INTERNATIONAL COURT OF JUSTICE

YEAR 2014

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3 March
General List
No. 156

3 March 2014

QUESTIONS RELATING TO THE SEIZURE AND DETENTION OF CERTAIN DOCUMENTS AND DATA

(TIMOR-LESTE *v.* AUSTRALIA)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: *President* TOMKA; *Vice-President* SEPÚLVEDA-AMOR; *Judges* OWADA, ABRAHAM, KEITH, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD, XUE, DONOGHUE, GAJA, BHANDARI; *Judges* ad hoc CALLINAN, COT; *Registrar* COUVREUR.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court,

Makes the following Order:

Whereas:

1. By an Application filed with the Registry of the Court 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").

2. At the end of its Application, Timor-Leste

"requests the Court to adjudge and declare:

> First, [t]hat the seizure by Australia of the documents and data violated (i) the sovereignty of Timor-Leste and (ii) its property and other rights under international law and any relevant domestic law;
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> Second, [t]hat continuing detention by Australia of the documents and data violates (i) the sovereignty of Timor-Leste and (ii) its property and other rights under international law and any relevant domestic law;
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> Third, [t]hat Australia must immediately return to the nominated representative of Timor-Leste any and all of the aforesaid documents and data, and destroy beyond recovery every copy of such documents and data that is in Australia's possession or control, and ensure the destruction of every such copy that Australia has directly or indirectly passed to a third person or third State;
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> Fourth, [t]hat Australia should afford satisfaction to Timor-Leste in respect of the above-mentioned violations of its rights under international law and any relevant domestic law, in the form of a formal apology as well as the costs incurred by Timor-Leste in preparing and presenting the present Application."

3. In its aforementioned Application, Timor-Leste bases the jurisdiction of the Court on the declaration it made on 21 September 2012 under Article 36, paragraph 2, of the Statute, and on the declaration Australia made on 22 March 2002 under the same provision.

4. On 17 December 2013, 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.

5. 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."

6. 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, to call upon Australia:

"(i) immediately to deliver to Timor-Leste and to the International Court of Justice a list of each and every document and file containing electronic data that it seized from 5 Brockman Street, Narrabundah, in the Australian Capital Territory, on 3 December 2013;

(ii) immediately to seal the documents and data (and any and all copies thereof);

(iii) immediately to deliver the sealed documents and data (and any and all copies thereof) either to the Court or to 5 Brockman Street, Narrabundah, in the Australian Capital Territory; and

(iv) not to intercept or cause or request the interception of communications between Timor-Leste (including its Agent H.E. Joaquim da Fonseca) and its legal advisers in relation to this action (DLA Piper, Sir E. Lauterpacht QC and Vaughan Lowe QC)."

7. The Registrar communicated forthwith an original copy of the Application and of the Request to the Government of Australia. The Registrar also notified the Secretary-General of the United Nations of the filing of these documents by Timor-Leste.

8. Pending the notification provided for by Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, by transmission of the printed bilingual text of the Application to the Members of the United Nations, the Registrar informed those States of the filing of the Application and its subject, and of the filing of the Request for the indication of provisional measures.

9. By a letter dated 18 December 2013, the President of the Court, acting under Article 74, paragraph 4, of the Rules of Court, 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".

10. A copy of the above-mentioned letter was also transmitted, for information, to the Government of Timor-Leste.

11. By a letter dated 18 December 2013, the Registrar informed the Parties that, in accordance with Article 74, paragraph 3, of the Rules of Court, 20, 21 and 22 January 2014 had been fixed as the dates of the oral proceedings on the Request for the indication of provisional measures.

12. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred upon it by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case; Timor-Leste chose Mr. Jean-Pierre Cot and Australia chose Mr. Ian Callinan.

13. At the public hearings held on 20, 21 and 22 January 2014, oral observations on the Request for the indication of provisional measures were presented by:

On behalf of Timor-Leste: H.E. Mr. Joaquim A.M.L. da Fonseca,
Sir Elihu Lauterpacht,
Sir Michael Wood.

On behalf of Australia: Mr. John Reid,
Mr. Justin Gleeson,
Mr. Bill Campbell,
Mr. Henry Burmester,
Mr. James Crawford.

14. 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.

15. 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 paragraph 5 above).

16. At the end of its second round of oral observations, Australia 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*."

17. 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.

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I. Prima facie jurisdiction

18. The Court may indicate provisional measures only if the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded, but the Court need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case (see, for example, *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)*, pp. 17-18, para. 49).

19. Timor-Leste seeks to found the jurisdiction of the Court in this case on the declaration it made on 21 September 2012 under Article 36, paragraph 2, of the Statute, and on the declaration Australia made on 22 March 2002 under the same provision (see paragraph 3 above).

20. 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".

21. The Court considers 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

22. The power of the Court 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 (see, for example, *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. 18, para. 53).

23. 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 (*ibid*., para. 54).

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24. Timor-Leste states that the rights which it seeks to protect are the ownership and property rights which it holds over the seized material, entailing the rights to inviolability and immunity of this property (in particular, documents and data), to which it is entitled as a sovereign State, and its right to the confidentiality of communications with its legal advisers. Timor-Leste moreover holds that confidentiality of communications between legal counsel and client is covered by legal professional privilege, which it states is a general principle of law.

