸ *Ibid.*, para 3.

²⁷⁹ There is also the complication that until recently a view—perhaps even the prevailing view—was that provisional measures were not, at the time of the Statute, regarded as binding (see the discussion in the previous article at (2001) 72 *BYIL* 111–126); though whether non-binding measures might be less or more appropriate in an interpretation context is uncertain.

²⁸⁰ S Rosenne, *Interpretation, Revision and Other Recourse from International Judgments* (Martinus Nijhoff, Leiden 2007) 183, cited in *Temple (Interpretation)*, Order of 18 July 2011, Dissenting Opinion of Judge Donoghue, para. 9.

²⁸¹ The *Avena* case itself might, on one view, be an example of this situation; but the relationship between the treaty right invoked and the execution of the Mexican national was less direct than it might have been if, for example, he had been extradited on the basis of a treaty excluding the application of the death penalty to a person so extradited; see, for example, the 1922 Treaty and Exchange of Notes between the US and Costa Rica in JS Reeves, 'Extradition Treaties and the Death Penalty' (1924) 18 *AJIL* 298. See also the controversy on whether the ICJ should have power to impose the death penalty, discussed in: WA Schabas, 'Indirect Abolition: Capital Punishment in Extradition Law and Practice', (2003) 25 *Loyola International and Comparative Law Review* 581.

²⁸² *Temple (Interpretation)*, Order of 18 July 2011, Dissenting Opinion of Judge Donoghue, para. 15, citing *Avena (Interpretation)*, *Provisional Measures*, Order of 16 July 2008 [2008] ICJ Rep 330, para. 72.

eleven to five. Even if it may be the rights secured by the original decision, as distinct from those that may spring from the interpretation judgment, that may be the subject of protection, the way in which these may be protected, and the scope of the protection to be offered, must be in accordance with the Statute. Judge Donoghue drew attention to a pertinent observation of the Court in the *Genocide Convention* case between Bosnia and Serbia:

the Court, having established the existence of a basis on which its jurisdiction might be founded, ought not to indicate measures for the protection of any disputed rights other than those which might ultimately form the basis of a judgment in the exercise of that jurisdiction; ... accordingly the Court will confine its examination of the measures requested, and of the grounds asserted for the request for such measures, to those which fall within the scope of the Genocide Convention[.]²⁸³

This appears to be a statement of the limits of the Court's jurisdiction to indicate measures, hardly compatible with the action taken in the *Temple* case, and was so read by Judge Donoghue. It is however not to be overlooked that the expression used is 'ought not' ('ne devrait pas') rather than 'may not', which may imply that the prohibition stated is not regarded as absolute.

At all events, the Court in 2011 does not seem to have recognized a limitation of this kind on its powers. The question, on which doubts were expressed above, whether a judgment on interpretation will or may constitute the basis of 'new' rights, so that these possible and prospective rights may be protected by provisional measures, was neatly got round by this formula: after reciting, as in previous cases, that

the power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights of the parties pending the decision of the Court, ... it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong to either party;

the Court continued by stating that 'this supposes that the rights which the party requesting provisional measures claims to derive from the judgment in question, *in the light of its interpretation of that judgment*, are at least plausible[.]'²⁸⁴ There is here a logical hiatus: the basis of the rights remains the *earlier* judgment, since an interpretation by definition does not add to the *depositum juris* there established, so that the rights are not rights 'subsequently adjudged' to belong to the party seeking relief.²⁸⁵

In adopting this approach, the Court does appear to have been influenced by its own practice in indicating broad-brush measures in the more usual cases where they were requested in the context of the merits of the dispute. Judge Donoghue drew attention to this, noting that 'in today's Order, the Court relies upon past orders imposing provisional measures in the context of border disputes ...'²⁸⁶ As she observes,

²⁸³ *Application of the Genocide Convention (Bosnia v. Serbia)*, Order of 8 April 1993, [1993] ICJ Rep 19, para. 35, quoted in *Temple (Interpretation)*, Order of 18 July 2011, Dissenting Opinion of Judge Donoghue, para. 21.

²⁸⁴ *Temple (Interpretation)*, Order of 18 July 2011, para. 34. (emphasis added).

²⁸⁵ In order to establish the necessary link between the measures requested and the rights claimed, the Court found that 'Cambodia, pending the Court's final decision, is precisely seeking the protection of the rights to sovereignty over this area which it claims to derive from the operative clause of the 1962 Judgment', and that 'the provisional measures sought thus aim to protect the rights that Cambodia invokes in its request for interpretation; and whereas the necessary link between the alleged rights and the measures requested is therefore established[.]': *Ibid.*, paras. 44, 45, emphasis added.

²⁸⁶ *Ibid.*, para. 17.

By contrast, in the case before the Court today, the present-day conflict between the Parties may be the impetus for the institution of an Article 60 proceeding, but the Court has no jurisdiction over it. It has no jurisdiction to delimit a boundary, to decide on sovereignty, to decide on State responsibility, to order the movement of military personnel or to impose any other remedy. It has jurisdiction only to answer legal questions that will resolve a dispute—a contestation—over three aspects of the meaning or scope of a prior judgment within ‘the limits of what was decided’ in 1962...²⁸⁷

A further possible justification for the extensive measures indicated might, as Judge Donoghue went on to indicate, be sought in the concept of non-aggravation, to be discussed in Section 2 below. It has become customary for the Court to include in an order indicating measures a requirement that each of the parties ‘should not take any action and should ensure that no action is taken which may aggravate or extend the existing dispute...’²⁸⁸ However, she reiterated that ‘the Court’s jurisdiction in this proceeding is limited to the resolution of a dispute regarding interpretation of the 1962 Judgment’ and accordingly could not accept that the idea of non-aggravation could support measures that went beyond that dispute.

Put another way, the conduct of the Parties in the border region would not “aggravate” the narrow and limited dispute about the meaning or scope of the words in a judgment. Thus, I do not find a jurisdictional basis for the inclusion of the standard non-aggravation clause in today’s Order, nor do I see how the concept of non-aggravation could explain the decision of the Court to extend today’s measures beyond the areas that are the subject of the dispute over interpretation in the Article 60 proceeding.²⁸⁹

What then are we to conclude as to the scope of the Court’s powers to indicate provisional measures in the context of interpretation proceedings? Judge Donoghue’s arguments are, in the present writer’s view, wholly convincing, and the majority did not attempt to refute them in the Order;²⁹⁰ yet the voting was overwhelmingly in favour of the exercise of the extended powers that Judge Donoghue considered were never given by the Statute. As noted in the general introduction above,²⁹¹ this situation points up the remarkable situation whereby the Court’s ability to develop the law relating to its own procedures—procedures here in a wide sense, covering the existence and conditions of rights under the Statute—amounts to virtually unfettered legislation.

(iii) Protection of human rights and humanitarian considerations: extra-judicial comment

A feature of the requests made to the Court for the indication of provisional measures in recent years has been the invocation of threatened injury to persons rather than to the interests of the State, and with this in view the invocation of treaty-law provisions

²⁸⁷ *Ibid.*, para. 19.

²⁸⁸ *Application of the Genocide Convention (Bosnia v. Serbia)*, Order of 8 April 1993, [1993] ICJ Rep 24, para. 52.

²⁸⁹ *Temple (Interpretation)*, Order of 18 July 2011, Dissenting Opinion of Judge Donoghue, para. 26.

²⁹⁰ It is possible that some justification may be offered at a later stage, particularly if in its judgment on the merits of the request for interpretation the Court has occasion to comment on compliance with the measures indicated. See the belated explanation of the refusal of a judge *ad hoc* in *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, [1971] ICJ Rep 16, and of the jurisdictional issue in the *Military and Paramilitary Activities in Nicaragua, Jurisdiction and Admissibility, Judgment*, [1984] ICJ Rep 392.

²⁹¹ Above, text and note 5.

concerning human rights, in a broad sense, and similar considerations. This might perhaps have been foreseen once the Court had responded favourably to the request for measures in the *LaGrand* case, directed to the preservation of human life, and had in addition availed itself of that case to declare the binding nature of provisional measures. Such requests have not always been successful, in the sense of securing the indication of appropriate measures, the stumbling-block being usually lack of jurisdiction. However, even where the Court has been unable to find jurisdiction, it has on occasion indicated some sympathy with the requests, by coupling a refusal of measures with general statements as to the duties of States in these domains which can be read, and are clearly intended to be read, as hints of what the Court would have wished to say if it had possessed jurisdiction.²⁹²

In the case of *Armed Activities on the Territory of the Congo (New Application: 2002)*, the DRC invoked a whole series of international conventions as bases of jurisdiction, including one to which the respondent Rwanda was not even a party,²⁹³ and two to each of which Rwanda had only acceded with a reservation excluding jurisdiction.²⁹⁴ The Court concluded that none of the instruments cited afforded even the *prima facie* jurisdiction required for the indication of measures.²⁹⁵ The Court however included in its Order refusing the request several paragraphs which, in the view of Judge Buergenthal, dealt 'with matters the Court has no jurisdiction to address once it has ruled that it lacks *prima facie* jurisdiction to issue the requested provisional measures'.²⁹⁶ In those paragraphs, the Court indicated that it was 'deeply concerned' by the human tragedy and loss of life in the region, 'mindful of the purposes and principles' of the UN Charter 'and of its own responsibilities in the maintenance of peace and security'.²⁹⁷ It went further: it indicated that it could not 'over-emphasize the obligation' of the parties 'to respect the provisions of the Geneva Conventions of 1949' and of the first Additional Protocol 'relating to the protection of victims of international armed conflicts'.²⁹⁸ At a later point in its Order, after having concluded that it was without jurisdiction, the Court included a paragraph recalling that 'whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law', reciting the various Security Council resolutions concerning the events in the Congo, and stressing 'the necessity for the Parties to these proceedings to use their influence to prevent the repeated grave violations of human rights and interna-

²⁹² Another feature of the decisions in these cases, which may be inspired to some extent by this motive, is that they contain very lengthy statements of the arguments presented to the Court by the parties, even though these turn out to be entirely irrelevant to a decision based, for example, on jurisdictional grounds (contrast the decisions in the two *Lockerbie* cases, for example). This however is a phenomenon observable in almost all recent decisions, and may be a side-effect of the Court's heavy workload; such statements can be prepared in advance of the deliberation, and incorporated in the judgment whatever the decision, whereas the preparation of a tailor-made summary of the parties' arguments for the purpose of the decision once made is a more delicate and time-consuming process.

²⁹³ The Convention against Torture: see *Armed Activities (New Application), DRC v. Rwanda*, Order of 10 July 2002, [2002] ICJ Rep 242, paras. 60–61.

²⁹⁴ The Convention on Racial Discrimination and the Convention on the Prevention and Punishment of the Crime of Genocide: see *ibid.*, 243–246, paras. 64–75.

²⁹⁵ In one case (the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation), there appeared to be jurisdiction, but the Congo did not ask for any measures related to the subject-matter of the Convention: *ibid.*, 248–259, paras. 86–88.

²⁹⁶ Declaration of Judge Buergenthal, *ibid.*, 257, para. 2.

²⁹⁷ *Ibid.*, 240–241, paras. 54–55 of the Order. ²⁹⁸ *Ibid.*, 241, para. 56.

tional humanitarian law which have been observed even recently.²⁹⁹ Judge Buergenthal summed up as follows his criticisms of these passages:

The Court's function is to pronounce itself on matters within its jurisdiction and not to voice personal sentiments or to make comments, general or specific, which, despite their admittedly 'feel-good' qualities, have no legitimate place in this Order.³⁰⁰

It is significant that Judge Buergenthal was here a lone voice; the overwhelming majority of the Court saw the humanitarian concerns involved as trumping the arguably more academic issues of jurisdiction and judicial propriety. An observer is bound to feel that if the jurisdictional bases invoked could have been 'stretched' to cover the matters raised in the request for measures, the Court would readily have lent itself to such an exercise.

In the case of the *Pulp Mills on the River Uruguay*, no questions of human rights or humanitarian issues were raised; the Court did however 'stress the necessity' for the parties 'to implement in good faith the consultation and co-operation procedures provided for in the 1975 Statute' of the River Uruguay;³⁰¹ but in this case the binding nature of that Statute, as an international treaty, and the Court's jurisdiction under it, were recognized by both parties.³⁰²

The influence of humanitarian considerations again became palpable, unsurprisingly, in the case of *Application of the International Convention on the Elimination of all Forms of Racial Discrimination*. The complaint made by Georgia against the Russian Federation essentially concerned its interventions in support of ethnic separatists in the provinces of South Ossetia and Abkhazia, but the only jurisdictional instrument cited was limited, as its title indicates, to the elimination of racial discrimination; the Court would have jurisdiction, as it found, 'under Article 22 of CERD to deal with the case to the extent that the subject-matter of the dispute relates to the "interpretation or application" of the Convention.'³⁰³ Within this jurisdictional framework, what then were the rights claimed in the proceedings which required protection by the indication of measures? Georgia requested the indication of measures

to prevent irreparable prejudice to the right of ethnic Georgians to be free from discriminatory treatment, in particular violent or otherwise coercive acts, including but not limited to the threat or infliction of death or bodily harm, hostage-taking and detention based on ethnicity, the destruction and pillage of property, and other acts intended to expel them from their homes in South Ossetia, Abkhazia, and adjacent regions located within Georgian territory.³⁰⁴

The Russian Federation first contended that measures to this effect would 'require Russia to take active steps to ensure or prevent certain acts from happening in the areas concerned', and pointed out that the Convention did not impose upon the parties to it any duty to prevent racial discrimination by other actors.³⁰⁵ The Court considered

²⁹⁹ Ibid, 249–250, para. 93. This last seems to be a finding of fact, uttered by a Court which has just expressly found that it is wholly without jurisdiction!

³⁰⁰ Ibid, 258, para. 4.

³⁰¹ *Pulp Mills*, Order of 13 July 2006, [2006] ICJ Rep 134, para. 82. This observation was repeated in paragraph 53 of the subsequent *Order of 23 January 2007*, [2007] ICJ Rep 16–17.

³⁰² At least as far as concerned the rights sought to be protected by the request for measures: see *Pulp Mills*, Order of 13 July 2006, 129, paras 58–59.

³⁰³ Order of 15 October 2008, [2008] ICJ Rep 388, para. 117.

³⁰⁴ Ibid, 390, para. 122, citing the Amended Request of Georgia.

³⁰⁵ Ibid, 391, para. 125.

that it was 'not appropriate in the present phase for it to pronounce' on this point, and continued:

whereas States parties to CERD have the right to demand compliance by a State party with specific obligations incumbent upon it under Articles 2 and 5 of the Convention; whereas there is a correlation between respect for individual rights, the obligations of States parties under CERD and the right of States parties to seek compliance therewith; whereas in the view of the Court the rights which Georgia invokes in, and seeks to protect by, its Request for the indication of provisional measures have a sufficient connection with the merits of the case it brings for the purposes of the current proceedings[.]³⁰⁶

This appears to mean that, if acts contrary to the Convention were being committed in South Georgia by another party to the Convention, Russia would be entitled to call upon that party to desist, by 'demanding compliance' with the Convention. But a power to take some action does not necessarily entail a duty to take it; the Court seems not to have been willing to go so far as to say that in the case of racial discrimination, the power did entail such a duty, but falls back on the very vague terminology of a 'correlation' between the rights and obligations arising under the Convention. The question prompted by this approach is whether any similar or analogous approach would have been taken in a case in which the rights sought to be protected were purely State rights, for example of an economic nature, so that no humanitarian or human rights dimension would have been present.

