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Right to peaceful settlement of disputes in the reasoning of the International Court of Justice (Timor-Leste v Australia)

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1. Introduction

Some might argue that State possibly *de facto* gravely violating the sovereignty of smaller neighbour may be nothing new on the international scene. But the case currently pending before the International Court of Justice (hereinafter referred to as ICJ or the Court), Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia) (Timor-Leste v. Australia, Case) may be considered one of the most controversial and complex disputes ever submitted. Judge Cançado Trinidade recalls that "*once again shows that the factual context of disputes lodged with an international tribunal like the ICJ may well cross the threshold of human imagination.*"[1]

The main storyline of the Case at hand is that Australian officials seized and continuously detain documents and data in the business premises of a legal adviser of Timor-Leste. The reasoning behind this act was that a former Australian intelligence officer disclosed classified information to the legal counsel. Australia therefore was acting in its national security interest, while it seized also numerous documents and data containing litigation and negotiation strategies of Timor-Leste. Such strategies also should serve in the arbitration regarding maritime delimitation (Arbitration) between Australia and Timor-Leste (Parties).

Currently the Case proceedings have been postponed by the Parties in order to endeavour to settle it by means of diplomatic negotiations. Although it is not clear whether the Court will eventually give judgement on the merits of the Case, already the Order regarding the provisional measures of 3 March 2014 (Order) is of tremendous importance to international law and its perception. This happened mainly because the ICJ emphasised a notion of certain procedural rights that may be attributed to a State, that in certain way create a an equivalent of a Right to fair trial of an individual. This shall be hereinafter be referred to as "Right to peaceful settlement of international disputes" (Right).

As shall be further elaborated upon hereunder, in the Order, the Court stated that "*at least some of the rights for which Timor-Leste seeks protection - namely, the right to conduct arbitration proceedings or negotiations without interference by Australia, the right of confidenti-*

[1] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia),* Request for the indication of provisional measures, Separate of Judge Cançado Trinidade, I.C.J. Reports 2014. pp. 1, para. 1.

ality of and non-interference in its communication with its legal advisers - are plausible."[2] The Court, however, did not provide an extensive description of the sources of such rights, except for the right to communicate with counsels and lawyers at the side of Timor-Leste, whereas it stated solely its possible link to the principle of sovereign equality of States and equality of the Parties before the law.[3]

The aim of this Paper is firstly the existence, nature and scope of such Right, special regards will be at certain point given to parallels between the Right and Right to fair trial of an individual. Secondly the outcome thereof shall indicate the plausibility of this Right and its impact on the possible ruling of the Court in the Case. For these purposes, it shall firstly review the main facts of the Case and political controversies related thereto. Henceforth this Paper shall elaborate on grounds upon which the Right could be based in order to determine its nature and scope. Thirdly the focus will be put on aspects of such Right set forth in the Order, as well as on a brief reflection of other possible rights that could apply in this regard.

2. Facts of the Case

2.1 Factual background of the case

The two Parties to the Case share long-lasting and enormously tight historical relations especially given their geographical location. In modern times their proximity caused tensions among them with regards to the delimitation of their maritime borders in the Timor Sea with subsequent impact on the natural resources therein. The exploitation of natural resources is governed by three treaties signed among the Parties, namely the Timor Sea Treaty (2002), Sunrise International Unitization Agreement (2003) and the Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS, 2007). The oil and gas deposits in the Timor sea are estimated to be worth $40 billion and the revenues thereof constitute greatest part of state income of Timor-Leste.[4]

[2] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia),* Request for the indication of provisional measures, Order, I.C.J. Reports 2014. pp. 7, para. 27

[3] Ibid

[4] ALLARD, T. ASIO raids office of lawyer Bernard Collaery over East Timor spy claim. In: *The Sydney Morning Herald* [online]. 2013-12-3 [Accessed 2015-8-1]. Available at: <http://www.smh.com.au/federal-politics/political-news/asio-raids-office-of-lawyer-bernard-collaery-over-east-timor-spy-claim-20131203-2yoxq.html>.

In 2013 officials of Timor-Leste and Mr. Bernard Collaery, a legal advisor of Timor-Leste publicly disclosed the ties with former officer of the Australian Secret Intelligence Service (ASIS), who provided testimony stating that Australia unlawfully spied on Timor-Leste while CMATS was being drafted back in 2004.[5] Based on this allegation, Timor-Leste started an Arbitration against Australia with the Permanent Court of Arbitration, aiming at nullification of the CMATS and thus creating an opportunity to renegotiate terms of maritime delimitation *pro futuro*.