25. Australia, for its part, contends that, "[e]ven assuming that the material removed from 5 Brockman Street, Narrabundah does belong to Timor-Leste — a matter which is yet to be established", there is no general principle of immunity or inviolability of State papers and property, and therefore the rights asserted by Timor-Leste are not plausible. It also contends that, if there is a principle in international law whereby any State is entitled to the confidentiality of all

communications with its legal advisers, that principle (akin to legal professional privilege) is not absolute and does not apply when the communication in question concerns the commission of a crime or fraud, constitutes a threat to national security or to the higher public interests of a State, or undermines the proper administration of justice.

26. At this stage of the proceedings, the Court is not called upon to determine definitively whether the rights which Timor-Leste wishes to see protected exist; it need only decide whether the rights claimed by Timor-Leste on the merits, and for which it is seeking protection, are plausible.

27. The Court begins by observing 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. 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.

28. 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.

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29. The Court now turns to the issue of the link between the rights claimed and the provisional measures requested.

30. 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 (see paragraph 5 above). 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

31. The Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of the judicial proceedings before it (see, for example, *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. 21, para. 63).

32. The power of the Court to indicate provisional measures 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 the rights in dispute before the Court gives its final decision (*ibid.*, para. 64). The Court must therefore consider whether such a risk exists at this stage of the proceedings.

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33. 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. According to Timor-Leste, these "matters are crucial to the future of Timor-Leste as a State and to the well-being of its people". It states that the confidential material includes advice of counsel, legal assessments of Timor-Leste's position and instructions given to counsel and to geological and maritime experts. Timor-Leste adds that it may already have been seriously harmed given that Australia has admitted that some of the hard-copy materials were briefly inspected during the search. In view of the sensitive nature of the seized material, Timor-Leste contends that, by its conduct, "Australia has placed itself in a position of considerable advantage, both in the pending Arbitration and in a whole range of matters involved in relations between Timor-Leste and Australia".

34. 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. Given that the preparations for the Timor Sea Treaty Arbitration are well underway, with oral proceedings due to begin at the end of September 2014, Timor-Leste states that time is of the essence if irreparable damage is to be avoided. Timor-Leste contends that, if the protection of its rights is deferred until the close of the proceedings on the merits in the current case, the prejudice it would suffer would be increased.

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35. 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. In this regard, Australia refers to various instructions and undertakings given by its Attorney-General on 4, 19 and 23 December 2013 and, in particular, to a further written undertaking of the Attorney-General given on 21 January 2014.

36. Australia 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. In his Statement, the Attorney-General indicated that the search warrants had been issued by him "at the request of ASIO, on the grounds that the documents and electronic data in question contained intelligence relating to national security matters". 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 further notes that, following the first procedural meeting of the Timor Sea Treaty Arbitral Tribunal convened on 5 December 2013, the Attorney-General of Australia provided a written undertaking to the Tribunal, dated 19 December 2013. In that undertaking, the Attorney-General recalled the instructions given to ASIO, and 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. Further, the Attorney-General 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 and that, should he become aware of any circumstance in which he would need to inform himself, he would first bring that fact to the attention of the Tribunal and offer further undertakings.

37. Australia informed the Court that, following the letter of the President under Article 74, paragraph 4, of the Rules of the Court (see paragraph 9 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".

38. At the start of Australia's first round of oral argument on the Request for the indication of provisional measures, 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
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> 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:
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>   *(a)* these proceedings; and
>
>   *(b)* the proceedings in the Arbitral Tribunal [constituted under the 2002 Timor Sea Treaty]."

In its oral pleadings, Australia affirmed that the Attorney-General's written undertaking, dated 21 January 2014, would protect Timor-Leste's rights "pending final judgment in these proceedings".

39. Moreover, 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 (see paragraph 37 above), the Solicitor-General of Australia stated that "ASIO to date has not inspected any of the documents". He noted that ASIO "[had] not commenced its task because the documents [were] being kept under seal for all purposes until [Australia had] this Court's decision on provisional measures", adding that, "to date, no information [had] been obtained from the documents."

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40. 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.

41. 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, nor does it remove the urgency of Timor-Leste's Request for the indication of provisional measures. While Timor-Leste acknowledges that this written undertaking goes further than the previous assurances in that it extends "to maritime delimitation matters", it contends that the written undertaking "should be backed up by an order of the Court that deals with the treatment of the materials".

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42. 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.

43. The Court notes 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.

44. 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 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.

45. 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)". The Attorney-General underlined in paragraph 2, 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".

46. 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 (see paragraph 39 above).

47. 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.

48. 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 in paragraphs 46 and 47 above. 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

49. 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. Article 75, paragraph 2, of the Rules of Court specifically refers to this power of the Court. The Court has already exercised this power on several occasions in the past (see, for example, *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning* the Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 551, para. 58). 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.

50. The Court 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.

51. Given 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.

52. 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.

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53. The Court reaffirms that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109) and thus create international legal obligations for any party to whom the provisional measures are addressed.

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54. 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. It leaves unaffected the right of the Governments of Timor-Leste and Australia to submit arguments in respect of those questions.

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55. 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.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this third day of March, two thousand and fourteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Democratic Republic of Timor-Leste and the Government of Australia, respectively.

(Signed) Peter TOMKA,
President.

