

Submission
to
Senate
Foreign Affairs,
Defence and
Trade References
Committee

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on behalf of *Timor Sea Justice Forum*
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The *Timor Sea Justice Forum* thanks the Senate for the opportunity to make this submission.

On 22 March 2002 the Australian government withdrew from the compulsory jurisdiction of the International Tribunal on the Law of the Sea and the maritime boundary jurisdiction of the International Court of Justice. In 2019 the Australian Senate is enquiring whether Australia's future interests would be better served by a return to compliance with those jurisdictions. The Timor Sea Justice Forum strongly recommends this course of action.

The consequences of the 2002 withdrawal are many. There were adverse effects on the Timorese people, and on the international good standing of Australia, and on the Australian people themselves.

The Withdrawal

- a. facilitated the evasion of cooperation with Timor-Leste in setting a border
- b. facilitated the subsequent espionage against Timor-Leste
- c. resulted in the allocation of 50% of Greater Sunrise to Australia through the *Certain Maritime Arrangements in the Timor Sea Treaty* (CMATS) Treaty.

The Espionage

- a. was conducted from 2004 under the cover of AusAid
- b. was revealed to the Timorese government because of its gross unethical basis, where high-ranking government officials responsible for the decision to spy were subsequently found to be in advisory, directive and lobbying arrangements with the company set to enjoy substantial financial gain from the Treaty
- c. resulted in Timor-Leste's withdrawal from the CMATS Treaty, leading to the establishment of an internationally recognised maritime boundary.

The Maritime Boundary

The *Treaty Between Australia and the Democratic Republic of Timor-Leste Establishing Their Maritime Boundaries in the Timor Sea* is the border delimitation which occurred after Timor discovered the espionage and withdrew from CMATS. Through this Treaty Australia will receive not 50%, as under CMATS, but around 20% of the tax revenue of the Greater Sunrise area.

The Effects

The withdrawal from the jurisdiction of ITLOS and the ICJ and the events which flowed from that decision have had detrimental effects on the nation of Timor-Leste, on Australia's standing with other nations, on Australia's regional reputation, and on Australians themselves.

1. Effects on Timor-Leste

The Timorese government and people have had to spend inordinate amounts of time, effort and money opposing the Australian determination to grasp as much revenue from the Timor Sea as possible. Instead of receiving comprehensive and genuine good faith support from Australian governments, the Timorese have had to devote their diplomatic and financial structures to protect their sovereign maritime rights.

The Timorese lost at least 40,000 people as a direct result of their wartime friendship to Australian soldiers, and were sold out by Australia to Indonesia from 1975 to 1999. Perhaps they are not overly surprised at the rapacious Australian act of retreating from UN supervisory instruments to weaken their negotiating position and attempt to swindle them.

2. Effects on other nations

As JSCOT reported on 26 August 2002, non-government committee members at that time believed that that the Australian decision to limit its acceptance of the compulsory jurisdiction of the ICJ and the ITLOS in maritime boundaries disputes "damages Australia's international reputation and may not be in Australia's long-term national interests" as it "may be interpreted as an effort to intimidate and limit the options of neighbouring countries in relation to any future maritime border disputes".

We contend that the effects of that decision extend well beyond maritime boundary questions. The disgrace of the act of spying – against a recently devastated small neighbour and with spies impersonating aid workers – has been compounded for the last 16 years by the deceit of the concealment, the bullying but eventually

unsuccessful tactics used to evade setting a border, and now the persistent pursuit of one of the spies and his lawyer. The Australian performance throughout this episode is one which erodes all forms of trust. Regionally and internationally, Australia has wilfully squandered an immense amount of good-will, opening this nation to high levels of deserved suspicion.

Australia has flouted good faith and standards of international citizenry in dealing with Timor-Leste. The withdrawal from the jurisdiction of ITLOS and the ICJ, the evasion of maritime boundary negotiations, and the resistance to the UN Compulsory Conciliation are acts through which Australia has undermined the processes designed to promote international cooperation.

