SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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I. *Prolegomena*

1. Destiny has wished that the judicial year of 2014 of the International Court of Justice (ICJ) was to start with the consideration of the present

case concerning *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia)*, lodged with the Court on 17 December 2013, which once again shows that the factual context of disputes lodged with an international tribunal like the International Court of Justice may well cross the threshold of human imagination. In effect, I have concurred with my vote to the adoption of the present Order of 3 March 2014, as I consider that the provisional measures of protection ordered by the Court are better than nothing, better than not having ordered any such measures at all. Yet, given the circumstances of the *cas d'espèce*, I think that the Court should have gone further, and should have ordered the measure requested by Timor-Leste, 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* here at its *siège* at the Peace Palace in The Hague.

2. I feel thus obliged to leave on the records the foundations of my personal position on the matter. To that effect, I shall address, firstly, the centrality of the quest for justice (disclosing the impertinence of the invocation of the local remedies rule, and of reliance on avoidance of so-called "concurrent jurisdiction"). Secondly, I shall dwell on the impertinence of reliance upon unilateral acts of States in the course of international legal proceedings. Thirdly, I shall address the prevalence of human values and the idea of objective justice over facts *(ex conscientia jus oritur)*. Fourthly, I shall address the question of the ownership of the seized documents and data. Fifthly, I shall focus on the relevance of general principles of international law. Sixthly, I shall dwell upon the prevalence of the juridical equality of States. I shall then move to my last line of consideration, on provisional measures of protection independent of unilateral "undertakings" or assurances, and on what I deem it fit to characterize as the *autonomous* legal regime of provisional measures of protection. Last but not least, I shall proceed to a recapitulation of all the points made in the present separate opinion.

II. The Centrality of the Quest for Justice

3. To start with, in the course of the present proceedings the Court was faced with arguments, advanced in particular by the respondent State, which required from it clarification so as to address properly the request for provisional measures of protection. Those arguments pertained to Australia's reliance on: *(a)* local remedies to be allegedly exhausted (by the applicant State) in national courts; and *(b)* avoidance of concurrent jurisdiction (the International Court of Justice and the Arbitral Tribunal of the Permanent Court of Arbitration (PCA)). Those arguments were advanced by counsel for Australia as alleged impediments to Timor-Leste to seek provisional measures of protection from the International Court of Justice itself, as it has done. Yet, it promptly became clear that, in the circumstances of the *cas d'espèce*, reliance on local remedies and on avoi-

dance of "concurrent jurisdiction" (judicial and arbitral procedures) were impertinent, and missed the central point of the quest for justice in the circumstances of the *cas d'espèce*.

1. Impertinence of Reliance on Local Remedies in the Circumstances of the Present Case

4. At the public sitting before the Court of 21 January 2014, counsel for Australia contended that Timor-Leste was to pursue "remedies in an Australian court", even though it conceded that this was not a "diplomatic protection claim"[1]. For its part, Timor-Leste contended that the rule of exhaustion of local remedies had no application here, in a case like the present one, "where a State asserts its own right against the State that has harmed it"[2]. It was made clear that, in such circumstances, it would be impertinent to insist on recourse to local remedies.

5. In effect, the rule of exhaustion of local remedies surely does not apply here. Firstly, this is a public complaint, a State claim with public — not private — origin. Secondly, this is a complaint of a *direct* injury to the State itself, fundamentally distinct from one of diplomatic protection. Thirdly, the State is, clearly, not only pursuing its own interests, but vindicating what it regards as its own right. Fourthly, in so doing, the State is acting on its own behalf. *In such circumstances*, a State cannot be compelled to subject itself to appear before national tribunals. As widely reckoned in international case law and legal doctrine, in these circumstances the local remedies rule does not apply: *par in parem non habet imperium, non habet jurisdictionem*[3].

2. Impertinence of Reliance on Avoidance of "Concurrent Jurisdiction" in the Circumstances of the Present Case

6. Counsel for Australia then drew attention to the pending arbitral proceedings opposing it to Timor-Leste, adding that the International Court of Justice, depending in its view on State consent, had "no inherent priority" over "other forums specially consented to by States", nor review authority over them, unless "such priority or authority have been expressly conferred"[4]. This argument was laid down on a strict State voluntarist outlook, privileging State will. Counsel of Australia proceeded that concurrent jurisdiction (International Court of Justice and PCA Arbitral Tribunal) should be avoided, as "[a] rigid adherence to the

[1] CR 2014/2, of 21 January 2014, pp. 19-20, para. 37.
[2] CR 2014/1, of 20 January 2014, p. 26, para. 20.
[3] A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge University Press, 1983, pp. 173-174.
[4] CR 2014/2, of 21 January 2014, pp. 43-44, paras. 21-22.

parallelism of jurisdictions will only encourage forum shopping, conflict and fragmentation, unduly favouring successive claimants"[5]. In Australia's counsel's view, in order to avoid one international tribunal affecting "parallel proceedings" before another, and also to avoid "two conflicting decisions on the same issue" (paras. 25-26), in his view the PCA Arbitral Tribunal, and not the International Court of Justice, was a "more appropriate forum" for dealing with provisional measures in the present case (paras. 31-33)[6].

7. The International Court of Justice has promptly and rightly disposed of these arguments in the present Order of 3 March 2014. From the start, it recalled that, in its previous Order, of 28 January 2014, in the present case, it

> "decided not to accede to Australia's request for a stay of the proceedings, considering, *inter alia*, that the dispute before it between Timor-Leste and Australia was [is] sufficiently distinct from the dispute being adjudicated upon by the Arbitral Tribunal in the Timor Sea Treaty Arbitration" (para. 17).

The arguments that it rejected unduly shifted attention from the quest for justice and the imperative of the realization of justice, into alleged needs of delimitation of competences between international tribunals.

8. Furthermore, it so happens that the Rules of Procedure of the PCA Arbitral Tribunal, in charge of the arbitration under the Timor Sea Treaty, provide that "[a] request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement". The *interna corporis* of the PCA Arbitral Tribunal itself sees no need of avoiding "forum shopping", or "parallelism of jurisdictions", or "fragmentation of international law", or the like. It is duly focused on the quest for justice.

9. In the present case, there is clearly no impediment to resort to another judicial instance in order to obtain provisional measures of protection, quite on the contrary. The contending Parties are expressly allowed to do so, in case such provisional measures are needed. And, contrary to what Australia's counsel says, the International Court of Justice, and not the PCA Arbitral Tribunal, is surely the "more appropriate forum" for dealing with provisional measures of protection in the case of which it has been seized. Moreover, it is my feeling that a word of caution is here needed as to the aforementioned euphemisms (the empty and misleading rhetoric of "forum shopping", "parallelism", avoidance of "fragmentation" of international law and of "proliferation" of international

[5] CR 2014/2, of 21 January 2014, pp. 44-45, para. 24.
[6] *Ibid.*, pp. 45-47, paras. 25-26 and 31-33.

tribunals) with which a trend of contemporary legal doctrine (*en vogue* to the north of the equator) has in recent years tried in vain to brainwash younger generations of scholars of our discipline, unduly diverting attention from the quest for justice to alleged "problems" of "delimitation" of competences.