On 2 December 2013, Australian Attorney-General, Senator the Honourable George Brandis QC issued a search warrant, enabling it for Australian Secret Intelligence Organisation (ASIO) to examine and seize documents and data from the business premises of Bernard Collaery. Sen. Brandis explained was that the former officer could by means of the testimony endanger national security of Australia as well as other agents or their families.[6] The execution of this warrant took place on 3 December 2013. Various documents, both in paper and electronic form, were seized. They are said to include confidential communication between Timor-Leste and Collaery, documents prepared by Collaery as well as the testimony of the former ASIS officer. Seized documents and data were from that time point in the custody of Sen. Brandis, who assured Timor-Leste that these shall not be used for any purpose of the exploitation of resources or related negotiations.

The proceedings before the Court begun with an Application filed with the Registry by the Government of the Democratic Republic of Timor-Leste on 17 December 2013 with respect to the seizure of 3 December 2013 and subsequent detention. On the same day, Timor-Leste filed also a Request for the indication of provisional measures, whereas it asked the Court to grant that Australia: 1) Seals the documents and data and deliver these into the custody of the ICJ, 2) provides the Court and Timor-Leste with a list of documents or data including leaked information and a list of persons familiar with such information, 3) provides the Court and Timor-Leste with a list of copies, 4) Australia destroys such copies beyond recovery, 5) pro-

[5] SHANAHAN, L. Aussie spies accused of bugging Timor cabinet. In: *The Australian* [online]. 2013-5-29 [Accessed 2014-8-1]. Available at: <http://www.theaustralian.com.au/national-affairs/foreign-affairs/aussie-spies-accused-of-bugging-timor-cabinet/story-fn59nm2j-1226652599040>.

[6] HURST, D. Timor-Leste rejects 'outrageous' claim in Australian spying dispute. In: *The Guardian* [online]. 2014-1-23 [Accessed 2014-8-1]. Available at: <http://www.theguardian.com/world/2014/jan/23/timor-leste-rejects-outrageous-slur-australian-spying-dispute>.

vides assurances of no further interception of communications of Timor-Leste and its legal advisers[7].

After the public hearings, Australia requested that the Court 1) refuses the concerned Request for the indication of provisional measures, 2) stays the proceedings until the judgement in the Timor Sea Treaty Arbitration is rendered.[8] This request was rejected. At the same time, Sen. Brandis gave other assurances in the Written undertaking of 21 January 2014. Within this undertakings he promises that the neither documents or data seized will be further used or examined until the judgement by him or any other person.[9]

2.2 Order of provisional measures

On 3 March 2014 the Court gave Order with respect to the Request, where it indicated provisional measures in accordance with the power vested in the Court by Article 41 (1) of the Statute of the International Court of Justice (Statute).

Concerning the jurisdiction the Court anticipated that the basis for jurisdiction could be founded. This decision constitutes a slight controversy by itself. Both Parties did make a Declaration under Article 36 (2) of the Statute, nonetheless Australia did so with certain reservations thereto. In accordance with this reservation, the Declaration of Australia is not applicable to "*any dispute in respect of which any other party to the dispute has accepted the compulsory jurisdiction of the Court only in relation to or for the purpose of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other party to the dispute was deposited less than 12 months prior to the filing of the application bringing the dispute before the Court.*"[10] Thus the jurisdiction could be disputable, because Timor-Leste made a declaration accepting the jurisdiction as compulsory just *one day* before it filed the Application with the Court. To this account, over the course of oral pleadings, Australia added that it retains its "*right to raise questions of jurisdiction and admissibility at the merits*

[7] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia),* Request for the indication of provisional measures, Written submission by Timor-Leste, I.C.J. Reports 2013. pp. 4 para. 10.

[8] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia),* Written Observations of Australia on Timor-Leste's Request for Provisional Measures, I.C.J. Reports 2014.

[9] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia),* Written undertaking by Senator the Hon George Brandis QC, Attorney-General of the Commonwealth of Australia dated 21 January 2014, I.C.J. Reports 2014.

[10] INTERNATIONAL COURT OF JUSTICE. Declarations Recognising the Jurisdiction of the Court as Compulsory. In: *International Court of Justice* [online] [Accessed 2014-8-1]. Available at: <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>

stage,"[11] but these it will not raise them in relation to the Request. This, however, indicates that Australia might still challenge the jurisdiction on the basis of the aforementioned reservation in these proceedings.