(Signed) Philippe COUVREUR,
Registrar.

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.

(Initialled) P. T.

(Initialled) Ph. C.

DISSENTING OPINION OF JUDGE KEITH

1. I regret that I cannot agree with two of the measures the Court has adopted. My regret is the greater for I do have some understanding of the "deep offence and shock" felt in Timor-Leste about the actions of ASIO to which the Agent of Timor-Leste referred at the outset of this proceeding. I do not however consider that grounds for adopting the measures have been established.

2. In its Application, Timor-Leste listed as its main legal grounds its property and other rights in the documents and data sent to, held by, received from or prepared by its legal representatives and legal advisers, *(a)* generally, *(b)* in the course of the provision of legal advice to it, and *(c)* in the course of preparation for litigation in which it is engaged as a party. "These rights exist under customary international law and any relevant domestic law, and as a consequence of the sovereignty of Timor-Leste under international law". The request for provisional measures adopts a broader position, going beyond the arbitration, by including among the consequences it seeks to avoid Australia being able to inform itself of (1) privileged advice given to Timor-Leste by its advisers relating to the Timor Sea and its resources, (2) Timor-Leste's position in relation to those matters, and (3) other matters, confidential to Timor-Leste, treated in the documents and data.

3. The undertaking of non-communication of the material seized, given by the Australian Attorney-General on 4 December 2013, related only to those individuals involved in the arbitration, as did that of 19 December to the Arbitral Tribunal; on 23 December that undertaking was extended to these proceedings (paragraph 37 of the Order). However, at this point, the undertakings did not extend to the other matters included by Timor-Leste in its request and listed at the end of the last paragraph.

4. While it is not surprising that the broader claims made by Timor-Leste in its request filed on 17 December were not addressed in the undertakings given by Australia just two and six days later on 19 and 23 December, it is not the case, as Australia claimed in the hearings, that those matters were raised "for the first time" at the beginning of the hearings. Australia was equally in error when it stated that it would much have preferred that Timor-Leste had taken up the Court's invitation to file written observations so that the charges it made the previous day could have been made with precision. The Court issued no such invitation.

5. Timor-Leste, in the first round of the hearings on 20 January 2014, emphasized the additional matters listed in its request and, as well, what it saw as the lack of binding force, at least at the international level, of the undertakings given by the Attorney-General. That led to the filing the next day by Australia of a further undertaking, dated 21 January 2014, by the Attorney-General (quoted in part in paragraph 10 below). The undertaking of non-communication now (1) applies until final judgment or until further or earlier order of the Court and (2) extends to "any part of the Australian Government for any purpose relating to the exploitation of resources in the Timor Sea or related negotiations".

6. In the second round of the oral hearings, the Agent of Timor-Leste and both of its counsel addressed the new undertaking. One counsel said that "only now does it extend to maritime delimitation matters". He asked that it be backed by an Order of the Court that deals with the treatment of the materials. He made no comment about any specific gap in the coverage of the undertaking. The second counsel stated that they would look at the new undertaking with interest in the light of Australia's responses to the questions put to it by Members of the Court. He made no reference to the widened scope of the new undertaking. It would be good, he said, to hear the Agent of Australia say unambiguously that Australia accepts that the undertaking given on 21 January is binding on Australia, vis-à-vis Timor-Leste, under international law. The Agent of Timor-Leste repeated that they awaited with interest Australia's answers to the questions.

7. In the second round Australia answered the questions put to it by Members of the Court. Further, its Agent repeated that the Attorney-General has the actual and ostensible authority to bind Australia as a matter of national law and international law. He continued: "Australia has made the undertakings, Australia will honour them". The last relevant step in this process is that Timor-Leste, in exercise of its opportunity to comment in writing on the answers given by Australia, said, in its letter of 27 January 2014, that, except in one respect, it did not find it necessary to comment on the answers at the provisional measures stage. The exception was to state its understanding of the scope of one particular undertaking given in those answers. Australia has not questioned that understanding.

8. The important points for me arising from those events are that Timor-Leste sought and received a broader undertaking, both temporally and substantively, and a clear acknowledgment, as I read Australia's statements, that the undertakings are binding on Australia as a matter of international law. I consider the two matters in turn.

9. In respect of the first, so far as the temporal scope of the undertaking is concerned, the undertakings have two different elements, the second of which runs into the latest undertaking's substantive scope. The first is that the undertaking of 21 January 2014 now applies "until final judgment or until final order or earlier order of the Court". That extent exactly meets the incidental, interim and conservatory function of provisional measures of protection in relation to the principal proceeding. To turn to the second element, the principal relevant undertaking is one of non-communication whereas on 23 December 2013 the Attorney-General had instructed that the material would be sealed, but only until 22 January 2014. That difference between non-communication to certain persons for certain purposes and sealing for all purposes leads into the substantive scope of the undertaking.

10. Like the Court, I proceed on the basis that the plausible right 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. The State should not in principle be at risk of that relationship being interfered with by the other party to the dispute (see Order, para. 27). In this case, to return to the elaboration which Timor-Leste provided in the course of the proceedings and to repeat it, the confidential relationship relates to (1) privileged advice given to Timor-Leste by its advisers relating to the Timor Sea and its resources, (2) Timor-Leste's position in relation to those matters, and (3) other matters, confidential to Timor-Leste, treated in the documents and data. The most relevant part of the undertaking given by the Attorney-General in his letter of 21 January reads as follows:

> "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 [seized from the law firm] 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]."