10. In this respect, destiny has wished (once again) that, shortly before the present case was lodged with the International Court of Justice, during the centennial celebrations of the Peace Palace (ICJ Seminar of 23 September 2013), I had the occasion to ponder that:

> "In our days, the more lucid international legal doctrine has at last discarded empty euphemistic expressions used some years ago, such as so-called 'proliferation' of international tribunals, so-called 'fragmentation' of international law, so-called 'forum-shopping', which diverted attention to false issues of delimitation of competences, oblivious of the need to focus on the imperative of an enlarged access to justice. Those expressions, narrow-minded, unelegant and derogatory — and devoid of any meaning — paid a disservice to our discipline; they missed the key point of the considerable advances of the old ideal of international justice in the contemporary world."[7]

3. General Assessment

11. Not surprisingly, the argument of the respondent State invoking the rule of exhaustion of local remedies *(supra)* did not survive in the circumstances of the present case. After all, *par in parem non habet imperium, non habet jurisdictionem*. Nor did its other argument, invoking the alleged risks of so-called "parallelism", or "concurrent jurisdiction", or "forum shopping", or "fragmentation" of international law, or the like. Such "neologisms", so much *en vogue* in international legal practice in our days, seem devoid of any meaning, besides diverting attention from the crucial point of the *quest for justice* to the false issue of "delimitation" of competences. It is about time to stop referring to so-called "fragmentation" of international law[8]. The current enlargement of access to justice to the *justiciables* is reassuring. International courts and tribunals have a *common mission* to impart justice, which brings their endeavours together,

[7] A. A. Cançado Trindade, "A Century of International Justice and Prospects for the Future", *A Century of International Justice and Prospects for the Future/Rétrospective d'un siècle de justice internationale et perspectives d'avenir* (eds. A. A. Cançado Trindade and D. Spielmann), Wolf Legal Publs., 2014, p. 21.

[8] As it is surely not at all a topic for codification or progressive development of international law, it should never have been retained in the agenda of the UN International Law Commission, as it did in 2002-2006. It is, at most, a topic for a university thesis (for an LL.M., rather than a Ph.D. degree).

in a harmonious way, and well above the zealous so-called "delimitation" of competences, much to the liking of the international legal profession.

12. In the present case concerning *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia)*, the International Court of Justice has put the issue in the right perspective. In the Order it has just adopted today, 3 March 2014, it has pointed out (para. 17) that, one month ago, in its previous Order of 28 January 2014 in the *cas d'espèce*, it had

> "decided not to accede to Australia's request for a stay of the proceedings, considering, *inter alia*, that the dispute before it between Timor-Leste and Australia is sufficiently distinct from the dispute being adjudicated upon by the Arbitral Tribunal in the Timor Sea Treaty Arbitration" *(ibid.)*.

III. Impertinence of Reliance upon Unilateral Acts of States in the Course of International Legal Proceedings

13. In the present case concerning *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia)*, the International Court of Justice has thus rightly discarded the empty and misleading rhetoric of "fragmentation" of international law. The multiplicity in international courts and tribunals simply reflects the way international law has evolved in our times. Yet, turning now to a distinct point, the International Court of Justice has insisted on relying upon unilateral acts of States (such as promise, in the form of assurances or "undertakings"), thus failing, once again, to extract the lessons from its own practice in recent cases.

14. Promises or assurances or "undertakings" have been relied upon in a distinct context, that of diplomatic relations. When they are unduly brought into the domain of international legal procedure, they cannot serve as basis for a decision of the international tribunal at issue, even less so when they ensue from an original act of arbitrariness. The posture of an international tribunal cannot be equated to that of an organ of conciliation. Judicial settlement was conceived as the most perfected means of dispute settlement; if it starts relying upon unilateral acts of States, as basis for the reasoning of the decisions to be rendered, it will undermine its own foundations, and there will be no reason for hope in the improvement of judicial settlement to secure the prevalence of the rule of law.

15. Reliance upon unilateral acts of promise or assurances has been the source of uncertainties and apprehension in the course of international legal proceedings. Suffice it here to recall, for example, that, in the case concerning *Questions relating to the Obligation to Prosecute or Extra-*

dite (Belgium v. *Senegal)* (*Judgment, I.C.J. Reports 2012 (II)*, p. 422), the International Court of Justice, instead of ordering provisional measures of protection, preferred to rely on a pledge on the part of the respondent State. In my separate opinion in the Judgment on the merits of 20 July 2012 in that case, after reiterating my dissent in the Court's Order of 28 May 2009 in the *cas d'espèce*, I recalled (*ibid.*, pp. 515-517, paras. 73-78) all the uncertainties that followed and the apprehension undergone by the Court (which I see no need to reiterate here) for its reliance on assurances.

16. Had the Court ordered the requested provisional measures in that case, this would have saved the Court from those uncertainties which put at greater risk the outcome of the international legal proceedings. As I concluded in my aforementioned separate opinion:

> "Unilateral acts of States — such as, *inter alia*, promise — were conceptualized in the traditional framework of the inter-State relations, so as to extract their legal effects, given the 'decentralization' of the international legal order. Here, in the present case, we are in an entirely distinct context, that of *objective* obligations (. . .). In the ambit of these obligations, a pledge or promise made in the course of legal proceedings before the Court does not remove the prerequisites (of urgency and of probability of irreparable damage) for the indication of provisional measures by the Court." (*Ibid.*, p. 517, para. 79.)

17. In the present case concerning *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia)*, the International Court of Justice, distinctly, has indicated provisional measures, but not in the terms they were requested by Timor-Leste: it has preferred to rely on unilateral assurances or "undertakings" on the part of the State which seized the documents and data at issue. The Court has thus disclosed its unwillingness to learn the lessons to be extracted from its own experience in recent cases. It has preferred, seemingly oblivious of its own authority, to keep on acting as a sort of "diplomatic court", rather than rigorously as a court of law. To my mind, *ex factis jus non oritur*.

18. The aforementioned case of *Hissène Habré*, opposing Belgium to Senegal, is not an isolated illustration of the point I am addressing here. In its recent Order (of 22 November 2013) in the merged cases of *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and of the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, the International Court of Justice conceded:

> "The Court (. . .) takes note of the assurances of Nicaragua (. . .) that it considers itself bound not to undertake activities likely to connect any of the two *caños* with the sea and to prevent any person or group of persons from doing so. However, the Court is not convinced

> that these instructions and assurances remove the imminent risk of irreparable prejudice, since, as Nicaragua recognized, persons under its jurisdiction have engaged in activities in the disputed territory, namely, the construction of the two new *caños*, which are inconsistent with the Court's Order of 8 March 2011." (*I.C.J. Reports 2013*, pp. 366-367, para. 50.)