The Court held in the Order that following measures are indicated upon the Request of Timor-Leste:

> *(1) Australia shall ensure that the content of the seized material is not in any way or at any time used by any person or persons to the disadvantage of Timor-Leste until the present case has been concluded;*
>
> *(2) Australia shall keep under seal the seized documents and electronic data and any copies thereof until further decision of the Court.*
>
> *(3) Australia shall not interfere in any way in communications between Timor-Leste and its legal advisers in connection with the pending* Arbitration under the Timor Sea Treaty of 20 May 2002 between Timor-Leste and Australia, *with any future bilateral negotiations concerning maritime delimitation, or with any other related procedure between the two States, including the present case before the Court.*[12]

In some of the added separate opinions, the provisional measures granted were considered to be obsolete with regards to the statements made by Sen. Brandis, whereas by these assurances bind Australia at the level of international law just as much as the Order. Furthermore the documents and data are still in the custody of Australia. In particular, Judge Cançado Trindade expressed in his Separate opinion, that "*the Court should have gone further and should have ordered* […] *to the effect of having the documents and data (containing information belonging to it) seized by Australia immediately sealed and delivered into* the custody of the Court itself [.]"[13]

2.3 Political controversies

[11] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia),* Request for the indication of provisional measures, Order, I.C.J. Reports 2014. pp. 6, para. 20.
[12] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia),* Request for the indication of provisional measures, Order, I.C.J. Reports 2014. pp. 15, para. 55.
[13] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia),* Request for the indication of provisional measures, Separate opinion of Judge Cançado Trinidade, I.C.J. Reports 2014. pp. 1, para. 1.

By means of granting the provisional measures the Court has put a spotlight on the issue of colliding sovereignty in an unprecedented scope. The provisional measure granted by the Court in the para. (3) as cited above, has been widely referred to as "*spy ban.*"[14] Such an emphasis put by the principal judicial body of the United Nations contests the good faith in Australian undertakings and thus basically makes Australia seem to be a "*bad global citizen*" unlawfully depriving its neighbour of the rights that it unjustly cherishes for itself[15]. From the domestic point of view, this case also brings shadows overhead of the liberals in Australia, since it is by far the greatest demonstration of then proposal of new ASIO laws, vesting considerable powers therein.[16] It is a reflection of overall tendency in Australia to suppress harshly any issue that may to whichever extent pose a counter-interest to national security.

On the other hand, the victimisation of Timor-Leste is also not entirely well-founded. It has been stressed by numerous sources that Timor-Leste was trying to use the light shed to nullify a treaty that had been a thorn in its side for a long time.[17] In this regard, Timor-Leste sought to renegotiate the settlement bilaterally several times. These circumstances could create an opportunity for such renegotiation, which Timor-Leste might be willing to leverage. It would be certainly harder to advocate the maintenance of such agreement, where drafting thereof has involved clandestine activities. This could would mean a significant substantial improvement of Timor-Leste both in the course of Arbitration as well as with regards to future maritime delimitation negotiations. *Professor James Crawford*, acting for Australia, has even mentioned that the application to the Court has been motivated by other factors than sole justice, rather with objective to shed a spotlight of publicity on the general talks as well as making a

[14] ALLARD, T. Australia ordered to cease spying on East Timor by International Court of Justice. In: *The Sydney Morning Herald* [online] 2014-3-4 [Accessed 2014-9-26]. Available at: <http://www.smh.com.au/federal-politics/political-news/australia-ordered-to-cease-spying-on-east-timor-by-international-court-of-justice-20140303-hvfya.html>

[15] LAMB, K. Timor-Leste v. Australia: what each country stands to lose. In: *The Guardian* [online]. 2014-1-23 [Accessed 2014-9-26]. Available at: <http://www.theguardian.com/world/2014/jan/23/timor-leste-v-australia-analysis>

[16] ACKLAND, R. The Timor-Leste spying case is a taste of our future under Asio's new powers. In: *The Guardian* [online]. 2014-9-10 [Accessed 2015-1-1]. Available at: <http://www.theguardian.com/commentisfree/2014/sep/10/the-timor-leste-spying-case-is-a-taste-of-our-future-under-asios-new-powers>.

[17] MURPHY K. and L. TAYLOR. Timor-Leste spy case: 'witness held, and lawyer's office raided by ASIO'. In: *The Guardian* [online]. 2013-12-3 [Accessed 2014-8-1]. Available at: <http://www.theguardian.com/world/2013/dec/03/timor-leste-spy-witness-held-lawyers-office-raided-asio>.

prejudicial comment on Australia.[18] This, however, must be assessed in light of the fact that prof. Crawford represents one of the Parties.

Lastly it must be once again noted and stressed that the intelligence involvement has not happened solely on one side. The fact that a former intelligence officer may have disclosed classified information of whichever kind to another State adversary to Australia constitutes a serious disturbance. Especially in the world after WikiLeaks affair that triggered thorough debate on the legitimacy of spying. Not to mention that public acknowledgement of information from such source by State authorities as well as its usage as grounds for commencement of Arbitration most likely amounts to encouragement on the part of Timor-Leste[19] meaning a serious breach of the good faith maxim on its part as well.