Paragraph 4 is the critical part of the undertaking. In so far as its introductory phrase may be seen as referring to national security purposes (subpara. 3), the Solicitor-General provided the clarification that the matters included in subparagraph 4 "fall outside the 'national security' purpose referred to in subparagraph 3" (CR 2014/4, p. 20, see also page 21 in respect of any criminal proceeding). When subparagraph 4 is read in accordance with that clarification, it seems to me to match in full the scope of the particular interests which Timor-Leste considers to be at risk of irreparable prejudice. Accordingly, I am not surprised that Timor-Leste in its letter of 27 January did not identify any gaps in the coverage of the new undertaking. It did not point to any remaining element of risk of irreparable prejudice to its rights and interests.

11. There remains the question whether the undertaking binds Australia as a matter of international law. I have no doubt that it does. As the Court says, Australia's good faith in complying with that commitment is to be presumed (Order, para. 44).

12. Given both the scope of the undertaking and its binding character, for me the matter of weighing Australia's concerns and its rights and interests relating to the disclosure of its agents' identities and intelligence methods does not arise. Any imminent risk of irreparable prejudice to Timor-Leste is removed by the most recent undertaking given by the Attorney-General on behalf of Australia, read with the clarifications provided by its Solicitor-General.

13. My votes on this Order in no way prejudge the positions I may take on questions concerning the jurisdiction of the Court, the admissibility of the Application or the merits as they arise later in these proceedings. As the Court says, the Order does not affect the rights of the Parties to submit arguments on those matters.

(Signed) Kenneth KEITH.

SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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I. *Prolegomena*

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

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

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

II. The Centrality of the Quest for Justice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. General Assessment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. *Ex Conscientia Jus Oritur*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. The Relevance of General Principles of International Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[23] Counsel for Timor-Leste added:

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

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

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

Timor-Leste has the documents it needs for the Arbitration; it has adequate undertakings to protect the integrity of the Arbitration; and the undertakings are being honoured." (CR 2014/4, paras. 5-6.)

2. General Assessment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. The Prevalence of the Juridical Equality of States

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

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

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

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

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

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

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

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

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

> "in such a situation, a State has a plausible right to the protection of its communications with counsel relating to an arbitration or to negotiations, in particular, to the protection of the correspondence between them, as well as to the protection of confidentiality of any documents and data prepared by counsel to advise that State in such a context" (Order, para. 27).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IX. The Autonomous Legal Regime of Provisional Measures of Protection

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

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

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

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

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

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

X. Epilogue: A Recapitulation

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

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

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

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

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

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

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

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

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

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

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

(Signed) Antônio Augusto CANÇADO TRINDADE.

DISSENTING OPINION OF JUDGE GREENWOOD

Legal criteria for indication of provisional measures — Necessity for caution on the part of the Court — Undertaking given by the Attorney-General of Australia dated 21 January 2014 — Formal undertaking given by a State is legally binding — Presumption that State will act in good faith in honouring its commitment to the Court — Undertaking sufficient to protect plausible rights of Timor-Leste from harm pending judgment on the merits — Effect of undertaking is that there is no real and imminent risk of irreparable harm to Timor-Leste's rights — Conditions for indication of provisional measures accordingly not satisfied in respect of seized material — Plausible rights of Australia not taken into account by Order — Real and imminent risk of Australia's interference with Timor-Leste's future communications with its lawyers.

1. Although I agree with much of the reasoning in the Order, I have voted against the first two paragraphs of the *dispositif*, because I consider that the undertaking given to the Court by the Attorney-General of Australia makes them unnecessary. I am also concerned that the Court, while rightly determined to protect the rights claimed by Timor-Leste, has ignored the rights asserted by Australia.

The Legal Criteria for the Indication of Provisional Measures of Protection

2. The Court's power to indicate provisional measures, pending a judgment on the merits, is conferred by Article 41 of the Statute, paragraph 1 of which provides — "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party." While the language of Article 41 does not make this point clear, the Court has decided that "orders on provisional measures under Article 41 have binding effect" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109) and thus create international legal obligations for the parties (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 258, para. 263) the breach of which may itself give rise to action by the Court at the merits phase, even if the Court does not otherwise grant relief on the merits.

3. Most legal systems have developed a power of this kind to enable a court or tribunal to issue an interim order to ensure that the rights claimed by one or both parties are not negated by anything done by a party

between the commencement of a case and the final judgment on the merits (see, e.g., L. Collins, "Provisional and Protective Measures in International Litigation", *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 234 (1992-III), p. 9). It is in the nature of such measures that they almost always have to be ordered at short notice and without the kind of detailed examination of the legal issues or the evidence which takes place when a court makes a decision on the merits. These are necessary features of a system of interim protection. Since provisional measures are a response to an urgent risk of irreparable harm, it would be impossible to make the indication of such measures contingent upon a court first establishing that it had jurisdiction, that the rights asserted actually existed and that they were applicable on the facts of the case. Nevertheless, the result is that the International Court of Justice, a court whose jurisdiction is derived from the consent of the parties (see, e.g., *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 39, para. 88), imposes a legal obligation upon a party before it decides whether that consent has been given and in order to protect rights the existence and application of which has not yet been established. A degree of caution in the exercise of the Court's powers under Article 41 is thus called for.