The influence of humanitarian considerations is perhaps most clearly shown in the attitude of the majority of the Court to the question of the risk of irreparable harm; and infringement of the right to life, for example, incontrovertibly entails irreparable harm. This aspect will be considered further in subsection (d) below.

(d) *'Irreparable prejudice' and the concept of 'preservation' of rights*

As was noted in the previous article, since Article 41 is concerned only with preservation of rights, if it is literally true that, as the Court said in the *Great Belt* case, 'no action taken *pendente lite* by a State... "can have any effect whatever as regards the legal situation that the Court is called upon to define"... and such action cannot improve its legal position *vis-à-vis* its opponent, there would be few cases in which the indication of provisional measures would be justified. Also, generally speaking, virtually all claims before the Court have a preventive, as well as retributory or declarative element; thus, '[u]nless provisional measures are to be granted in every case, it must be possible to make a distinction between cases in which it is appropriate to grant measures to preserve in some way the *status quo*, and cases in which this is unnecessary'.³⁰⁷ The criterion that has been adopted is that of preventing 'irreparable prejudice' to some or other of the rights claimed in the proceedings, or perhaps rather to the continued exercise of those rights.

An interesting point of intertemporal law was raised by Judge Bennouna in a separate opinion in the *Pulp Mills* case; referring to the preservation of rights, he noted that 'we have to ask ourselves whether this is to preserve the status quo prevailing at the time of

³⁰⁶ *Ibid.*, 392, para. 126.

³⁰⁷ (2001) 72 BYIL 37, 92.

the seisin of the Court or to restore that which existed prior to the Respondent's allegedly unlawful act'.³⁰⁸ He continued:

If the latter is the case, the violation of protected rights of itself carries the risk of irreparable prejudice and the Court can indicate provisionally, as it did in the case concerning *United States Diplomatic and Consular Staff in Tehran*, measures to restore the situation existing before the allegedly unlawful act.³⁰⁹

The essence of the situation in that case was however that it constituted a continuing violation of the rights of the United States, so that measures to protect those rights after the handing-down of the Court's Order necessarily also entailed putting an end to the violation, and thus restoring the status quo existing prior to Iran's wrongful acts. Where a single completed act by the respondent State carries such implications for repetition in the future that a request for provisional measures is justified, would this justify the Court in ordering also, as a provisional measure, the revocation or annulment of that act? It is suggested that this could only be done when the Court came to take a decision on the merits of the case; that provisional measures look to the future and not to the past.

Recent cases in which measures were refused on grounds other than that no 'irreparable prejudice' had been shown are here not directly in point, but contain some useful indications. In the case of *Armed Activities on the Territory of the Congo* the Court found that it had no prima facie jurisdiction on the basis of which it could exercise its power to indicate measures; it therefore made no findings as to the existence of irreparable prejudice. In respect of one of the asserted bases of jurisdiction, however, it was the absence of any indication of a need for preservation of rights related to that basis that led to a finding of lack of jurisdiction. Normally, as the Court was to state in the later Order in the *Pulp Mills* case,

in establishing the Court's prima facie jurisdiction to deal with the merits of the case, the question of the nature and extent of the rights for which protection is being sought in the request for the indication of provisional measures has no bearing; ... that latter question will only be addressed once the Court's prima facie jurisdiction over the merits of the case has been established[.]³¹⁰

However, the DRC had relied on Article 14, paragraph 1, of the Montreal Convention,³¹¹ and asserted that Rwanda had breached the Convention by shooting down a DRC airliner.³¹² The Court observed that 'the [DRC] has not however asked the Court to indicate any provisional measure relating to the preservation of rights which it believes it holds under the Montreal Convention' and concluded that 'the Court is not required, at this stage in the proceedings, to rule, even on a prima facie basis, on its jurisdiction under that Convention nor on the conditions precedent to the Court's jurisdiction contained therein'. The Court might have added that the shooting down of an airliner, unless it could be shown to be part of an intended pattern of activity, would not signify the risk in the future of 'irreparable prejudice'.

³⁰⁸ *Pulp Mills*, Order of 13 July 2006, Separate Opinion of Judge Bennouna, [2006] ICJ Rep 142, para. 2. The antecedent of 'this' is not apparent; the original French text is clearer: 'Encore faut-il se demander s'il s'agit du maintien du *status quo*...'

³¹⁰ *Pulp Mills*, Order of 23 January 2007, [2007] ICJ Rep 10, para. 25.

³¹¹ Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 September 1971.

³¹² *Armed Activities (New Application)*, Order of 10 July 2002, [2002] ICJ Rep 248-249, para. 86.

The prejudice asserted in the case of *Certain Criminal Proceedings in France* was somewhat tenuous in nature.³¹³ The criminal proceedings in question alleged the commission of crimes against humanity and torture committed in the Republic of the Congo on the responsibility of a number of prominent Congolese figures including the President of the Republic. The French Government had made it clear that the President enjoyed 'immunities from jurisdiction, both civil and criminal', in France, but there had been some question of endeavouring to have him questioned by a French magistrate. The allegedly relevant rights claimed by the Congo were

first, the right to require a State, in this case France, to abstain from exercising universal jurisdiction in criminal matters in a manner contrary to international law, and second, the right to respect by France for the immunities conferred by international law on, in particular, the Congolese Head of State.³¹⁴

In what way would any threatened breach of these rights involve 'irreparable prejudice'? The Congo complained of the publicity accorded to the French proceedings, 'in flagrant breach of French law governing the secrecy of criminal investigations', which impugned the honour of the President and other dignitaries, 'and in consequence, the international standing of the Congo'.³¹⁵ During the hearings, the Congo elaborated this thesis:

the prejudice which would result if no provisional measures are indicated would be the continuation and exacerbation of the prejudice already caused to the honour and reputation of the highest authorities of the Congo, and to internal peace in the Congo, to the international standing of the Congo and to Franco-Congolese friendship.³¹⁶

There must be some doubt whether prejudice of this kind might not be too amorphous, intangible and vague to justify an Order—a binding Order—indicating provisional measures.³¹⁷ The Court therefore approached the problem by examining in turn the rights which the Congo was asserting, and considering whether they would in any way be prejudiced.

The first basis for the contention that there would be 'irreparable prejudice' was that this would be prejudice 'to the right of the Congo to respect by France for the immunities of President Sassou Nguesso as Head of State'.³¹⁸ The Court had little difficulty in finding that, both as regards the President himself and as regards the other Congolese dignitaries mentioned, 'there is at the present time no risk of irreparable prejudice...'³¹⁹ The claim had however also been advanced in the form, dealt with by the Court as a separate question, that

the unilateral assumption by a State of universal jurisdiction in criminal matters constitutes a violation of a principle of international law;... in this respect the question before the Court is whether the proceedings before the *Tribunal de grande instance* of Meaux involve a threat of irreparable prejudice to the rights invoked by the Congo justifying, as a matter of urgency, the indication of provisional measures;³²⁰

³¹³ In this sense, counsel for France (M. Dupuy): 'On ne peut qu'être frappé, par la nature extrêmement générale sinon vague et approximative du préjudice allégué par le demandeur...': CR 2003/21, 32, para. 7.

³¹⁴ *Certain Criminal Proceedings in France*, Order of 17 June 2003, [2003] ICJ Rep 108, para. 25.

³¹⁵ *Ibid.*, para. 26, quoting the Congolese request for measures.

³¹⁶ *Ibid.*, 108, para. 27.

³¹⁷ The Court might, it is suggested, have dismissed the request on that ground, without further examination of the nature and existence of the rights claimed; this would be an example of the judicial economy urged above, Section 1(i).

³¹⁸ *Certain Criminal Proceedings in France*, Order of 17 June 2003, [2003] ICJ Rep 109, para. 30.

³¹⁹ *Ibid.*, para. 35.

³²⁰ *Ibid.*, 111, para. 36.

The distinction between this and the first contention of the Congo is not very clear, since the assumption of universal jurisdiction in criminal matters would not appear to affect the rights of other States unless it had some impact upon citizens of another State, or upon that State itself, e.g. through infringement of immunities. It did however, on the facts, widen the scope of the matter, as one of the Congolese dignitaries named in the French proceedings, General Dabira, had a residence in France, and had in fact been 'heard as a *témoin assisté*' by the French magistrate. The Court in this respect looked specifically to the preventive effect that the measures asked for might have:

whereas however the practical effect of a provisional measure of the kind requested would be to enable General Dabira to enter France without fear of any legal consequences; whereas the Congo has not demonstrated the likelihood or even the possibility of any irreparable prejudice to the rights it claims resulting from the procedural measures taken in relation to General Dabira.³²¹

The Court thus, unsurprisingly, found that the request for measures failed for lack of demonstration of a risk of irreparable prejudice.

The sequence of events in the *Pulp Mills* case has already been briefly discussed above (section (d)(i)) in the context of the rights to be protected; it will be recalled that in that case the second request for provisional measures was submitted, unusually, by the respondent State, Uruguay. This scenario immediately raises a problem, inasmuch as what has to be shown is the risk of irreparable prejudice to one of the rights claimed in the proceedings; and in many cases the respondent is not itself submitting any 'claim', except insofar as contending that the applicant's claim should be dismissed can be classified as itself a claim; and it is difficult to see what events would cause 'irreparable prejudice' to this. The basis of the *Pulp Mills* case lay in a treaty between the two States referred to as 'the 1975 Statute',³²² and it was the compromissory clause (Article 60, paragraph 1) of this instrument that Argentina had invoked to found jurisdiction for its claim; but Uruguay was of course equally entitled to invoke that clause to bring proceedings of its own before the Court. The circumstances giving rise to the request were that organized groups of Argentinean citizens had been blockading 'a vital international bridge over the Uruguay River, shutting off commercial and transit travel from Argentina to Uruguay'.³²³ The connection with the case before the Court was that these actions were intended to bring pressure on Uruguay to suspend work on the Botnia plant. The right for which Uruguay sought protection from the Court was the right to carry on with the construction and operation of that plant, which Argentina was asking the Court to restrain, 'in conformity with the environmental standards established under' the 1975 Statute.³²⁴ It also claimed to be protecting its right to have the dispute resolved by the Court pursuant to the 1975 Statute, 'rather than by Argentina's unilateral acts of an extrajudicial and coercive nature',³²⁵ an ingenious but not entirely convincing construction.

The Court found that

any right Uruguay may have to continue the construction and to begin the commissioning of the Botnia plant in conformity with the provisions of the 1975 Statute, pending a final decision by the Court, effectively constitutes a claimed right in the present case, which may

³²¹ Ibid, para. 38.

³²² Statute of the River Uruguay, 26 February 1975.

³²³ *Pulp Mills*, Order of 23 January 2007, [2007] ICJ Rep 5, para. 8.

³²⁴ Ibid, 6, para. 11.

³²⁵ Ibid, para. 12.

in principle be protected by the indication of provisional measures; and whereas Uruguay's claimed right to have the merits of the present case resolved by the Court under Article 60 of the 1975 Statute also has a connection with the subject of the proceedings on the merits initiated by Argentina and may in principle be protected by the indication of provisional measures.³²⁶

There are some difficulties in this approach. The Court appears to treat the construction of the plant as the exercise of a right conferred by the 1975 Statute; but in fact that Statute, by imposing commitments for avoidance of pollution of the river Uruguay, merely limited a right which is inherent in Uruguay's sovereignty: the right to construct what it wishes on its own territory. If the right of construction is a 'claimed right', by the same token it is a right without jurisdictional foundation in the 1975 Statute. It is also difficult to see how the right to have the merits of a given dispute settled by the Court is prejudiced merely by interference with the exercise of the rights claimed in the dispute: no amount of blockading of the bridges would affect the power of the Court to decide the dispute, or the right, and the exercise of the right, of the parties to obtain a decision. The thinking is of course that the blockade constituted pressure on Uruguay to suspend or cancel the construction of the plant, thereby giving to Argentina what it was seeking from the Court,³²⁷ but does that amount to an interference with the right to make use of the Court? The problem is perhaps better addressed in the manner suggested by Judge Buergenthal in his declaration, discussed further in section (2) below, on the basis of measures to prevent escalation of a dispute.

The *Avena (Interpretation)* case and the *Temple (Interpretation)* case both raise the problem of ascertainment of the rights to be protected, the rights to which 'irreparable prejudice' might be caused, in the context of proceedings seeking an interpretation of a judgment, and will be dealt with together below.

The *Racial Discrimination Convention* case between Georgia and Russia, involving application of the Convention briefly referred to as 'CERD'³²⁸, raised, as already mentioned, the question of the relationship between rights of individual nationals of a State, particularly those of a human rights nature, and the rights of the State, and the nature or existence of threatened 'irreparable prejudice' to the rights of each category. Georgia claimed that 'the rights that Georgia and its nationals may have on the basis of Articles 2, 3, 4, 5, and 6 of CERD constitute the subject of the proceedings before the Court on the merits of the case.'³²⁹ It contended that Russian armed forces in Georgia were committing and were likely to continue committing actions which would violate these obligations. The essence of Russia's response was that, if such breaches were being committed, the wrongdoers were not regular Russian forces for whose conduct Russia was internationally responsible; this aspect has been dealt with above.³³⁰

Was there a risk of irreparable prejudice? The Order found it sufficient that 'the rights in question in these proceedings... are of such a nature that prejudice to them *could*

³²⁶ Ibid, 10-11, para. 29.

³²⁷ Presumably if Uruguay gave in, Argentina would withdraw the proceedings so soon as it had guarantees that the project was definitively abandoned, so that the Court would not be able to decide the legal issue.

³²⁸ The International Convention on the Elimination of All Forms of Racial Discrimination, adopted 21 December 1965, entered into force 4 January 1969.

³²⁹ Order of 15 October 2008, [2008] ICJ Rep 389, para. 119. The Articles referred to set out at some length the obligations of States parties under the Convention; for present purposes it is not necessary to specify these in detail.

³³⁰ Text and note 307 above.

be irreparable.³³¹ As the joint dissenting opinion of Vice-President Al-Khasawneh and Judges Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov pointed out, '[t]he Court thus appears to suggest that certain rights may automatically fulfil the irreparable harm criterion, without analyzing the real facts on the ground or the actual threat against the said rights'.³³² Certainly the loss of human life is a harm that is irreparable; this was the justification for the measures in the death penalty cases (*Breard*, *LaGrand* and *Avena*); but the curious implication of the Order in the *Georgial/Russia* case is that the subsequent death of a Georgian at the hands of a Russian unit, or person for whom Russia is internationally responsible, will be a breach of the Order if, and only if, he was killed because he was a Georgian, as an act of racial discrimination. This is of course the unavoidable consequence of a limited jurisdictional title being invoked in a situation where the real mischief is of a nature going beyond the confines of that title; and the eventual judgment on the merits could only find that a *past* injury to, or killing of, a Georgian had been unlawful if it were racially motivated and thus a breach of the Convention. There is however something incongruous about a Court directing a party, in a conflict situation, not to avoid that conflict causing injury to persons of a particular race, but only to avoid injuring them with a racial motivation. The Order in the *Georgial/Russia* case does not of course speak in those terms: it directs the parties to 'refrain from any act of racial discrimination against persons, groups of persons or institutions' and to 'do all in their power... to ensure, without distinction as to national or ethnic origin, ... security of persons'.³³³ The incongruity is disguised, but it is there.