3. The principles governing the Right

As already outlined, there is no express corresponding provision under international law word by word stating that a State would be entitled to exercise the Right. Neither is there the right to conduct arbitration proceedings or right to communicate with its legal counsel without interference from any other Party. Regardless thereto, the range of sources from which the Right might be indirectly derived is wide.

3.1 Reciprocal character to the corresponding Obligation

The most convenient first basis for any Right of this kind shall be sole mirroring the obligation, whereas where all States in the international community are bound by the Article 2 (3) of the Charter "*to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered*" (Obligation). In assessing this source, it is essential to define the terms used in this Article. First of all, arbitration is one of the means of pacific settlement of disputes identified in Article 33 (1). Thus the Case falls within the scope of the Obligation. The two Articles put together set forth the equal importance of both proceedings as well as result, *i.e.* that the process is lawful and the judgment should be just. Thus by wording of the first part of the Article 2 (3), the scope of the corresponding Right shall encompass both outlined aspects as well.

[18] GEARIN, M. Australia rejects East Timor's demands to return documents seized in ASIO raid. In: *ABC News* [online]. 2014-1-22 [Accessed 2014-9-26]. Available at: <http://www.abc.net.au/news/2014-01-21/australia-responds-to-east-timor-case-at-the-hague/5211912>

[19] Ibid

By the second part of the Article 2 (3) the widely defined scope of Right may be narrowed through the aims, why the disputes should *actually* be settled peacefully, *i.e.* peace, security and justice. The issue is whether the seizure and detention or regional dispute over maritime delimitation can challenge the values outlined in the rest of the article. As peace or security cannot be under current circumstances deemed to be endangered, the most relevant condition for the case at hand as set in the Article 2 (3) shall be justice.

The Charter repeatedly sets forth the prominent position of justice in international law. It is included already in its Preamble, whereas it is the aim of the peoples of the United Nations "*to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.*" Justice is also incorporated within the scope of the Purposes and Principles of the United Nations declared in the Article 1 to the Charter. Article 1 (1), after the maintenance of peace and security and suppression of aggression, it pronounces that the solemn purpose of the UN shall be "*[…] to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.*" Furthermore the notion of justice plays an important role in the other Articles of the Charter as outlined above as well.

Remarkably enough, in the Preamble the term "justice" is put before the sacred other principles of international law[20], which is extraordinary given the general approach to the justice mainly considered to be certain moral corrective of the ascertainable legal sources.[21] In relation to the peaceful settlement of international disputes, the doctrinal sources differ to a certain extent of the content of the term "justice". Firstly, *Bruno Simma* argues that the core lies within the potentially achieved result of the undertakings in spirit of the peaceful settlement of disputes[22]. On the other hand, *Jean-Pierre Cot*[23] stresses that such justice is enshrined mainly in the freedom of action of the States, not in an objective to restrict this freedom for higher

[20] This order of priorities has been used also in other sources of international law, for example in the 1982 Manila Declaration on the Peaceful Settlement of International Disputes, UN Document. A/RES/37/10(1982): Peaceful settlement of disputes between States (Annex). 68th plenary meeting, 15 November 1982.

[21] FRANCIONI, F. *Equity in International Law*. In: WOLFRUM, Rüdiger. The Max Planck encyclopedia of public international law, Volume III. 1st publ. Oxford: Oxford University Press, 2012. ISBN 978-0-19-929168-7.

[22] SIMMA, Bruno. The Charter of the United Nations: a commentary. 2nd ed. Oxford: Oxford University Press, 2002, lxiv, 895, XXXIII. ISBN 0-19-924449-9. pp. 111 para. 35.

[23] Jean-Pierre Cot is also sitting as a judge *ad hoc* in the Case upon nomination of Timor-Leste.

good.[24] Also, his commentary states that even justice is always applied in defence of State's own interest in the matter[25], reflecting the fact that justice cannot be determined to be an objective criterion with regards to the slightly politicised nature of undertakings within international law.

As for justice in the reasoning of the ICJ, the Court itself has repeatedly assessed that "[w]*hatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable.*"[26] As the Court noted in the *Continental Shelf* (*Tunisia v. Libya Continental Shelf* case: "[The Court] *is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result. While it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice.*"[27] Thus it may be assumed that both proceedings and result thereof shall ultimately be covered by the notion of justice.