4. That caution manifests itself, first, in the conditions which the Court has developed, over the years, as prerequisites for the exercise of its power under Article 41 of the Statute. Thus, the Court must satisfy itself *(a)* that the jurisdictional provisions relied upon appear, prima facie, to afford a basis for the jurisdiction of the Court; *(b)* that the rights asserted are at least plausible, that is to say that there is a realistic prospect that when the Court rules upon the merits of the case they will be adjudged to exist and to be applicable; *(c)* that there exists a link between those rights and the measures to be ordered; and *(d)* that there is a real and imminent risk that, unless measures are ordered, irreparable harm will be caused to the rights in dispute before the Court gives its final decision on the merits (see, e.g., *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. 17, para. 49, p. 18, para. 53, p. 20, para. 60 and pp. 21-22, paras. 63-64).

5. It is the way in which the Court has dealt with the fourth requirement in the present case which has forced me to dissent (see paragraphs 22-29, below). That requirement actually embraces several different but related elements all of which must be present if the Court is to indicate provisional measures. The first element is that the Court must be satisfied that there is a real and imminent risk that the rights which might be adjudged to belong to a party will suffer irreparable harm before judgment is given on the merits, so that, in that sense at least, the judgment on the merits would be rendered nugatory. The second element is that the

measures which the Court is proposing to indicate must be considered necessary to prevent the occurrence of such harm. Implicit in that second element is a third one, namely that the measures should not go beyond what is considered necessary to achieve that end. That is particularly important where those measures may restrict — possibly for some years — the exercise by the party to whom they are directed of rights which that party may subsequently be found to possess.

6. The need for caution is also reflected in the Court's approach to the relationship between its role at the provisional measures and merits phases of a case. Proceedings for provisional measures are dealt with in the Rules of Court under the heading "incidental proceedings". They are incidental, or ancillary, to the proceedings on the merits in that the Court may order such measures only if to do so is necessary for the preservation of rights which it may, at the merits phase, decide belong to one of the parties and are applicable to the facts proven at that phase[1]. In this respect, I believe that it is misleading to speak of provisional measures as autonomous. They are autonomous only in the sense that a State may be held responsible for violation of a provisional measure notwithstanding that it prevails on the merits. In addressing a request for provisional measures, however, the Court has to be careful not to stray into matters which can properly be decided only at the merits phase. Thus, while the Court insists that measures will be ordered to protect claimed rights only if those rights are plausible, it should not go beyond that preliminary appraisal and do or say anything which prejudges questions which can only be decided on the merits after the Court has determined that it has jurisdiction and after it has had the benefit of full argument on the law and heard the evidence which the parties wish to put before it. Nor should the Court allow itself to be influenced, at the provisional measures stage, by consideration of the likely outcome on the merits.

7. Finally, while the Court may not indicate provisional measures unless the requirements set out in paragraph 4, above, are met, the fact that they are met does not oblige it to indicate such measures. Once those requirements are satisfied, the Court has a discretion, as the language of

[1] It might seem that the measure, frequently included in an order for provisional measures, by which the Court enjoins both parties to refrain from any action which might aggravate or extend the dispute (see, e.g., *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. 27, para. 86 (3)) is an exception to this principle. In fact, the exception is more apparent than real. A measure of this kind is not normally free-standing but is indicated where the Court also indicates measures for the protection of rights. Moreover, the link to the merits is still present, since the dispute which the parties are required not to aggravate or extend is the dispute on which the Court is being asked to rule at the merits phase.

Article 41 of the Statute makes clear. In the exercise of that discretion, the Court has to consider carefully the rights asserted by both parties. In seeking to protect the plausible rights asserted by one party from irreparable harm, it should always be mindful of the effect which compliance with its Order may have on the ability of the other party to exercise plausible rights of its own. In some national jurisdictions this consideration has led courts to make the grant of interlocutory relief to a party subject to a requirement that that party undertake to indemnify the other party for the costs of compliance with the interlocutory order in the event that the first party is unsuccessful at the merits stage. This kind of condition affords some protection to the rights which may subsequently be adjudged to belong to the second party and makes interlocutory relief less one-sided. The International Court of Justice has never sought to impose such a condition and the nature of most of the cases which come before it (including the present case) is such that a financial indemnity of this kind would usually be neither sufficient nor appropriate. Nevertheless, that does not excuse the Court from the duty to ensure that any provisional measures which it might indicate do not achieve protection for the rights of one party at the expense of undue harm to the rights of the other. In this respect also a degree of caution is required.

Application of the Criteria to the Present Case

8. When one comes to apply these criteria to the facts of the present case, it becomes apparent that this case calls for particular sensitivity on the part of the Court. The background to the request by Timor-Leste for provisional measures is most unusual. First, in an arbitration which it has commenced, Timor-Leste alleges that Australian officials engaged in conduct on the territory of Timor-Leste, as a result of which Australia obtained an unfair advantage in treaty negotiations with Timor-Leste. In advancing this allegation, Timor-Leste proposes to rely upon the testimony of a former officer of the Australian Secret Intelligence Service ("ASIS"). Secondly, Timor-Leste maintains that officers of the Australian Security Intelligence Organisation ("ASIO"), in violation of Timor-Leste's rights under international law, seized documents relating to the first allegation and other papers concerning Timor-Leste's legal position vis-à-vis Australia from the Canberra office of an Australian lawyer who is advising Timor-Leste. Thirdly, Australia maintains that the public statements made by Timor-Leste and its Australian lawyer suggest that a former ASIS officer committed a crime under Australian law in disclosing information about ASIS activities and may thereby have endangered the national security of Australia, including putting at risk the lives of other ASIS officers.