19. In my separate opinion appended to the Court's more recent Order of 22 November 2013, I again made the point of the need to devote greater attention to the *legal nature* of provisional measures of protection, and their *legal effects*, particularly those endowed with a *conventional* basis such as the provisional measures ordered by the International Court of Justice (*ibid.*, p. 359, paras. 22-23 and p. 360, paras. 27-28). Only in this way they will contribute to the progressive development of international law. Persistent reliance on unilateral "undertakings" or assurances or promises formulated in the context of provisional measures in no way contributes to the proper understanding of the expanding legal institute of provisional measures of protection in contemporary international law.

20. Expert writing on unilateral acts of States has been very careful to avoid the pitfalls of "contractual" theories in international law, as well as the dangers of unfettered State voluntarism underlying unilateralist manifestations in the decentralized international legal order. Unilateral acts, as manifestations of a subject of international law to which this latter may attach certain consequences, do not pass without qualifications. Proposed enumerations of unilateral acts in international law have not purported to be exhaustive[9], or conclusive as to their legal effects. It is not surprising to find that expert writing on the matter has thus endeavoured to single out those unilateral acts to which legal effects can be ascribed[10] — and all this in the domain of diplomatic relations, but *certainly not in the realm of international legal procedure*.

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[9] J. Dehaussy, "Les actes juridiques unilatéraux en droit international public: à propos d'une théorie restrictive", 92 *Journal du droit international*, Clunet (1965), pp. 55-56, and cf. p. 63; and cf. also, generally, A. Miaja de la Muela, "Los Actos Unilaterales en las Relaciones Internacionales", 20 *Revista Española de Derecho Internacional* (1967), pp. 456-459; J. Charpentier, "Engagements unilatéraux et engagements conventionnels: différences et convergences", *Theory of International Law at the Threshold of the 21st Century — Essays in Honour of K. Skubiszewski* (ed. J. Makarczyk), The Hague, Kluwer, 1996, pp. 367-380.

[10] Cf., in particular, Eric Suy, *Les actes juridiques unilatéraux en droit international public*, Paris, LGDJ, 1962, pp. 1-271; K. Skubiszewski, "Les actes unilatéraux des Etats", *Droit international — Bilan et perspectives* (ed. M. Bedjaoui), Vol. 1, Paris, Pedone, 1991, pp. 231-250; G. Venturini, "La portée et les effets juridiques des attitudes et des actes unilatéraux des Etats", 112 *Recueil des cours de l'Académie de droit international de La Haye* (1964), pp. 63-467. And cf. also: A. P. Rubin, "The International Legal Effects of Unilateral Declarations", 71 *American Journal of International Law* (1977), pp. 1-30; C. Chinkin, "A Mirage in the Sand? Distinguishing Binding and Non-Binding Relations between States", 10 *Leiden Journal of International Law* (1997), pp. 223-247.

21. Other contemporary international tribunals have likewise been faced with uncertainties and apprehension deriving from unilateral assurances by contending parties. For example, in its judgment (of 17 January 2012) in the case of *Othman (Abu Qatada)* v. *United Kingdom*, the European Court of Human Rights (ECtHR — Fourth Section) took account of the expressions of "grave concern" as to diplomatic assurances, manifested in the course of the legal proceedings (para. 175): first, such assurances "were unable to detect abuse"; secondly, "the monitoring regimes provided for by assurances were unsatisfactory"; thirdly, "frequently local monitors lacked the necessary independence"; and fourthly, "assurances also suffered from a lack of incentives to reveal breaches" (paras. 176-179). States, in their relations with each other, can take into account diplomatic assurances, and extract consequences therefrom. International tribunals, for their part, are not bound to base their decisions (on provisional measures or others) on diplomatic assurances: they are bound to identify the applicable law, to interpret and apply it, in sum, to say what the law is *(juris dictio)*.

22. International legal procedure has a logic of its own, which is not to be equated with that of diplomatic relations. International legal procedure is not properly served with the insistence on reliance on unilateral acts proper of diplomatic relations — even less so in face of the perceived need of assertion that *ex injuria jus non oritur*. Even if an international tribunal takes note of unilateral acts of States, it is not to take such acts as the basis for the reasoning of its own decisions.

23. In this connection, may I recall that, in the course of the advisory proceedings of the International Court of Justice concerning the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (*Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 403), a couple of participants invoked the principle *ex injuria jus non oritur*. In my separate opinion appended to the Court's Advisory Opinion, I asserted that "[a]ccording to a well-established general principle of international law, a wrongful act cannot become a source of advantages, benefits or else rights for the wrongdoer: *ex injuria jus non oritur*" (*ibid.*, p. 576, para. 132).

24. After considering the application of this principle in the factual context of the matter then before the International Court of Justice (*ibid.*, p. 577, paras. 133-135), I added:

> "This general principle, well-established as it is, has at times been counterbalanced by the maxim *ex factis jus oritur.* (. . .) In the conceptual universe of international law, as of law in general, one is in the domain of *Sollen*, not of *Sein*, or at least in that of the tension between *Sollen* and *Sein*. (. . .)
>
> [T]he maxim *ex factis jus oritur* does not amount to a *carte blanche*, as law plays its role also in the emergence of rights out of the

tension between *Sollen* and *Sein*." (*I.C.J. Reports 2010 (II)*, pp. 577-578, paras. 136-137.)

25. In effect, to allow unilateral acts to be performed (in the course of international legal proceedings), irrespectively of their discretionary — if not arbitrary — character, and to accept subsequent assurances or "undertakings" ensuing therefrom, is to pave the way to uncertainties and unpredictability, to the possibility of creation of *faits accomplis* to one's own advantage and to the other party's disadvantage. The certainty of the application of the law would be reduced to a mere probability. As the lucid writer Machado de Assis remarked in the nineteenth century:

> "Se esse mundo não fosse uma região de espíritos desatentos, era escusado lembrar ao leitor que eu só afirmo certas leis quando as possuo deveras; em relação a outras restrinjo-me à admissão da probabilidade."[11]

IV. *Ex Conscientia Jus Oritur*

26. Already in the late forties — at a time when international legal doctrine was far more cultivated than it seems to be nowadays — it was observed that modern international law was not prepared to admit that that "void and unlawful acts can be arbitrarily validated"[12]. In effect — as pointed out one decade earlier, in the late thirties — even if international law finds itself in the presence "of acts, undertakings and situations which falsely claim to give rise to rights", such acts, undertakings and situations

> "are void (. . .), for the reason that, deriving from an unlawful act, they cannot produce beneficial results for the guilty party. *Ex injuria jus non oritur* is a general principle of international law (. . .) [T]he essence of the law, that is to say (. . .) the legal effectiveness and validity of one's obligations, cannot be affected by individual unlawful acts."[13]

27. No State is entitled to itself rely upon an arbitrary act in order to vindicate what it regards as a right of its own, ensuing therefrom. May I further recall, in this respect, that, in the past, a trend of legal doctrine —

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[11] Machado de Assis, *Memórias Póstumas de Brás Cubas* [1881]: "If this world were not a region of unattentive spirits, there would be no need to remind the reader that I only affirm certain laws when I truly possess them; in relation to others I limit myself to the admission of the probability." *[My own translation.]*

[12] P. Guggenheim, "La validité et la nullité des actes juridiques internationaux", 74 *Recueil des cours de l'Académie de droit international de La Haye* (1949), pp. 230-233, and cf. pp. 226-227 *[translation by the Registry]*.

