DISSENTING OPINION OF JUDGE *AD HOC* CALLINAN

1. I have formed the view that it is unnecessary for the Court to indicate provisional measures. Before explaining why I have formed that view, I should say something about the facts of the case so far as they may be discerned at this early stage of these proceedings.

Context

2. At any interlocutory stage of any curial proceedings, the true and full facts can rarely be confidently ascertained. An application for provisional relief will almost always be made in circumstances of asserted urgency. Indeed, without urgency there is no foundation for the indication of provisional measures.

3. There is another reason here for uncertainty as to the true factual situation. Australia contends that there are issues of national security involved which are of legitimate concern to it. Sometimes, indeed more often than not, there will, or can be no open, public or close examination whether, and the extent to which, national security may be at risk because such an examination, and disclosures in respect of it, may themselves increase or precipitate the realization of risk. One obvious risk at the forefront of the minds of those engaged in intelligence collection and national security is that their identities, and the nature of the operations in which they have engaged will be disclosed.

4. Many countries, including liberal democracies of which Australia is one, adopt therefore, bipartisan or even completely consensual policies, of not confirming or denying that particular conduct has, or has not been pursued, by their national security agencies.

Facts

5. Australia and Timor-Leste are parties to treaties relating to the sharing of revenue from the exploitation of underwater resources in an area of the seas between them. Timor-Leste has instituted proceedings before an arbitral tribunal, for which the Permanent Court of Arbitration is acting as Secretariat, seeking to set aside, avoid, or have declared invalid or otherwise not binding upon it, a 2006 Treaty between the Parties, on the ground, in substance, that Australia was obliged to, but did

not negotiate the treaty or treaties in good faith. Australia contends that the Arbitral Tribunal does not have jurisdiction over the matter.

6. It is possible, if not likely, that the genesis of the proceedings before the Arbitral Tribunal is a claim said to have been made by a former Australian intelligence officer.

7. That inference arises from various media reports, including one published in May 2013 in the print media of Timor-Leste, a copy of which is reproduced in Australia's presentation, Second Round, of 22 January 2014. It is reported there that an Australian intelligence agent, currently unwell in an Australian hospital, has alleged that Australian intelligence agents broke into, and eavesdropped upon, Timor-Leste's Cabinet rooms nine years ago. The Australian agent is said, in the newspaper report, to have divulged this information in a bid to clear his conscience. The implication there, and elsewhere, is that, by electronically eavesdropping upon Cabinet discussions, Australia was able to derive unfair or unethical advantages in negotiating the later of the treaties to which I have referred. The article identifies an Australian lawyer, Mr. Bernard Collaery, as "Minister [Timor-Leste's] Pires's lawyer".

8. On 2 December 2013, shortly before the Arbitral Tribunal convened a preliminary hearing to give directions with respect to the conduct of Timor-Leste's proceedings there, the Australian Attorney-General and the Minister responsible for the Australian Security Intelligence Organisation (ASIO), issued a search warrant to enable the search and seizure of material to which it refers, at and from Mr. Collaery's legal office and a residence in Canberra. It is important to notice that the Attorney-General was obliged to, and had satisfied himself that there were reasonable grounds for believing that access by ASIO to records and other things on the subject premises would substantially assist the collection of intelligence in accordance with the Act . . . [and] is important in relation to security under section 25 (1) of the Australia Security Organisation Act 1979 (Cth) (the "Act").

9. The search warrant was executed on 3 December 2013. A number of documents and other things were seized, some of which have been returned, and others of which have been retained and are the subject of these proceedings. Mr. Collaery was not present at his legal office when the search warrant was executed there.

10. The fact of the search and seizure came quickly into the public domain. Mr. Collaery, it seems, was interviewed by the Australian public broadcaster, the Australian Broadcasting Corporation, on television on 3 December 2013. He was introduced on the program as "the lawyer for East Timor". He said on air that the Director of the Australian Secret

Intelligence Service (ASIS) ordered a team into Timor to conduct work which was well outside the proper function of ASIS. The interviewer referred to a witness who had been questioned "tonight". Mr. Collaery's response was that the "witness" was a "very senior, experienced, officer who formed a proper view . . .". Further derogatory references were made by Mr. Collaery to Australia and ASIO. He said that the oral evidence of a prime witness [in the arbitration] was being muzzled. Not surprisingly, these events were followed up by the media. A reporter employed by the Australian Broadcasting Corporation said on air on 4 December said that "the spy has now revealed all and is the star witness for an East Timorese legal action in The Hague to have the billion dollar Treaty recapped. His identity remains a tightly guarded secret." On another occasion, shortly afterwards Mr. Collaery (from Amsterdam) is reported to have "called for a full inquiry".