9. Even this brief summary of this background suggests that the Court needs to be especially cautious in the present case. In the first place, important elements of this background are the subject of proceedings before another tribunal and are not, therefore, matters on which this Court can pronounce, or by which it should be influenced. It is for the arbitration tribunal, not the Court, to decide whether Timor-Leste's allegations that Australia bugged its government offices in Dili and thus obtained important information regarding Timor-Leste's stance in the negotiation of a treaty on the resources of the Timor Sea are well-founded and, if so, what are the consequences for the validity of the treaty and the responsibility of Australia. Whether a former ASIS officer has violated the criminal law of Australia is a matter for the Australian courts. The issue before this Court is confined to the allegations regarding the seizure of documents from the office of Timor-Leste's Australian lawyer and the justification which might be put forward by Australia for that seizure. Moreover, that issue is one for the merits phase of the present proceedings. The need which arises in all provisional measures cases to ensure that the Court does not stray into matters which can only be considered on the merits is here complicated by the fact that the merits of the case before the Court are bound up with, but have to be kept separate from, the merits of the proceedings before the arbitration tribunal and any proceedings which might be brought before the Australian courts.

10. The task of the Court is also complicated by the nature of the allegations. The adjudication of issues involving national security is seldom an easy matter. In the present case the national security of both Timor-Leste and Australia is potentially at stake. The handling of intelligence material and allegations regarding the activities of intelligence services is notoriously difficult in any legal system. This consideration compounds the difficulty which always faces the Court at the provisional measures stage of a case, namely that there is very little evidence or information regarding the facts before the Court. In the present case, Timor-Leste is understandably concerned that the raid on its lawyer's office has placed in the hands of the Australian Government legal and technical advice and correspondence which could give Australia a marked, and most unfair, advantage in the arbitration proceedings and in any future negotiations with Timor-Leste over the Timor Sea but it is unsure precisely what documents Australia has in its possession. Australia, having sealed the documents in response to the request of the President (Order, paras. 9 and 37) has told the Court that it does not know what is in those documents (see the statements by the Solicitor-General of Australia (CR 2014/4, pp. 9 and 17 (Gleeson))) but expresses concern that they may contain information relevant to safeguarding the lives of members of its intelligence services and its methods of gathering intelligence. The Court is thus obliged to proceed in a difficult matter with even less

information than it would usually have on a request for provisional measures.

11. None of this means that the Court should be deterred from exercising its powers under Article 41 of the Statute. The Court has a responsibility to do what it can to ensure that plausible rights asserted by a State in proceedings before it are not irreparably damaged before the Court rules on jurisdiction or merits. Nevertheless, it does suggest that the Court must tread carefully, ensuring that the criteria for the indication of provisional measures are indeed met, that it is sensitive to the plausible rights of both Parties and that it does not go beyond what is necessary for the protection of the rights of either.

12. I agree with the Court that the first three requirements for the indication of provisional measures are met. That the provisions relied upon by Timor-Leste to found the jurisdiction of the Court appear, at least prima facie, to afford a basis of jurisdiction is clear beyond doubt and is not challenged by Australia[2]. The Order quite rightly finds that Timor-Leste has demonstrated that it has plausible rights. I agree both with the Court's definition of those plausible rights — "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" (Order, para. 28) — and with its implicit decision that it is unnecessary at the present stage of the proceedings to enquire into the broader rights asserted by Timor-Leste. I am not sure that those rights may be derived from Articles 2 (1) and 2 (3) of the United Nations Charter, as opposed to a general principle of law concerning the confidentiality of communications with legal advisers, but that is a matter for the merits. Finally, I agree that there is a link between the rights asserted by Timor-Leste and the measures which the Court has indicated.

13. Where I must part company with the Court is in the application of the fourth requirement, namely that the measures must be necessary to prevent a real and imminent risk of irreparable harm to those rights. The majority has found that such a risk exists notwithstanding the undertaking given by the Attorney-General of Australia to the Court. I do not agree. Save in one respect, I believe that the undertaking is sufficient to prevent the harm feared by Timor-Leste. To see why that is so, it is necessary to examine the undertaking in some detail.

[2] Australia has, however, reserved the right to challenge the jurisdiction of the Court or the admissibility of the Application at a later stage.

14. Australia has given more than one undertaking to this Court and to the arbitration tribunal but it is only the undertaking dated 21 January 2014 that is relevant to whether or not there exists a risk of irreparable harm. The other undertakings were either subsumed by this one or are concerned only to preserve the status quo pending the Court's ruling on the request for provisional measures. Thus, following the letter of 18 December 2013 from the President of the Court, in the exercise of his powers under Article 74 (4) of the Rules of Court (Order, para. 9), Australia placed the documents under seal and undertook that no official of Australia would have access to them until the Court rendered its decision on the request for provisional measures (*ibid.*, para. 37). While this undertaking was a very proper response to the President's letter, it will expire on the delivery of the present Order and is therefore of no relevance to the question whether provisional measures are necessary in respect of the period which will elapse between the Order and the final judgment of the Court.

