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Summary
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Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)

Application and Request for the indication of provisional measures (paras. 1-17 of the Order)

The Court begins by recalling that, by an Application filed with the Registry on 17 December 2013, the Democratic Republic of Timor-Leste (hereinafter "Timor-Leste") instituted proceedings against Australia with respect to a dispute concerning the seizure on 3 December 2013, and subsequent detention, by "agents of Australia of documents, data and other property which belongs to Timor-Leste and/or which Timor-Leste has the right to protect under international law". In particular, Timor-Leste claims that these items were taken from the business premises of a legal adviser to Timor-Leste in Narrabundah, in the Australian Capital Territory, allegedly pursuant to a warrant issued under section 25 of the Australian Security Intelligence Organisation Act 1979. The seized material, according to Timor-Leste, includes, inter alia, documents, data and correspondence between Timor-Leste and its legal advisers relating to a pending Arbitration under the Timor Sea Treaty of 20 May 2002 between Timor-Leste and Australia (hereinafter the "Timor Sea Treaty Arbitration").

On the same day, Timor-Leste also submitted a Request for the indication of provisional measures, pursuant to Article 41 of the Statute of the Court and Articles 73 to 75 of the Rules of Court. The Court recalls that, at the end of its Request, Timor-Leste asks the Court to

"indicate the following provisional measures:

(a) [t]hat all of the documents and data seized by Australia from 5 Brockman Street, Narrabundah, in the Australian Capital Territory on 3 December 2013 be immediately sealed and delivered into the custody of the International Court of Justice;

(b) [t]hat Australia immediately deliver to Timor-Leste and to the International Court of Justice (i) a list of any and all documents and data that it has disclosed or transmitted, or the information contained in which it has disclosed or transmitted to any person, whether or not such person is employed by or holds office in any organ of the Australian State or of any third State, and (ii) a list of the identities or descriptions of and current positions held by such persons;

(c) [t]hat Australia deliver within five days to Timor-Leste and to the International Court of Justice a list of any and all copies that it has made of any of the seized documents and data;

(d) [t]hat Australia (i) destroy beyond recovery any and all copies of the documents and data seized by Australia on 3 December 2013, and use every effort to secure the destruction beyond recovery of all copies that it has transmitted to any third party, and (ii) inform Timor-Leste and the International Court of Justice of all steps taken in pursuance of that order for destruction, whether or not successful;

(e) [t]hat Australia give an assurance that it will not intercept or cause or request the interception of communications between Timor-Leste and its legal advisers, whether within or outside Australia or Timor-Leste."

The Court then recalls that Timor-Leste further requested that, pending the hearing and decision of the Court on the Request for the indication of provisional measures, the President of the Court exercise his power under Article 74, paragraph 4, of the Rules of Court. It states in that regard that, by a letter dated 18 December 2013, the President of the Court, acting under that article, called upon Australia "to act in such a way as to enable any Order the Court will make on the request for provisional measures to have its appropriate effects, in particular to refrain from any act which might cause prejudice to the rights claimed by the Democratic Republic of Timor-Leste in the present proceedings".

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The Court then states that public hearings on Timor-Leste's Request for the indication of provisional measures were held on 20, 21 and 22 January 2014, during which Agents and counsel for the Governments of Timor-Leste and Australia presented oral observations. During the hearings, questions were put by some Members of the Court to the Parties, to which replies were given orally. Timor-Leste availed itself of the possibility given by the Court to comment in writing on Australia's reply to one of these questions.

The Court recalls that, at the end of its second round of oral observations, Timor-Leste asked the Court to indicate provisional measures in the same terms as included in its Request (see above) and that Australia, for its part, stated the following:

"1. Australia requests the Court to refuse the Request for the indication of provisional measures submitted by the Democratic Republic of Timor-Leste.

2. Australia further requests the Court stay the proceedings until the Arbitral Tribunal has rendered its judgment in the Arbitration under the Timor Sea Treaty."

The Court then states that, by an Order dated 28 January 2014, the Court 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. The Court therefore, after having taken into account the views of the Parties, proceeded to fix time-limits for the filing of the written pleadings.

Reasoning of the Court (paras. 18-54)

I. Prima facie jurisdiction (paras. 18-21)

The Court begins by observing that, when a request for the indication of provisional measures has been made, it need not, before deciding whether or not to indicate such measures, satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case; it only

has to satisfy itself that the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded.