11. One other reference to media reports may be relevant. *The Sydney Morning Herald*, a Sydney broadsheet, purported to quote Mr. Pires, Timor-Leste's National Resources Minister as having ". . . identified the team of people who came in to do the bugging. We have their names. They are males, along with a possible lady spy." The report added that Mr. Pires acknowledged that the members of the team might be at risk if their names got out over the internet.

12. In interlocutory proceedings hearsay evidence is frequently provisionally received. The point needs to be made here that some of the *evidence* to which I have referred, consisting as it does of media reports, is not only untested, but is also double hearsay, in that it is stated by a person one or two persons removed from the person claiming to have direct knowledge of the facts.

13. It is also relevant to observe that Mr. Collaery's exact position or role has its ambiguities and could conceivably give rise to conflicts. It appears from a letter of 12 December 2013 put before this Court, that a Sydney Queen's Counsel has been briefed by Mr. Collaery to advise and confer with an anonymous witness, who it can reasonably be inferred is the former agent responsible for the claims of entry into Timor-Leste's Cabinet rooms. According to the letter from that counsel (which was sent to a senior official of the Attorney-General's department) Mr. Collaery would withdraw as the solicitor for the anonymous witness, and be replaced by another, unnamed solicitor. It is not entirely clear therefore which of the documents that were seized and retained in execution of the search warrant in Mr. Collaery's office came into existence as a result of instructions from Mr. Pires personally, Timor-Leste, or the anonymous witness. In short, it is not at this stage clear, so far as at least some of the seized material is concerned, who is the person entitled to claim legal professional privilege in respect of, and any sort of possible proprietary or other interest in it.

14. The Attorney-General (a democratically elected senator in the Australian Parliament and the First Law Officer of the Commonwealth of Australia), on 4 December 2013 made both a statement to the Senate Chamber and to the public of the kind to which I have referred in paragraph 4 hereof:

> "As Honourable Senators are aware, it has been the practice of successive Australian Governments not to comment on security matters. I intend to observe that convention. However, in view of the publicity which has surrounded the matter since yesterday, I consider that it would be appropriate for me to make a short statement about the matter which does not trespass beyond the convention, and which will also provide an opportunity to correct some misleading statements that have been made in the Chamber this morning, and by others.
>
> . . . . . .
>
> Warrants of the kind executed yesterday are issued under section 25 of the Australian Security Intelligence Organisation Act 1979 (the Act). They are only issued by the Attorney-General at the request of the Director-General of ASIO, and only if the Attorney-General is satisfied as to certain matters. It is important to make that point, since it was asserted by Senator . . ., in apparent ignorance of the Act, that I had 'set ASIO onto' these individuals. The Attorney-General never initiates a search warrant; the request must come from ASIO itself.
>
> . . . . . .
>
> A search warrant may only be issued by the Attorney-General if the conditions set out in section 25 (2) are fulfilled. That provision requires that the Attorney be satisfied that there are reasonable grounds . . . in respect of a matter that is important in relation to security . . . "

15. From no later than 10 December 2013, Timor-Leste had been represented by another firm of solicitors, DLA Piper ("Piper"). That firm entered into an exchange of correspondence with the Attorney-General, and senior officials of his Department. In it, Piper demanded copies of the search warrant(s) and the return of all of the documents which had been seized and returned. Because Australia declined to comply with Piper's demand, Timor-Leste instituted these proceedings on 17 December 2013. The nature of the proceedings, and the provisional relief now sought appear fully from the Order of the Court. In the exchange of correspondence to which I have referred, Australia has adopted the position that Timor-Leste should seek to vindicate such rights as it may have in the domestic courts of Australia.

The Legal Position

16. I take the jurisprudence of this Court to be that it will indicate provisional measures only if these conditions are satisfied: that the case is

prima facie within its jurisdiction, is admissible; it is plausible; it is urgent; and, if the conduct complained of is not stopped, there is a risk that the moving party will be irreparably harmed. I do not take it to be settled international law that if those conditions are satisfied, the Court must indicate provisional measures. If it were otherwise, this Court, unlike almost any other court anywhere else in the world, would deny itself the exercise of a nuanced discretionary judgment that had regard to all of the relevant circumstances.