What is overall problematic about justice is the high level of subjectivity and its virtually absolute dependence on the distribution of facts. Since it is not an objective criterion, the victimisation of a poorer party as well as influential backgrounds of the Judges coming from various parts of the world may play an unfavourable role.[28] For these reasons an entirely "just" solution is most likely entirely out of reach and the Right is usually limited to the sole probability of reaching the desired outcome for one State. It is mainly because a result, however justifiable, may always be deemed unjust to the defeated Party.

3.2 Sovereign equality of States

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[24] COT, Jean-Pierre and Alain PELLET. *La Charte des Nations Unies : commentaire article par article.* 3e éd. Paris : Economica, 2005, XX, 1366. ISBN 2-7178-5057-0. pp. 433

[25] Ibid. pp. 434

[26] *North Sea Continental Shelf, ICJ Reports (1969),* pp. 3, 48 (para. 88). *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), ICJ Reports* (1982), pp. 18, 60 (para. 71), Separate opinion of Judge Jiménez de Aréchaga, *ibid.*, p. 106 (para. 25), *Continental Shelf (Libyan Arab Jamahiriya v. Malta),* ICJ Reports (1985), pp. 13, 39 (para. 45).

[27] *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya),* Judgment, ICJ Reports (1982). pp. 18, para. 60

[28] More on the topic of assessment of outer influences on the ICJ, see DE FIGUEIREDO, M. F. P. and E. POSNER. *Is the International Court of Justice Biased?* John M. Olin Program in Law and Economics Working Paper No. 234, 2004. Online available at: <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1289&context=law_and_economics>.

Article 2 (3) of the Charter is closely connected to the principle of sovereign equality of States,[29] insofar as the impossibility of the usage of coercive measures the freedom of choice of means is granted to the States. The principle of sovereign equality of States, however, encompasses one very important aspect and that is the juridical equality of the States and their equality in general as well as before the law[30].

The core of the concept lies in prioritisation of the equality of States before law over the sole sovereignty.[31] This is also in general to a certain extent reflected in the power of the Security Council to assess the threats to the peace or aggression and decide on the appropriate measures under Article 39 of the Charter. This interconnectivity between principles and means can be drawn for example when a State endangers territorial sovereignty of another, i.e. commits an act of aggression. Such State is then not only in breach of fundamental maxim of prohibition of the use of force set forth in the Article 2 (4) of the Charter which prohibits such use of force, but also in breach of respecting the sovereignty and thus the sovereign equality of States. For these reasons the Security Council may *ultima ratio* decide even on use of coercive measures including armed force and thus reach back the equilibrium in the international arena, both in terms of peace and security, but also in spirit of the sovereign equality of States.

For that matter, *Malenovský* further characterises the sovereign equality of States in a way that "*subordinate sovereignty and tolerant reciprocity balance each other in international relations and unity of these contradictory tendencies create the dynamics of the principle of sovereign equality.*"[32] According to this description, the core of the maxim lies within the notion of reciprocity. Should this be reflected also within the concept of peaceful settlement of international disputes, it means simply a correspondent obligation to respect other State's Obligation. This further corresponds to the reciprocal right of a State to have other States respecting its Obligation in this way and thus *ipso facto* its Right.

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[29] SIMMA, Bruno. The Charter of the United Nations: a commentary. 2nd ed. Oxford: Oxford University Press, 2002, lxiv, 895, XXXIII. ISBN 0-19-924449-9. pp. 103, para. 2.

[30] ČEPELKA, Čestmír and Pavel ŠTURMA. *Mezinárodní právo veřejné*. 1st ed. Praha: Beck, 2008, xli, 840 p. ISBN 978-80-7179-728-9. pp. 52, para. 15

[31] SHAW, Malcolm N. International law. 6th ed. Cambridge: Cambridge University Press, 2008, clxvi, 1542 p. ISBN 978-0-521-72814-0. pp. 215

[32] Translated by the author of this Paper. Originally in MALENOVSKÝ, Jiří. Mezinárodní právo veřejné, jeho obecná část a poměr k vnitrostátnímu právu, zvláště k právu českému. 4th ed. Brno: Masarykova univerzita, 2004, 467 p. ISBN 80-210-3375-4. pp. 21

3.3 Good faith

In accordance with Article 2 (2) of the Charter, the States "*shall* [in pursuit of the Purposes stated in Article 1] *fulfil in good faith the obligations assumed by them in accordance with the present Charter*". Interdependence between good faith and equity and justice is indisputable.[33] By reference made in this Article the endeavour and process of settling the disputes towards peace, security and justice shall be governed by good faith principle. The Court upheld the *bona fides* principle in the Order that "*The Court has no reason to believe that the written undertaking dated 21 January 2014 will not be implemented by Australia. Once a State has made such a commitment concerning its conduct, its good faith in complying with that commitment is to be presumed.*"[34]

What constitutes yet another controversy in this Case is the fact that it is not disputed by Australia that at least some of the seized documents are related to the Arbitration strategy as well as possible future negotiations on maritime delimitation, as Timor-Leste claims.[35] Henceforth it may be well stated that Australia could assume that the rights of Timor-Leste, or at least its position in the ongoing dispute as well as future maritime delimitation negotiations would be endangered by means of seizure of such documents. Therefore the good faith in Australian undertakings shall be debatable.