The Court notes that Timor-Leste seeks to found the jurisdiction of the Court in this case on the declaration it made by it on 21 September 2012 under Article 36, paragraph 2, of the Statute, and on the declaration made by Australia on 22 March 2002 under the same provision. The Court adds that, in the course of the oral pleadings, Australia stated that, while reserving its "right to raise questions of jurisdiction and admissibility at the merits stage", it would not be "raising those matters in relation to Timor-Leste's Request for provisional measures".

The Court considers therefore that the declarations made by both Parties under Article 36, paragraph 2, of the Statute appear, prima facie, to afford a basis on which it might have jurisdiction to rule on the merits of the case. The Court thus finds that it may entertain the Request for the indication of provisional measures submitted to it by Timor-Leste.

II. The rights whose protection is sought and the measures requested (paras. 22-30)

The Court recalls that its power to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the requesting party are at least plausible. Moreover, a link must exist between the rights which form the subject of the proceedings before the Court on the merits of the case and the provisional measures being sought.

The Court begins by considering whether the rights claimed by Timor-Leste on the merits, and for which it is seeking protection, are plausible. It first observes that it is not disputed between the Parties that at least part of the documents and data seized by Australia relate to the Timor Sea Treaty Arbitration, or to possible future negotiations on maritime delimitation between the Parties, and that they concern communications of Timor-Leste with its legal advisers. It notes, moreover, that the principal claim of Timor-Leste is 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. The Court notes that this claimed right might be derived from the principle of the sovereign equality of States, which is one of the fundamental principles of the international legal order and is reflected in Article 2, paragraph 1, of the Charter of the United Nations. More specifically, equality of the parties must be preserved when they are involved, pursuant to Article 2, paragraph 3, of the Charter, in the process of settling an international dispute by peaceful means. If a State is engaged in the peaceful settlement of a dispute with another State through arbitration or negotiations, it would expect to undertake these arbitration proceedings or negotiations without interference by the other party in the preparation and conduct of its case. It would follow that 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.

Accordingly, the Court considers that at least some of the rights for which Timor-Leste seeks protection — namely, the right to conduct arbitration proceedings or negotiations without interference by Australia, including the right of confidentiality of and non-interference in its communications with its legal advisers — are plausible.

The Court then turns to the issue of the link between the rights claimed and the provisional measures requested. The Court recalls that the provisional measures requested by Timor-Leste are

aimed at preventing further access by Australia to this seized material, at providing the former with information as to the scope of access of Australia to the documents and data seized, and at ensuring the non-interference of Australia in future communications between Timor-Leste and its legal advisers. The Court considers that these measures by their nature are intended to protect Timor-Leste's claimed rights to conduct, without interference by Australia, arbitral proceedings and future negotiations, and to communicate freely with its legal advisers, counsel and lawyers to that end. The Court thus concludes that a link exists between Timor-Leste's claimed rights and the provisional measures sought.

III. Risk of irreparable prejudice and urgency (paras. 31-48)

The Court recalls that it has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are in dispute, and that this power will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to those rights.

Timor-Leste claims that Australia's actions in seizing confidential and sensitive material from its legal adviser's office create a real risk of irreparable prejudice to its rights. Timor-Leste asserts that it is highly probable that most of the documents and data in question relate to its legal strategy, both in the context of the Timor Sea Treaty Arbitration and in the context of future maritime negotiations with Australia. Timor-Leste affirms that the risk of irreparable prejudice is imminent because it is currently considering which strategic and legal position to adopt in order to best defend its national interests vis-à-vis Australia in relation to the 2002 Timor Sea Treaty and the 2006 Treaty on Certain Maritime Arrangements in the Timor Sea.

According to Australia, there is no risk of irreparable prejudice to Timor-Leste's rights. It states that the comprehensive undertakings provided by the Attorney-General of Australia demonstrate that any rights which Timor-Leste may be found to possess are sufficiently protected pending final judgment in the current case.

Australia first explains that on 4 December 2013 the Attorney-General of Australia made a Ministerial Statement to Parliament on the execution by Australia's security intelligence agency ("ASIO") of the search warrants on the business premises of a legal adviser to Timor-Leste in Canberra and that, on that occasion, he emphasized "that the material taken into possession in execution of the warrants [was] not under any circumstances to be communicated to those conducting the [arbitration] proceedings on behalf of Australia".

Australia then notes that its Attorney-General provided a written undertaking to the Timor Sea Treaty Arbitral Tribunal, dated 19 December 2013, in which he declared that the material seized would not be used by any part of the Australian Government for any purpose related to the Timor Sea Treaty Arbitration and undertook that he would not make himself aware or otherwise seek to inform himself of the content of the material or any information derived from the material.