17. The distinction as a matter of substance between jurisdiction and admissibility is not always a clear one. As a general principle, parties cannot confer a jurisdiction upon a court that it does not lawfully have. Timor-Leste has itself quite properly pointed out that this Court must satisfy itself that it has prima facie jurisdiction. By prima facie, I take Timor-Leste to mean, I think, at least for the purposes of the current application for measures of a provisional kind only, arguable jurisdiction.

18. Both Timor-Leste and Australia have made declarations acknowledging that the jurisdiction of the Court is compulsory. In its Declaration (under Article 36 (2)), Australia has made a reservation to exclude

> "any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone, pending its delimitation".

That reservation was the subject of submissions by Australia in the recent case of *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening)*. It is unnecessary to say anything further about that reservation, or the effect of Australia's recent submissions about it in that case at this stage of these proceedings because Australia does not, in relation to the provisional measures sought by Timor-Leste, seek to rely upon the reservation. It is not apparent therefore whether Australia will seek to found upon that reservation at any later stage of these proceedings an argument that the subject material in so far as it relates to, for example, "the exploitation [of] any maritime zone pending the delimitation . . ." is beyond the jurisdiction of the Court, or makes the case inadmissible here.

19. Australia informed the Court (on 21 January 2014) that while it might well contest the jurisdiction and admissibility of Timor-Leste's Application, at the merits phase or earlier, it will not be raising jurisdictional or admissibility matters on Timor-Leste's request for provisional measures.

20. Another possible argument, in the alternative, against admissibility or jurisdiction has been adverted to in the pleadings. It is that by reason of the exception in Australia's Optional Clause Declaration with respect

to "any dispute in regard to which the parties thereto have agreed or shall agree to have resolved by some other method of peaceful settlement", this Court is denied jurisdiction or should not admit Timor-Leste's claim in this Court. Such an argument would be based upon Article 23 of the 2002 Treaty between the Parties. It is an argument that I understand has been foreshadowed by Australia already as depriving the Arbitral Tribunal of jurisdiction to entertain Timor-Leste's claim there.

21. The threshold for an indication of provisional relief is not high. Australia offers undertakings[1] which, in my opinion, are adapted to and sufficient for, the circumstances of the case. That this is so relieves the Court of the need to give any lengthy consideration now to jurisdiction and admissibility. If and when that need arises, it may be helpful to revisit some earlier opinions of judges of the Court. The jurisprudence of the Court on these issues has not of course stood still since 1974, but I doubt whether what Sir Garfield Barwick said about admissibility then in his dissenting opinion in the *Nuclear Tests (New Zealand* v. *France)* case[2] has been rejected in whole or in part, or fully considered since:

> "I observed earlier that there is no universally applicable definition of the requirements of admissibility. The claim may be incompetent, that is to say inadmissible, because its subject-matter does not fall within the description of matters which the Court is competent to hear and decide[3]; or because the relief which the reference or application seeks is not within the Court's power to consider or to give; or because the applicant is not an appropriate State to make the reference or application, as it is said that the applicant lacks standing in the matter; or the applicant may lack any legal interest in the subject-matter of the application or it may have applied too soon or otherwise at the wrong time, or, lastly, all preconditions to the making or granting of such a reference or application may not have been performed, e.g., local remedies may not have been exhausted. Indeed it is possible that there may arise other circumstances in which the reference or application may be inadmissible or not receivable. Thus admissibility has various manifestations.
>
> Of course all these elements of the competence of the reference or application will not necessarily be relevant in every case. Which form of admissibility arises in any given case may depend a great deal on the source of the relevant jurisdiction of the Court on which reliance is placed and on the terms in which its jurisdiction is expressed. This, in my opinion, is the situation in this case."

[1] The undertakings are set out in the Order of the majority.
[2] *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 423.
[3] Competence and power to hear may also raise jurisdictional questions.