Australia has eroded its credibility as an upholder of the international rules-based order by advancing contradictory and duplicitous standpoints on maritime disputes in Southeast Asia. Notwithstanding that Australia had withdrawn from ITLOS and denied the government of Timor Leste the opportunity to take the Timor Sea dispute to the ICJ, more than a decade later in 2016, the Australian government supported the decision of the Permanent Court of Arbitration (part of the ICJ) in the arbitration between the Philippines and China over exclusive economic rights in the South China Sea. China denied the jurisdiction of the Permanent Court of Arbitration and refused to abide by the decision: a similar stance to that of Australia in the Timor Sea. Yet the Australian Minister for Foreign Affairs upheld the importance of international dispute-solving mechanisms and urged China and the Philippines to abide by the decision. Minister Bishop noted that "Australia supports the right of all countries to seek to resolve disputes peacefully in accordance with international law ... All claimant states have benefited enormously from the rules-based international order."¹

These contradictory views on international law and maritime disputes confirm to governments and civil societies across Southeast Asia that Australia is motivated by self-interest and should not be regarded as a role model for regional harmony and peaceful dispute resolution.

3. Effects on Australians

a. Betrayal

As has been shown, the Australian withdrawal from international oversight led to a series of further flawed decisions and actions in regard to the Timorese people. As a result, there is a sense of betrayal among the many Australians who take regional relationships seriously.

This betrayal has a highly practical aspect. Numerous groups were formed across Australia during the Indonesian occupation which devoted themselves to agitating for justice for the Timorese people. Many of these continued after the Timorese gained independence. They took on raising money and delivering aid to the people after the Indonesian withdrawal.

Some of these groups were specifically founded to aid Timor, and others undertook working for the Timorese as well as continuing their usual focuses.

Some Australian Groups specifically for East Timor:

2/2 Commando Association; Action in Solidarity with Indonesia and East Timor; Australia-East Timor Association; Australians for a Free East Timor; Australia East Timor Friendship Association; Brisbane East Timor Office; Campaign for an Independent East Timor; East Timor Action Coalition; East Timor Campaign; East Timor Foundation; East Timor Human Rights Centre; East Timor International Support Centre; East Timor Justice Lobby; East Timor Relief Association; Friends of East Timor; numerous Friendship Groups; Hobart East Timor Committee; Christians In Solidarity With East Timor; Christian Sanctuary Network Australia; Mary MacKillop Institute of East Timorese Studies; Parliamentarians for East Timor; Timor Aid; Timor Aid for Children; Timor Information Service; University Students for East Timor.

Some Australian Groups that adopted a focus on East Timor:

APHEDA - Union Aid Abroad; Action for World Development; Australian Campaign against the Arms Trade; Australian Catholic Relief (later Caritas); Australian Coalition for East Timor; Australian Council for Overseas Aid; Australian Council of Churches; many individual churches;

¹ Ministerial press release 12 June 2016, https://foreignminister.gov.au/releases/Pages/2016/jb_mr_160712a.aspx.

Australian Forum of Human Rights Organisations; Australian People for Health, Education and Development Abroad; Campaign against Militarism; Catholic Commission for Justice and Peace (replaced by Australian Catholic Social Justice Council); Community Aid Abroad; International Commission of Jurists - Australian Section; Minority Rights Group International; National Council of Major Religious Superiors of Australia; numerous Religious Orders; Service for the Treatment and Rehabilitation of Torture and Trauma Survivors; numerous Trade Unions including CFMEU, MWUA; Australian Education Union; Young Christian Workers; Young Christian Students.

The activities which these groups engaged in were designed to assist the Timorese people to recover from the trauma and destruction of the occupation years, and especially from the devastation of 1999. The Australian Army's assessment of infrastructure collapse in the capital, Dili, was 100%. The damage in outer regions varied from 20% to 80%.² By 2002, when Australia withdrew from UNCLOS and the ICJ just before the declaration of Timorese independence, the rebuilding had hardly begun. The 150,000 people taken at gunpoint to Indonesian camps across the border were still in the process of returning.