Australia further informed the Court that, following the letter from the President under Article 74, paragraph 4, of the Rules of the Court (see above), the Attorney-General of Australia wrote a letter dated 23 December 2013 to the Director-General of Security of ASIO, directing that the measures set out in the undertaking to the Arbitral Tribunal on 19 December 2013 be implemented equally in relation to the proceedings instituted before the Court. In his letter, the Attorney-General stated, in particular, that "it would be desirable and appropriate for Australia to satisfy the President's request by ensuring that, from now until the conclusion of the hearing on 20-22 January, the material is sealed, that it is not accessed by any other officer of ASIO, and that ASIO ensure that it is not accessed by any other person".

Furthermore, the Attorney-General provided the Court with a written undertaking dated 21 January 2014. Australia points out that this written undertaking contains comprehensive assurances that the confidentiality of the seized documents will be safeguarded. It points, in particular, to the following declarations made by the Attorney-General in his written undertaking:

> "that until final judgment in this proceeding or until further or earlier order of the Court:
>
> 1. I will not make myself aware or otherwise seek to inform myself of the content of the Material or any information derived from the Material; and
>
> 2. Should I become aware of any circumstance which would make it necessary for me to inform myself of the Material, I will first bring that fact to the attention of the Court, at which time further undertakings will be offered; and
>
> 3. The Material will not be used by any part of the Australian Government for any purpose other than national security purposes (which include potential law enforcement referrals and prosecutions); and
>
> 4. Without limiting the above, the Material, or any information derived from the material, will not be made available to any part of the Australian Government for any purpose relating to the exploitation of resources in the Timor Sea or related negotiations, or relating to the conduct of:
>
>   (a) these proceedings; and
>
>   (b) the proceedings in the Arbitral Tribunal [constituted under the 2002 Timor Sea Treaty]."

Lastly, during the oral proceedings, with reference to the letter dated 23 December 2013 from the Attorney-General of Australia to the Director-General of Security of ASIO, the Solicitor-General of Australia stated that "ASIO to date has not inspected any of the documents" and he noted that the documents [were] being kept under seal for all purposes until [Australia had] this Court's decision on provisional measures".

With respect to the undertakings given by the Attorney-General of Australia on 4, 19 and 23 December 2013, Timor-Leste argues that they are "far from adequate" to protect Timor-Leste's rights and interests in the present case. According to Timor-Leste, in the first place they lack binding force, at least at the international level; secondly, they are in serious respects more limited than the provisional measures requested by Timor-Leste, as they do not address the wider issues going beyond the Timor Sea Treaty Arbitration; and thirdly, the instructions set out in the letter dated 23 December 2013 from the Attorney-General of Australia to the Director-General of ASIO are given only until the conclusion of the hearings in the present phase of the case.

With reference to the written undertaking dated 21 January 2014, Timor-Leste asserts that it does not suffice to prevent the risk of irreparable harm and that it "should be backed up by an order of the Court that deals with the treatment of the materials".

On the basis of this information, the Court is of the view that the right of Timor-Leste to conduct arbitral proceedings and negotiations without interference could suffer irreparable harm if Australia failed to immediately safeguard the confidentiality of the material seized by its agents on 3 December 2013 from the office of a legal adviser to the Government of Timor-Leste. In particular, the Court considers 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.

The Court notes, however, that the written undertaking given by the Attorney-General of Australia on 21 January 2014 includes commitments to the effect that the seized material will not be made available to any part of the Australian Government for any purpose in connection with the exploitation of resources in the Timor Sea or related negotiations, or in connection with the conduct of the current case before the Court or of the proceedings of the Timor Sea Treaty Tribunal. The Court observes that the Solicitor-General of Australia moreover clarified during the hearings, in answer to a question from a Member of the Court, that no person involved in the arbitration or negotiation has been informed of the content of the documents and data seized.

The Court further notes that the Agent of Australia stated that "the Attorney-General of the Commonwealth of Australia [had] the actual and ostensible authority to bind Australia as a matter of both Australian law and international law". The Court states that it has no reason to believe that the written undertaking dated 21 January 2014 will not be implemented by Australia. Once a State has made such a commitment concerning its conduct, its good faith in complying with that commitment is to be presumed.

The Court, however, takes cognizance of the fact that, in paragraph 3 of his written undertaking dated 21 January 2014, the Attorney-General states that the seized material will not be used "by any part of the Australian Government for any purpose other than national security purposes (which include potential law enforcement referrals and prosecutions)". It further notes that, in paragraph 2 of the same document, the Attorney-General underlined that "[s]hould [he] become aware of any circumstance which would make it necessary for [him] to inform [himself] of the Material, [he] would first bring that fact to the attention of the Court, at which time further undertakings will be offered".