The rather simpler problem of the death penalty as irreparable injury returned to the Court in the form of the request for provisional measures made by Mexico in the context of its request for interpretation of the judgment in the *Avena* case, already discussed in section (c) (ii) above; and as there stated, it seems to have been the humanitarian aspect, the concern to protect human life, that underlay the decision despite the strength of the counter-arguments of a purely legal nature presented by the United States.

(2) Measures to prevent escalation of a dispute

In the previous article³³⁴ mention was made of the apparent existence in the Court's case-law of two distinct classes of provisional measures. The most established, and until recently the most frequently encountered, class of measures is that of measures intended, in the words of the Statute, 'to preserve the respective rights of either party'; but since the Permanent Court case of the *Electricity Company of Sofia and Bulgaria*, measures have from time to time been indicated calling on one or both parties 'not to allow any step of any kind to be taken which might aggravate or extend the dispute'.³³⁵ These are distinct in the sense that they aim at two separate objectives: preservation of rights, and prevention of escalation of the dispute. In many situations, both risks may be present, and to some extent the indication of preservation measures may assist in reducing the risk of escalation, but they are nevertheless, it is suggested, distinct.³³⁶ One distinguish-

³³¹ Order of 15 October 2008, [2008] ICJ Rep 396, para. 142 (emphasis added).

³³² Joint Dissenting Opinion of Vice-President Al-Khasawneh and Judges Ranjeva, Shi, Koroma, Tomka, Bennouna and Skotnikov, *ibid.*, 405, para. 21.

³³³ Order of 15 October 2008; *ibid.* 398, para. 149 (operative clause), A (1) and (3) (i).

³³⁴ (2001) 72 *BYIL* 37, 99.

³³⁵ *PCIJ* Series A/B, No. 79, 93

³³⁶ Doubts may therefore be felt about the conflation of the two in *Pulp Mills*, Order of 13 July 2006, Separate opinion of Judge Bennouna, [2006] ICJ Rep 142, para. 2: '[T]he protection of the rights of each

ing element may be that protective measures of the classic kind are intended to prevent 'irreparable prejudice' to some right claimed by the applicant, and the existence of that right has, to some limited degree, to be demonstrated;³³⁷ in the case of non-aggravation measures, this requirement does not exist, aggravation of the dispute being apparently regarded as a sort of *malum in se* against which a State is entitled to seek protection independently of the nature of the rights asserted in that dispute.

This is particularly evident when the aggravation contemplated may involve hostilities or armed action.³³⁸ In the previous article on this subject, attention was drawn to a trend in the Court's practice in the indication of provisional measures, towards a conception of such measures as the Court's contribution to the maintenance of international peace, rather than the preservation of 'the respective rights of either party', as provided for in the Statute,³³⁹ or even the non-aggravation, by less than forcible means, of the dispute brought before the Court. Since then, this trend appears if anything to have intensified. The most striking (and the most recent) example of this is the Order made in the *Temple (Interpretation)* case, in the formal context, not of a substantive dispute, but of a dispute over the meaning of a passage of a judgment given in 1962; this will be discussed below.

In its Order of 23 January 2007 in the *Pulp Mills* case (on the second request for provisional measures—that of Uruguay), the Court noted, in response to a request for measures of the 'non-aggravation' kind, that it had 'on several occasions issued provisional measures directing the parties not to take any actions which could aggravate or extend the dispute or render more difficult its settlement', but went on to say that 'in those cases provisional measures other than measures directing the parties not to take actions to aggravate or extend the dispute or to render more difficult its settlement', i.e. measures of the usual preventive or protective kind, 'were also indicated'.³⁴⁰ This text suggests, without actually saying so, that the Court was ruling that 'non-aggravation' measures may only be indicated as an adjunct to preventive measures; and the impression is confirmed when in the next paragraph it noted that it had not found an risk of 'irreparable prejudice' justifying preventive measures, and ruled that the actions complained of by Uruguay did not justify the indication of the second measure requested (non-aggravation) 'in the absence of the conditions for the Court to indicate the first [preventive] measure'.³⁴¹

party is ensured by means of provisional measures...with a view to preventing irreparable prejudice from nullifying the rights at issue...The aim is undoubtedly to preserve the status quo and to make sure that there is no "aggravation or extension of the dispute"...

³³⁷ See the discussion in sub-section (d) above.

³³⁸ The first case of this kind where the non-aggravation measures were specifically linked with threatened use of force was the *Frontier Dispute between Burkina Faso and Mali*; see *Order of 10 January 1986*, [1986] ICJ Rep 9–12. Earlier judgments contained a *pro forma* ban on aggravation: e.g. *Military and Paramilitary Activities in Nicaragua*, Order of 10 May 1984, [1984] ICJ Rep 187, para. 3.

³³⁹ This development has been proposed as an example of what is seen as the increasing impact of community interests on the workings of the Court; see M Benzing, 'Community Interests in the Procedure of International Courts and Tribunals', (2006) 5 *The Law and Practice of International Tribunals* 369, 378–379.

³⁴⁰ *Pulp Mills*, Order of 23 January 2007, [2007] ICJ Rep 16, para. 49; the Court cited the cases of *US Diplomatic and Consular Staff in Tehran*, *Genocide Convention*, *Land and Maritime Boundary between Cameroon and Nigeria*, and *Armed Activities on the Territory of the Congo*.

³⁴¹ *Ibid.*, para. 50.

Notable by its absence is any reference to the precedent of the Order of 10 January 1986 in the *Frontier Dispute* case between Burkina Faso and Mali.³⁴² In that decision, the Chamber noted the requests for measures referred to armed actions in the disputed area, but that (following the Permanent Court decision in *Legal Status of the South-Eastern Territory of Greenland*), 'incidents likely to aggravate or extend the dispute' could not affect 'the existence or value of the sovereign rights claimed over the territory in question',³⁴³ i.e. that there was no risk of irreparable prejudice to *rights*. It continued:

[I]ndependently of the requests submitted by the Parties for the indication of provisional measures, the Court or, accordingly, the chamber possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require[.]³⁴⁴

It then proceeded to indicate measures purely of a non-aggravation nature.³⁴⁵ As was suggested in the previous article, the decision suggests that the Court may 'indicate non-aggravation measures independently of any finding that preservative measures [are] appropriate'.³⁴⁶

The question of the relationship between precautionary measures and non-aggravation measures was the subject of an interesting declaration appended by Judge Buergenthal to the second Order on measures in the *Pulp Mills* case. He considered that the Court had taken too restrictive a view of its powers under Article 41 of the Statute. He cited the PCIJ decision in the *Electricity Company* case,³⁴⁷ the 1986 *Frontier Dispute* case, the *Land and Boundary* case and the *DRC v. Uganda* case, discussed above. His interpretation of these decisions was more specific than a simple directive not to 'aggravate' the dispute; he held that they were

predicated on the assumption that it has the power under Article 41 to order provisional measures to prevent a party to a dispute before it from interfering with or obstructing the judicial proceedings by coercive extrajudicial means, unrelated to the specific rights in dispute, that seek or are calculated to undermine the orderly administration of justice in a pending case.³⁴⁸

On the question of the relationship between the two sorts of measures, he noted that

It is true that the Court has tended to combine the two types of provisional measures in one single paragraph in the *dispositif* when indicating such measures, and that it has thus far not had occasion to indicate the second type of provisional measures in a case in which the first type was not also indicated. That does not necessarily prove that it lacks the power to do so, although it has given rise to the suggestion that the second type of provisional measures is merely ancillary to the first and that the Court consequently lacks the power under Article 41 to grant the second independently of the first.³⁴⁹

³⁴² This was so even though one Member of the Court cited the *Frontier Dispute (Burkina Faso/Mali)* decision in a declaration appended to the Order. In the *Pulp Mills* case, the reference was to what 'the Court' had done in the past, and the *Frontier Dispute* Order was made by a Chamber; but see Article 27 of the Statute. The *Frontier Dispute* decision, curiously enough, was cited in the case of the *Land and Maritime Boundary between Cameroon and Nigeria*, mentioned in the *Pulp Mills* Order: see Order of 15 March 1996, 2, para. 40.

³⁴³ Order of 15 March 1996 [1996] ICJ Rep, para. 17, citing PCIJ Series A/B, No. 48, 285.

³⁴⁴ *Ibid.*, para. 18.

³⁴⁵ One measure—preservation of the status quo in the disputed area—might *à la rigueur* be regarded as protective, but, as noted in the previous article, 'it was presented as ancillary to a non-aggravation measure, rather than the other way around': (2001) 72 BYIL 37, 101. ³⁴⁶ *Id.*

³⁴⁷ Order of 5 December 1939, PCIJ Series A/B No. 79, p. 109.

³⁴⁸ Declaration appended to Order of 23 January 2007, 22–23, para. 6. ³⁴⁹ *Ibid.*, 23, para. 8.

He made it clear that, in his view, this was uncalled-for restriction of the powers conferred on the Court by the Statute:

The fact that the Court, as it emphasizes in paragraph 49 of its Order, has in all these prior cases also indicated the first type of provisional measures, does not detract from the wording of Article 41 of the Statute, which makes the decision whether or not to indicate provisional measures dependent upon the 'circumstances' that may require it. These circumstances may involve an imminent threat of irreparable prejudice to the rights in dispute. But, independently thereof, no compelling reason has been advanced by the Court why they may not also apply to situations in which one party to the case resorts to extrajudicial coercive measures, unrelated to the subject-matter in dispute, that aggravate a dispute by seeking to undermine or interfere with the rights of the other party in defending its case before the Court. In such situations the test would not be whether there is an imminent threat of irreparable harm to the subject matter of the dispute, but whether the challenged actions are having a serious adverse effect on the ability of the party seeking the provisional measures to fully protect its rights in the judicial proceedings.³⁵⁰

Measures directed to preventing escalation of the dispute were sought, or contemplated, in five recent cases: those of *Certain Criminal Proceedings, Pulp Mills* (both Orders), *Racial Discrimination Convention, Certain Activities*, and *Temple (Interpretation)*. Such measures were indicated in the last three of these cases. The circumstances in which the Court did not find it necessary or appropriate to indicate measures directed to preventing escalation are worth noting.³⁵¹

In the case of the *Armed Activities (DRC v. Rwanda)*, the applicant sought 'to avert irreparable harm—in reality, the aggravation of irreparable harm' resulting from armed activities on its territory.³⁵² The Court was however unable to find that it had jurisdiction on the basis of any of the grounds presented by the DRC; this of course was a bar to the indication of any measures directed to protecting the rights claimed. But the Court could have followed, but did not, the precedent of the 1986 Order in the *Frontier Dispute* case between Burkina Faso and Mali. In that Order, as explained above,³⁵³ the Chamber dealing with the case decided that the incidents in the disputed area did not affect the rights claimed, so that measures to protect those rights were not required; but it asserted an independent power of the Court 'to indicate, if need be, such provisional measures as may conduce to the due administration of justice',³⁵⁴ that is to say

³⁵⁰ Ibid, 24–25, para. 11.

³⁵¹ It may be convenient to recall here the cases, since the publication of the previous article in this series, in which measures have been requested:

Armed Activities on the Territory of the Congo (New Application), Order of 10 July 2002, [2002] ICJ Rep 219; measures refused; *Certain Criminal Proceedings in France*, Order of 17 June 2003, [2003] ICJ Rep 102; measures refused; *Pulp Mills on the River Uruguay*, Orders of 13 July 2006 and 23 January 2007 [2006] ICJ Rep 113 and [2007] ICJ Rep 3, measures refused; *Avena (Interpretation)*, Order of 16 July 2008 [2008] ICJ Rep 311, measures ordered; *Convention on Elimination of Racial Discrimination (Georgia v. Russia)*, Order of 15 October 2008, [2008] ICJ Rep 353, measures ordered; *Questions relating to the Obligation to Prosecute or Extradite*, Order of 28 May 2009, [2009] ICJ Rep 139, measures refused; *Certain Activities carried out by Nicaragua in the Border Area*, Order of 8 March 2011, measures ordered; *Temple of Preah Vihear (Interpretation)*, Order of 18 July 2011, measures ordered.

³⁵² Request of the DRC, quoted in *Armed Activities (New Application)*, Order of 10 July 2002, [2002] ICJ Rep 231, para. 33.

³⁵³ (2001) 72 BYIL 37, 100–102.

³⁵⁴ *Frontier Dispute (Burkina Faso/Mali)*, Order of 10 January 1986, [1986] ICJ Rep 9, para. 19. It found such measures appropriate even though the parties had agreed a cease-fire; *ibid*, 10, para. 25.

non-escalation measures. This precedent was followed ten years later by the full Court in the case of the *Land and Maritime Boundary between Cameroon and Nigeria*.³⁵⁵

In the *Certain Criminal Proceedings* case,³⁵⁶ the Court was dealing with two States (Congo and France) whose relations were normal, and the dispute concerned a very specific set of events; there was no reason at all to anticipate this being treated more seriously than it warranted. In the *Pulp Mills* case, the circumstances at the time of the first Order did not indicate any need for non-aggravation measures, and the Court did not refer to the question. The second Order was unusual in that it was made in the request of the respondent State, Uruguay, and was in response to certain measures of self-help taken by citizens of Argentina, who endeavoured to press their country's claim by blockading the bridges and roads connecting the two States. As mentioned above,³⁵⁷ the fact that it was the respondent State that was asking for measures raised the problem of determining what rights could be protected in such a situation. The Court was in fact not convinced that there was a threat of irreparable injury to the rights of Uruguay;³⁵⁸ accordingly, it declined to indicate measures for the protection of those rights.³⁵⁹ Uruguay had however strongly pressed for the indication of non-aggravation measures, and the jurisprudence suggesting that these need not be linked to the protection of any specific claims made in the proceedings tended to support its position. Argentina nevertheless urged that there was no risk of aggravation inasmuch as 'no right that Uruguay could invoke before the Court in respect of the dispute before it has been infringed'.³⁶⁰ The Court proceeded to recall previous cases in which it had indicated non-aggravation measures, and continued:

Whereas the Court has not found that at present there is an imminent risk of irreparable prejudice to the rights of Uruguay in dispute before it, caused by the blockades of the bridges and roads linking the two States...; whereas the Court therefore considers that the blockades themselves do not justify the indication of the second provisional measure requested by Uruguay [non aggravation], in the absence of the conditions for the Court to indicate the first provisional measure [prevention of blockade].³⁶¹

This amounts to a striking *revirement de jurisprudence*, a coupling of non-aggravation measures with right-protection measures, in the sense of requiring for the indication of either the risk of injury to rights claimed in the case, contrary to the view taken in the *Frontier Dispute* and *Land and Maritime Boundary* cases.

The indication of non-aggravation measures in the *Racial Discrimination Convention* case does not depart from this new line of approach. Such indication in fact appears in the Court's Order almost as an afterthought. In two paragraphs the Court recalls the requirement of 'irreparable prejudice... to rights which are the subject of a dispute in judicial proceedings',³⁶² and the need for urgency 'in the sense that action prejudicial to the rights of either party might be taken before the Court has given its final decision'.³⁶³ There is however no repetition of the paragraph in earlier decisions recalling the possibility for the Court to indicate non-aggravation measures; but in the operative clause, having indicated measures directed to compliance with the Racial Discrimination

³⁵⁵ [1996] ICJ Rep 22–23, para. 41; discussed in (2001) *BYIL* 37, 102–103.

³⁵⁶ Order of 17 June 2003, [2003] ICJ Rep 111, para. 39. ³⁵⁷ Above, text preceding note 324.