[13] H. Lauterpacht, "Règles générales du droit de la paix", 62 *Recueil des cours de l'Académie de droit international de La Haye* (1937), pp. 287-288 *[translation by the Registry]*.

favoured by so-called "realists" — attempted to deprive some of the strength of the general principle *ex injuria jus non oritur* by invoking the maxim *ex factis jus oritur*. In doing so, it confused the validity of norms with the required coercion (at times missing in the international legal order) to implement them. The validity of norms is not dependent on coercion (for implementation); they are binding as such (objective obligations).

28. The maxim *ex factis jus oritur* wrongfully attributes to facts law-creating effects which facts *per se* cannot generate. Not surprisingly, the *"fait accompli"* is very much to the liking of those who feel strong or powerful enough to try to impose their will upon others. It so happens that contemporary international law is grounded on some fundamental general principles, such as the principle of the *juridical equality of States*, which points in the opposite direction. Factual inequalities between States are immaterial, as all States are juridically equal, with all the consequences ensuing therefrom. Definitively, *ex factis jus non oritur*. Human values and the idea of objective justice stand above facts. *Ex conscientia jus oritur*.

V. The Question of the Ownership of the Seized Documents and Data

29. Another issue, addressed by the contending Parties in the course of the present proceedings, was that of the ownership of the documents and data seized by Australia. From the start, Timor-Leste asserted, in its oral arguments, that the present case "is one in which Timor-Leste is complaining of the seizure of its property and is seeking the recovery of the documents that were held on its behalf by Mr. B. Collaery"[14]. Counsel for Timor-Leste then stated that its lawyer (Mr. Collaery), through his office,

> "conducts his legal activities covering a number of matters for the Government of Timor-Leste, as well as for other clients. In that office, Mr. Collaery regularly keeps, on behalf of the Government of Timor-Leste, many confidential documents relating to the international legal affairs of Timor-Leste. Some cover such very important and delicate matters as the negotiations between the two countries regarding access to the maritime resources of the Timor Sea."[15]

30. The applicant State then asserted that it was clear that among the documents and data seized

> "were many files relating to matters on which Mr. Collaery's office was working on behalf of the Government of Timor-Leste. All these

[14] CR 2014/1, of 20 January 2014, p. 24, para. 16.
[15] *Ibid.*, p. 19, para. 8.

> files are thus the property of the Government of Timor-Leste and were held as such by Mr. Collaery in the course of his duties on behalf of the Government of Timor-Leste. [T]he client — in this case the Government — has proprietary ownership of documents that have been brought into existence, or received, by a lawyer acting as agent on behalf of the client, or that have been prepared for the benefit of the client and at the client's expense, such as, letters of advice, memoranda and briefs to counsel."[16]

31. For its part, Australia preferred not to dwell upon the issue of the ownership of the seized documents and data. It argued that:

> "Questions of ownership cannot be answered in the absence of a proper examination of the documents in question. That examination has not occurred because we have not inspected the documents. We therefore cannot accept the proposition that the documents are necessarily the property of Timor-Leste, nor can we put before you a full submission on where ownership might lie."[17]

32. Timor-Leste insisted on its position, affirming categorically that "documents in the hands of lawyers on behalf of their clients belong to the clients, in this case, Timor-Leste. That applies to most of the items seized"[18]. From the aforementioned, it is clear that Australia did not clarify its position as to who owns the seized documents and data, having preferred not to respond to Timor-Leste's arguments that those documents and data are its property. This is another point to be kept in mind, in the proper consideration of the requested provisional measures in the *cas d'espèce*.

VI. The Relevance of General Principles of International Law

33. In the course of the public sitting of the Court on 21 January 2014, I deemed it fit to put the following question to both contending Parties, Timor-Leste and Australia:

> "What is the impact of a State's measures of alleged national security upon the conduction of arbitral proceedings between the Parties? In particular, what is the effect or impact of seizure of documents and data, in the circumstances of the present case, upon the settlement of an international dispute by negotiation and arbitration?"[19]

[16] CR 2014/1, of 20 January 2014, p. 21, para. 11.
[17] CR 2014/4, of 22 January 2014, p. 19, para. 42.
[18] CR 2014/3, of 22 January 2014, p. 19, para. 33.
[19] CR 2014/2, of 21 January 2014, p. 48.

1. Responses of the Parties to a Question from the Bench

34. In his prompt answer to my question, counsel for Timor-Leste, remarking that he would try to respond to it "both as a matter of principle, and as it applies to this case", stated that:

> "States should refrain from allowing national interests, including national security interests — important though they may be — adversely to affect international proceedings between sovereign States, and the ability of sovereign States to obtain legal advice. Nothing should be done which would infringe the principles of the sovereign equality of States, non-intervention, and the peaceful settlement of disputes, provided for in Article 2.3 of the United Nations Charter. These are at the core of the international legal order as reflected in the Charter and other key documents, such as the [1970 Declaration on Principles of International Law concerning] Friendly Relations Declaration[20].
>
> Applying this to the case in hand, we look to the Court to ensure that Australia does not secure unfair advantage, either in the context of litigation or (. . .) in the context of the Timor Sea.
>
> Both Parties seem to agree that legal privilege is a general principle of law, and is not without limitations, but the Parties seem to disagree on the scope of these limitations. In response to Judge Cançado Trindade's question, I would point to the difference between such limitations under domestic law, as argued for by Australia, and limitations under international law. The domestic limitations argued for by Australia should not apply when a sovereign State seeks legal advice. Australia is not entitled to restrict Timor-Leste's ability freely to communicate with its lawyers. There is no limit on immunity in respect of diplomatic documents on Australian soil; [and] there is no reason of principle why the same should not apply to a State's claim to privilege in respect of legal advice.
>
> In any case, any assertion of limitation to privilege should not hinder Timor-Leste's preparations for international proceedings or negotiations. This principle was expressly recognized in the *Libananco* case[21]. Contrary to what Mr. Burmester said yesterday[22], recognition of this principle should not preclude Australia from continuing any

[20] UN doc. A/RES/25/2625, Declaration on Principles in International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, of 24 October 1970.

[21] Case *Libananco Holdings Co. Ltd.* v. *Turkey*, ICSID case ARB/06/8, decision on preliminary issues, of 23 June 2008, p. 42, para. 2.

[22] Cf. CR 2014/2, of 21 January 2014, p. 32, para. 17.

criminal investigation; it would just ensure that Timor-Leste's documents remain notwithstanding that process.