It is held by doctrine that the good faith has a directive functions in determining the nature of situations where the organs of the UN, including the ICJ, are considering imposition of recommendatory or coercive measures.[36] The Commentary to the Charter specifies this criterion in a manner that "*good faith develops particular legal effects wherever States have a qualified relationship of confidence with one another, such as in the context of an arbitral* […] *procedure* [.]"[37] The common objective of the countries in the Arbitration as of their mutual fulfilment of Obligation determines the nature of special obligations under such qualified relationship, such as increased responsibility of the maintenance of justice *inter alia*. *Markus Kotzur*

[33] FRANCIONI, F. *Equity in International Law*. In: WOLFRUM, Rüdiger. The Max Planck encyclopedia of public international law, Volume III. 1st publ. Oxford: Oxford University Press, 2012. ISBN 978-0-19-929168-7.

[34] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia),* Request for the indication of provisional measures, Order, I.C.J. Reports 2014. pp. 12, para. 44

[35] Ibid, pp. 7, para. 27.

[36] KOTZUR, M. *Good faith (Bona fides).* In: WOLFRUM, Rüdiger. The Max Planck encyclopedia of public international law, Volume IV. 1st publ. Oxford: Oxford University Press, 2012. ISBN 978-0-19-929168-7. pp. 514, para. 23

[37] SIMMA, Bruno. The Charter of the United Nations: a commentary. 2nd ed. Oxford: Oxford University Press, 2002, lxiv, 895, XXXIII. ISBN 0-19-924449-9. pp 95, para. 10.

claims that "*The closer the relationship between international actors becomes, the more important becomes mutual confidence in common endeavours to achieve common objectives.*"[38] Thus the way both parties have handled the undertakings relevant to the Case at hand as well as within their qualified arbitral relation shall be given weight in the potential judgement on the merits.

4. Right to free trial of States?

It would be daring to declare that the Right amounts to an exact equivalent of the Right to fair trial on a contextual basis of international community. Nonetheless *Jeremy Waldron* provides that "*As individual humans are the subjects of domestic law, nation-states are the individual subjects of international law.*"[39] Since there is no overarching sovereign authority in international law, the Right shall basically protect States of one another, given the horizontal nature of the system of governance under international law.[40] With particular consideration given to the principle of the sovereign equality of States, we may assent that since all States are equal before law, they shall be *de iure* granted the same rights and privileges as well. Upon examination of the undertakings of the ICJ, it may be argued that there is a certain selection of procedural rights applies to each State in each proceedings brought before the Court. The possibility to claim substantial rights is henceforth secured and maintained through respecting the particular procedural rights, just as it functions in the case of individual.

Should the premise be accepted that the Right to a certain extent encompasses similar aspects as the right to fair trial, it may lead to more concrete guidelines on its aspects. As already mentioned, in the Order the Court states in particular the *Right to conduct arbitration proceedings or negotiations without interference by other State* and *Right of confidentiality of and non-interference in its communications with its legal advisers*. Furthermore the Court touched the equality of the Parties to a dispute. Lastly more rights may be derived from the sole common determinants of all Contentious cases presented to the Court.

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[38] KOTZUR, M. *Good faith (Bona fides).* In: WOLFRUM, Rüdiger. The Max Planck encyclopedia of public international law, Volume IV. 1st publ. Oxford: Oxford University Press, 2012. ISBN 978-0-19-929168-7. pp. 514, para. 23

[39] WALDRON, J. The Rule of International Law. In: *Harvard Journal of Law & Public Policy,* Vol. 30 No. 1, p. 15-30. pp. 20.

[40] More on the particular aspects of relation between international law and the rule of law may be found in WALDRON, J. *Are sovereigns entitled to the benefit of the international Rule of Law*? IILJ Working Paper 2009/3, Finalised 2009-4-3. New York: New York University, School of Law. ISSN 1552-6275, online available at: <http://www.iilj.org/publications/documents/2009-3.Waldron.pdf>.