³⁵⁸ *Pulp Mills*, Order of 23 January 2007, [2007] ICJ Rep 13, para. 41. ³⁵⁹ *Ibid*, 14, para. 43.

³⁶⁰ Quoted at *ibid*, 15, para. 47. ³⁶¹ *Ibid*, 16, para. 50.

³⁶² *LaGrand*, Order of 3 March 1999, [1999-I] 14–15, para. 22, cited in Order of 15 October 2008, [2008] ICJ Rep 392, para. 128. ³⁶³ *Ibid*, 392, para. 129.

Convention, and permitting humanitarian assistance, the Court includes a paragraph, on the lines used in previous Orders, indicating that each party is to refrain from prejudicial action or action which might aggravate or extend the dispute.³⁶⁴

The approach adopted in the *Certain Activities* case is at first sight similar: the Court first indicated certain 'tailor-made' provisional measures, and then added a brief non-aggravation section in the operative clause;³⁶⁵ it had included, towards the end of the reasoning of the Order, a paragraph stating that 'it is in addition appropriate in the circumstances to indicate complementary measures, calling on both Parties to refrain from any act which may aggravate or extend the dispute or render it more difficult of solution'.³⁶⁶ However, the circumstances that it had in mind included the fact that Costa Rica had specifically asked for a form of non-aggravation measure, and in this context it included the established form of recital of its power to indicate such measures, and a list of precedents.³⁶⁷ What is however striking is that this passage appears in a section of the Order headed 'Link between the rights whose protection is being sought and the measures requested'. It may not be too daring an interpretation to read this as a confirmation that the Court was no longer asserting a power to indicate non-aggravation measures independently of any threat to the rights claimed in the proceedings; this will however only be confirmed (or refuted) if the Court is confronted with a case in which no protection-measures are needed, in the absence of a threat to such rights, but considers that there is a need for non-aggravation measures, as in the 1986 *Frontier Dispute* case.

In the *Temple (Interpretation)* case, discussed in subsection (ii) above, protective measures were indicated which did not merely secure the rights in issue in the proceedings, but went far beyond these. A non-aggravation provision was included in the operative clause;³⁶⁸ in the reasoning this was prepared for in the following terms:

Whereas, when it is indicating provisional measures for the purpose of preserving specific rights, the Court, independently of the parties' requests, also possesses the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that the circumstances so require...³⁶⁹

This is something more substantial in the way of a pointer to the Court's approach; the phrase 'when it is indicating...' implies that the possibility of non-aggravation measures is to be limited to cases in which there is a threatened infringement of rights claimed, justifying protective measures.

(3) Indication of provisional measures *proprio motu*

It was noted in the previous article that in the 1978 revision of the Rules of Court, the existing mention of indication of 'interim measures other than those proposed in the request' submitted by a party, and of the indication of measures '*proprio motu*', i.e. presumably in the absence of any request for them, was supplemented to make it clear that the Court may indicate measures to be taken by the party that requested an Order addressed to the other party.

³⁶⁴ Ibid, 399, para. 149.C.

³⁶⁵ *Certain Activities carried out by Nicaragua in the Border Area*, Order of 8 March 2011, para. 86 (3).

³⁶⁶ Ibid, para. 83.

³⁶⁷ Ibid, para. 62. ³⁶⁸ Order of 18 July 2011, para. 69(4).

³⁶⁹ Ibid, para. 59; the paragraph continues with a list of precedents which does not include the *Frontier Dispute* (but does include the *Land and Maritime Boundary Order*).

While the Court has not yet found it appropriate to indicate measures in the absence of any request at all for such measures, it has felt free to indicate measures that neither party has requested, and measures to be complied with by both parties, particularly when these are of the 'non-aggravation of the dispute' type.³⁷⁰ The *Temple (Interpretation)* case currently before the Court affords a particularly striking example.

In 1962 in proceedings between Cambodia and Thailand, the Court had decided that 'the Temple of Preah Vihear is situated in territory under the sovereignty of Cambodia'; it did not however indicate the extent of that territory, nor identify a boundary line, since the parties in their submissions had not asked it to do so. An important element in the case was however a map, referred to in the proceedings as 'the Annex 1 Map',³⁷¹ drawn up in 1907 by a Franco-Siamese Mixed Commission on which a line was drawn representing the frontier between Cambodia and Thailand in the area in which the Temple stood. On 28 April 2011 Cambodia filed an application requesting the Court to interpret the 1962 judgment, in accordance with Article 60 of the Statute. It stated that a dispute existed between the parties to the 1962 case, inasmuch as, according to Cambodia,

Thailand believes that Cambodia's sovereignty is confined to the Temple and does not extend to the area surrounding it, authorizing Thailand to claim sovereignty over that area and to occupy it... Thailand considers that the frontier in the area of the Temple has not been recognized by the Court and has still to be determined in law; whereas Cambodia asserts that, in the first paragraph of the operative clause of the 1962 Judgment, the Court clearly refused to confine Cambodia's sovereignty solely to the Temple, by determining the ownership of the latter 'on the basis of the sovereignty over the territory in which the Temple is situated'...³⁷²

Cambodia also drew attention to the fact that

in the second paragraph of the operative clause of the 1962 Judgment, the Court declared that 'Thailand is under an obligation to withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory'

and contended that

this obligation derives from the fact that the Temple of Preah Vihear and its vicinity are situated in territory under Cambodian sovereignty, as recognized by the Court in the first paragraph of the operative clause, and 'goes beyond a withdrawal from only the precincts of the Temple itself and extends to the area of the Temple in general'; and whereas Cambodia argues that the setting forth of this obligation in the operative clause of the Judgment indicates that it must be understood as a general and continuing obligation incumbent upon Thailand not to advance into Cambodian territory.³⁷³

The specific submission made in the Cambodian application was that the Court adjudge and declare that

The obligation incumbent upon Thailand to 'withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory' (second paragraph of the [1962] operative clause) is a particular consequence of the

³⁷⁰ See section (2) above, where it was noted that the use of measures of this type where there was insufficient jurisdictional and other grounds for 'protection of rights' measures may be declining.

³⁷¹ So called because it had been presented to the Court as Annex 1 to the Memorial of Cambodia.

³⁷² Order of 18 July 2011, para. 3.

³⁷³ *Ibid.*, para. 2.

general and continuing obligation to respect the integrity of the territory of Cambodia, that territory having been delimited in the area of the Temple and its vicinity by the line on the Annex I map, on which the Judgment of the Court is based³⁷⁴

Immediately after filing its application, Cambodia filed a request for the indication of provisional measures, complaining that there had been incursions into its territory by Thai armed forces, and that a number of armed clashes had occurred. The measures requested were:

- an immediate and unconditional withdrawal of all Thai forces from those parts of Cambodian territory situated in the area of the Temple of Preah Vihear;
- a ban on all military activity by Thailand in the area of the Temple of Preah Vihear;
- that Thailand refrain from any act or action which could interfere with the rights of Cambodia or aggravate the dispute in the principal proceedings³⁷⁵

Thailand did not request the indication of any measures addressed to Cambodia, but requested the Court to remove the case from the list.

The basis upon which the Court found that a case had been made out for the indication of provisional measures is discussed in section (I) above. It prefaced its indication of measures with a paragraph recalling that

when it is indicating provisional measures for the purpose of preserving specific rights, the Court, independently of the parties' requests, also possesses the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that the circumstances so require³⁷⁶

The Court proceeded to indicate a 'provisional demilitarized zone' some four kilometers by three around the Temple (indicated on a sketch map attached to the Order). The actual measures that it indicated were:

Both Parties shall immediately withdraw their military personnel currently present in the provisional demilitarized zone, as defined in paragraph 62 of the present Order, and refrain from any military presence within that zone and from any armed activity directed at that zone;...

Thailand shall not obstruct Cambodia's free access to the Temple of Preah Vihear or Cambodia's provision of fresh supplies to its non-military personnel in the Temple;... Both Parties shall continue the co-operation which they have entered into within ASEAN and, in particular, allow the observers appointed by that organization to have access to the provisional demilitarized zone;...

Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve...³⁷⁷

³⁷⁴ Ibid, para. 5.

³⁷⁵ Ibid, para. 11.

³⁷⁶ Ibid, para. 59, citing *Land and Maritime Boundary between Cameroon and Nigeria*, Order of 15 March 1996, [1996-1] ICJ Rep 22-23, para. 41; *Armed Activities on the Territory of the Congo*, Order of 1 July 2000, [2000] ICJ Rep 128, para. 44; *Certain Activities carried out by Nicaragua in the Border Area*, Order of 8 March 2011, para. 83.

³⁷⁷ Ibid, para. 69 (B) (1) to (4). Note that the Court also revived, in a slightly different form, a provision first used in the *Icelandic Fisheries Jurisdiction* cases, whereby it decided that 'until the Court has rendered its judgment on the request for interpretation, it shall remain seized of the matters which form the subject of this Order'; para. 69 (B) (5); see [1972] ICJ Rep 18, para. 26 (2) and 35-36, para. 27 (2); see also *United States Diplomatic and Consular Staff in Tehran*, [1979] ICJ Rep 21, para. 46 (B).

(4) The legal effect of provisional measures

The previous article³⁷⁸ contained a lengthy critique—and criticism—of the decision in the *LaGrand* case that provisional measures indicated by the Court give rise to a binding legal obligation to comply with them. However unsatisfactory the reasoning of the decision may be,³⁷⁹ it has to be accepted that it is the established law as seen by the Court; and in this domain what counts is how the Court, rather than the generality of States, sees the matter.³⁸⁰

Establishment of the binding character of an indication of provisional measures may have implications for the terms in which such indications are expressed. In this connection, one observer has drawn attention to a small but significant modification by the Court of the language used in its orders in the death penalty cases.³⁸¹ Where the *Breard* and *LaGrand* orders required the United States to use 'all measures at its disposal' to ensure that the death penalty was not carried out while the case was pending, in the *Avena* order of 5 February 2003 employed the formula 'all measures necessary to ensure' that the named Mexican nationals be not executed pending the proceedings.³⁸² This may be seen as acceptance of an argument submitted by Mexico that, in view of the reliance by the United States in the earlier cases on its constitutional structure as a reason why it could not comply with the measures indicated, a stricter formulation was needed.³⁸³ At the hearings, Mexico recalled that in *LaGrand* the Court had ruled that the provisional measures order had not imposed on the United States an obligation of result,³⁸⁴ and urged that wording be employed to indicate that such an obligation was intended, and this seems to have been the reason for the use of the formula 'all measures necessary to ensure...' In its 2004 judgment in the case, however, the court found that the United States had, as Mexico alleged, committed breaches of the Vienna Convention on Consular Relations, and the reparation due was defined as consisting in 'the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the sentences' imposed on the Mexican nationals concerned.³⁸⁵ The Court did not deal with any breach of the provisional measures order as such, and stated that the obligations of the United States under it 'are, with effect from the date of the present Judgment, replaced by those declared in the Judgment'.³⁸⁶ When in 2008

³⁷⁸ (2001) 72 BYIL 37, 111–126.

³⁷⁹ For an interesting parallel for judicial extension to provisional measures powers, by a different, but perhaps equally strained, reasoning, see the European Court of Human Rights decision in *Mamatkulov and Askarov v. Turkey* (case nos. 46827/99; 46951/99), attributing a binding quality to measures on the basis of texts that were not self-evidently intended to achieve this: cf. L. Caflisch, 'The Law: Substantive and Procedural Questions', 7 *The Law and Practice of International Courts and Tribunals*, (2008) 289, 291–292. See also the 'Decision on Jurisdiction and Recommendation on Provisional Measures' of the ICSID Tribunal in *SAIPEM v. Bangladesh* on 21 March 2007, cited by B. Stern, 'Commentary on Substantive and Procedural Questions', (2008) 7 *The Law and Practice of International Courts and Tribunals* 301, 305.

³⁸⁰ Attention was drawn above (in the Introduction to the present article) to the far-reaching effect of the Court's rulings on procedural matters.

³⁸¹ See RD Sloane, 'Measures Necessary to Ensure: The ICJ's Provisional Measures Order in *Avena* and Other Mexican Nationals', (2004) 17 *Leiden Journal of International Law* 673.

³⁸² *Avena, Provisional Measures*, Order of 5 February 2003, [2003] ICJ Rep 77.

³⁸³ The Mexican request (para. 18) used the expression 'measures sufficient to ensure that no Mexican national be executed'.

³⁸⁴ CR 2003/1, p. 40, para. 120 (Donovan), citing *LaGrand, Judgment*, [2001] ICJ Rep 466, 506, para. 111.

³⁸⁵ *Avena, Judgment*, [2004] ICJ Rep 12, 72, para. 153 (9).

³⁸⁶ *Ibid.*, 70, para. 152.

Mexico requested an interpretation of the 2005 judgment in the *Avena* case, and in that context again asked for provisional measures, it referred to the operative clause of the 2005 judgment and argued that

the language in that provision of the *Avena* Judgment establishes an obligation of result that obliges the United States, including all its component organs at all levels, to provide the requisite review and reconsideration irrespective of any domestic law impediment.³⁸⁷

The United States indicated that it agreed with this categorization, and contended that therefore there was no dispute as to the meaning of the 2005 judgment.³⁸⁸

The implications of a finding that there exists for a party to a case an obligation of result to ensure a particular event or effect, and the relevance (if any) in that respect of the maxim *lex non cogit ad impossibilia*, fall outside the scope of the present article.³⁸⁹ It is perhaps worth noting, however, that it is more difficult for the Court to assess a question of this kind on the basis of the summary review of the situation appropriate to provisional measures proceedings, than at the close of a fully-argued case on the merits. It is perhaps therefore appropriate for the Court to be guarded in its definition of the obligations imposed on a party by what is now generally accepted as a means having binding effect, namely the indication of provisional measures.

A question raised in the previous article,³⁹⁰ as to the effect, viewed *ex post facto*, of measures indicated by a court that later discovers it was without jurisdiction to entertain the case at all, has not yet received a specific answer.³⁹¹ In the *LaGrand* case, the jurisdiction over the merits was not challenged, so that the question did not arise.³⁹² Some slight, but ambiguous, guidance is afforded by the *Anglo-Iranian Oil Co.* decision: after indicating an extensive set of measures, none of which were complied with, the Court found that it had no jurisdiction whatever over the merits. Having stated that conclusion, it referred to the provisional measures as having been indicated 'pending its final decision in the proceedings' and continued: 'It follows that [the relevant] Order ceases to be operative upon the delivery of this Judgment and that the Provisional Measures

³⁸⁷ *Avena (Interpretation)*, Order of 16 July 2008, [2008] ICJ Rep 323–324, para. 48.

³⁸⁸ *Ibid.*, 324–325, paras. 50–51.

³⁸⁹ The observer already quoted suggests, following the contentions of Mexico, that it is a question of 'the simple but critical distinction between physical and legal obstacles to compliance'; Sloane, 'Measures Necessary to Ensure' (fn. 381 above) 673, 685. ³⁹⁰ (2001) 72 BYIL 37, 120, fn. 309 and 123–124.

³⁹¹ Another possible conundrum that has not yet presented itself is this: proceedings are instituted and a request made for the indication of provisional measures, which is acceded to; but the measures are not fully complied with. The applicant subsequently endeavours to withdraw the case, perhaps because it is not confident of convincing the Court on the jurisdictional issue. If the respondent agrees to the discontinuance, under Article 88, paragraph 2, of the Rules of Court, it will presumably only do so if the other party absolves it from any consequences of non-compliance with the measures. If the parties do not agree, and the proceedings continue, in accordance with Article 89, paragraph 2, of the Rules, but the applicant lets the case go by default, what is the position as to the breach of the Court's Order indicating measures?