Given that, in certain circumstances involving national security, the Government of Australia envisages the possibility of making use of the seized material, the Court finds that there remains a risk of disclosure of this potentially highly prejudicial information. The Court notes that the Attorney-General of Australia has given an undertaking that any access to the material, for considerations of national security, would be highly restricted and that the contents of the material would not be divulged to any persons involved in the conduct of the Timor Sea Treaty Arbitration, in the conduct of any future bilateral negotiations on maritime delimitation, or in the conduct of the proceedings before this Court. However, once disclosed to any designated officials in the circumstances provided for in the written undertaking dated 21 January 2014, the information contained in the seized material could reach third parties, and the confidentiality of the materials could be breached. Moreover, the Court observes that the commitment of Australia to keep the seized material sealed has only been given until the Court's decision on the Request for the indication of provisional measures.

In light of the above, the Court considers that the written undertaking dated 21 January 2014 makes a significant contribution towards mitigating the imminent risk of irreparable prejudice created by the seizure of the above-mentioned material to Timor-Leste's rights, particularly its right to the confidentiality of that material being duly safeguarded, but does not remove this risk entirely.

The Court concludes from the foregoing that, in view of the circumstances, the conditions required by its Statute for it to indicate provisional measures have been met in so far as, in spite of the written undertaking dated 21 January 2014, there is still an imminent risk of irreparable prejudice as demonstrated. It is therefore appropriate for the Court to indicate certain measures in order to protect Timor-Leste's rights pending the Court's decision on the merits of the case.

IV. Measures to be adopted (paras. 49-54)

The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are in whole or in part other than those requested. In the present case, having considered the terms of the provisional measures requested by Timor-Leste, the Court finds that the measures to be indicated need not be identical to those requested.

The Court first notes that the Solicitor-General of Australia clarified during the oral proceedings that the written undertaking of the Attorney-General of 21 January 2014 "will not expire" without prior consultation with the Court. Thus, this undertaking will not expire once the Court has ruled on Timor-Leste's Request for the indication of provisional measures. As the written undertaking of 21 January 2014 does not contain any specific reference to the seized documents being sealed, the Court must also take into account the duration of Australia's commitment to keep the said material under seal contained in the letter dated 23 December 2013 from the Attorney-General of Australia to the Director-General of ASIO. The Court takes note of the fact that, under the terms of that letter, the commitment was given until the close of the oral proceedings on the Request for the indication of provisional measures. The Court further observes that, during the oral proceedings, Australia gave assurances that the seized material would remain sealed and kept inaccessible until the Court had rendered its decision on that Request.

Noting moreover the likelihood that much of the seized material contains sensitive and confidential information relevant to the pending arbitration and that it may also include elements that are pertinent to any future maritime negotiations which may take place between the Parties, the Court finds that it is essential to ensure that the content of the seized material is not in any way or at any time divulged to any person or persons who could use it, or cause it to be used, to the disadvantage of Timor-Leste in its relations with Australia over the Timor Sea. It is therefore necessary to keep the seized documents and electronic data and any copies thereof under seal until further decision of the Court.

The Court then notes that Timor-Leste has expressed concerns over the confidentiality of its ongoing communications with its legal advisers concerning, in particular, the conduct of the Timor Sea Treaty Arbitration, as well as the conduct of any future negotiations over the Timor Sea and its resources, a matter which is not covered by the written undertaking of the Attorney-General of 21 January 2014. The Court further finds it appropriate to require Australia not to interfere in any way in communications between Timor-Leste and its legal advisers, either in connection with the pending arbitral proceedings and with any future bilateral negotiations concerning maritime delimitation, or in connection with any other related procedure between the two States, including the present case before the Court.

The Court emphasizes, finally, that its orders on provisional measures have binding effect and thus create international legal obligations with which both parties are required to comply. It adds that the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves, and that it leaves unaffected the right of the Governments of Timor-Leste and Australia to submit arguments in respect of those questions.

Operative clause (para. 55)

The last paragraph of the Order reads in full as follows:

"For these reasons,

THE COURT,

Indicates the following provisional measures:

(1) By twelve votes to four,

Australia shall ensure that the content of the seized material is not in any way or at any time used by any person or persons to the disadvantage of Timor-Leste until the present case has been concluded;

IN FAVOUR: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Xue, Gaja, Bhandari; Judge ad hoc Cot;

AGAINST: Judges Keith, Greenwood, Donoghue; Judge ad hoc Callinan;

(2) By twelve votes to four,

Australia shall keep under seal the seized documents and electronic data and any copies thereof until further decision of the Court;

IN FAVOUR: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Xue, Gaja, Bhandari; Judge ad hoc Cot;

AGAINST: Judges Keith, Greenwood, Donoghue; Judge ad hoc Callinan;

(3) By fifteen votes to one,

Australia shall not interfere in any way in communications between Timor-Leste and its legal advisers in connection with the pending Arbitration under the Timor Sea Treaty of 20 May 2002 between Timor-Leste and Australia, with any future bilateral negotiations concerning maritime delimitation, or with any other related procedure between the two States, including the present case before the Court.