Mr. Campbell began by asking you to keep in mind the alleged general principles applying to provisional measures set out in Australia's written observations. (. . .) [W]e do not regard as convincing what they had to say on these matters. The written observations take a very restrictive view of provisional measures. Yet the institution of provisional measures is essential to the judicial process. Its importance is increasingly recognized by international courts and tribunals." (Paras. 3-7.)[23]

35. For his part, in his response to my question, counsel for Australia, like that of Timor-Leste *(supra)*, began by saying that he would endeavour to answer "first at the level of principle and then at the level of application"; and then he added that:

"At the level of principle, we would accept that, if a State engages in arbitration with another State, and finds it necessary to take measures of national security which may bear on the arbitration, the State should, as a matter of prudence, if not strict law, take such steps as are reasonable to limit the impact of national security measures on the arbitration. We accept, as was put this morning, that to do otherwise would interfere with arbitration as a peaceful method of resolving inter-State disputes. I emphasize, the principle is qualified by reasonableness. The circumstances may not always provide a perfect accommodation between the two interests in conflict and a State could not be asked absolutely to put on hold measures of national security merely because it is brought to arbitration." (CR 2014/4, pp. 8-9, para. 4.)

36. This was the "general answer"; moving then to the "specific answer", counsel for Australia proceeded:

"[I]n the present case the measures of national security will have no

[23] Counsel for Timor-Leste added:

"Of course, like any judicial process it can be abused, but courts know how to deal with that. [W]e reject any insinuation by Australia that Timor-Leste is acting abusively in seeking provisional measures. In particular, we reject the unworthy suggestion by Professor Crawford that Timor-Leste is using these proceedings 'to skirt around the confidentiality provisions and maximise the opportunity for publicity and comment prejudicial to Australia'. We are not." (CR 2014/3, of 22 January 2014, pp. 12-14.)

And, for Australia's argument, cf. CR 2014/2, of 21 January 2014, p. 39, para. 8.

> adverse impact on the Arbitration — for three reasons. Firstly, Timor-Leste's counsel in the Arbitration, on 5 December [2013], accepted they have copies of the key removed documents, including an affidavit from the person they describe as 'Witness K' which they have lodged with the PCA. No case of disadvantage has been made before you. Second[ly], the Attorney-General acted reasonably from the outset — from the Ministerial Statement of 4 December [2013], supplemented by undertakings — to ensure there would be no illegitimate advantage to Australia by way of documents being made available to the legal team in the Arbitration. Wisely, with hindsight, he anticipated this problem might arise and he acted in advance to prevent it. The third part of the practical answer is that there is not a skerrick of evidence pointed to by Timor-Leste to suggest the undertakings have not been honoured to date or will not be honoured in the future. (. . .) [T]he documents have been kept under seal (. . .).
>
> Timor-Leste has the documents it needs for the Arbitration; it has adequate undertakings to protect the integrity of the Arbitration; and the undertakings are being honoured." (CR 2014/4, paras. 5-6.)

2. General Assessment

37. In sum, and as pointed out by the International Court of Justice in the present Order, Australia has clearly relied on its solemn "undertakings" that the documents of Timor-Leste's legal adviser that it has seized in Canberra will be kept sealed and inaccessible, safeguarding their confidentiality, so as not to be used to the disadvantage of Timor-Leste in the proceedings of the Timor Sea Treaty Arbitral Tribunal (Order, paras. 35-39). Timor-Leste, in turn, has challenged such arguments (*ibid.*, paras. 40-41), and has held that it seeks to protect the ownership and property rights it holds over the seized material (inviolability and immunity of its property) as a sovereign State (*ibid.*, para. 24), and has added that the seized documents and data concern its position on matters pertaining to the Timor Sea Treaty Arbitration and in the context of future negotiations; such matters, it has added, are "crucial to the future of Timor-Leste as a State and to the well-being of its people" (*ibid.*, para. 33).

38. Arguments of alleged "national security", such as raised by Australia in the *cas d'espèce*, cannot be made the concern of an international tribunal, in a case like the present one. The Court has before itself general principles of international law *(supra)*, and cannot be obfuscated by allegations of "national security", which fall outside the scope of the appli-

cable law here. In any case, an international tribunal cannot pay lip-service to allegations of "national security" made by one of the parties in the course of legal proceedings.

39. This particular point was made by Timor-Leste in the *cas d'espèce*. In this respect, the *ad hoc* International Tribunal for the former Yugoslavia (ICTY — Appeals Chamber), in its decision (of 29 October 1997)[24] in the *Blaškić* case, confronted with a plea that documents sought from Croatian State officials were protected by "national security", pondered:

> "[T]o grant States a blanket right to withhold, for security purposes, documents necessary for trial might jeopardise the very function of the International Tribunal, and 'defeat its essential object and purpose'. The International Tribunal was established for the prosecution of persons responsible for war crimes, crimes against humanity and genocide; these are crimes related to armed conflict and military operations. It is, therefore, evident that military documents or other evidentiary material connected with military operations may be of crucial importance, either for the Prosecutor or the defence, to prove or disprove the alleged culpability of an indictee, particularly when command responsibility is involved (in this case military documents may be needed to establish or disprove the chain of command, the degree of control over the troops exercised by a military commander, the extent to which he was cognisant of the actions undertaken by his subordinates, etc.). To admit that a State holding such documents may unilaterally assert national security claims and refuse to surrender those documents could lead to the stultification of international criminal proceedings: those documents might prove crucial for deciding whether the accused is innocent or guilty. The very *raison d'être* of the International Tribunal would then be undermined." (*Prosecutor* v. *T. Blaškić*, para. 65.)

40. The due process of law cannot be undermined by the behaviour of one of the parties dictated by reasons of alleged "national security". Equality of arms *(égalité des armes)* in arbitral and judicial proceedings is to be preserved. International tribunals know how to handle confidential matters in the course of legal procedure, and this cannot be intermingled with one of the parties' concerns with its own "national security". In the experience of contemporary international tribunals, there have

[24] Appeals Chamber's decision of 29 October 1997, review of the Decision of Trial Chamber II of 18 July 1997, para. 65.

been occasions of hearings of testimonies in special sittings, so as to duly instruct the case and protect witnesses. To evoke but one illustration, the Inter-American Court of Human Rights (IACtHR), in the course of the proceedings culminating in its Judgment of 25 November 2000 (merits) in the case of *Bámaca Velásquez* v. *Guatemala*, deemed it necessary to collect the testimony of a witness, and commissioned three of its members to do so, in a sitting held outside its *siège* in Central America[25]. The sitting took place at the headquarters of the Organization of American States (OAS) in Washington D.C., as the witness concerned was still defining his migratory status as a refugee.

41. As to the handling of confidentiality, international tribunals know their respective applicable law, and do not yield to considerations of domestic law as to "national security"; they keep in mind the imperative of due process of law in the course of international legal proceedings, and preserve the equality of arms *(égalité des armes)*, in the light of the principle of the proper administration of justice *(la bonne administration de la justice)*. Allegations of State secrecy or "national security" cannot at all interfere with the work of an international tribunal, in judicial settlement or arbitration.