³⁹² Germany argued on the basis that jurisdiction over the merits was established. It has been suggested that the Court might act otherwise 'in cases of contested jurisdiction'; K. Oellers-Frahm, 'Article 41' in A Zimmerman et al. (eds), *The Statute of the International Court of Justice: A Commentary* (OUP, Oxford 2006) 957–958, para. 92. At the stage at which the measures were ordered in the *LaGrand* case the jurisdictional situation was however far from clear: Germany could invoke the Vienna Convention, but did that instrument confer jurisdiction to protect rights of individual nationals? What seems certain is that the Court would not regard itself as automatically debarred from indicating binding measures when there is a challenge to jurisdiction, any more than it has in the past, when the binding character of such measures was questionable at most, otherwise the respondent State could prevent any measures being indicated merely by raising a challenge, however factitious, to the jurisdiction.

lapse at the same time'.³⁹³ On the one hand, the Court did not say that the measures had never been effective, in view of the lack of jurisdiction over the merits; on the other, while perhaps implying that the measures had been valid and effective (for what they might have been worth) up to the date of the judgment, it made no comment on the fact that they had not been complied with. This is of course consistent with the view which was commonly held at the time that the measures could never be more than a non-binding indication.

The proceedings on Mexico's request for interpretation of the judgment in the *Avena* case³⁹⁴ may show which way the wind is blowing in this respect. The reason for the request was transparent: despite the efforts of the Federal Government, the intransigence of some authorities of US states meant that a number of the Mexican nationals mentioned in the 2004 judgment were likely to be executed, without the 'review and reconsideration' of their cases which the Court had decided the US was obliged to carry out. As soon as the application requesting an interpretation had been filed, so that the Court had become seised of the matter, Mexico filed a request for the indication of provisional measures which would require the United States to prevent the carrying-out of the threatened executions. It was clearly this request that was the main purpose of the whole operation, and the ingenuity of Mexico's advisers has to be applauded; nor was the request for interpretation by any means a sham. The preliminary question was whether the Court has jurisdiction to indicate measures in the context, not of a regular case, but of a request for interpretation of an earlier judgment; this has already been examined in section (c) above.

By an Order of 16 July 2008, the Court indicated measures, to the effect that the United States 'shall take all measures necessary to ensure that [five named Mexican nationals] are not executed pending judgment' on the request for interpretation.³⁹⁵ By the time, however, that the Court came to give judgment on the request for interpretation, one of the Mexican nationals had already been executed. The decision on the request itself was however a rejection: the Court found that

the matters claimed by the United Mexican States to be in issue between the Parties, requiring an interpretation under Article 60 of the Statute, are not matters which have been decided by the Court in its Judgment of 31 March 2004... and thus cannot give rise to the interpretation requested by the United Mexican States.³⁹⁶

Mexico had also asked the Court to declare that 'the United States breached the *Avena* Judgment by executing [the named national] without having provided him review and reconsideration consistent with the terms of that Judgment'.³⁹⁷ The Court's response to this request was that it noted

that the only basis of jurisdiction relied upon for this claim in the present proceedings is Article 60 of the Statute, and that that Article does not allow it to consider possible violations of the Judgment which it is called upon to interpret... In view of the above, the Court finds that the additional claim by Mexico concerning alleged violations of the *Avena* Judgment must be dismissed.³⁹⁸

³⁹³ [1952] ICJ Rep 114.

³⁹⁴ Discussed in section (c)(ii) above.

³⁹⁵ *Avena (Interpretation)*, Order of 16 July 2008, [2008] ICJ Rep 331, para. 80.

³⁹⁶ *Avena (Interpretation)*, Judgment, [2009] ICJ Rep 3, 21, para. 61.

³⁹⁷ *Ibid*, 20, para. 56.

³⁹⁸ *Ibid*, paras. 56-57.

What then of the provisional measures? Mexico had also claimed that the United States had breached the Order of 16 July 2008 by carrying out the execution without any 'review and reconsideration' having been afforded. The United States argued that the Court had no jurisdiction to deal with this claim. The Court decided:

There is no reason for the Court to seek any further basis of jurisdiction than Article 60 of the Statute to deal with this alleged breach of its Order indicating provisional measures issued in the same proceedings. The Court's competence under Article 60 necessarily entails its incidental jurisdiction to make findings about alleged breaches of the Order indicating provisional measures. That is still so even when the Court decides, upon examination of the Request for Interpretation, as it has done in the present case, not to exercise its jurisdiction to proceed under Article 60.³⁹⁹

Attention is drawn to the careful drafting of the last sentence. If the Court had found that it had no jurisdiction to entertain the request for interpretation, there would have been some degree of doubt as to the validity or effect of the measures indicated earlier, even though the jurisdictions to interpret and to indicate measures are established by separate provisions of the Statute (Articles 60 and 41). What the Court had in fact decided, in the operative clause of the judgment, was that the matters raised by Mexico 'cannot give rise to the interpretation requested'; it could be argued that, similarly, if the interpretation proceedings were misconceived *ab initio*, there was nothing to support the Order indicating provisional measures, given in the context of those proceedings. The text just quoted however clearly conveys the idea of a court regularly seised, that decides 'not to exercise its jurisdiction' to give an interpretation, thus impliedly leaving intact its jurisdiction to deal with such incidental matters as provisional measures.

The formal decision that 'the United States of America has breached the obligation incumbent upon it under the Order Indicating provisional measures of 16 July 2008, in the case of' the executed Mexican national was adopted unanimously. It was thus taken with the concurring vote also of Judge Buergenthal, who had voted against the Order indicating measures, and written a strongly-worded dissenting opinion expressing the view that the Court lacked the necessary jurisdiction to make the Order.⁴⁰⁰

The Court as a body appears determined to make of the provisional measures system a powerful institution impelling States towards compliance with their international obligations—more powerful perhaps than was foreseen when the Statute, and its predecessor the PCIJ Statute, were drafted.⁴⁰¹ Furthermore, the fact that a human life was at stake, and the threatened execution of someone who might conceivably be innocent of the crime alleged against him,⁴⁰² meant that a refusal of the measures originally requested would go against the grain for any but the most diehard supporter of the death penalty; and it would be seen as illogical to support the indication of measures, supposedly legally binding, and yet refuse to condemn the State that failed to comply with them. This prompts the speculation; how would the law in this domain have devel-

³⁹⁹ Ibid, 19, para. 51. Judge Abraham considered this decision as inconsistent with the dismissal of the claim for breach of the judgment: see further below, section 7(4).

⁴⁰⁰ *Avena (Interpretation)*, Order of 16 July 2008, Dissenting Opinion of Judge Buergenthal, [2008] ICJ Rep 333, para. 1.

⁴⁰¹ See the previous article, (2001) 72 *BYIL* 115 ff.

⁴⁰² In fact, it appears that there was little doubt about the guilt of most, if not all, of the Mexican nationals concerned; the question was rather whether they had had a fair trial and proper consideration of sentencing options, commutation of sentence, etc.

oped if the questions, first of the binding effect of measures, and secondly of the effect on an Order indicating them of a defect in the main proceedings, had first arisen in, say, a commercial context rather than a humanitarian one?⁴⁰³ The *Passage through the Great Belt* case is instructive; the evidence was that for Denmark to interrupt construction of its planned bridge, as would be the effect of the measures requested by Finland, would involve enormous expense, with no prospect of recovery of any of it from Finland if the Court decided that it had no jurisdiction, or to reject the claim on the merits.⁴⁰⁴ If provisional measures were non-binding indications, as was probably the prevailing view at the time, Denmark could decide for itself whether to continue the work and risk an adverse judgment, or adopt a more cautious strategy.⁴⁰⁵

A solution, or at least a palliative, may be for the Court in such cases to consider indicating measures specifically stated to be non-binding recommendations. In the *Great Belt* case itself, the Court reminded each of the parties of the possible implications of a decision adverse to the claims of that party,⁴⁰⁶ if an indication of this kind were embodied in a non-binding measures Order, the Court would be in a strong position, when it gave its eventual judgment, to take account of the conduct of the losing party in assessing the consequences for that party of the decision. It must be conceded however that this raises the difficult question of how far the reasonableness of a State's conduct may affect the consequences of an established breach of international law.⁴⁰⁷

(5) Provisional measures in advisory proceedings?

Nothing further has been heard, during the period under review, of this idea, discussed in the previous article.⁴⁰⁸

2. Preliminary objections

(1) Nature and classification of objections

Article 79, paragraph 2, of the Rules of Court, as adopted in 1978, provides for the filing of '[a]ny objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits'. The scope of questions of jurisdiction and of admissibility is capable of reasonably accurate definition in the abstract, but the third category is evidently wide. In the previous article on this subject, the two *Lockerbie* cases were discussed, in which for the first time an objection which was neither one of jurisdiction nor one of admissibility was found to be valid (though not disposed of, being in effect 'joined to the merits' under the terms of Article 79,

⁴⁰³ The requirement of 'irreparable prejudice' would have had to be fulfilled, of course; but the preservation of life is not the only field in which such prejudice might arise, even if it is the most striking example.

⁴⁰⁴ See the discussion in a previous article: (2001) 72 *BYIL* 37, 124–125.

⁴⁰⁵ In fact, by the time the case reached the Court, Denmark must already have weighed up its options in this way, once it became clear that Finland was determined to stop the construction of the bridge unless its demands as to minimum height were met.

⁴⁰⁶ Order of 29 July 1991, [1991] ICJ Rep 19–20, paras. 33, 34.

⁴⁰⁷ On this point, see for example J Crawford, *The International Law Commission's Articles on State Responsibility* (CUP, Cambridge 2002) 212, para. 5 sub Article 34.

⁴⁰⁸ (2001) 72 *BYIL* 37, 126–128.

excluded *a priori* from its jurisdiction,⁴⁵ the Court would, it seems, have been more in line with precedents. It is true that little guidance can be derived from the practice of the Permanent Court of International Justice. Yet, some help may be found in the case of the *Denunciation of the Treaty of 1865 between China and Belgium* (Interim Protection) (1927). At that time, the President of the Permanent Court was empowered by the Rules of Court then in force, to indicate interim measures of protection. In making the Order he relied on the following considerations:—

"Belgium and China have signed and ratified the Protocol of signature of December 16th, 1920, relating to the adoption of the Statute of the Court;

"... These two Powers have recognised as compulsory the Court's jurisdiction, in accordance with Article 86, paragraph 2, of the Court's Statute; and . . . sub-paragraph (d) of this paragraph covers legal disputes concerning the nature or extent of the reparation to be made for the breach of an international obligation. . . ."⁴⁶

Since the President also stated that by its final decision "the Court will either declare itself to have no jurisdiction or give judgment on the merits,"⁴⁷ he was evidently of the opinion that he was competent to indicate such measures, even before the question of jurisdiction had been decided, but when *prima facie* the dispute came within, or at least did not fall outside, the Court's jurisdiction.⁴⁸ As the Czechoslovak-Hungarian Mixed Arbitral Tribunal tersely and more explicitly put it:—

"All that is required is that the Court does not patently and evidently lack jurisdiction."⁴⁹

The precedents of the Mixed Arbitral Tribunals were, however, discounted by Judges Winarski and Badawi Pasha, who, in their joint dissenting opinion, put forward the view that:—

⁴⁵ Cf. B. Cheng, "The Anglo-Iranian Dispute," 5 *World Affairs* (New Series) (1951), p. 357, at pp. 358-9.

⁴⁶ A. S., p. 7.

⁴⁷ *Ibid.*

⁴⁸ See also P.C.I.J.: *Administration of the Prince of Pless Case* (1933), A/B. 54, p. 153; *Polish Agrarian Reform Case* (1933), A/B. 58, p. 179. *Baroccy Case* (1928), *loc. cit.*, p. 65. (Transl.) See also Pol.-Germ. M.A.T.: *Franzeseherin Szamothly Case* (1925), 6 T.A.M., p. 326, at p. 327; *Ungarischer Case* (1925), *ibid.*, p. 328; at p. 329; *Follmer et al. Cases* (1925), *ibid.*, pp. 332-3.

"The Court ought not to indicate interim measures of protection unless its competence, in the event of this being challenged, appears to the Court to be nevertheless *reasonably probable*. Its opinion on this point should be reached after a summary consideration; it can only be provisional and cannot prejudice its final decision."⁵⁰

Differences of opinion may, therefore, exist, as to whether there must be a probability that the Court has jurisdiction or whether a mere possibility is sufficient. What is certain, however, is that an international tribunal need not be convinced, nor reasonably certain, that it would have jurisdiction before it can indicate interim measures of protection. The reason why an international tribunal may exercise this power even when its jurisdiction as to the merits is yet uncertain must be sought in the fact that the duty of the parties to the dispute to maintain the *status quo* already exists independently of any judicial intervention⁵¹ and that the Court's indication is rather in the nature of a "judicial suggestion."⁵²

Moreover, when indicating such interim measures of protection, international tribunals will observe

"a principle which, although it may not have been included in the rules of procedure, is not any the less worthy of consideration, namely, the principle that the possible injury that may be caused by the proposed interim measures of protection must not be out of proportion with the advantage which the claimant hopes to derive from them."⁵³

Finally, it need hardly be mentioned that, should the Court eventually come to the conclusion that it has no jurisdiction

⁵⁰ *Loc. cit.*, p. 97. Italics added.

⁵¹ See *supra*, p. 140.

⁵² Cf. the wording of Art. 41, para. 2 of the Statute of the I.C.J., and see the *travaux préparatoires* relating to the corresponding article in the Statute of the P.C.I.J., e.g., Report of the Advisory Committee of Jurists, *Procès-verbaux*, pp. 735-6; speech of Elihu Root in the Committee of Jurists (March, 1929), created by the Council of the I.C.J., to examine the Statute of the P.C.I.J., L.O.N.P.: C.168.M.66.1929.V., pp. 68-4. See Hammarfeld, *Jurisdiction internationale*, 1938, pp. 299 et seq.; contra Hudson, *The P.C.I.J.*, 1943, pp. 425-7. See, however, pp. 419 et seq. of Hudson's work published in 1934. Cf. Pol.-Germ. M.A.T.: *Comité central de la Mission intérieure de l'Église Évangélique allemande Case* (1926), 6 T.A.M., p. 331.

⁵³ Belg.-Bulg. M.A.T.: *Cie d'Electricité de Sofia et de Bulgarie* (1928), 2 T.A.M., p. 324, at pp. 326-7. (Transl.) See also *Baroccy Case* (1928), *loc. cit.*, pp. 58-7.

The Political Use of Unilateral Applications and Provisional Measures Proceedings

Tullio Treves

1. Are unilateral applications to international courts and tribunals unfriendly acts?

The *Institut de droit international* has stated in 1959 that unilateral applications to international courts and tribunals should not be considered as unfriendly acts¹. The U.N. General Assembly has repeated this view in the Manila Declaration on the Peaceful Settlement of International Disputes of 15 November 1982: "Recourse to judicial settlement of legal disputes, particularly referral to the International Court of Justice, should not be considered an unfriendly act between States"². Yet, authoritative opinion holds that: "State practice does not support that idea"³ arguing that: "Unilateral proceedings have been instituted with-

¹ Resolution on "Compétence obligatoire des instances judiciaires et arbitrales internationales", *Annuaire de l'Institut de droit international, Session de Neuchâtel*, 1959, II, 358, par. 1: "... le recours à la Cour internationale de Justice ne saurait en aucun cas être considéré comme un acte peu amical vis-à-vis de l'Etat défendeur".

