

East Timor's Case in the ICJ: Will the Court Decide Whether Spying Violates International Law?

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In December, East Timor initiated a case against Australia in the International Court of Justice. The facts are out of a Tom Clancy novel. In short, East Timor alleges that Australia bugged an East Timorese cabinet office during bilateral negotiations about an important maritime treaty (the 2002 Timor Sea Treaty) between the two countries, in order to gain intelligence about East Timorese strategy and negotiating positions. East Timor initiated arbitration against Australia, claiming that Australia's alleged bugging during negotiations rendered the Timor Sea Treaty invalid. That arbitration is private (i.e., closed).

That brings us to the ICJ case. East Timor further contends that on December 3, 2013, officers of the Australian Security Intelligence Organization, pursuant to a warrant issued by the Australian Attorney General, raided the office of East Timor's Australian lawyer in Canberra and seized documents, a laptop, an iPhone, and a thumb drive. Some of those documents related to the pending arbitration. But news sources report that the raid also was an attempt to seize information that may have revealed information about the Australian bugging scheme, including statements by a former Australian intelligence officer disclosing Australian national security information to East Timor. For those interested, EJIL Talk has a useful post setting out additional factual details and background.

East Timor's filing for provisional measures in the ICJ "requests the Court to adjudge and declare . . . that seizure by Australia of the documents and data violated (i) the sovereignty of Timor-Leste and (ii) its property and other rights under international law and any relevant domestic law. . . ."

Among other remedies, East Timor asks for its documents back and for an apology and payment of costs from the Australian government. It also demands that Australia "not intercept or cause or request the interception of communications between Timor-Leste and its legal advisers whether within or outside Australia or Timor-Leste." (Note the reference to "request[ing] the interception," which may be a passive reference to the Five Eyes agreement that recently has been in the news.)

Why, *Lawfare* readers may ask, is this of interest? The ICJ just held hearings on East Timor's provisional measures request. One of the first things Sir Elihu Lauterpacht (one of East Timor's lawyers) stated was that this was not a case about spying and espionage. Instead, he framed the case as one about theft by one state of something (documents) belonging to another state, even when the documents are located in the first state (here, Australia). This seems to be an effort to ease the concerns of those on the Court who might be uncomfortable wading into the question of whether it violates international law for one state to spy on another state, or to "steal back" documents containing sensitive national security information after having spied on another state.

And there surely are some judges on the Court who would be loathe to take on this issue, given the lack of precedent. But one also can imagine that some other judges on the Court might actually want to (or feel the need to) confront that question, sensitized as they will be to state-on-state spying questions in this post-Snowden world of ours. Until it is clear that most members of the Court fall into the first camp, we should stay tuned to this case.