SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

1. Although I have concurred in the adoption today, 22 April 2015, of the present Order of Provisional Measures of Protection in the case of *Questions Relating to the Seizure and Detention of Certain Documents and Data* (Timor-Leste *versus* Australia), for standing in agreement with the resolutory points of its *dispositif*, I do not entirely share the reasoning of the Court which has led to its decision. I feel thus obliged, in the faithful exercise of the international judicial function, to lay on the records, in the present Separate Opinion, the foundations of my own personal position on the relevant issues, raised herein, pertaining to provisional measures of protection. Such measures, in my understanding, are endowed with an autonomous legal regime of their own.

2. The present Order of Provisional Measures of Protection should, in my view, have been adopted by the Court *proprio motu*, on the basis of Article 75(1) of its Rules, upon its own initiative and in its own terms, and not in the terms of an initiative of request by a contending Party, on the basis of Article 76(1) of its Rules. In any case, the International Court of Justice (ICJ) does not need to abide by the request itself of a provisional measure of protection, in the terms that the request is made. It may indicate or order provisional measures of protection that go beyond what was requested, in terms wholly or partly distinct from those of the request (Article 75(2) of its Rules)[1].

3. After all, the Court is master of its own competence in matters of provisional measures of protection. It can indicate or order them *sponte sua*. The ICJ is master of its own procedure and jurisdiction, and it can perfectly act *ex officio* in the domain of what I have been conceptualizing, in the adjudication of successive cases before the ICJ, as the *autonomous legal regime* of provisional measures of protection[2]. Within this legal regime, the Court is well entitled to take a more proactive posture (under Article 75(1) and (2) of its Rules), in the light also of the principle of the juridical equality of States.

4. As I stated in my earlier Separate Opinion (paras. 14-15, 17, 19 and 25) in the ICJ's Order of 03.03.2014 in the present case of *Questions Relating to the Seizure and Detention of Certain Documents and Data*, the Court is on safer ground if it does not rely, in its decisions, only on unilateral assurances or "undertakings" on the part of States, which can prove to be "the source of uncertainties and apprehension in the course of international legal proceedings" (para. 15). In my perception, the Court is on safer ground if it acts on its own initiative and terms, attentive to the *legal nature* and the *effects* of provisional measures of protection.

5. As these latter purport to prevent irreparable harm — or, like in the present case, to prevent *further* irreparable harm to Timor-Leste, — there is no room for indulging into an exercise

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[1] And it may *proprio motu* request information from the contending Parties on "any matter" connected with the implementation of any provisional measures it has indicated or ordered (Article 78 of its Rules).

[2] Cf. to this effect, the considerations developed in my Dissenting Opinion in the Court's Order of 28.05.2009 in the case concerning *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium *versus* Senegal), paras. 26-27, 29, 84, 88, 90-91; in my Separate Opinion in the Court's Order of 18.07.2011 in the case of the *Temple of Préah Vihéar* (Cambodia *versus* Thailand), paras. 65 and 74; in my Dissenting Opinion in the Court's Order of 16.07.2013 in the merged cases of *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica *versus* Nicaragua) and of *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua *versus* Costa Rica), paras. 40-42, 46-47, 50-53, 59-60 and 69-76; in my Separate Opinion in the Court's Order of 22.11.2013 in the merged cases of *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica *versus* Nicaragua) and of *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua *versus* Costa Rica), paras. 20-40; and in my Separate Opinion in the Court's Order of 03.03.2014, case of *Questions Relating to the Seizure and Detention of Certain Documents and Data* (Timor-Leste versus Australia), paras. 59-62 and 71.

of balancing the interests of the contending parties, as anyway the ICJ is not an *amiable compositeur*, but rather a court of law. Another word of attention is called for at this stage. The Agent for Australia, in its letter to the ICJ of 25.03.2015, while expressing Australia's preparedness now to return the documents and materials (belonging to Timor-Leste) that it seized on 03.12.2013, again refers — as it had done earlier on — to its alleged "serious national security concerns" (p. 1). Yet, as I deemed it fit to warn in my previous Separate Opinion (paras. 38-41) in the Court's Order of 03.03.2014 in the present case, arguments of alleged "national security", such as the ones in the present case, cannot be made the concern of an international tribunal.

6. The ICJ is attentive, instead, to the general principles of law, to the prevalence of the due process of law, to the preservation of equality of arms (*égalité des armes*). Initiatives of ordering new provisional measures of protection should, in my understanding, rest on the ICJ itself, rather than on requests of the contending parties to that effect. Moreover, as I sustained in my previous Separate Opinion (paras. 53 and 62) in the ICJ's Order of 03.03.2014 in the *cas d'espèce*, the Court should have taken and kept custody itself of Timor-Leste's seized documents, here in its premises in the Peace Palace at The Hague, so as to have them promptly returned, duly sealed, to Timor-Leste, whom they belong to.

7. The ICJ should have thus proceeded, as master of its own jurisdiction, without leaving space and time to abide later by the (respondent) State's "will". In my perception, contrary to what the Court says in the present Order (paras. 12, 14, 15 and 18), the situation itself has not at present changed. *Animus* is not a synonym of *factum*. What has now changed, is not the objective situation in the present case, but rather the state of mind, the attitude or predisposition of the respondent State, as it now realizes that the seized documents and data should be returned, — it can be added, — properly sealed, to Timor-Leste, whom they belong to. In any case, in the present Order, the Court rightly determines that the documents are kept sealed until thus returned by Australia to Timor-Leste's lawyers (resolutory points 1-2).