42. In my perception, Timor-Leste has made its case that the documents seized from its legal adviser's office in Canberra, containing confidential information concerning its positions in the Timor Sea Treaty Arbitration, are not to be used to its disadvantage in that PCA arbitration. Timor-Leste's preoccupation has its *raison d'être*, and, in my view, the International Court of Justice has taken the right decision to order the provisional measures; however, it should have done so in the terms requested by Timor-Leste, namely, to have the documents seized by Australia immediately sealed and delivered into the custody of the International Court of Justice itself, here in its *siège* at the Peace Palace in The Hague. The present proceedings in the case concerning *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia)*, suggest, once again, in the light of the arguments advanced by both Timor-Leste and Australia, that States appear far more sensitive than human beings. Even more so in a delicate matter such as the one of the present case. As the learned Antônio Vieira observed in the seventeenth century: "Não há dúvida que todas as coisas são mais estimadas e de maior gosto quando se recuperam depois de perdidas, que quando se possuem sem se perderem."[26]

43. It is clear that the concern of an international tribunal is with properly imparting justice, rather than with assessing measures of alleged "national security", entirely alien to its function. International tribunals

[25] In the host State, San José of Costa Rica.

[26] Antônio Vieira, *Sermão de Santo Antônio* [1657]: "There is no doubt that all things are more esteemed and of greater taste when recovered after having been lost, than when possessed without being lost." *[My own translation.]*

are concerned with the prevalence of international law; national governments (their secret or so-called "intelligence" services) occupy themselves with issues they regard as affecting alleged "national security". The international legal positions of one State cannot be subjected to measures of alleged "national security" of another State, even less so when they are contending parties in the same contentious case before an international tribunal. In this connection, an international tribunal such as the International Court of Justice is to make sure that the principle of the *juridical equality* of States prevails, so as to discard eventual repercussions in the international legal procedure of *factual inequalities* between States.

VII. The Prevalence of the Juridical Equality of States

44. The present case concerning *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia)*, bears witness of the relevance of the principle of the juridical equality of States. The prevalence of this fundamental principle has marked a longstanding presence in the realm of international law, ever since the times of the II Hague Peace Conference of 1907, and then of the drafting of the Statute of the Permanent Court of International Justice by the Advisory Committee of Jurists, in June-July 1920. Recourse was then made, by that Committee, *inter alia*, to general principles of law, as these latter embodied the objective idea of justice. A general principle such as that of the juridical equality of States, enshrined a quarter of a century later in the United Nations Charter (Article 2 (1)), is ineluctably intermingled with the quest for justice.

45. Subsequently, throughout the drafting of the 1970 UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1964-1970), the need was felt to make it clear that stronger States cannot impose their will upon the weak, and that *de facto* inequalities among States cannot affect the weaker in the vindication of their rights. The principle of the juridical equality of States gave expression to this concern, embodying the *idée de justice*, emanated from the universal juridical conscience. I have had the occasion to dwell upon this point elsewhere, having pondered that:

> "On successive occasions the principles of international law have proved to be of fundamental importance to humankind's quest for justice. This is clearly illustrated by the role played, *inter alia*, by the principle of juridical equality of States. This fundamental principle, the historical roots of which go back to the II Hague Peace Conference of 1907, proclaimed in the UN Charter and enunciated also in the 1970 Declaration of Principles, means ultimately that all States — factually strong and weak, great and small — are equal before international law, are entitled to the same protection under the law and

before the organs of international justice, and to equality in the exercise of international rights and duties.

Despite successive attempts to undermine it, the principle of juridical equality of States has remained, from the II Hague Peace Conference of 1907 to date, one of the basic pillars of international law. It has withstood the onslaught of time, and shown itself salutary for the peaceful conduction of international relations, being ineluctably associated — as it stands — with the foundations of international law. It has been very important for the international legal system itself, and has proven to be a cornerstone of international law in the United Nations era. In fact, the UN Charter gave it a new dimension, and the principle of juridical equality of States, in turn, paved the way for, and contributed to, new developments such as that of the system of collective security, within the ambit of the law of the United Nations."[27]

VIII. Provisional Measures of Protection Independently of Unilateral "Undertakings" or Assurances

46. As from the characterizations by the International Court of Justice itself of the essence and main features of the dispute lodged in the *cas d'espèce*, one would legitimately expect that the Court would not proceed to ground the provisional measures of protection that it has indicated in the present Order on a unilateral "undertaking" or assurance by one of the contending Parties, precisely the one that has caused a damage — by the seizure and detention of the documents and data at issue — to the applicant State. In effect, in the present Order, the International Court of Justice, after taking note of the principal claim of Timor-Leste that "a violation has occurred of its right to communicate with its counsel and lawyers in a confidential manner with regard to issues forming the subject-matter of pending arbitral proceedings and future negotiations between the Parties", recalled that this right derives from the fundamental principle of the juridical equality of States, enshrined in Article 2 (1) of the UN Charter (Order, para. 27).

47. The International Court of Justice then proceeded that "equality of the parties must be preserved" when they are engaged — pursuant to Article 2 (3) of the UN Charter — in the process of peaceful settlement of an international dispute (another general principle of international law). Once a State is engaged therein, it is entitled to undertake arbitral proceedings or negotiations "without interference by the other party in the preparation and conduct of its case" *(ibid.)*. It follows, the Court added, that,

[27] A. A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, 2nd rev. ed., Leiden/The Hague, Nijhoff, 2013, pp. 84-85, and cf. pp. 62-63, 65 and 73.

> "in such a situation, a State has a plausible right to the protection of its 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" (Order, para. 27).

48. The Court concluded, on this issue, that at least some of the rights for which Timor-Leste seeks protection are "plausible", in particular, "the right to conduct arbitration proceedings or negotiations without interference by Australia", and "the correlative right of confidentiality of and non-interference in its communications with its legal advisers" (*ibid.*, para. 28). I would take even a step further, in acknowledging that *a right is a right*, irrespective of its so-called "plausibility" (whatever that might concretely mean)[28]. In any case, having reached such a conclusion, one would expect the Court to order its own provisional measures of protection independently of any promise or unilateral "undertaking" on the part of the State which has breached that "plausible" right.

49. For reasons which escape my comprehension, the Court did not do so, and, from then onwards, embarked on a distinct line of reasoning, on the basis of the "undertaking" or assurance by Australia to secure the confidentiality of the material seized by its agents in Canberra on 3 December 2013. The Court was aware of the imminent risk of irreparable harm (*ibid.*, para. 42), and insisted that there remained a risk of further disclosure of the seized material (*ibid.*, para. 46) to the additional disadvantage of Timor-Leste. The Court considered that

> "there could be a very serious detrimental effect on Timor-Leste's position in the Timor Sea Treaty Arbitration and in future maritime negotiations with Australia should the seized material be divulged to any person or persons involved or likely to be involved in that arbitration or in negotiations on behalf of Australia. Any breach of confidentiality may not be capable of remedy or reparation as it might not be possible to revert to the *status quo ante* following disclosure of the confidential information." (*Ibid.*, para. 42.)