IN FAVOUR: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Bhandari; Judge ad hoc Cot;

AGAINST: Judge ad hoc Callinan."

Judge KEITH appends a dissenting opinion to the Order of the Court; Judge CANÇADO TRINDADE appends a separate opinion to the Order of the Court; Judge GREENWOOD appends a dissenting opinion to the Order of the Court; Judge DONOGHUE appends a separate opinion to the Order of the Court; Judge ad hoc CALLINAN appends a dissenting opinion to the Order of the Court.

Dissenting opinion of Judge Keith

At the outset of his dissent, Judge Keith expresses his understanding of the "deep offence and shock" felt by Timor-Leste regarding the actions on 3 December 2013 of the Australian Security and Intelligence Organization. He does not consider however that grounds for two of the provisional measures adopted by the Court have been made out.

Judge Keith recalls that in its Application Timor-Leste invoked its property and other rights in documents and data sent to, held or prepared by its legal advisers, particularly in the context of an ongoing arbitration between the Parties. Its Request for provisional measures adopted a broader position, both in terms of substantive rights at issue, and the purpose for which the material had been prepared, including longer-term negotiations relating to the Timor Sea.

Judge Keith considers the different undertakings which have been given by Australia, and Timor-Leste's responses. Initially the Australian undertakings prevented the use of the seized material only by persons involved in the arbitration, and did not extend to the other dealings between the Parties. In response to Timor-Leste's concerns, the Australian Attorney-General provided a broader undertaking on 21 January 2014. Judge Keith notes that, from this point, Timor-Leste no longer took issue with the breadth of the undertaking, but only with its binding nature. In his opinion, that matter was adequately resolved by the end of the proceedings.

Judge Keith concludes that Timor-Leste's request for an undertaking that was broader substantively and temporally, and clearly binding on Australia in international law, has been satisfied. The undertaking of 21 January 2014 applies, as it should, "until final Judgment or until further or earlier order of the Court".

Judge Keith proceeds on the basis that the plausible right of Timor-Leste at issue in this case is the right of a State to enjoy a confidential relationship with its legal advisers, in particular in respect of disputes with another State which are or may be the subject of litigation or negotiation or other form of peaceful settlement. In view of the undertakings given by the Australian government, Judge Keith is of the opinion that there is currently no risk of irreparable prejudice being caused to this right. He does not find it necessary to address the rights and interests of Australia regarding its national security, or the balance between the Parties' respective rights.

Separate opinion of Judge Cançado Trindade

1. Judge Cançado Trindade begins his Separate Opinion, composed of ten parts, by identifying some points, raised in the present Order, which appear to him deserving of closer attention. Although he has concurred with his vote to the adoption of the present Order, he considers that the provisional measures of protection ordered by the Court should have gone further, and that the ICJ 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 at its siège at the Peace Palace at The Hague.

2. Given the importance that he attributes to the points not sufficiently developed in the present Order, he feels obliged, moved by a sense of duty in the exercise of the international judicial function, to leave on the records the foundations of his own personal position thereon (part I). He first examines the arguments, advanced in particular by the respondent State, singling out, first, the impertinence of reliance on local remedies in the circumstances of the present case, of alleged direct injury to the State itself, in which the applicant State is vindicating what it regards as

its own right, and, in doing so, is acting on its own behalf. Par in parem non habet imperium, non habet jurisdictionem.

3. Judge Cançado Trindade then observes that the ICJ has rightly dismissed the argument of avoidance of "concurrent jurisdiction" (judicial and arbitral procedures), likewise impertinent. Recourse to another judicial authority to obtain provisional measures of protection is allowed by the Rules of Procedure of the PCA Arbitral Tribunal itself, which sees no need of reliance on avoidance of "concurrent" jurisdictions. That argument, — he proceeds, — misses the central point of the need of realization of justice (part II). Judge Cançado Trindade adds a word of caution as to the "empty and misleading rhetoric" of euphemisms like "forum shopping", "parallelism", avoidance of "fragmentation" of international law and of "proliferation" of international tribunals, — which unduly diverts attention from the quest for justice to alleged "problems" of "delimitation" of competences between international tribunals (para. 9).