² Last sentence of sect. II, para. 6, of the Declaration adopted by G.A.res. 37/10 of 15 November 1982, in *United Nations Juridical Yearbook*, 1982, 103.

³ *Sb. Rosenne, The Perplexity of Modern International Law, General Course on Public international Law, Hague Academy of International Law, Collected Courses*, vol. 291, 2001, 96. *Id.*, *The Law and Practice of the International Court, 1920-1996*, 124 f. See also Judge G. Guillaume, in his "Avant-propos" to *Ph. Pazartzis, Les engagements internationaux en matière de règlement pacifique des différends entre Etats*, 1992, XV ff.

out previous notice, accompanied by a request for the indication of provisional measures, in a large number of instances of political tension between the States concerned"⁴.

The opinion supported by the U.N. General Assembly and by the *Institut de Droit International* is consistent with the broadly held idea that compulsory jurisdiction of courts and tribunals is an element of progress of international law. According to this view, each acceptance of the "optional clause" of article 36, para. 2, of the Court's Statute is a positive development, every provision included in a treaty or convention stating that each party may submit unilaterally a dispute concerning its interpretation to a judge or arbitrator marks a step forward. The doctrinal opinion going in the opposite direction seems to view the consensual basis of jurisdiction as best assured when consent is given for each specific dispute after such dispute has arisen. But must we really envisage this opinion as a retrogressive one? As branding as politically unwise what has been an objective of the movement for international justice for decades? Can the strong trend to accept compulsory adjudication, which emerges in modern broadly ratified international treaties dealing with relevant chapters of international law, such as the law of the sea and international trade⁵, be rejected as establishing the basis for "unfriendly" acts between States?

In my view at least, there can be no doubt that the strengthening of the compulsory jurisdiction of courts and tribunals marks progress in international law as it extends and deepens the rule of law in international relations. Acceptance of compulsory jurisdiction is a sign of confidence in international law. It may become an element in the very technique of codification of international law, as it permits to leave questions open by constructively ambiguous texts in the expectation that, if need arises, these questions will be solved through adjudication. If this is true, how can one look at the utilization in a specific case of the mechanism of compulsory jurisdiction through unilateral application to a judge or arbitrator as unfriendly as such? The strengthening of compulsory jurisdiction should make unilateral applications a routine event, devoid of specific political content.

Indeed, unilateral applications are routinely utilized in the framework of the World Trade Organization Understanding for the settlement of

⁴ *Sb. Rosenne*, *The Perplexity* (note 3), 96.

⁵ On this trend *T. Treves*, *Le controversie internazionali, nuove tendenze, nuovi tribunali*, Milano, 1999, 3 ff.

disputes and of the United Nations Convention for the Law of the Sea. Notwithstanding, or perhaps because of, the economic importance of trade disputes, States are learning to consider as a normal event, as do merchants in domestic trade, to sue and be sued. Since entry into force of the Law of the Sea Convention, all disputes concerning its interpretation or application brought to the International Tribunal for the Law of the Sea or to arbitration have been instituted on the basis of the compulsory jurisdiction provisions of the Convention. In most cases, no political implications have been detected. Moreover, States have indicated that they feel comfortable with the provisions on the settlement of disputes of the Law of the Sea Convention by making them applicable to disputes concerning the interpretation of a number of recent conventions.⁶ Unilateral applications have been used to bring cases before the International Court of Justice without jeopardizing the good relations between the States concerned. The *ELSI* case (Italy v. United States)⁷, the *Passage through the Great Belt* case (Finland v. Denmark)⁸, the *Delimitation in the Area between Greenland and Jan Mayen* case (Norway v. Denmark)⁹, the *Fisheries Jurisdiction* case (Spain v. Canada)¹⁰ and the *LaGrand* case (Germany v. United States)¹¹ may be quoted as recent examples.

⁶ Agreement on the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 December 1995, *International Legal Materials*, vol. 34, 1995, 1542, in force since 11 November 2001 art. 30; Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Honolulu, 5 September 2001, *International Legal Materials*, vol. 40, 2001, 278, not yet in force, art. 31; Convention on the Protection of the Underwater Cultural Heritage, Paris, 6 November 2001, *International Legal Materials*, vol. 41, 2002, 40, not yet in force, art. 25; Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean, 20 April 2001, *International Legal Materials*, vol. 41, 2002, 257, not yet in force, art. 24.

⁷ Judgment of 20 July 1989, *I.C.J. Reports 1989*, 15.

⁸ Order on the indication of provisional measures of 29 July 1991, *I.C.J. Reports 1991*, 12; Order of 10 September 1992 on removal of the case from the List after its discontinuance, *I.C.J. Reports 1993*, 348.

⁹ Judgment of 14 June 1993, *I.C.J. Reports 1993*, 38.

¹⁰ Judgment on jurisdiction of 4 December 1998.

¹¹ Judgment of 27 June 2001.

However, the widening of compulsory jurisdiction of courts and tribunals brought about a consequence which is normal whenever the law offers new possibilities. Together with the positive aspects, also the possibilities of unforeseen, and perhaps improper, uses and even of abuse are introduced. Together with enhanced possibilities of submitting to a court or tribunal a dispute whose judicial or arbitral settlement entails the elimination of a difficulty or a cause of tension in the relationship between the parties, it becomes possible to use proceedings before courts and tribunals as elements of broader political strategies. Seen from this perspective, the fact that proceedings are pending may count more than the eventual decision. The decision by the judge or the arbitrator might at most give the applicant an advantage in the broader conflict, without, however, necessarily eliminating it or facilitating its elimination. In other words, it becomes possible to use a unilateral application to an international court or tribunal as a weapon in a political fight. This use of unilateral applications can be seen as unfriendly. It is this use of what should otherwise be considered a positive development in international law that, in my view, raises the concerns of the scholarly opinion mentioned above. These concerns have been echoed from the bench in the separate opinion of Judge Kooijmans in the judgment on preliminary objections in the *Lockerbie cases*. He observes

how easily the Court can be portrayed as an instrument used by one of the parties for extrajudicial purposes. And this risk becomes an acute danger if the impression arises that the Court is used as a pawn in a game of chess where other principal organs of the United Nations play a role¹².

2. Provisional measures and the political use of unilateral applications

A very important element of the strategy involving "unfriendly" or "political" use of unilateral applications is the request of provisional measures. Sometimes one has the impression that the real objective of the applicant is to bring to the Court a request for provisional meas-

¹² *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (preliminary objections), Judgment of 27 February 1998, *Libya v. United Kingdom*, I.C.J., *Reports 1998*, pp. 54-55.

ures, rather than to institute proceedings on the merits. The previous institution of proceedings is often seen only as a legally necessary prerequisite for requesting provisional measures.

From the viewpoint of an applicant trying to score political points, a request for provisional measures presents numerous advantages. Firstly, it is a way to bring the case before world public opinion in a very short time. The applicant can obtain at very short notice a hearing and a decision of the Court. According to article 74, paragraph 4, of the Rules of Court:

A request for the indication of provisional measures shall have priority over all other cases.

In fact, decisions on requests for provisional measures are normally handed down by the Court in very short time, ranging from a few months to a few weeks and, exceptionally, days¹³.

Secondly, a request for provisional measures makes it possible to obtain a decision by the Court in cases where the basis for jurisdiction is uncertain. It is well known that the Court considers it necessary to have *prima facie* jurisdiction on the dispute submitted to it in order to be able to decide on a request for the indication of provisional measures¹⁴. To have *prima facie* jurisdiction is not the same thing as to have jurisdiction. This standard is certainly less exacting than that adopted by the Court in determining in a judgment, after full consideration of the question, whether it has jurisdiction.

Thirdly, according to article 41, paragraph 2, of the Court's Statute, the measures set out in the Order are brought to the attention of the Secu-

¹³ Just to quote two recent examples, in the case of the *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* the request for provisional measures was submitted on 28 May 2002 and the Order was handed down on 10 July 2002; in the case of the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* the request for provisional measures was submitted on 19 June 2000 and the Order was handed down on 1 July 2000.

¹⁴ See, for instance the Order of 8 December 2000 in the *case concerning the arrest warrant of 11 April 2000 (Dem. Rep. of the Congo v. Belgium)*, para. 67: "Whereas, when the Court has before it a request for the indication of provisional measures, it has no need, before deciding whether or not to indicate such measures, to satisfy itself beyond doubt that it has jurisdiction on the merits of the case, but whereas it cannot nevertheless indicate those measures unless the provisions invoked appear *prima facie* to constitute a basis on which its jurisdiction could be founded" (www.icj-cij.org).

riety Council¹⁵. This may be a tool for exercising pressure on the respondent, especially in light of the recent orientation of the Court in favor of considering the provisional measures it "indicates" as binding¹⁶.

Fourthly, even in cases in which the request is denied because of lack of *prima facie* jurisdiction, the applicant may hope that the Court introduces in its order statements which it can use to its advantage before world public opinion. Such sentences may, in particular, indicate concern for the situation and remind parties that, also in cases the jurisdiction of the Court is lacking, they remain obliged to comply with substantive rules of international law.

Recent Orders concerning requests for provisional measures show that there seems to be a discussion within the Court as to whether, when the Court lacks *prima facie* jurisdiction, these sentences are appropriate, and, if so, whether they are all the Court can say or whether it can take a more proactive role.

The ten Orders of 1999 on the *Legality of use of force* between Yugoslavia and member States of NATO¹⁷, and the order of 2002 in the *Armed Activities in the Territory of the Congo* (Congo v. Rwanda)¹⁸, especially in light of the declarations and separate or dissenting opinions of some judges, seem to be evidence of this discussion. In both cases the Court was seized with a unilateral application in connection with very dramatic events, it found that it lacked *prima facie* jurisdiction and it included in the Orders statements of the kind mentioned above.

¹⁵ It may be noted that article 41, paragraph 2, speaks of measures "suggested".

¹⁶ See the observations of Judge ad hoc Dugard in his separate opinion in the *Armed Activities* (Congo v. Rwanda) Order of 10 July 2002. The Court decided that its Orders indicating provisional measures are binding in its Judgment of 27 June 2001 on the *LaGrand* case (Germany v. United States), paras 92-116, www.icj-cij.org.

¹⁷ Orders of 2 June 1999, *Yugoslavia v. Belgium, Canada, France, Germany, Italy, The Netherlands, Portugal, Spain, United Kingdom, United States of America*, *I.C.J. Reports 1999*.

¹⁸ Quoted above at note 16.

3. The Legality of use of force Orders of 1999

The ten Orders of 1999 are connected with the conflict in Kosovo that saw, because of the atrocities committed by Yugoslavia against the Albanian population of Kosovo, the States of the North Atlantic Treaty Organization (NATO) intervene against Yugoslavia (Serbia and Montenegro) with air strikes, which produced considerable loss of life. In the middle of the conflict, the Yugoslav Government accepted the "optional clause" conferring compulsory jurisdiction to the Court (25 April 1999). A few days later (29 April)¹⁹ it submitted simultaneous applications against ten member States of NATO requesting the Court to declare that these States had violated a number of obligations, in particular those of abstaining from the use of force and of non-intervention. It also requested the indication of provisional measures consisting in that each of the respondent States "shall cease immediately the acts of use of force and shall refrain from any act of threat or use of force against the Federal Republic of Yugoslavia". The bases of jurisdiction invoked were not the same for all the defendant States. Some of them had, and some of them had not, accepted the "optional clause"; among those that had accepted it, some had done so with reservations relevant in the case (in particular the reservation excluding disputes with States whose acceptance of the optional clause had been made a short time before the application). All respondent States were party to the Genocide Convention; some, however, had made reservations concerning the clause introducing compulsory jurisdiction and some had not.

As a whole, it appeared that, for most, and perhaps for all defendants, the bases for jurisdiction, were, at least *prima facie*, quite shaky. In "normal" cases, in which the applicant would not have pursued political objectives, legal advisers would certainly have cautioned against the risk of submitting an application to the Court. As a matter of fact, the Court, with its orders of 2 June 1999 decided not to indicate the requested provisional measures, because, in its opinion, in all cases the prerequisite of *prima facie* jurisdiction was missing. In some cases the lack of jurisdiction appeared so evident that the Court decided to remove the case from the list. In other cases the Court kept the cases on the list reserving the subsequent procedure for further decision implic-

¹⁹ Judge Oda, in his separate opinions to the ten Orders (para 9 of his opinion in the Yugoslavia v. Belgium case, *I.C.J. Reports 1999*, 148) sees in this "bad faith" on the part of Yugoslavia.

itly considering that, whatever its *prima facie* assessment, the question of jurisdiction could be submitted to deeper examination

Yet there are in the 1999 Orders of the Court certain statements, which, even though they are carefully drafted as referring to both sides, could be used by the applicant before world public opinion. In one such statements the Court stated that it was profoundly concerned with the use of force in Yugoslavia; and that under the present circumstances such use raised very serious issues of international law²⁰. The Court stressed that it was

Mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter and the Statute of the Court²¹.

In another of these statements the Court said:

whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law, including humanitarian law²².

While no separate opinion states the view that these statements were inappropriate, even in the cases that the Court decided to remove from the List, dissenting opinions state that stronger language should have been included.

So Judge Vereshchetin stated:

Even if ultimately the Court may come to the conclusion that, due to constraints in its Statute, it cannot indicate fully fledged provisional measures in accordance with Article 41 of the Statute in relation to one or another of the respondent States, the Court is inherently empowered, at the very least, immediately to call upon the Parties neither to aggravate nor to extend the conflict and to act in accordance with their obligations under the Charter of the United Nations. This power flows from its responsibility for the safeguarding of international law and from major considerations of public order. Such an authoritative appeal by the "World Court", which would also be consistent with Article 41 of its Statute and

²⁰ Para. 17 of the Order in the *Yugoslavia v. Belgium* case. The same sentence is in the other nine orders of the same date.

²¹ Para. 18 of the Order in the *Yugoslavia v. Belgium* case. The same sentence is in the other nine orders of the same date.

²² Para. 48 of the Order in the *Yugoslavia v. Belgium* case. See also para. 19. The same sentences are in the other nine orders of the same date.

Article 74, paragraph 4, and Article 75, paragraph 1, of its Rules, could have a sobering effect on the Parties involved in the military conflict, unprecedented in European history since the end of the Second World War.

Similarly, in the dissent of Judge Shi one can read the following:

I am of the opinion that, confronted with that urgent situation, the Court ought to have contributed to the maintenance of international peace and security in so far as its judicial functions permit. The Court would have been fully justified in point of law if, immediately upon receipt of the request by the Applicant for the indication of provisional measures, and regardless of what might be its conclusion on *prima facie* jurisdiction pending its final decision, it had issued a general statement appealing to the Parties to act in compliance with their obligations under the Charter of the United Nations and all other rules of international law relevant to the situation, including international humanitarian law, and at least not to aggravate or extend their dispute. In my view, nothing in the Statute or Rules of Court prohibits the Court from so acting. According to the Charter of the United Nations, the Court is after all the principal judicial organ of the United Nations, with its Statute as an integral part of the Charter; and by virtue of the purposes and principles of the Charter, including Chapter VI (Pacific Settlement of Disputes), the Court has been assigned a role within the general framework of the United Nations for the maintenance of international peace and security. There is no doubt that to issue such a general statement of appeal is within the implied powers of the Court in the exercise of its judicial functions. It is deplorable that the Court has failed to take an opportunity to make its due contribution to the maintenance of international peace and security when that is most needed.

