

The Secretary
Foreign Affairs Defence and Trade Committee

Re:

Denouncing a treaty or part of a treaty

1. Since the Attorney General Daryl Williams introduced a requirement that treaties be ratified by Parliament, I put the view that it follows that denouncing a treaty or part of a treaty or limiting its application (after ratifying it) should also require parliamentary approval. This did not occur in relation to the treaty requirements which would have allowed resort to juridical intervention on the East Timor Australia sea boundary and oil/gas issues, if talks failed.

In the 1995 report of the Senate Legal and Constitutional References committee, called Trick or Treaty: Commonwealth Power to Make and Implement Treaties, I note that ironically Alexander Downer was cited (p 279 para 16.31) as giving a speech to the Liberal Party in Albury almost exactly 25 years ago (a day before Halloween to which the Senate report owes its title), a speech considering bringing in a requirement for parliamentary disallowance of treaties. Yet the UNCLOS treaty protecting both East Timor and us was reportedly dumped in the early noughties by Mr Downer in secret.

2. In relation to the negotiations with East Timor over boundaries/oil and gas, it is apparent that, sadly, our government decided to “sandpaper the ball” to tip the negotiations unfairly in our favour. And yet we were not short of oil and gas wells in that area. I have counted 45 of which 8 were in the East Timor area before the recent agreement. If the bugging of the East Timor Cabinet offices in 2004 was an Intelligence Services Act S. 6.1(e) operation, then the direction to David Irvine to do it had to come from Foreign Minister Alexander Downer, and the Inspector General of Intelligence Services then, either Bill Blick or Ian Carnell, had to receive a copy of the Foreign Minister’s direction.

I use the word “sadly” above, given the following:

In 1942 Western Australia, the NT and Queensland were under Japanese aerial attack launched from Timor. In WA Broome, Kalumburu and Wyndham were bombed. There was a submarine attack in the Southern Ocean. Our Sparrow Force, 50% of them from WA, in the 2/2 Commando, stayed in East Timor as guerillas at MacArthur's request, and helped by East Timorese, who lost 60,000 people throughout the war, kept 9000 Japanese troops busy, who might otherwise have been sent to help take Port Moresby.

The 2/4 and 2/40 squadrons later also joined in in East Timor. Not looking like locals they could only operate as guerillas with the help of local people, known as the criados.

Three Western Australians, directly involved in the East Timor issue who grew up and were educated in an Australia free of Japanese occupation, were beneficiaries in part of the East Timorese sacrifices, as was I.

Duncan Lewis, just retired as ASIO head (ASIO prompted the prosecution of Bernard Collaery, and Witness K).

David Irvine, former head of ASIS (ASIS organised the bugging of the Cabinet room, as you know)

Christian Porter (signed off on the prosecution submitted by the CDPP)

3. Two Australians have become improperly enmeshed in the government's continuing defence of the indefensible, Bernard Collaery and Witness K.

They are both entitled to legal immunity according to the applicable Australian law, the International Court of Justice (Privileges and Immunities) Regulations 1967, which was pointed out to the AG and CDPP fifteen months ago, as well as the then Foreign Minister, Julie Bishop. More recently the current Minister for Foreign Affairs, Marise Payne, was asked about similar immunities in the UN legislation, the Statute of the International Court of Justice, which the Commonwealth legislation below reflects. She would not comment. We cannot secretly withdraw from the Statute as we did from the UN Convention on the Law of the Sea, as it is enshrined in our domestic law. It is not in the Prime Minister Scott Morrison's category of "negative globalism" where international instruments seemingly are to be observed or not observed as we choose. The Statute aside, basic principles of law should dictate that advocates and witnesses before a court are not to be intimidated.

Here are relevant parts of our Australian regulations on this matter:

The Privileges and Immunities (International Court of Justice) Regulations.

(1) A person has:

- (a) while acting as an assessor of the Court;
- (b) while appearing as a witness or an expert before the Court; or
- (c) while performing a mission by order of the Court, and while on a journey in connexion with such a duty, the privileges and immunities specified in paragraphs 1 to 5 (inclusive) of Part I of the Fifth Schedule to the Act.