4. He understands that 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, in a harmonious way, and well above zeals of so-called 'delimitation' of competences" (para. 11). To him, in the present case, in dismissing that argument, "the ICJ has put the issue in the right perspective" (para. 12).

5. Turning to the next point, he observes that in the cas d'espèce the ICJ has, however, insisted on relying upon unilateral acts of States (such as promise, in the form of assurances or "undertakings"), here failing to extract the lessons from its own practice in recent cases (part III). He ponders that 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"; judicial settlement cannot rely upon unilateral acts of States as basis for the reasoning of the decisions to be rendered" (para. 14).

6. He recalls that reliance upon such unilateral acts "has been the source of uncertainties and apprehension in the course of international legal proceedings", and has put at greater risk their outcome, as illustrated by the recent case concerning Questions Relating to the Obligation to Prosecute or Extradite (Belgium versus Senegal), the ICJ, — as he warned in his Separate Opinion in the Judgment on the merits of 20.07.2012, as well as in his Dissenting Opinion in the Court's Order of 28.05.2009 in the same case (para. 15). He stressed therein that a pledge or promise made in the course of legal proceedings before the ICJ "does not remove the prerequisites (of urgency and of probability of irreparable damage) for the indication of provisional measures by the Court" (para. 16). To his mind, ex factis jus non oritur (para. 17).

7. He further recalls that, in its recent Order (of 22.11.2013) 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, the ICJ conceded precisely that it was "not convinced" by unilateral assurances given to it in the course of international legal proceedings, which had not removed "the imminent risk of irreparable prejudice". In his Separate Opinion appended thereto, Judge Cançado Trindade 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 ICJ (...). 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.

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 (...) do not pass without qualifications. (...) 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, — and all this in the domain of diplomatic relations, certainly not in the realm of international legal procedure" (paras. 18-20).

8. Judge Cançado Trindade then points out that other contemporary international tribunals have likewise been faced with uncertainties and apprehension deriving from unilateral assurances by contending parties (para. 21). He adds that international legal procedure has "a logic of its own", which is not to be equated to that of diplomatic relations. In his understanding, "[i]nternational 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" (para. 22). And he adds:

"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" (para. 25).

9. Judge Cançado Trindade then recalls that, in the past, a trend of legal doctrine — 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 (part IV). In doing so, — he adds, "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)" (para. 27). And he concludes on this point:

"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" (para. 28).

10. An issue, addressed by the contending Parties in the course of the present proceedings, was that of the ownership of the seized documents and data. From the start, and repeatedly, Timor-Leste refers to the seized documents as its own property, while Australia prefers not to dwell

upon the issue of the ownership of the seized documents and data, which it does not clarify. This is a point which cannot pass unnoticed in the proper consideration of the requested provisional measures in the cas d'espèce (part V). Even more significant is the relevance, for such consideration of the requested measures, of thegeneral principles of international law (part VI).

11. The Court — Judge Cançado Trindade continues — has before it such general principles, and "cannot be obfuscated by allegations of 'national security', which fall outside the scope of the applicable 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" (para. 38). He then refers to examples of the difficulties faced by international tribunals whenever "national security" concerns were raised before them (paras. 39-40). The proper concern of international tribunals, — he proceeds, — is

> "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" (para. 41).

12. In Judge Cançado Trindade's perception, the present case concerning Questions Relating to the Seizure and Detention of Certain Documents and Data, bears witness of the relevance of the principle of the juridical equality of States (part VII), and "an international tribunal such as the ICJ 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" (para. 43). That principle, enshrined nowadays in the United Nations Charter (Article 2(1)), "is ineluctably intermingled with the quest for justice, (...) embodying the idée de justice, emanated from the universal juridical conscience" (paras. 44-45).

13. Turning his attention to provisional measures of protection independently of unilateral "undertakings" or assurances (part VIII), Judge Cançado Trindade observes that, in the present Order, as the ICJ reckons that "equality of the parties must be preserved" in the process of peaceful settlement of an international dispute, one would expect it to order its own provisional measures of protection "independently of any promise or unilateral 'undertaking'" on the part of the State which has unduly seized the documents and data (para. 47); yet, it has not done so, having preferred to reason "on the basis of the 'undertaking' or assurance by Australia to secure the confidentiality of the material seized by its agents in Canberra on 03.12.2013", to "the additional disadvantage of Timor-Leste" (para. 49).