In short, the two dissenting judges hold the view that in cases where there is no *prima facie* jurisdiction, and even before determining whether there is or there is not such *prima facie* jurisdiction, the Court is entitled to issue "general statements" appealing to the parties to abide by their obligations under international law or at least not to aggravate or extend their dispute.

4. The 2002 Order in the *Armed activities (Congo v. Rwanda)* case

The Order in the *Armed Activities (Congo v. Rwanda)* case is connected with the complex political and military situation following the fall of the Congolese dictator Mobutu Sese Seko. Foreign troops, especially from Uganda and Rwanda, were engaged on the territory of the Congo with substantial loss of human life and the commission of numerous atrocities. Applications of Congo against Uganda and Rwanda were made by the Congo followed by requests for provisional measures. While the Court found that it had *prima facie* jurisdiction in the case against Uganda and granted such measures, in the case against Rwanda it found that it lacked *prima facie* jurisdiction.

This notwithstanding, in the Order rejecting the request for provisional measures, the Court indicated its „deep concern“ for the loss of human life due to the continuing fighting in the Eastern part of the Congo (para. 54). It also stated:

the Court finds it necessary to emphasize that all parties to proceedings before it must act in conformity with their obligations pursuant to the United Nations Charter and other rules of international law, including humanitarian law; [...] the Court cannot in the present case over-emphasize the obligation borne by the Congo and Rwanda to respect the provisions of the Geneva Conventions of 12 August 1949 and of the first Protocol additional to those Conventions, of 8 June 1977, relating to the protection of victims of international armed conflicts, to which instruments both of them are parties (para 56).

The paragraph containing this sentence is preceded by a paragraph stating that:

the Court is mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter and the Statute of the Court (para. 55).

Finally, after stating that

whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law [and that] in particular they are required to fulfil their obligations under the United Nations Charter;

it recalled relevant resolutions of the Security Council and stated:

The Court wishes to stress the necessity for the Parties to these proceedings to use their influence to prevent the repeated grave violations of human rights and international humanitarian law which have been observed even recently (para 93).

The sentences quoted above, and especially the last one, would seem to come close to the "general statements" which Judges Vereshchetin and Shi would have liked the Court to make in the *Legality of use of force* orders. Judges Koroma and El Araby, in their declarations, although satisfied with the "general statements" in the Order, seem to stress that these statements are, in substance, the same thing as provisional measures and almost hint that indeed, the Court could have made them as provisional measures. In particular, Judge Koroma states:

12. Although the Court has been unable to grant the request for want of prima facie jurisdiction, it has, in paragraphs 54, 55, 56 and 93 of the Order, rightly and judiciously, in my view, expressed its deep concern over the deplorable human tragedy, loss of life and enormous suffering in the east of the Democratic Republic of the Congo resulting from the fighting there. The Court has also rightly emphasized that all parties to the proceedings before it must act in conformity with their obligations pursuant to the United Nations Charter and the rules of international law, including humanitarian law [...]

13. It was also appropriate for the Court to emphasize in the context of this case, as it has done in paragraph 93 of the Order, that whether or not States accept the jurisdiction of the Court, they remain, in any event, responsible for acts attributable to them that violate international law and that they are required to fulfil their obligations under the United Nations Charter and in respect of the relevant Security Council resolutions [...]

14. Finally, the Court has stressed the necessity for the Parties to these proceedings to use their influence to prevent the repeated grave violations of human rights and international humanitarian law which have been observed even recently.

15. According to the jurisprudence of the Court, a provisional measure may take the form of an exhortation to "ensure that no step of any kind is taken capable of prejudicing the rights claimed ... or of aggravating or extending the dispute submitted to the Court" (*Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J., Series A/B, No. 79, p. 199*); or it may be granted where it has been shown that there is a risk of irreparable harm or injury which is

not illusory or insignificant; or it may consist of a protective measure ordered by the Court encouraging the parties to reach an agreement to preserve the status quo until the merits of the claim are finally adjudged, or it may urge the parties to a dispute not to resort to force and to settle their dispute peacefully on the basis of the law.

16. In my view, if ever a dispute warranted the indication of interim measures of protection, this is it. But while it was not possible for the Court to grant the request owing to certain missing elements, the Court has, in accordance with its *obiter dicta* in the cited paragraphs, nevertheless discharged its responsibilities in maintaining international peace and security and preventing the aggravation of the dispute. The position taken by the Court can only be viewed as constructive, without however prejudging the merits of the case. It is a judicial position and it is in the interest of all concerned to hearken to the call of the Court.

Judge Buergenthal raises strong objections against the statements set out in the paragraphs quoted above of the Order. These objections, set out in eloquent detail in his declaration, bring him to the conclusion that it was not proper as a matter of law for the Court to include the above paragraphs in this Order.²³

Judge Buergenthal's basic objection is that the paragraphs mentioned above

deal with matters the Court has no jurisdiction to address once it has ruled that it lacks *prima facie* jurisdiction to issue the requested provisional measures. (para 2)

In particular:

6. In paragraph 55, the Court declares that it "is mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of peace and security under the Charter". Of course, how could it be otherwise? But what is the point of this statement? Is it an *apologia* for the Court's lack of jurisdiction to do what it would like to do in this case? If so, I wonder whether it is appropriate. But more importantly, the Court's own "responsibilities in the maintenance of peace and security under the Charter" are not general. They are strictly limited to the exercise of its judicial functions in cases over which it has jurisdiction. In making the above statement, the Court is not performing these functions

²³ Para 10 of Judge Buergenthal's separate opinion, www.icj-cij.org.

because of its lack of jurisdiction. The paragraph reads like a preamble to a resolution of the United Nations General Assembly or Security Council, where it would be entirely appropriate. It is not in this Order.

7. As for paragraph 56, the fact that this statement is even-handed in that it addresses both Parties to the case, does not make it any more appropriate than it would be if it had been addressed to only one of them. It is inappropriate, first, because the Court has no jurisdiction in this case to call on the States parties to respect the Geneva Conventions or the other legal instruments and principles mentioned in the paragraph. Second, since the request for preliminary measures by the Democratic Republic of the Congo sought a cessation by Rwanda of activities that might be considered to be violations of the Geneva Conventions, the Court's pronouncement in paragraph 56 can be deemed to lend some credence to this claim.

8. This latter conclusion is strengthened by the language of paragraph 93, which bears close resemblance to the language the Court would use if it had granted the provisional measures request. The fact that the paragraph is addressed to both Parties is irrelevant, for in comparable circumstances the Court has issued provisional measures formulated in similar language addressed to both Parties although they were requested by only one of them [...]. Besides, the Court lacks jurisdiction in this case to address this appeal to both Parties every bit as much as it would were it to address it to only to one of them.

The legal objections made above bring Judge Buergenthal to a policy objection as to the wisdom of these "general statements" in cases the Court lacks *prima facie* jurisdiction:

9. Whether intended or not, the Court's pronouncements in the foregoing paragraphs, particularly in paragraphs 56 and 93, might be deemed to lend credence to the factual allegations submitted by the Party seeking the provisional measures. In the future, they might also encourage States to file provisional measures requests, knowing that, despite the fact that they would be unable to sustain the burden of demonstrating the requisite *prima facie* jurisdiction, they would obtain from the Court some pronouncements that could be interpreted as supporting their claim against the other Party.

5. The limits to "political" or "unfriendly" uses of unilateral applications

The opposing views of Judge Buergenthal and of the majority of the Court throw light on the limits of the results that can be obtained through the "political" or "unfriendly" use of unilateral applications. The lack of similar sentiments expressed by members of the Court towards equivalent sentences in the *Legitimacy of use of force* orders of 1999 would seem to show that these limits may vary depending on the perception of the factual and political situation. An indication of the background to such a difference in perception may be seen in that, in a case dealing with the same conflict opposing Congo with its neighbours involved in the fighting following the fall of the former dictator Mobutu Sese Seko (in which the bases of jurisdiction of the Court are quite solid)²⁴, namely that of Congo v. Uganda, counter-claims by the defendant have been found admissible²⁵.

The points made by Judge Buergenthal, and the different views emerging in the order of the Court and in Judge Koroma's separate opinion, together with the observations made above, contribute to put into focus the discussion concerning the „unfriendly“ use of unilateral applications. Is such use always inappropriate? If the answer is no, are there limits to such use?

In my opinion, to use unilateral applications as parts of broader political strategies in complex situations of conflict cannot be condemned as such. If the requirements of the existence of a dispute and of the jurisdiction of the Court are satisfied, it does not seem to me correct to consider the cases brought to the Court as different from any other case satisfying the same requirements. The Court expressed itself in a similar vein when, after the United States seized it of the *case concerning United States Diplomatic and Consular Staff in Teheran*, Iran stated in a letter to the Court that the question of hostages represented „only a marginal and secondary aspect of an overall problem“ and that the Court could not „examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last 25 years“²⁶. The Court, in

²⁴ See the Order of 1 July 2000, in www.icj-cij.org.

²⁵ See the Order of 29 November 2001, in www.icj-cij.org.

²⁶ Letter of 9 December 1979, repr. in the Court's Order of 15 December 1979, I.C.J. *Reports* 1979, 10.

its Order on provisional measures, stated that these (as well as other) considerations could not „be accepted as constituting an obstacle to the Court's taking cognizance of the case“²⁷.

One may wonder whether these applications constitute an abuse of legal process. Before accepting that this is the case, it would seem to me that a high threshold must be overcome. Bad faith could be part of such threshold as indicated by Judge Oda in a statement quoted above²⁸. I have doubts, however, as to whether the fact relied upon by Judge Oda that the declaration accepting compulsory jurisdiction was made just a few days before the application (and obviously with the application in mind) amounts to bad faith corresponding to abuse of legal process. Reservations to prevent the effect of declarations of this kind have been used and upheld by the Court. Also amendments to a declaration under article 36, para 2, introduced by a State specifically to prevent the jurisdiction of the Court in a category of cases considered as likely to be brought after a certain action has been taken by that State, have been considered as acceptable as shown in the *Fisheries Jurisdiction* Judgment in the case between Spain and Canada²⁹.

Moreover, the function of an International Court or Tribunal is not only that of settling disputes or of developing international law. As for all other courts of law, its function is also that of permitting the statement in public of legal views under strict jurisdictional and procedural requirements. This remains true even if this aspect of the proceedings is seen as helpful by one party in a political context.

6. Political *obiter dicta* in Orders indicating provisional measures

A different matter is whether the Court should encourage such „unfriendly“ use of unilateral applications by the frequent inclusion in its decisions of *obiter dicta* of the kind discussed above. Such *obiter dicta* in preliminary phases of the case (and especially in Orders on the request of indication of provisional measures) may be perceived by the applicant as more important for its political strategy than the final deci-

²⁷ I.C.J. Reports 1979, para 26 at p. 16.

²⁸ Supra note 19.

²⁹ Judgment of 4 December 1998, www.icj-cij.org.

sion of the Court. It would seem to me that the line should be drawn between cases in which there is jurisdiction, or (in Orders for the indication of provisional measures) where there is *prima facie* jurisdiction, and cases in which the Court finds that it has no *prima facie* jurisdiction. A further problem is whether there should be a difference between cases in which there is no *prima facie* jurisdiction and cases that the Court decides to remove from the list of cases because, at the provisional measures phase, jurisdiction appears radically lacking.

In cases where the Court finds that it has at least *prima facie* jurisdiction, it seems to me appropriate for it to invoke its responsibilities in the maintenance of international peace and security as an organ of the United Nations³⁰, and, in light of such responsibilities, also indicate its concern for certain situations and to remind parties of their responsibilities under international law.

Statements of this kind should, however, be utilized with restraint. They should not become routine. The decisive factor in determining whether to use them in a decision should be, it would seem to me, their usefulness as a contribution to the maintenance of international peace and security and not their "feel good" character (to use the expression of Judge Buergenthal). This factor should be envisaged from within the perspective of a case of which the Court is seized and has at least *prima facie* jurisdiction.

Much more restraint seems to be required whenever the Court is requested to indicate provisional measures and finds that it lacks *prima facie* jurisdiction. Here it can be seriously doubted whether the use of any of the above discussed *obiter dicta* is opportune. It would seem, nonetheless, difficult to hold the view that the indication of concern for certain situations, or the emphasizing of the Court's responsibilities for the maintenance of peace and security, are wrong as a matter of law.

³⁰ Cf. the address of Judge Bedjaoui in his capacity as president of the I.C.J. to the U.N. General Assembly on 13 October 1994, in www.icj-cij.org: "The Court is clearly an essential part not only of the machinery for the peaceful settlement of disputes set up by the Charter, but also of the general system for the maintenance of international peace and security that it has introduced". *Rosenne*, *The Law and Practice* (note 3) 109: "[T]he principles and purposes for which the United Nations exists apply to the Court as much as to any other organ". See also *A. Pellet*, *La glaive et la balance*, *Remarques sur le rôle de la C.I.J. en matière de maintien de la paix et de la sécurité internationales*, in *Y. Dinstein* (ed.), *International Law in a Time of Perplexity*, *Essays in Honor of Shabtai Rosenne*, 1989, 539, espec. 540-545.

They may be, and are very likely to be, unnecessary for the decision, reached in these cases, not to indicate the requested provisional measures because of lack of *prima facie* jurisdiction. They might be read as platitudes. Still, in light of the Court's role within the United Nations system, in egregious cases, they may serve a useful purpose. It would seem more difficult to consider them as useful in cases brought before a regional or a specialized international Court of Tribunal not connected with the United Nations system.

Consequently, the sweeping conclusion of Judge Buergenthal that the inclusion of all the statements he considers of the Order on the request for provisional measures in the Congo v. Rwanda case cannot be considered as appropriate "as a matter of law", should not, in my opinion, be followed all the way. Such assertion seems, nonetheless, correct as far as a specific category of these statements is concerned. This is the category of the statements whose content is equivalent to that of a provisional measure the Court could have indicated if it had found that it had *prima facie* jurisdiction. The statement according to which "[t]he Court wishes to stress the necessity for the Parties to these proceedings to use their influence to prevent the repeated grave violations of human rights and international humanitarian law which have been observed even recently" set out in para 93 of the Order on the request for provisional measures in the Congo v. Rwanda case, seems to be a good example.

It is true that this sentence is not set out in the operative part of the Order. It still seems to me that the use of prescriptive language goes beyond what is appropriate. One could, however, venture to consider that, after the *LaGrand* judgment quoted above, stating that the provisional measures "indicated" by the Court are binding, the difference between statements of the kind mentioned above included in the reasoning of the Court and in its operative part becomes relevant, so that now it would be easier than before for the Court to include such prescriptive general statement in its reasoning.³¹ Are the statements set out in the Congo v. Rwanda Order, and especially the above quoted one in paragraph 93, a follow-up of the *LaGrand* judgment? The Court in its 2002 Order does not indicate a connection, but there could be one. The absence of such indication might also indicate that the Court is waiting

³¹ This kind of problem has emerged in the practice of the International Tribunal for the Law of the Sea, a tribunal whose provisional measures are "prescribed" and clearly made compulsory by the relevant provision of the U.N. Convention on the Law of the Sea of 1982 (article 290, para. 6).

for further occasions to refine the doctrine it stated in general terms in its *LaGrand* judgment.