(2) A person referred to in the last preceding subregulation who has ceased to perform the duties referred to in that subregulation has the immunities specified in Part II of the Fifth Schedule to the Act.

(which says) Part II of the Fifth Schedule (this applies to Mr Collaery)

Immunities of Person who has served on Committee or participated in Work of, or performed Mission on behalf of, International Organisation
Immunity from suit and from other legal process in respect of acts and things done in serving on the committee, participating in the work or performing the mission.

(the definition below is important)

(3) For the purposes of this regulation, the Fifth Schedule to the Act has effect in relation to a person:

- (a) as if the words "while acting as an assessor of the Court, while appearing as a witness or an expert before the Court or while performing a mission by order of the Court" were substituted for the words "in serving on the committee, participating in

the work or performing the mission" in paragraph 2 of Part I and in Part II of that Schedule; and
(b) as if the word "Court" were substituted for the word "organisation" in paragraph 4 of Part I of that Schedule.

Now here are those two schedules:

Third schedule - applies to Mr Collaery

Part I

*Privileges and Immunities of Representative accredited to, or attending
Conference convened by, International Organisation*

1. Immunity from personal arrest or detention.
2. Immunity from suit and from other legal process in respect of acts and things done in his capacity as such a representative.
3. Inviolability of papers and documents.
4. The right to use codes and send and receive correspondence and other papers and documents by couriers or in sealed bags.

Fifth schedule - applies to Witness K

Part I

*Privileges and Immunities of Person serving on Committee or participating in
Work of, or performing Mission on behalf of, International Organisation*

1. Immunity from personal arrest or detention.
2. Immunity from suit and from other legal process in respect of acts and things done in serving on the committee, participating in the work or performing the mission.
- 2A. Exemption from taxation on salaries and emoluments received from the organisation.
3. Inviolability of papers and documents.
4. The right, for the purpose of communicating with the organisation, to use codes and to send and receive correspondence and other papers and documents by couriers or in sealed bags.

The privileges and immunities still apply afterwards:

A person, not being an Australian citizen or a person acting on behalf of the Government of Australia, who has concluded his appearance before the Court as agent, counsel or advocate has the immunities specified in Part II of the Third Schedule to the Act.

I read one of the two alternatives as "not being.... a person acting on behalf of the Government of Australia".

Third Schedule

Pt II

Immunities of Former Representative accredited to, or attending conference convened by, International Organisation

Immunity from suit and from other legal process in respect of acts and things done in his capacity as such a representative.

4. I append at the foot of this submission a brief description of the Cumaraswamy case which has parallels in relation to immunities applying to those who are serving in various capacities in the UN or its organs such as the International Court of Justice.

5. Strategically, the AG/CDPP decision to prosecute was ill timed anyway, as, apart from any other consideration, Carnarvon Oil has three offshore wells (Buffalo, Buller and Bluff) in the Buffalo tenement passing to Timor Leste (TL) sovereignty under the Australia TL agreement. The TL parliament as of August 2018 had still to legislate the fiscal arrangements for Carnarvon.

6. I note that in Senate Estimates this week Cmr Reece Kershaw of the AFP has retained former National Crime Commissioner Lawler to consider the issues involved in politically sensitive prosecutions. It is of note that Mr Collaery is a former member of the National Crime Commission and there are aspects of the handling of the raids on him and government statements about this which are most concerning.

See

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Completed_inquiries/2013-2016/report156/d01

This was a reply on 4th December 2013 by Mr Collaery recorded in Senate Hansard to accusations made against him by the then Attorney General George Brandis.

Adding to this is a quote of more than usual interest from the man leading East Timor's team, which included Mr Collaery, in the International Court of Justice at the time of the AFP raids on Mr Collaery and Witness K, the late Sir Elihu Lauterpacht. He had formerly served as a judge on the International Court of Justice and he had served our Department of Foreign Affairs for three years as chief legal counsel.

