

Ghosts and Memory Sticks: Court Hears East Timor Case Against ASIO Swoop

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Perhaps it was a glow emanating from the Mandela bust outside the court, or from the bronzed Gandhi next to it, but an unexpectedly gentile civility pervaded The Hague's baronial Peace Palace on Monday, as the United Nations' International Court of Justice (ICJ) began hearing a case that outwardly seems anything but civil.

Courtesies were evident from the outset in the matter of the Democratic Republic of Timor- Leste *versus* the Commonwealth of Australia, for this is no courtroom thriller of grandstanding egos and preening beaks – at least not yet.

As extravagantly robed judges from countries as diverse as Slovakia and Somalia filed in from the winter grey of a Dutch morning to take their seats, they discovered counsel and juniors, ministers, diplomats and aides from both sides of the case warmly and genuinely embracing each other as old friends, as doubtless they are in the common recent history of the two nations.

That would be the history before December 3 last year. On that date about a dozen agents of the Australian Security Intelligence Organisation (ASIO) raided the Canberra offices of East Timor's lawyer in Australia, Bernard Collaery – who has also journeyed to The Hague this week – and carted off a laptop computer, legal documents and a USB memory stick. Australian Attorney-General George Brandis justified the swoop on the grounds of “national security”.

East Timor claims the material is crucial to a separate case it has brought before another international court in The Hague, over who has rights – and in what proportions – to the billions in oil and gas under the Timor Sea, which separates East Timor and Australia.

Dili wants the seized material back and has petitioned the ICJ to rule in its favour, to stop Australia using it; Timor contends that Canberra bugged its negotiators during the talks that led to the disputed 2006 oil and gas deal, and the ASIO-seized material may include details of a witness who would testify to that. The ghosts of Mandela and Gandhi may have been about, and amidst claims of espionage, a whiff of Snowden was also evident in the room.

This opening day belonged solely to East Timor putting its case – Australia will get its chance on Tuesday. The cordial tone was set on opening when Joaquim Fonseca, Dili's ambassador, told the court how close Australia and East Timor are, how much East Timor appreciates the role that Australia played in the country attaining its independence from Indonesia in 2002 and what immense respect East Timorese have for Australians; he said he couldn't imagine that this case, whatever its outcome, would change these feelings. The Australian bench, rather more numerous in its representatives – and portlier too – than the opposite side, graciously nodded back.

And then entered Sir Elihu Lauterpacht, the bewigged octogenerian Queen's Counsel leading the Timorese team. At 85, he wasn't quite a *tour de force*, but his performance was nonetheless arresting, as he scythed through the Australian actions.

Head theatrically bowed in sorrow, he first explained to the serried rank of robes in sitting judgment how profoundly disappointed he was to find himself arguing in a case against Australia, a country he said he bears a particular fondness toward.

It was in Australia, Lauterpacht once told a biographer, that he had spent “probably one of the best periods of my life”, the three years of the mid-1970s when the 40-something Elihu worked in Canberra as an international law specialist.

The Whitlam government – the same government that in 1974 told Indonesia’s President Suharto that Canberra wouldn’t oppose Indonesia’s seizure of what was then Portuguese Timor – had appointed him to represent Australia in international legal fora.

With a growing reputation as an expert in international law, Lauterpacht then fronted for Australia in bodies such as the UN General Assembly and at the Law of the Sea conferences that established maritime boundaries and protocols – rather like the treaty between Dili and Canberra over regional oil and gas spoils that East Timor now wants to tear up.

Indeed, Lauterpacht was on the Australian team in the first ever case Canberra brought before the International Court of Justice in The Hague. He fought Australia’s corner in 1974, as the country’s then diplomatic David sought to stop the French nuclear-testing Goliath, not long after Whitlam met Indonesian President Suharto in Java to tell him that “East Timor was too small to be independent.”

Four decades on, a rueful Sir Elihu told the court on Monday that in its raid on East Timor’s legal material, Australia has “fallen so far short of the standards” expected of a law-abiding nation that “it defies understanding”.

Sir Eli described the raid as “undoubtedly a violation of the national security of Timor-Leste”, and also argued that ASIO’s seizure of the documents was akin to an invasion of sovereign territory.

“What’s required is a clear, firm and severe condemnation of what Australia has done,” he said. The raid, he said, doesn’t just violate long-established diplomatic norms and international law but possibly Australian laws as well.

These documents, he said, are of the “utmost sensitivity” in informing a matter “crucial to the future of Timor-Leste as a state and to the welfare of its people”. The matter continues Tuesday.