With 95% of school buildings severely damaged, and hospitals and clinics lacking even the most basic equipment, assistance from outside was essential. As 2004 dawned, the year the Australian bugging of the Timorese cabinet rooms began, Australians were well into the task of working with the Timorese. Together they continued rebuilding and re-furbishing, digging wells and laying water pipes, delivering basic medical and dental help, making or delivering school furniture, nursing traumatised people, and helping track missing relatives.

By 2006 when the CMATS Treaty was signed and with Australian spying still unknown to the Timorese, further efforts were required of Australians. As serious difficulties between the Timorese Army and Police erupted, thousands of internal refugees were housed in tents, and the social fabric was placed under enormous strain. Again many Australians came to the fore, changing tack to assist in whatever way they could.

All of these activities required money, which was given generously by Australians. The groups named above and others raised the funds required. They made direct requests, sold goods, ran raffles, put on concerts and other events, issued newsletters, gave information sessions at churches and civic events, applied for grants, made personal donations, and much more. Fundraising to assist the Timorese was accompanied by the willing donation of time and energy by a great many people, an effort which continued for years.

The fact that the Australia government at the same time did not observe the most basic ethical conduct in its financial dealings with the Timorese is difficult to absorb. It is scandalous.

The withdrawal from the jurisdiction of UNCLOS and the ICJ occurred during years that ordinary Australians worked diligently with the Timorese to build their nation. Concurrently, and untrammelled by any form of international accountability, the Australian government was conspiring to defraud the government of Timor-Leste. While Australian families donated millions of dollars to support the Timorese, their government was covertly ensuring that the same Timorese were robbed.

All through that time we were being duped by our own government.

b. The prosecutions of "Witness K" and Bernard Collaery

One of the worst reverberations of the decision to withdraw from the oversight of UNCLOS and the ICJ is the current prosecution of "Witness K", the spy whose ethical considerations led to the eventual border delimitation, and his lawyer Bernard Collaery. These men were charged by the Australian government under the Criminal Code and the Intelligence Services Act 2001. National Security legislation is also invoked. The charges were laid a few months after the signing of the Treaty establishing the border in 2018.

International law acknowledges that all people should be equal before the courts. Article 14 of the International Covenant on Civil and Political Rights sets out the minimum standards for a fair trial. These

² Bob Breen, *Mission Accomplished: East Timor* (Crows Nest, NSW: Allen & Unwin, no date), 18-19. The InterFET assessment of damage ranges from minimal (Lolotoe) to 50% (Remixio) with most places upwards of 60%/ Los Palos in the east (70%), Suai (south) and Balibo (west) both at 95%, and the capital Dili - 100%.

include prompt notification of the charges and evidence, the entitlement to be tried without undue delay, and that trials should be public except in clear cases of national security considerations.

The prosecutions of Witness K and Bernard Collaery:

- a. are increasingly seen as acts of revenge for the reduction in potential financial gain, and for the international distrust of Australia which the revelation of the spying on an impoverished neighbour has engendered
- b. serve as a warning to those in the intelligence community and in other positions of responsibility that the concealment of government fraud takes precedence over morality and ethics
- c. are being conducted as though the defendants' actions constitute a threat to Australian national security despite lack of any evidence of threat
- d. are characterised by an inordinate number of hearings, some of which have been delayed or adjourned. To date, 19 hearings have been scheduled in the 15 months since charges were laid
- e. do not adhere to Article 14 of UN Convention on Civil and Political Rights
- f. are withholding the briefs of evidence from the defendants
- g. place undue strictures on defendants e.g. Mr Collaery is prevented from instructing his lawyers
- h. are being conducted by hearings which are not always readily accessed, e.g. the court was closed in one instance, and some other hearings were not publicly listed at the court or on the website
- i. are the subject of the serious concern of increasing numbers of citizens, including high-ranking lawyers and judges, at the fact and the conduct of the prosecution.

Recommendations

1. We strongly recommend that the Commonwealth of Australia returns to the jurisdiction of the International Tribunal on the Law of the Sea and the maritime boundary jurisdiction of the International Court of Justice.
2. We strongly recommend that the Attorney-General and the Director of Public Prosecution cease the prosecutions of Witness K and Bernard Collaery immediately.