A further explanation for the statements (in particular the one which seems to me objectionable) in the *Congo v. Rwanda* case, could be the fact that the ten Orders of the Court in the *Legality of the use of force* cases have introduced a further nuance, as far as jurisdiction is concerned, in cases in which provisional measures have been requested. The distinction between cases in which the Court finds that there is *prima facie* jurisdiction and those in which it finds that there is not, has been completed by the further distinction between cases in which, while holding that there is no *prima facie* jurisdiction, the Court keeps the dispute on the list of cases, and those in which it decides to dismiss the case, striking it out of the list. This latter possible outcome of requests for provisional measures, which does not seem to have precedents in the case law of the Court, seems to indicate an abusive use of "unfriendly" unilateral applications. Any statement that could be used to the political advantage of the applicant would seem highly criticisable as it would amount to a prize for abusing the legal process. It is to be noted that the Court, in the *Congo v. Rwanda* Order rejected the request of Rwanda to strike out the case from the list because of manifest lack of jurisdiction.³²

A consequence of the above illustrated difference which exists, as far as the inclusion of general statements of the kind described is concerned, between cases where there is and those in which there is not *prima facie* jurisdiction, is, it would seem to me, that the idea proposed by Judges Shi and Vereshchetin that the Court, seized of a request for provisional measures, should make this kind of general statement *in limine litis*, before determining whether it has *prima facie* jurisdiction, goes too far. This is particularly, but not exclusively, true, as far as statements referring to the aggravation or extension of the dispute are concerned. It is to be stressed that, when the Court has decided that

the Court possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require³³,

³² Paragraph 91 of the Order.

³³ Order of 15 March 1996 in the Case concerning *Land and maritime boundaries between Cameroon and Nigeria* I.C.J. Reports 1996, para. 41, p. 13,

such power has only been exercised when the Court had determined that it had *prima facie* jurisdiction.

quoting the previous Order of 10 January 1986 in the *Burkina Faso v. Mali frontier dispute*, in *I.C.J. Reports 1986*, para. 18 at p. 10.

UNCLASSIFIED

From: Conolly, Alan [mailto:ARConolly@arconolly.com.au]
Sent: Friday, December 20, 2013 9:42 AM
To: Sekler, Irene
Cc: FileNotes; McDonald, Catherine
Subject: Execution of ASIO search warrants (your ref: 13209380; our ref: 234853)

Dear Ms Sekler

1. We have been instructed to act for Bernard Collaery, and to respond to your letter of 16 December 2013, which the writer has read for the first time this morning.
2. We are instructed that the attendance of ASIO at our client's premises on 3 December 2013 was, in many respects, videoed.
3. We request you provide us with a copy of the video as a matter of urgency. We request you do so by 5pm today.
4. The deadlines you stipulate for a claim for privilege are impracticable.
5. We believe, when you examine the video, you will understand that the fashion in which Mr Collaery's clerk was informed concerning what was taken from the premises was unsatisfactory to a high degree.
6. Mr Collaery does not know what was taken in sufficient detail to provide us with adequate instructions on the issue of privilege.
7. Please provide us with details of each and every document and piece of data ASIO took, document by document, and piece of data by piece of data.
8. Mr Collaery's position is that he does not know what ASIO has taken. He accordingly cannot obtain instructions until you provide that information.
9. We must consider, not only the preservation of privilege that may vest in Mr Collaery's clients, but also the protection of the privacy of all data that may have been taken illegally.
10. It may also be that the entry into the premises was illegal, and the taking of material was illegal. One possibility is your client will be required by court order to return all the material taken without copying.
11. We ask for an undertaking by your client not, in any way, to copy or deal with what was taken from Mr Collaery's premises until we have had a response to this letter, and the opportunity thereafter, if need be, to institute proceedings.
12. Our instructions are the warrant was not served, in that it was not left with Mr Collaery's clerk, and nor was she given time to properly read it. Further, there were portions of the warrant that were blacked out.
13. We ask that you provide us with a copy of the warrant that was shown to Mr Collaery's clerk, and that we receive that by 5pm today.
14. We also request that you deliver to us by 5pm on Monday, at our Sydney offices, the original warrant, which was shown to Mr Collaery's clerk.

15. We also ask that you provide us with a copy of the warrant without any blacking out, so that the full warrant can be read.

16. Please provide us with a copy of the seizure record.

17. Please advise:

a. why portions of the warrant were blacked out;

b. why the ASIO officer who spoke with Mr Collaery's clerk refused to give the warrant to her and allow her to retain it;

c. the identity of each of the persons who entered the premises;

d. the identity of each person's employer; and

e. the instructions each person had from his or her employer in relation to the entry onto the premises.

18. We also ask that you identify the documents which the Attorney-General considered when determining whether he should issue the warrant under section 25 of the Australian Security Intelligence Organisation Act 1979.

19. We also ask that you advise which of those documents your client is prepared to allow us to inspect.

20. Please inform us of the Attorney-General's grounds for believing that access by ASIO to records or things on the premises will substantially assist the collection of intelligence with respect to a matter that is important in relation to security.

Yours faithfully
Alan Conolly

ALAN CONOLLY

SENIOR PARTNER

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Please note: AGS offices will be closed from COB 24 December 2013 until 2 January 2014. If you need advice or assistance during that time, please contact 0409 320 713 until 27 December, then 0407 464 028 until 2 January.

If you have received this transmission in error please notify us immediately by return e-mail and delete all copies. If this e-mail or any attachments have been sent to you in error, that error does not constitute waiver of any confidentiality, privilege or copyright in respect of information in the e-mail or attachments.



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Your ref. 234853

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20 December 2013

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Dear Mr Conolly

Execution of ASIO search warrant

1. We refer to your email of 20 December 2013 and a 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. As a consequence of the President's request, the Commonwealth will take no steps in relation to 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.
3. We are seeking instructions on the other matters raised in your email and will respond as soon as we are able to do so.
4. Please do not hesitate to contact the writer in relation to the matter.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Irene Sekler', written in a cursive style.

Irene Sekler
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Your reference

Our reference
GB/GB/3161557/837016
AUM/1205400283.1

2 January 2014

By Email Only: irene.sekler@ags.gov.au

Dear Ms Sekler

**GOVERNMENT OF THE DEMOCRATIC REPUBLIC OF TIMOR-LESTE
EXECUTION OF ASIO SEARCH WARRANTS**

We refer to your letter dated 24 December 2013.

We note that your client's undertaking in paragraph 2 is expressed to last until the ICJ hearing on 20-22 January 2014. In accordance with the usual practice, however, the ICJ's Provisional Measures Order is likely to be issued not on 22 January but sometime thereafter. Accordingly, please confirm that the undertaking will remain in place at least until the ICJ Order is made.

We also note your repeated references to the assertion of our client's claims through the Australian courts. For the avoidance of doubt, we wish to make it clear that the claims of Timor-Leste against Australia, that are the subject of the proceedings instituted at the ICJ, are claims of Timor-Leste under international law. There is no requirement under international law that Timor-Leste, a sovereign State, first subject itself to Australian domestic processes before raising such claims at the international level.

As to any recourse that Timor-Leste may separately have to the Australian courts, your client has no legal right to impose an arbitrary time bar on our client.

Yours sincerely

PP
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GOVERNO
República Democrática de Timor-Leste

30 December 2013

Mr Garth Schofield
Legal Counsel
Permanent Court of Arbitration
Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands

Dear Mr Schofield,

Re Democratic Republic of Timor-Leste v Australia

We have to hand a copy of the letter from Mr John Reid, Agent for Australia, to yourself dated 30 December 2013. We appreciate that for reasons of urgency Mr Reid wrote direct to yourself.

Timor-Leste would not characterise the proceedings against Australia in the International Court of Justice (ICJ) as incidental to the Arbitration under the Timor Sea Treaty. Accordingly, the request by Australia will need to be discussed with Counsel appearing in the ICJ proceedings

before a final view can be advanced by Timor-Leste. Given the season, we expect to be able to provide Timor-Leste's views shortly.

A copy of this letter has been sent to the Agent for Australia, Mr John Reid.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Amy McMullen', written in a cursive style.

Amy McMullen
Counsellor (Legal Affairs)
Co-Agent for Timor-Leste
Embassy of the República Democrática de Timor-Leste
4 Beauchamp Road
London SW11 1PQ
United Kingdom



Australian Government
Attorney-General's Department
**International Law & Human
Rights Division**

30 December 2013

Mr Garth Schofield
Legal Counsel
Permanent Court of Arbitration
Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands

Dear Mr Schofield

***Arbitration under the Timor Sea Treaty
Democratic Republic of Timor-Leste v Commonwealth of Australia***

I refer to correspondence from the Co-Agent for Timor-Leste of 19 December 2013. As that correspondence notes, on 17 December 2013 Timor-Leste instituted proceedings against Australia in the International Court of Justice (the Court) in relation to documents and data (the Material) removed from the Australian office of Mr Bernard Collaery on 3 December 2013.

In filing its Application before the Court, Timor-Leste also requested Provisional Measures in relation to the Material, principally on the basis that such measures are necessary to preserve the positions of the Parties in the *Arbitration under the Timor Sea Treaty* (the Arbitration). The Provisional Measures request will be heard by the Court on 20 to 22 January 2014.

Given the direct relationship between the Arbitration and Timor-Leste's Provisional Measures request before the Court, it will be necessary for information pertaining to the Arbitration to be put before the Court. Accordingly, it has become necessary to seek a variation to Article 26 of the Rules of Procedure (Confidentiality of the Proceedings) adopted by the Tribunal at the Preliminary Conference on 5 December 2013.

At the Preliminary Conference, Australia agreed to Timor-Leste's proposal for a variation to the then draft Rules of Procedure to enable reference to be made to relevant aspects of the Arbitration in any proceedings commenced before an Australian court (see Transcript of the Procedural Hearing, pp 89-90). Australia respectfully seeks the Tribunal's agreement to extend this variation to enable reference to be made to relevant aspects of the Arbitration in the proceedings instituted by Timor-Leste before the Court. Australia also requests that relevant documents relating to the Arbitration such as the Transcript of the Procedural Hearing, Rules of Procedure, documents tendered and undertakings made to the Tribunal be

permitted to be put before the Court for the purposes of defending the proceedings instituted by Timor-Leste.

In light of the short timeframe established for the Provisional Measures proceedings, I would be grateful for the Tribunal's urgent consideration of this request.

I would be grateful if you would communicate this letter to the Tribunal. A copy of this letter has been forwarded to the Agent for Timor-Leste.

Yours sincerely



John Reid
Agent for Australia
First Assistant Secretary
International Law and Human Rights Division
Attorney-General's Department
Canberra, Australia



H.E. Mr. Joaquim da Fonseca
Ambassador and Agent
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BY E-MAIL: RUSSO@MINIHUB.ORG

Mr. John Reid
First Assistant Secretary
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30 December 2013

RE: ARBITRATION UNDER THE TIMOR SEA TREATY (TIMOR-LESTE V. AUSTRALIA)

Dear Madam, dear Sirs,

On behalf of the Tribunal in the above-captioned matter, I acknowledge receipt of Australia's letter of today's date, requesting a variance of Article 26 of the Rules of Procedure concerning confidentiality. I further acknowledge receipt of Timor-Leste's letter of today's date, regarding the same subject. Copies of both letters are enclosed for the attention of all concerned.

Timor-Leste is invited to provide any further comments it may have regarding Australia's request by **Friday, 3 January 2013**. Please do not hesitate to contact me should you have any questions concerning this letter.

Yours sincerely,

Garth Schofield
Legal Counsel

Encl.: Letter from Australia dated 30 December 2013
Letter from Timor-Leste dated 30 December 2013

cc: *Arbitral Tribunal:*
Professor Tullio Treves (by e-mail: tulliorodolfo.treves3@gmail.com)
Lord Collins of Mapesbury (by e-mail: lcollins@essexcourt.net)
Professor W. Michael Reisman (by e-mail: michael.reisman@yale.edu)

Counsel for Timor-Leste:

Sir Elihu Lauterpacht CBE QC (by e-mail: el14@cam.ac.uk)

Professor Vaughan Lowe QC (by e-mail: vlowe@essexcourt.net)

Mr. Bernard Collaery (by e-mail: bernard.collaery@collaerylawyers.co.uk)

Counsel for Australia:

Mr. Justin Gleeson SC (by e-mail: ben.gauntlett@ag.gov.au)

Professor James Crawford AC SC (by e-mail: jrc3000@aol.com, jrc1000@cam.ac.uk)



Australian Government
Attorney-General's Department

**International Law & Human
Rights Division**

1 January 2014

Mr Garth Schofield
Legal Counsel
Permanent Court of Arbitration
Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands

Dear Mr Schofield

***Arbitration under the Timor Sea Treaty
Democratic Republic of Timor-Leste v Commonwealth of Australia***

I refer to my correspondence of 30 December 2013, seeking the Tribunal's consideration of amended confidentiality orders so as to allow for the presentation of necessary evidence before the International Court of Justice in proceedings instituted by Timor-Leste on 17 December 2013.

By way of clarification, the orders sought from the Tribunal are not intended in any way to derogate from the ability of the International Court of Justice to make such confidentiality orders as it sees fit over any material which is presented before that Court.

I would be grateful if you would communicate this letter to the Tribunal. A copy of this letter has been forwarded to the Agent for Timor-Leste.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'J Reid'.

John Reid
Agent for Australia
First Assistant Secretary
International Law and Human Rights Division
Attorney-General's Department
Canberra, Australia



GOVERNO
República Democrática de Timor-Leste

3 January 2014

Mr Garth Schofield
Legal Counsel
Permanent Court of Arbitration
Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands

Dear Mr Schofield,

Re Democratic Republic of Timor-Leste v Australia

I refer to correspondence regarding the Tribunal's consideration of amended confidentiality orders so as to allow for reference by the Parties before the International Court of Justice to correspondence, pleadings and transcript evidence in the current Arbitration proceedings between Timor-Leste and Australia.

Timor-Leste has no objection to the issue of amended confidentiality orders so long as those orders relate to proceedings before the ICJ. Timor-Leste considers that any amended orders of the Tribunal should relate in similar terms to Timor-Leste and Australia and be restricted to, at this stage, the presentation of evidence before the ICJ. We see no reason for the expression “necessary evidence” and believe this expression to be unclear.

In agreeing to any such orders, Timor-Leste in no way waives for itself or any other party or person the immunities that may attach to the proceedings in the Arbitration.

Yours sincerely,



Amy McMullen
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H.E. Mr. Joaquim da Fonseca
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First Assistant Secretary
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7 January 2014

RE: ARBITRATION UNDER THE TIMOR SEA TREATY (TIMOR-LESTE V. AUSTRALIA)

Dear Madam, dear Sirs,

Please find enclosed the Tribunal's *Procedural Order N° 2* in the above-captioned matter.

Yours sincerely,

Garth Schofield
Legal Counsel

Encl.: Procedural Order N° 2

cc: *Arbitral Tribunal:*
Professor Tullio Treves (*by e-mail:* tulliorodolfo.treves3@gmail.com)
Lord Collins of Mapesbury (*by e-mail:* lcollins@essexcourt.net)
Professor W. Michael Reisman (*by e-mail:* michael.reisman@yale.edu)

Counsel for Timor-Leste:

Sir Elihu Lauterpacht CBE QC (*by e-mail:* el14@cam.ac.uk)
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