50. How can the Court assume that such breach of confidentiality has not already occurred, to the detriment of Timor-Leste? On what basis can the Court assume that the material seized by Australia has not yet been divulged, or was not divulged on the days following its seizure, and before the "undertaking" or assurance by Australia? How can the Court be sure that Timor-Leste has not yet suffered an irreparable harm? How

[28] "Plausibility", as understood nowadays, has its etymological origins tracing back to the sixteenth and seventeenth centuries, means something which is worth of approval or applause (from *plaudere*).

can the Court proceed, on the basis of the seizure undertaken by the Australian Security Intelligence Organisation (ASIO), to ground in the present Order its own provisional measures of protection, instead of taking custody of the seized material? From this point of the present Order (reliance on the seizure of documents and data for alleged "national security" reasons) onwards, it is difficult to avoid the sensation of entering into the realm of surrealism.

51. The fact is that it cannot be denied with certainty that, with the seizure of the documents and data containing its privileged information, Timor-Leste has *already* suffered an irreparable harm. Six and a half decades ago (in 1949), in his last book, *Nineteen Eighty-Four*, George Orwell repeatedly warned: "Big Brother Is Watching You"[29]. Modern history is permeated with examples of the undue exercise of search and seizure, by those who felt powerful enough to exercise unreasonable surveillance of others. Modern history has also plenty of examples of the proper reaction of those who felt victimized by such exercise of search and seizure. In so reacting, the latter felt that, though lacking in factual power, they had law on their side, as all are equal before the law. If Orwell could rise from his tomb today, I imagine he would probably contemplate writing *Two Thousand Eighty-Four*, updating his perennial and topical warning, so as to encompass surveillance not only at *intra-State* level, but also at *inter-State* level; nowadays, "Big Brother Is Watching You" on a much wider geographical scale, and also in the relations across nations.

52. If the Court were sensitive to that, it would have ordered — as in my view it should have — its provisional measures of protection independently of any unilateral "undertaking" or assurance on the part of the State which exercised search and seizure (Australia) of documents and data containing privileged information belonging to the applicant State (Timor-Leste). The Court would have ordered the seized documents and data to be promptly sealed and delivered into its custody here at its *siège* at the Peace Palace in The Hague. In any case, the provisional measures of protection indicated in the present Order of the Court, concerning a situation of urgency, purports to prevent *further* irreparable harm to Timor-Leste.

53. The Court did not at all need to have relied factually upon Australia's seizure of the documents and data containing information belonging to Timor-Leste, so as to order Australia to "keep under seal the seized documents and electronic data and any copies thereof" (resolutory point 2). The Court should have taken custody of those documents and data (and any copies thereof) from then on. Instead of that, the Court ordered the State which seized them to ensure that no *further* damage is

[29] Part I, Chapter I; and Part III, Chapter VI.

done to Timor-Leste by further disclosure for use by any person(s), of the seized material (resolutory point 1).

54. Ironically, in the present Order the Court itself admits (Order, para. 30) that the provisional measures of protection requested by Timor-Leste are aimed at preventing *further* damage to it. It is clear that damage has already been made to Timor-Leste. Yet the Court orders provisional measures of protection to be taken by the State — as from its unilateral "undertaking" — that has seized the documents and data for alleged reasons of "national security". In this connection, in the mid-fifties, the poet Vinicius de Moraes pitied the ungrateful task of those who worked in archives (and I would here add, in secret archives, amidst documents allegedly concerning "national security"); in his own words:

> "Antes não classificásseis
> Os maços pelos assuntos
> Criando a luta de classes
> Num mundo de anseios juntos! (. . .)
> Ah, ver-vos em primavera
> Sobre papéis de ocasião
> Na melancólica espera
> De uma eterna certidão! (. . .)"[30]

55. In distinct contexts, the inviolability of State papers and documents has been an old concern in diplomatic relations. The 1946 UN Convention on the Privileges and Immunities of the United Nations refers to the "inviolability for all papers and documents" of Member States participating in the work of its main and subsidiary organs, or in conferences convened by the United Nations (Art. IV). In the same year, a resolution of the UN General Assembly asserted that such inviolability of all State papers and documents was granted by the 1946 Convention "in the interests of the good administration of justice"[31]. Thus, already in 1946, the UN General Assembly had given expression in a resolution to the presumption of the inviolability of the correspondence between Member States and their legal advisers. This is an international law obligation, not

[30] Vinicius de Moraes, "Balada das Arquivistas", *Antologia Poética* (1954):

> "Better if you would not classify
> The files by the subjects
> Creating class struggle
> In a world full of anguish! (. . .)
> Ah, to see you all in the springtime
> Over occasional papers
> In the melancholic expectation
> Of an eternal certificate! (. . .)" *[My own translation.]*

[31] GA resolution 90 (I), of 11 December 1946, para. 5 *(b)*.

one derived from a unilateral "undertaking" or assurance by a State following its seizure of documents and data containing information belonging to another State.

56. In my perception, there is no room, in provisional measures of protection, for indulging in an exercise of balancing of interests of the contending parties. For example, in the present Order, the Court refers to the "significant contribution" of Australia's unilateral "undertaking" or promise (of 21 January 2014) towards "mitigating the imminent risk of irreparable prejudice" to Timor-Leste (Order, para. 47). Yet, immediately afterwards, the Court goes on to say that, despite that unilateral "undertaking" by Australia, "there is still an imminent risk of irreparable prejudice" to Timor-Leste (*ibid.*, para. 48). This being so, what is the "significant contribution" of the unilateral "undertaking" or assurance to mitigate the "imminent risk of irreparable prejudice" to Timor-Leste? The Court provides no explanation for its assertion. What is so "significant" about that unilateral act? The Court does not demonstrate its "significance", only takes the promise at its face value.

57. Can a unilateral assurance or promise provide a basis for the Court's reasoning in Orders of binding provisional measures of protection? Not at all — as I sustained half a decade ago in my dissenting opinion in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (*Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 139), and as I once again sustain in this separate opinion in the present Order of 3 March 2014 in the case concerning *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia)*. Like Ionesco's *Rhinocéros* (1960), *je ne capitule pas . . .*

58. The International Court of Justice is not a simple *amiable compositeur*, it is a court of law, the principal judicial organ of the United Nations (Article 92 of the UN Charter). In the exercise of its judicial function, it is not to ground its reasoning on unilateral "undertakings" or assurances or promises formulated in the course of international legal proceedings. Precepts of law provide a much safer ground for its reasoning in the exercise of its judicial function. Those precepts are of a perennial value, such as the ones in (Ulpian's) opening book I (item I, para. 3) or in Justinian's *Institutes* (early sixth century): *honeste vivere, alterum non laedere, suum cuique tribuere* (to live honestly, not to harm anyone, to give each one his/her due).

IX. The Autonomous Legal Regime of Provisional Measures of Protection

59. This brings me to my last point in the present separate opinion. The present legal proceedings, in my perception, bring to the fore, once again, what I have for some time been characterizing as *the autonomous*

legal regime of provisional measures of protection. In this respect, as I have pointed out, e.g., in my dissenting opinion in the merged cases of *Certain Activities Carried Out by Nicaragua in the Border Area* and of the *Construction of a Road in Costa Rica along the San Juan River* (*Provisional Measures, Order of 16 July 2013, I.C.J. Reports 2013*, p. 230), opposing Costa Rica to Nicaragua (and vice versa), the object of requests for provisional measures of protection is different from the object of applications lodged with international tribunals, as to the merits.