There are other aspects of the passage that I have quoted from Sir Garfield Barwick's opinion which may have relevance if what he said there is not inconsistent with the ratio of the Court's Order, or foreclosed by subsequent decisions of the Court. The first relates to the relevance of non-exhaustion of domestic local remedies. In its responses to Piper's complaints before the institution of these proceedings, Australia urged Timor-Leste to seek relief from the Australian courts. The Applicant declined to do so. Could it have done so? Should it have done so? Could a refusal to do so argue against urgency? Is non-recourse to domestic courts relevant to the exercise of a discretionary judgment of this Court? *Rahimtoola* v. *Nizam of Hyderabad*[4], upon which Timor-Leste relies, may not assist it. The passage quoted from A. V. Dicey in Viscount Simonds's speech[5] is concerned with cases against a sovereign State. It does not suggest that a State cannot or should not resort to courts of another State as a claimant or plaintiff. It is also an example of a coincidence of domestic law and international law of a kind which may — a matter not to be decided now — be the situation in Australia with respect to legal professional privilege and proprietary and sovereign rights.

22. Another aspect of the passage quoted that may be of relevance is the residence or otherwise in this Court of a general discretion to grant or refuse relief, particularly of the kind that was being dealt with there, and is being sought here, that is relief of an injunctive kind. It would be unusual if this Court did not have a broad discretion in such circumstances, but no opinion needs to be formed about that, or indeed, any of the questions posed which may or may not arise in the future.

23. As Judge Greenwood emphasized at paragraph two of his declaration in the case of *Costa Rica* v. *Nicaragua*[6], the Court's decision on a request for provisional measures is not an interim ruling on the merits. Nor does such a request require a concluded opinion on legal issues.

24. I will touch however upon the matter of irreparable damage, merely to say that the concept is analogous with common law principle which holds that interlocutory or provisional relief will not be ordered if, for example, damages or perhaps some other remedy would be an adequate remedy, adding that in a real sense a satisfactory undertaking takes the place of other adequate remedy.

---

[4] [1958] AC 379.

[5] *Ibid.*, at 394.

[6] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 46.

25. The existence of a sovereign inviolability of documents in the possession of a lawyer in another country is a large claim, and, I think, possibly novel. Whether it will be necessary for the Applicant to show that there is an absolute inviolability or immunity can only be determined after full argument.

26. As important and extensive a privilege it is, there may also be reason for concern about the absoluteness (in domestic and international law) of legal professional privilege when a nation's security may be in jeopardy. Any court, including this Court, would be conscious of the unlikelihood that any nation or its leaders would regard themselves as bound to treat national security as inferior, or subject to, legal professional privilege. The extent to which there is a settled principle of legal professional privilege, unique to the law of nations, and immune to any limitation in an international or national interest, will require detailed and careful argument. The same may be said of an absolute sovereign right in respect of documents in the possession of a sovereign nation's lawyers in another country.

27. On the final hearing, the nature and breadth of the so-called fraud or crime exception to legal professional (and a sovereign right or privilege) will also need to be the subject of full argument. That exception has been recognized in domestic law since the nineteenth century, if not earlier[7]. A question that may require a decision is whether an intrusion upon a privilege that, either purposely or incidentally, would both uncover evidence of a crime or fraud, and help to prevent the commission or furtherance of a crime or fraud, would fall within the exception. Here, for example, it is possible that the documents seized would answer both of those descriptions. If legal professional privilege were to be subject to an exception (which it is not) solely to enable the gathering of evidence to prove that a crime of fraud has been committed, the privilege would be subverted.

28. Another claim, of an unrestricted proprietary right (not dependant on sovereignty) was made to the seized documents. In deciding upon the existence or otherwise, or the extent, of any of these asserted rights, there may be the further factor to be considered, that is of the commercial and legal role and obligations of the lawyer in physical possession of the documents. That lawyer will be subject to relevant domestic commercial and legal regulatory regimes of the host nation, over which any proprietary sovereign or legal professional privilege rights may or may not prevail. So too, if a simple proprietary (as opposed to a special sovereign proprietary) right is claimed, regard may need to be had to section 51 (xxxi) of

[7] *R.* v. *Cox and Railton* (1884), 14 QBD 153; see also discussion of earlier cases in J. H. Wigmore, *Evidence in Trials at Common Law*, Vol. 8, rev. 1961, para. 2298, at pp. 572-577.

the Australian Constitution which confers upon the Commonwealth the power to acquire property (that is, of any kind, including copyright) on just terms for a Commonwealth, that is to say, a sovereign purpose, one of which is of course defence (s 51 (vi)).