4.1 Right to non-interference in peaceful settlement of disputes

The Right to demand that other States refrain from interfering the endeavour is by wording limited to the proceedings, without an explicit right to result. However, a judgement, decision, any other outcome or *no outcome at all* if the Parties wish so, constitute an inherent part in procedural sense. Thus it would be more precise to say that this right does not grant a specific outcome in substance, however procedurally relevant end mark of the proceedings without any interference from other Party is, indeed, granted.

Despite the formulation of "non-interference", the peaceful settlement of international disputes in any of the forms recognised by the Charter should not be mistaken what is usually named the principle of non-interference. In accordance with Article 1 (7) of the Charter, this notion is solely related to *domaine réservé*, the domestic jurisdiction. Therefore the non-interference in this case refers rather to the sovereignty in spirit of the principle of sovereign equality of States in the international arena.

4.2 Right of confidentiality and non-interference in communications with legal advisers

The second right declared by the Court in the present proceedings could be thoroughly linked to the attorney-client privilege as stipulated in the domestic law. In general this privilege prohibits disclosure of confidential information of from the legal counsellor to the court. This privilege exists in various jurisdictions worldwide, including Australian, which is particularly relevant to the Case.

Under international law, the roles of both legal advisers *within* the organisational structure of the State authorities (i.e. foreign ministries), with international organisations or the role of such advisors in the armed conflicts is at least somehow defined.[41] Nonetheless there is no difference between legal position of a State and an individual before the Court in relation to legal counselling. In this notion, similar rights and obligations shall apply to legal advisers regardless to whether they are representing State or an individual.

The principal grounds of claims made by Timor-Leste in its application to the Court are "*the property and other rights possessed by Timor-Leste in documents and data sent to, or held by, or received from, its legal representatives and legal advisers* […]"[42] Such documents would

[41] WOOD, M. *Legal Advisers*. In: WOLFRUM, Rüdiger. The Max Planck encyclopedia of public international law, Volume VI. 1st publ. Oxford: Oxford University Press, 2012. ISBN 978-0-19-929168-7.

[42] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Application to the Court (Timor-Leste), I.C.J. Reports 2013. pp. 3 para. 10

normally, if this was a case under domestic law of Australia, be covered fully by legal professional privilege. This privilege is governed by the 2001 *Evidence Act*. Under Articles 118 and 119, the legal advice clause, no evidence is going to be, upon the objection of the client, adduced in case such adduction would violate the confidentiality of communication or relevant documents. It does not speak of prohibition of seizure or inspection thereof, neither for the harm of client or attorney.[43] This may be, however, assumed from the nature of the privilege in general. On the other hand, since Australia was aware that the seized documents contain confidential correspondence or writings, therefore it knew that these cannot be used before the court in prosecution of the former ASIO officer, it could be anticipated that the motivation for the seizure and detention lied elsewhere. Thus a significant bad light is shed on the fulfilment of obligations in good faith in the conduct of Australia.

Sen. Brandis affirmed the existence of the Privilege during the Oral proceedings. He, however, stated that such Privilege cannot be deemed to be absolute and that it "*does not apply when the communication in question concerns the commission of a crime or fraud, constitutes a threat to national security or to the higher public interests of a State, or undermines the proper administration of justice.*"[44]

In the *Libananco Holding v Turkey* case[45], the International centre for Settlement of Investment Disputes pronounced itself on the waging of principles of attorney-client privilege. Here, Turkey was having persons associated with the claimant, Libananco Holding Co. Ltd, including its legal counsel, under surveillance due to criminal proceedings launched against this company. The International centre for Settlement of Investment disputes held that there were certain basic principles, such as basic procedural fairness, respect for confidentiality and legal privilege and right to seek a legal advice freely without any third Party intervention. Furthermore it held, that Turkey must not intercept communications between Claimant and its counsel or other persons of interest, regardless to ongoing criminal investigations. The Centre ordered that all records and copies must be destroyed in a period not longer than 30 days and,

[43] Articles 118 and 119 of the Evidence Act (Act 76 of 2001), Royal Assent received on 17 December 2001, available at: <http://www.austlii.edu.au/au/legis/tas/consol_act/ea200180/>.
[44] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Request for the indication of provisional measures, Order, I.C.J. Reports 2014. pp. 7 para. 25
[45] *Libananco Holdings Co Limited v Republic of Turkey* (ICSID Case No ARB/06/8, Annulment proceeding (Decision on Applicant's Request for a Continued Stay of Enforcement of the Award)).

upon the responsibility of Turkey, assurances must be made that no leaks take place. This, of course, does not constitute a precedent for the ICJ.[46]

Regardless to Brandis' national security claim, in the Case at hand, the Court stated a violation of right to the exercise of attorney-client privilege, specifying it in "*right to the protection of its* [Timor-Leste's] *communications with counsel relating to an arbitration or to negotiations, in particular to the protection of the correspondence between them, as well as to the protection of confidentiality of any documents and data prepared by counsel to advise that State in such a context.*"[47]. Since all States are equal in rights and obligations before the law under the concept of the sovereign equality of States, this right thus shall enjoy universality.