60. Furthermore, the rights to be protected are not necessarily the same in the two respective proceedings. Compliance with provisional measures runs parallel to the course of proceedings as to the merits of the case at issue. The obligations concerning provisional measures ordered and decisions as to the merits (and reparations) are not the same, being autonomous from each other. The same can be said of the legal consequences of non-compliance (with provisional measures, or else with judgments as to the merits), the breaches (of one and the other) being distinct from each other (*ibid.*, pp. 267-268, paras. 70-71).

61. What ensues herefrom is the pressing need to dwell upon, and to develop conceptually, the *autonomous legal regime* of provisional measures of protection, particularly in view of the expansion of these latter in our days (*ibid.*, para. 75). This is the point which I have made not only in my dissenting opinion in the two aforementioned merged cases opposing Costa Rica to Nicaragua, but also in my earlier dissenting opinion in the case of *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (*Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, pp. 192-193, paras. 80-81), and which I see fit to reiterate here, in the present case of *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia)*. It should not pass unnoticed that this point has marked presence in these recent cases, surrounded by entirely distinct circumstances. This, in my view, discloses the importance of the acknowledgment of the *autonomous legal regime* of provisional measures of protection, irrespective of the circumstances of the cases at issue.

62. I deem it a privilege to be able to serve the cause of international justice here at the Peace Palace in The Hague. With all that is going on here at the Peace Palace — at the International Court of Justice and at the Permanent Court of Arbitration next door — as well illustrated herein, the present case concerning *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia)*, since its lodging with the International Court of Justice last 17 December 2013 up to now, marks a proper closing of the celebrations of the centenary of the Peace Palace. This emblematic centenary would have been more remarkable if the International Court of Justice had ordered today, 3 March 2014, what in my view it should have done, i.e., the adoption of an order of provisional measures of protection to the effect of, from now on, keep-

ing custody itself, as master of its own jurisdiction, of the seized documents and data containing information belonging to Timor-Leste, here in its premises at the Peace Palace in The Hague.

X. Epilogue: A Recapitulation

63. From the preceding considerations, I hope it has become crystal clear why I consider that the provisional measures of protection indicated by the Court in the present Order of 3 March 2014, in the case concerning *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia)* are better than nothing, better than not having ordered any such measures at all, though I find that the Court should have gone further and have ordered provisional measures of protection independently of any unilateral "undertaking" or assurance by one of the Parties, and should from now on have kept custody of the seized documents and data itself, at its *siège* here at the Peace Palace in The Hague. I have thus felt obliged, in the faithful exercise of the international judicial function, to lay the foundations of my own position in the *cas d'espèce* in the present separate opinion. I deem it fit, at this stage, to recapitulate all the points of my personal position, expressed herein, for the sake of clarity, and in order to stress their interrelatedness.

64. *Primus:* When a State pursues the safeguard of its own right, acting on its own behalf, it cannot be compelled to appear before the national tribunals of another State, its contending party. The local remedies rule does not apply in cases of this kind; *par in parem non habet imperium, non habet jurisdictionem*. *Secundus:* The centrality of the quest for justice prevails over concerns to avoid "concurrent jurisdiction". *Tertius:* The imperative of the realization of justice prevails over manifestations of a State's will. *Quartus:* Euphemisms *en vogue* — like the empty and misleading rhetoric of "proliferation" of international tribunals, and "fragmentation" of international law, among others — are devoid of any meaning, and divert attention to false issues of "delimitation" of competences, oblivious of the need to secure an enlarged access to justice to the *justiciables*.

65. *Quintus:* International courts and tribunals share a *common mission* to impart justice, which stands above the zeal of "delimitation" of competences. *Sextus:* Unilateral "undertakings" or assurances by a contending party cannot serve as basis for provisional measures of protection. *Septimus:* Reliance on unilateral "undertakings" or assurances has been the source of uncertainties and apprehension; they are proper to the realm of inter-State (diplomatic) relations, and reliance upon such unilateral acts is to be avoided in the course of international legal proceedings; *ex factis jus non oritur*.

66. *Octavus:* International legal procedure has a logic of its own, which is not to be equated to that of diplomatic relations, even less so in face of

the perceived need of assertion that *ex injuria jus non oritur*. *Nonus:* To allow unilateral acts to be performed with the acceptance of subsequent "undertakings" or assurances ensuing therefrom would not only generate uncertainties, but also create *faits accomplis* threatening the certainty of the application of the law. *Decimus:* Facts only do not *per se* generate law-creating effects. Human values and the idea of objective justice stand above facts; *ex conscientia jus oritur*.

67. *Undecimus:* Arguments of alleged "national security", as raised in the *cas d'espèce*, cannot be made the concern of an international tribunal. Measures of alleged "national security", as raised in the *cas d'espèce*, are alien to the exercise of the international judicial function. *Duodecimus:* General principles of international law, such as the juridical equality of States (enshrined into Article 2 (1) of the United Nations Charter), cannot be obfuscated by allegations of "national security". *Tertius decimus:* The basic principle of the juridical equality of States, embodying the *idée de justice*, is to prevail, so as to discard eventual repercussions in international legal procedure of factual inequalities among States.

68. *Quartus decimus:* Due process of law, and the equality of arms *(égalité des armes)*, cannot be undermined by recourse by a contending party to alleged measures of "national security". *Quintus decimus:* Allegations of State secrecy or "national security" cannot interfere in the work of an international tribunal (in judicial or arbitral proceedings), carried out in the light of the principle of the proper administration of justice *(la bonne administration de la justice)*.

69. *Sextus decimus:* Provisional measures of protection cannot be erected upon unilateral "undertakings" or assurances ensuing from alleged "national security" measures; provisional measures of protection cannot rely on such unilateral acts, they are independent from them, they carry the authority of the international tribunal which ordered them. *Septimus decimus:* In the circumstances of the *cas d'espèce*, it is the Court itself that should keep custody of the documents and data seized and detained by a contending party; the Court should do so as master of its own jurisdiction, so as to prevent further irreparable harm.

70. *Duodevicesimus:* The inviolability of State papers and documents is recognized by international law, in the interests of the good administration of justice. *Undevicesimus:* The inviolability of the correspondence between States and their legal advisers is an international law obligation, not one derived from a unilateral "undertaking" or assurance by a State following its seizure of documents and data containing information belonging to another State.

71. *Vicesimus:* There is an autonomous legal regime of provisional measures of protection, in expansion in our times. This autonomous legal

regime comprises: *(a)* the rights to be protected, not necessarily the same as in the proceedings on the merits of the concrete case; *(b)* the corresponding obligations of the States concerned; *(c)* the legal consequences of non-compliance with provisional measures, distinct from those ensuing from breaches as to the merits. The acknowledgment of such autonomous legal regime is endowed with growing importance in our days.

(Signed) Antônio Augusto CANÇADO TRINDADE.