14. In his view, "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" (para. 51). Accordingly, the Court should have ordered that the seized documents and data "be promptly sealed and delivered into its custody here at its siège at the Peace Palace at The Hague", so as to "prevent further irreparable harm to Timor-Leste" (para. 52, and cf. paras. 53-54).

15. In distinct contexts, — he proceeds, — the inviolability of State papers and documents has been an old concern in diplomatic relations, — as from the reference of the 1946 U.N. Convention on the Privileges and Immunities of the United Nations 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 (Article IV), and from a resolution of the

U.N General Assembly of the same year which 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". Thus, — Judge Cançado Trindade adds, — "already in 1946, the U.N. 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 one derived from a unilateral 'undertaking' or assurance by a State following its seizure of documents and data containing information belonging to another State" (para. 55).

16. Instead of unilateral "undertakings" or assurances or promises formulated in the course of the international legal proceedings, — he ponders, — "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 (Ulpian's) opening book I (item I, para. 3) of Justinian's Institutes (early VIth century): honeste vivere, alterum non laedere, suum cuique tribuere (to live honestly, not to harm anyone, to give each one his/her due)" (para. 58).

17. Judge Cançado Trindade's last line of reflections pertains to what he characterizes as the autonomous legal regime of provisional measures of protection (part IX). He begins by recalling that he has addressed this particular issue also in his earlier 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 (Order of 16.07.2013), opposing Costa Rica to Nicaragua (and vice-versa), wherein he pointed out that the object of requests for provisional measures of protection is different from the object of applications lodged with international tribunals, as to the merits. 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 ones and the others) being distinct from each other" (para. 60).

18. What ensues herefrom is "the pressing need to dwell upon, and to develop conceptually, the autonomous legal regime of provisional measures of protection" (para. 61), as he observed not only in his Dissenting Opinion in the two aforementioned merged cases opposing Costa Rica to Nicaragua, but also in his previous Dissenting Opinion (paras. 80-81) in the case of Questions Relating to the Obligation to Prosecute or Extradite (Belgium versus Senegal, Order of 28.05.2009), and which he sees it fit to reiterate here, in the present case on Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste versus Australia). This point, he adds, has marked presence in these recent cases and the present one, irrespective of the distinct circumstances surrounding them. He then reiterates that, in the cas d'espèce, the ICJ should have decided, from now on, to keep "custody itself, as master of its own jurisdiction, of the seized documents and data containing information belonging to Timor-Leste, here in its premises in the Peace Palace at The Hague" (para. 62).

19. Last but not least, in an epilogue, Judge Cançado Trindade summarizes, in recapitulation (part X), the foundations of his own position in the present case, as explained in the present Separate Opinion, for the sake of clarity, and in order to stress their interrelatedness. 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 search 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.

20. Quintus: International courts and tribunals share a common mission to impart justice, which stands above zeals 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. 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.

21. 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 U.N. 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.

22. 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). 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.

23. 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. 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.

Dissenting opinion of Judge Greenwood

Judge Greenwood considers that caution on the part of the Court is necessary in the consideration of whether to indicate provisional measures, since such measures impose a legal obligation upon a party before the existence and application of either party's rights have been established. The legal criteria for the indication of provisional measures allows the Court to employ a degree of caution in the exercise of its powers under Article 41 of its Statute.

Judge Greenwood is of the opinion that the undertaking given to the Court by the Attorney-General of Australia dated 21 January 2014 makes the first two paragraphs of the dispositif unnecessary. A formal undertaking given by a State is legally binding, and it is presumed that a State will act in good faith in honouring its commitment to the Court. The effect of the undertaking is that there is therefore no real and imminent risk of irreparable harm to Timor-Leste's rights, and accordingly, the conditions for the indication of provisional measures are not satisfied in respect of the seized material. Moreover, Judge Greenwood is concerned that the plausible rights of Australia to exercise its criminal jurisdiction and its right to protect the safety of its officials have not been taken into account by the Order. Judge Greenwood is, however, of the opinion that there is a real and imminent risk of Australia's interference with Timor-Leste's future communications with its lawyers. For these reasons, Judge Greenwood voted against paragraphs (1) and (2) of the dispositif, but in favour of paragraph (3).

Separate opinion of Judge Donoghue

Judge Donoghue finds much common ground between her views and those contained in the Order. She agrees with the Court that there is prima facie jurisdiction in this case, that at least some of the rights asserted by Timor-Leste are plausible and that there is a link between the measures sought and the rights asserted by Timor-Leste in its Application.