“This improper unprecedented and indeed inexplicable conduct compounded at various times by selfcontradictory statements on behalf of Australia is not the behaviour of some state that does not subscribe to normal standards of international legal behaviour, rather it is the

behaviour of a state of considerable international standing. Its behaviour in the present situation defies understanding.”

The International Court voted 15:1 (our Ian Callinan voting against) for us not to interfere in all communications between Timor Leste and its legal advisers in relation to a range of matters between it and us.

The then Inspector General of Intelligence and Security (IGIS), Vivienne Thom, in Senate hearings in 2014, seemed to have trouble tracing letters between Witness K and her predecessor Ian Carnell which were vital to establishing why Witness K had retained Mr Collaery as legal counsel. And yet a scant two months later these letters were cited in the Memorial (written case) presented by our legal team to the Court.

In view of the Lawler investigation just announced, can I suggest that the case against Mr Collaery in the ACT court be withdrawn pending Mr Lawler's recommendations to Cmr Kershaw?

7. The Prime Minister's current assertion that no one is above the law in this country might well be shown to be very questionable in the light of some events regarding the East Timor boundary/oil and gas issue. There is currently a relevant letter from parliamentarians McKim, Wilkie and Patrick to the AFP. It presents another sensitive issue which Mr Lawler might well follow up.

Thank you
Geoff Taylor

Addendum:

Link: <https://www.icj-cij.org/en/case/100>

Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights

OVERVIEW OF THE CASE

By a letter dated 7 August 1998, the Secretary-General of the United Nations officially communicated to the Registry Decision 1998/297 of 5 August 1998, by which the Economic and Social Council requested the Court for an advisory opinion on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations to a Special Rapporteur of the Commission on Human Rights, and on the legal obligations of Malaysia in that case. The Special Rapporteur, Mr. Cumaraswamy, was facing several lawsuits filed in Malaysian courts by plaintiffs who asserted that he had used defamatory language in an interview published in a specialist journal and who were seeking damages for a total amount of US\$112 million. However, according to the United Nations Secretary-General, Mr. Cumaraswamy had been speaking in his official capacity as Special Rapporteur and was thus immune from legal process by virtue of the above-mentioned Convention.

Written statements having been filed by the Secretary-General and by various States, public sittings were held on 7, 8 and 10 December 1998, during which the Court heard oral statements by the representative of the United Nations and three States, including Malaysia. In its Advisory Opinion of 29 April 1999, having concluded that it had jurisdiction to render such an opinion, the Court noted that a Special Rapporteur entrusted with a mission for the United Nations must be regarded as an expert on mission within the meaning of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations. It observed that Malaysia had acknowledged that Mr. Cumaraswamy was an expert on mission and that such experts enjoyed the privileges and immunities provided for under the Convention in their relations with States parties, including those of which they were nationals. The Court then considered whether the immunity applied to Mr. Cumaraswamy in the specific circumstances of the case. It emphasized that it was the Secretary-General, as the chief administrative officer of the Organization, who had the primary responsibility and authority to assess whether its agents had acted within the scope of their functions and, where he so concluded, to protect those agents by asserting their immunity. The Court observed

that, in the case concerned, the Secretary-General had been reinforced in his view that Mr. Cumaraswamy had spoken in his official capacity by the fact that the contentious Article several times explicitly referred to his capacity as Special Rapporteur, and that in 1997 the Commission on Human Rights had extended his mandate, thereby acknowledging that he had not acted outside his functions by giving the interview. Considering the legal obligations of Malaysia, the Court indicated that, when national courts are seised of a case in which the immunity of a United Nations agent is in issue, they must immediately be notified of any finding by the Secretary-General concerning that immunity and that they must give it the greatest weight. **Questions of immunity are preliminary issues which must be expeditiously decided by national courts *in limine litis*. As the conduct of an organ of a State, including its courts, must be regarded as an act of that State, the Court concluded that the Government of Malaysia had not acted in accordance with its obligations under international law in the case concerned.**