8. Already in 1931, it was pondered with insight that provisional measures are bound to assist the development of international law, as they, after all, contribute to the realization of justice in a given legal situation[3]. At that time, the old Permanent Court of International Justice (PCIJ) already admitted its prerogative to indicate or modify *ex officio* provisional measures of protection, in terms other than the ones requested by the contending Parties[4]. The ICJ, for its part, in revising the relevant provisions of its Rules of Court and bringing them closer to its Statute (Article 41(1))[5], sought to enhance the authority of its initiative to indicate or order provisional measures of protection[6].

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[3]P. Guggenheim, *Les mesures provisoires de procédure internationale et leur influence sur le développement du droit des gens*, Paris, Libr. Rec. Sirey, 1931, pp. 14-15 and 62.

[4]G. Guyomar, *Commentaire du Règlement de la Cour Internationale de Justice — Interprétation et pratique*, Paris, Pédone, 1973, pp. 348.

[5]From the start, Article 41(1) of the Statute of the ICJ — and of its predecessor, the PCIJ — set forth the power of the Court to indicate provisional measures; the doctrinal debates that followed (as to their effects) did not hinder the development of a vast case-law (of the PCIJ and the ICJ) on the matter; cf., e.g., J. Sztucki, *Interim Measures in the Hague Court — An Attempt at a Scrutiny*, Deventer, Kluwer, 1983, pp. 35-60 and 270-280; J.B. Elkind, *Interim Protection — A Functional Approach*, The Hague, Nijhoff, 1981, pp. 88-152.

[6]Cf. S. Rosenne, *Provisional Measures in International Law — The International Court of Justice and the International Tribunal for the Law of the Sea*, Oxford, Oxford University Press, 2005, pp. 73-74. The ICJ can do so *proprio motu*, whenever, in its assessment, the circumstances of the case so require; cf. K. Oellers-Frahm, "Article 41", *in The Statute of the International Court of Justice — A Commentary* (eds. A. Zimmermann *et alii*), 2nd. ed., Oxford, Oxford University Press, 2012, pp. 1050 and 1053.

9. The ICJ is entitled to do so *in its own terms*, as it deems appropriate, even more so to prevent an aggravation of a dispute[7]. This Court has already disclosed its preparedness to do so: an example to this effect lies in the decision of the ICJ, — which I keep in grateful memory, — in its Order of 18.07.2011 in the case of the *Temple of Préah Vihéar* (Cambodia *versus* Thailand), to establish a "provisional demilitarized zone", so as to prevent further irreparable harm.

10. Nowadays, with eight and a half decades of sedimentation of experience, looking back in time, we can realize that steps ahead have been taken, but the move towards the progressive development of international law in this domain has been rather slow. In our days, in early 2015, such progressive development requires an awareness of the autonomous legal regime of provisional measures of protection, as well as judicial decisions which reflect it accordingly, with all its implications.

11. In my perception, the way is paved and the time is ripe for the ordering by the ICJ of provisional measures of protection *proprio motu*, on the basis of Article 75(1) and (2) of the Rules of Court. Advances in this domain cannot be achieved in pursuance of a voluntarist conception of international law in general, and of international legal procedure in particular[8]. The requirements of objective justice stand above the options of litigation strategies. These latter rest in the hands of the contending Parties, while the former constitute the essentials whereby an international tribunal accomplishes its mission to impart justice.

12. The autonomous legal regime (as I perceive it) of provisional measures of protection has been formed after a long evolution. The traditional precautionary legal actions, as they originally flourished in comparative domestic procedural law, were transposed into the international legal order, and evolved in both of them[9], appearing nowadays with a character, more than precautionary, truly *tutelary*. Provisional measures of protection constitute nowadays a true jurisdictional guarantee of a preventive character, corresponding to an evolutionary legal conception.

13. In my conception, the *autonomous* (not simply "accessory") legal regime of provisional measures of protection, in expansion in our times, disclosing the relevant preventive dimension in international law, comprises the *rights* to be protected (which are not necessarily the same as in the proceedings on the merits of the concrete case), the corresponding *obligations* of the States concerned, and the *legal consequences of non-compliance* with provisional measures (which are

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[7]Cf. H. Thirlway, *The Law and Practice of the International Court of Justice — Fifty Years of Jurisprudence*, Oxford, Oxford University Press, 2013, vol. I, pp. 953-955; and vol. II, pp. 1805-1806.

[8]For my criticisms of the voluntarist conception, cf. A.A. Cançado Trindade, *Le Droit international pour la personne humaine*, Paris, Pédone, 2012, pp. 115-136; A.A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires, Ed. Ad-Hoc, 2013, pp. 69-77; A.A. Cançado Trindade, *Os Tribunais Internacionais e a Realização da Justiça*, Rio de Janeiro, Edit. Renovar, 2015, pp. 197-198 and 352-354.

[9]Cf., on the case-law of national tribunals, e.g., E. García de Enterria, *La Batalla por las Medidas Cautelares*, 2nd. rev. ed., Madrid, Civitas, 1995, pp. 25-385; and cf., on the case-law of international tribunals, e.g., R. Bernhardt (ed.), *Interim Measures Indicated by International Courts*, Berlin/Heidelberg, Springer-Verlag, 1994, pp. 1-152.

distinct from those ensuing from breaches as to the merits of the case). And the Court is fully entitled to decide thereon, without waiting for the manifestations of the "will" of a contending State party. It is human conscience, standing above the "will", that accounts for the progressive development of international law. *Ex conscientia jus oritur*.

(Signed) Antônio Augusto CANÇADO TRINDADE.