The Role of the Attorney-General

29. Timor-Leste made a submission that, in signing and therefore re-issuing the warrants, the Attorney-General was, under international law, carrying out a judicial or quasi-judicial function. It is unnecessary to decide, but there is reason to doubt (without deciding) whether, even under any extended meaning of "quasi-judicial", that is so. Under section 75 (v) of the Australian Constitution, any and all officers of the Commonwealth of Australia are amenable to the prerogative writs of *certiorari*, prohibition and *mandamus*, as well as injunction and declarations. The High Court of Australia has consistently and repeatedly held this to be so since 1903. The Attorney-General is a member of the Executive, and neither a judge nor a quasi-judge[8]. He is no more exercising a judicial power or quasi-judicial power in satisfying himself that a search warrant should be issued than is a police officer or a medical officer in requiring or taking a blood or other sample from the person of a criminal suspect, an intrusive requirement routinely enforced in countries all over the world.

Undertakings

30. Undertakings are repeatedly given and accepted in lieu of the making of orders by courts in common law countries. A failure to honour an undertaking is likely to expose anyone who has given it to penalty for contempt of court. Solemnly given as they were here to this Court, they are binding upon Australia. In any event, it is unthinkable that the First Law Officer of the Commonwealth, in his capacity both as a senior counsel obliged as an officer of the Courts of Australia to act honestly in all professional affairs and a Minister answerable to the Parliament, would not honour all undertakings given to this Court.

[8] As to the political and administrative or executive features and role of a Minister in Australia, see: *Minister for Immigration and Multicultural Affairs* v. *Jia* (2001), 205 CLR at 244-245. Chapter 3 of the Australian Constitution and the whole structure of the Constitution contemplate both a functional and legal separation in Australia of the Parliament, the Executive and the Judiciary. See also *R.* v. *Kirby; Ex parte Boilermakers' Society of Australia* (1956), 94 CLR 254.

31. The undertakings offered here, initially given to Piper on behalf of Timor-Leste and extended, enhanced and clarified in the oral and written submissions of Australia are, in my opinion, sufficient to meet the circumstances (including of urgency) of this case, and will ensure that no irreparable harm is done to Timor-Leste between now and the final hearing. The effect of them is, among other things, to impose upon Australia, and the Attorney-General in particular, an obligation not to have himself, or to provide or enable access to others within the Australian administration to the seized documents without first giving notice to the Court and to Timor-Leste to enable the latter to have its concerns again ventilated in the Court if it wishes. It would not be reasonable to indicate a further measure or to expect Australia to undertake not to "eavesdrop" on or intercept the communications of Timor-Leste as that would or might suggest that Australia has done so, or will do so in the future, matters that would require cogent and persuasive evidence not produced here[9]. It may also be questioned whether there is a sufficient linkage between the claim in or justiciable in this Court and a provisional measure of that kind.

32. Quite apart from the other concerns to which I have referred in this opinion, I think that there may be a problem about the use of the word "interfere" in the third *dispositif* paragraph, by reason of its breadth and unspecific nature.

33. National security is a reasonable and natural aspiration and expectation of any body of peoples. Here, the nature of the risk with which the Attorney-General is concerned is not known to the Court, and may, in any event change in seriousness or imminence. All or most nations have, as Australia's pleadings show, intelligence organizations. They have them because they need them. Terrorists now operate within communities which shelter and have succoured them. International law must take cognizance of the painful realities of the vulnerabilities of the people in free nations. Any law or principle of it which does not do that may fail to command obedience as well as respect. It is difficult for those not the possessor of all the relevant information to know which piece of new, or further, or seemingly slight piece of information, will indicate an escalation of risk. Algorithms designed to process such pieces of information to identify risk and its heightening are now universally and ceaselessly employed. And a risk which can arise suddenly and dangerously is to the safety of a particular officer of officers of an intelligence organization, as well as to the security of the nation itself. In my respectful opinion, the

[9] Evidence is to be evaluated according to the capacity and the circumstances of the party adducing it. It is a canon of good sense long recognized in, for example, the common law, that the cogency and strength of the evidence to establish allegations of fact vary according to the gravity and turpitude of the conduct embraced by them. See *Blatch* v. *Archer* (1774), 98 ER 969; *Refjek* v. *McElroy* (1965), 112 CLR 517.

undertakings to which I have referred are reasonable and sufficient, and should be accepted by the Court without the need for indications of any provisional measures.

(Signed) Ian CALLINAN.