15. The undertaking of 21 January 2014 is of an entirely different character. In a letter of that date, the Attorney-General stated that:

"Whereas

A. I am the Attorney-General of the Commonwealth of Australia, having responsibility, *inter alia*, for the administration of the Australian Security Intelligence Organisation Act 1979 and for the conduct of these proceedings; and
B. I am aware that the Australian Security Intelligence Organisation ('ASIO') executed a warrant at premises occupied by the law firm of Mr. Bernard Collaery and that in execution of that warrant, certain material ('the Material') was taken into possession by ASIO; and
C. On 19 December 2013, I made a written undertaking to an Arbitral Tribunal constituted under the 2002 Timor Sea Treaty relating to restrictions on the use of the Material; and

D. On 20 January 2014, the Government of Timor-Leste raised before the International Court of Justice ('the Court') concerns relating to the use of the Material in contexts unrelated to the arbitration.

I declare to the Court that:

1. I have not become aware or sought to inform myself of the content of the Material or any information derived from the Material; and
2. I am not aware of any circumstance which would make it neces-

sary for me to inform myself of the content of the Material or any information derived from the Material; and

3. I have given a Direction to ASIO that the content of the Material and any information derived from the Material, is not under any circumstances to be communicated to any person for any purpose other than national security purposes (which include potential law enforcement referrals and prosecutions) until final judgment in this proceeding or until further or earlier order from the Court.

I undertake to the Court 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 referred to in Recital C."

As the present Order records, the Agent of Australia stated before the Court that the Attorney-General had the authority to bind Australia as a matter of both Australian and international law (CR 2014/2, p. 9 (Reid) and CR 2014/4, p. 27 (Reid), quoted in paragraph 44 of the Order).

16. The Attorney-General's undertaking was clarified by the answers given by Australia to questions asked by Members of the Court. In response to the question "[u]nder what circumstances would the undertaking of the Attorney-General expire prior to this Court's Judgment" (CR 2014/2, p. 49), the Solicitor-General of Australia replied:

"it will not expire. All the words in question were intended to do was to allow for a possible variation after the Court so ordered. There are no circumstances, other than those referred to in subparagraph 2,

> which would require a variation. The purpose of subparagraph 2 was that if circumstances arose where it became necessary — for reasons currently unanticipated — for the Attorney-General to inform himself of the material, Australia will first bring the matter to [the Court], on notice to Timor-Leste, and will not act before [the Court has] been able to consider the matter." (CR 2014/4, p. 20 (Gleeson).)

The undertaking was thus of indefinite duration and would be varied only with the consent of the Court.

17. Australia was also asked about the relationship between subparagraph (3) and subparagraph (4) of the undertaking "in light of the fact that subparagraph (4) begins with the phrase 'without limiting the above'". The question was:

> "If Australia wishes, for 'national security purposes', to provide the material or information derived from the material to a part of the Australian Government that has responsibility for the matters described in subparagraph (4), could it do so consistent with the Undertaking?" (CR 2014/2, p. 49.)

The Solicitor-General's answer was categorical —

> "The answer to your second question is 'no'.
> The purpose of subparagraph (4) was only to clarify that matters concerning the Timor Sea and related negotiations, as well as the conduct of these Court proceedings and of the Tribunal, fall outside the 'national security' purpose referred to in subparagraph (3)." (CR 2014/4, p. 20 (Gleeson).)

In other words, Australia was undertaking that, except with the consent of the Court, none of the material seized, or information derived therefrom, would be communicated to anyone involved in the proceedings before this Court or the proceedings before the arbitration tribunal or anyone who might become involved in any future negotiations regarding the Timor Sea which might take place between Australia and Timor-Leste.

18. The undertaking related to future disclosure of the material seized or information derived therefrom but, in answer to another question from a Member of the Court (CR 2014/2, p. 49), the Solicitor-General of Australia gave an undertaking that no information derived from that material or notes taken during the execution of the search warrant had already been disclosed to persons involved in the arbitration proceedings or who might be involved in any future negotiations regarding the Timor Sea (CR 2014/4, pp. 20-21 (Gleeson)).

19. Lastly, a Member of the Court asked Australia:

> "In the event of a prosecution in Australia, will any of the documents seized or information derived from those documents be dis-

> closed in court in such a way that those documents or that information will be likely to come to the notice of persons involved in the arbitration, in the proceedings in this Court or in any negotiations [regarding the Timor Sea]?" (CR 2014/2, pp. 49-50.)

The Solicitor-General replied:

> "[I]f the documents remain in the hands of ASIO or the prosecutors, Australia's approach would be to make the appropriate application to the Court [i.e., the Australian court] under the National Security Information (Criminal and Civil Proceedings) Act 2004 which can be applied to ensure that the information does not come to the notice of persons referred to in the question.
>
> The Attorney-General undertakes to you that in the event of such a prosecution, he will direct the Commonwealth Director of Public Prosecutions to invoke the relevant provisions of that Act. And, in the unlikely event that a prosecution took place before the resolution of this matter, the Attorney-General, through me, undertakes that he will inform the Court [i.e., the Australian court before which the prosecution takes place] of the undertaking I have just given you, he will seek the appropriate orders to limit the dissemination of the information. And in the unlikely event the orders were not made, the Attorney-General will bring the matter back to this Court before any further action is taken in Australia." (CR 2014/4, p. 21 (Gleeson).)