As to the risk of irreparable prejudice, Judge Donoghue agrees with the Court that the prejudice to Timor-Leste could be irreparable if the seized materials were shared with persons involved in the pending arbitration, future proceedings relating to maritime delimitation or the present case. She has voted against the first two provisional measures, however, in light of the assurances contained in the 21 January 2014 undertaking made by Australia's Attorney-General to the Court. The Attorney General, who has the authority to bind Australia under international law, has undertaken that the seized material and information derived from it will not be shared with officials responsible for the present case, for the Timor Sea Treaty arbitration, or for purposes relating to the exploitation of resources in the Timor Sea or related negotiations. Australia's good faith is to be presumed and nothing in the record suggests that it lacks the capacity to meet its commitment to the Court. For these reasons, Judge Donoghue considers that there is only a remote possibility that the seized material or information derived from it will be transmitted to persons involved in the matters referred to in the Attorney-General's undertaking. The 21 January 2014 undertaking therefore addresses any irreparable prejudice to the rights asserted by Timor-Leste that are at least plausible.

Judge Donoghue has voted in favour of the third provisional measure because Australia has not taken comparable steps to address prospective acts of interference with communications between Timor-Leste and its legal advisers with regard to the pending arbitration, future

proceedings relating to maritime delimitation, or other related procedures, including the present case.

Dissenting opinion of Judge ad hoc Callinan

Judge ad hoc Callinan concludes that it is unnecessary for the Court to indicate provisional measures.

Context and factual background

Judge ad hoc Callinan first observes that the true and full facts can rarely be confidently ascertained at any interlocutory stage of curial proceedings. In the present proceedings, these difficulties may be heightened by an understandable concern of Australia that it not disclose certain details relating to the national security issues involved.

With this observation in mind, Judge ad hoc Callinan proceeds to outline some of the factual background to the present proceedings, based on the materials put before the Court thus far. He recalls the continuing arbitral proceedings between the Parties regarding a 2006 treaty relating to the Timor Sea, and various media reports of alleged incidents involving officials of the Parties and legal advisers of Timor-Leste. Judge ad hoc Callinan notes that the evidence relied on in these reports is untested, and often involves double hearsay. He also observes that, on the record before the Court, there appears to be some doubt regarding who would be entitled to claim legal professional privilege in respect of the documents and other material seized by Australian officials.

The legal position

Turning to the legal requirements for the indication of provisional measures by the Court, Judge ad hoc Callinan recalls that the case must, prima facie, be within the Court's jurisdiction and admissible, that the rights invoked by the Applicant must be at least plausible, and that there must be an urgent risk of irreparable harm to these rights. Even where these conditions are satisfied, however, indication of provisional measures is not mandatory: the Court, like any court elsewhere in the world, retains a discretion to indicate interlocutory relief.

Judge ad hoc Callinan observes that the distinction between jurisdiction and admissibility is not always a clear one. Australia has hinted at a number of potential objections to jurisdiction and/or the admissibility of Timor-Leste's Application (referring, for example, to the exceptions in its declaration of acceptance of the Court's compulsory jurisdiction under Article 36 (2) of the Court's Statute), but has not yet presented these as formal objections.

Judge ad hoc Callinan suggests that the Applicant State's failure to have recourse to available domestic remedies may be a relevant factor to be weighed by the Court in exercising its discretion to order provisional measures.

Judge ad hoc Callinan observes that the concept of irreparable damage, as a condition for the indication of provisional measures by the Court, is analogous with the common law principle that interlocutory relief will not be ordered where damages, for example, would be an adequate remedy. In this respect, an adequate undertaking by the Respondent could constitute an adequate remedy.

On the plausible nature of the rights invoked, Judge ad hoc Callinan suggests that the existence of a sovereign right to inviolability of documents in the possession of a lawyer in another country is a large and, possibly, novel claim. The extent to which there is a settled principle of legal professional privilege, immune to any limitation in an international or national interest, will

require detailed and careful argument at the merits phase. The same is true of the relevance, if any, of the so-called fraud or crime exception to legal professional privilege.

Judge ad hoc Callinan doubts whether the Australian Attorney-General, in authorizing the warrants at issue in the present proceedings, was carrying out a judicial or quasi-judicial function. Rather, the Australian Constitution and relevant case law suggests that the Attorney-General is a member of the Executive, and neither a judge nor a quasi-judge.

Conclusion

Finally, Judge ad hoc Callinan expresses the view that the undertakings offered by Australia, as extended, enhanced and clarified in the oral and written submissions, are adapted to and sufficient for the circumstances of the case. Regarding dispositive paragraph 3, Judge ad hoc Callinan doubts the grounds for this measure, and suggests that the breadth and unspecific nature of the word "interfere" may be problematic.