4.3 Other enshrined rights

Let us now shortly focus on other possible rights that could be vested in the overall term of Right, especially in the ICJ proceedings. Firstly the Parties are equal in terms of their rights as well as in the terms of their legal personality and capacity.[48]

All States dispose of the same free choice of means of settling their international disputes, including the possibility to defend their interests through individual or joint submission to the Court. This right is limited in twofold direction. Firstly, the submission requires reciprocity, *i.e.* that both Parties accept the jurisdiction of the Court in one way or another. Second limitation relates to the outcome, whereas should the lack of jurisdiction or inadmissibility be of the Case be founded, the Court may reject the jurisdiction and thus not give a judgement or any other decision in the matter.

Also it can be argued that the legally relevant expectations of Timor-Leste have been violated by Australia, since it seems to be beyond ordinary anticipation that business premises of legal counsellor of a State should be subjected to raid by intelligence service of another. No prior notice has been given to Timor-Leste in this matter. Thus some extent of legal certainty could be anticipated as well.

[46] Although the role of judicial decisions in the ruling of ICJ could be subjected to broader debate, in spirit of the Article 38 (1) (d) of the Statute, the judicial decisions may serve solely as "*subsidiary means for the determination of rules of law.*" Therefore no direct binding force may be accorded to the decision at hand.

[47] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia),* Request for the indication of provisional measures, Order, I.C.J. Reports 2014. pp. 7 para. 27

[48] SHAW, Malcolm N. International law. 6th ed. Cambridge: Cambridge University Press, 2008, clxvi, 1542 p. ISBN 978-0-521-72814-0. pp. 215

What is curious is that the procedure of handling the evidence by the ICJ is regulated nor in the Statute, nor in the Rules of the Court. Nonetheless in spirit of justice and good faith, it shall be presumed that no unlawfully obtained evidence shall be used in the proceedings. This lies yet again with the discretion of the judges and could serve - just as the other rights outlined - as subject of yet another and significantly longer debate.

5. Conclusion

The Right may be derived from various sources of international law, especially from the maxims enshrined in the Charter, namely from the Obligation, the principle of the sovereign equality of States as well as good faith maxim. From examination of these as well as the regular conduct of the Court, there are procedural rights as well as certain - and very debatable - substantial rights in preservation of justice, of States in relation to their conduct in spirit of the Right.

With regards to Timor-Leste v. Australia, it may be asked if the Court already implicitly outline the future possible decision. The indication of provisional measures by itself does not grant relief on the merits by the Court, henceforth the potential decision in this case cannot be assessed at this point of time beyond any reasonable doubt. On the other hand, since the ruling in this case is solely concerning the seized and detained documents and data and not about the arbitration, which is going to be lawfully settled within the framework of the Arbitral Tribunal of the Permanent Court of Arbitration and the Court has stated that certain rights of Timor-Leste have been violated by the conduct of Australia, such declaration is likely to have an impact, since the case radiates around these rights.

Finally as already said, the Parties are currently trying to settle the dispute amicably through other recognised means, such as direct negotiations and behind-the-doors pre-negotiations of the Arbitration just the next door to ICJ in the Hague Peace palace.[49] Regardless to the whether the Parties will reach consensus through judicial or non-judicial proceedings, the Rights mentioned in this Paper shall be maintained and cherished. Just as the Court stated in its judgment in the case of *Aerial Incident of 10 August 1999 (Pakistan v. India)*: "*The Court's lack of jurisdiction does not relieve States of their* [Obligation]. *The choice of those means*

[49] ABC/AFP. East Timor spy row: Australia, East Timor postpone ICJ case to seek 'amicable settlement'. In: *ABC News* [online]. 2014-9-7 [Accessed 2014-9-9]. Available at: <http://www.abc.net.au/news/2014-09-06/icj-postpones-australia-etimor-spy-row-case/5724918>

admittedly rests with the parties under Article 33 of the United Nations Charter. They are nonetheless under an obligation to seek such a settlement, and to do so in good faith in accordance with Article 2, paragraph 2, of the Charter."[50]

[50] *Aerial Incident of 10 August 1999 (Pakistan v. India),* Jurisdiction of the Court, Judgment, I.C.J. Reports 2000, p. 12, para. 53. cited from SHAW, Malcolm N. International law. 6th ed. Cambridge: Cambridge University Press, 2008, clxvi, 1542 p. ISBN 978-0-521-72814-0. pp. 216

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