20. The Court has in the past taken into account a formal undertaking regarding future conduct of the kind given by Australia and concluded that, in the light of that undertaking, no risk of irreparable harm existed (see *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 155, paras. 71-72). It has also taken note of a formal undertaking in proceedings before the Court as to an existing state of affairs (see *Maritime Dispute (Peru* v. *Chile), Judgment, I.C.J. Reports 2014*, p. 65, para. 178). As the Court says in the present Order,

> "[t]he Court 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." (Order, para. 44.)

21. It is implicit in paragraph 44 of the Order and in the approach taken by the Court in *Belgium* v. *Senegal* that a formal undertaking of the kind given by Australia in proceedings before the Court is legally binding as a matter of international law and creates legal obligations for the State that makes it.

22. Should the Court, therefore, have followed the same course that it adopted in *Belgium* v. *Senegal* and treated the Australian undertaking (as clarified in the hearings before the Court) as sufficient to demonstrate that there was no real and imminent risk of irreparable harm? To answer that question, it is necessary to look both at the right, as defined by the Court, and the risks identified by Timor-Leste and the Court.

23. The principal claim of Timor-Leste, which the Court considered had been established as plausible and thus deserving, if the other requirements were satisfied, of protection by means of provisional measures was "[the] 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" (Order, para. 27; see also para. 28). The risk of irreparable harm to this right identified by Timor-Leste was the risk that the material seized from its lawyer's office, or information derived therefrom, would find its way into the hands of those responsible on the part of Australia for the conduct of the arbitration or any future negotiations. Thus, counsel for Timor-Leste told the Court

> "The essence of what we seek is to ensure that the illegally seized materials should not be made available to any person having any role in connection with Australian diplomatic or commercial relations with Timor-Leste over the Timor Sea and its resources. This includes, but is not limited to, any person having any role in relation to the Arbitration." (CR 2014/1, pp. 33-34 (Sir Michael Wood).)

24. It was that risk of a detrimental effect on Timor-Leste's position in the arbitration and in any future negotiations which would arise if the seized material was divulged to any person involved in the arbitration or likely to be involved in any future negotiations on the Australian side which was the decisive consideration for the Court (see Order, para. 42).

25. Yet that is precisely the risk which the Attorney-General's undertaking, if complied with, would prevent. As clarified before the Court, that undertaking is that:

(1) none of the seized material or any information derived therefrom has so far been divulged to any person involved in the arbitration or the Court proceedings or who may be likely to be involved in any future Timor Sea negotiations;

(2) none of the seized material or any information derived therefrom will be divulged to any person involved in the arbitration or the Court proceedings or who may be likely to be involved in any future Timor Sea negotiations until after the Court has given its final judgment in the case;

(3) in the event that criminal proceedings are brought in Australia before the Court has given its final judgment in this case, the Australian court will be asked to take special measures to ensure that none of the seized material or information derived therefrom is disclosed in a manner which might lead to it coming to the attention of any of the persons involved in the arbitration or the Court proceedings or who may be likely to be involved in any future Timor Sea negotiations and, if the Australian court declines to take such measures, Australia will not proceed further in the Australian courts until it has given this Court the opportunity to rule on the question.

26. This undertaking is far more precise and detailed than that given in *Belgium* v. *Senegal*. Since the Court has held that there is no reason to believe that Australia will not comply with the commitment that it has made to the Court, I cannot conclude that there is a real and imminent risk that any of the information concerned will find its way into the hands of anyone involved in the arbitration or the conduct of the current proceedings or who is likely to be involved in any future negotiations between the Parties over the Timor Sea. The Court reaches a different conclusion on the basis that,

> "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" (Order, para. 46).

27. I entirely understand and sympathize with the Court's concern to maintain the confidentiality of what seems certain to be sensitive material capable of giving Australia a most unfair advantage in the ongoing arbitration proceedings and possibly in any future negotiations but it has to be asked quite what the Court has in mind in the passage just quoted. The possibility of disclosure coming about as a result of a prosecution in Australia has been covered by the supplementary undertaking given orally through the Solicitor-General and quoted at paragraph 19, above. The Court may have had in mind the possibility of a disclosure by an officer of ASIO empowered to examine the material for national security reasons. Yet that concern is difficult to reconcile with what the Court says in paragraph 44 of the Order about having no reason to doubt that Australia will comply with the undertaking. A State can act only through its officials and an officer of ASIO is, in accordance with the principle codified in Article 4 of the ILC Articles on State Responsibility, an organ of the Australian State. It is, therefore, a contradiction in terms to say that the Court has confidence that Australia will comply in good faith with the commitment it has made but that it doubts whether certain organs of the Australian State will do so. Even if such an ASIO officer were acting in an

unauthorized manner, his or her conduct would still be the conduct of Australia so long as he or she acted in their official capacity (ILC Articles on State Responsibility, Article 7) and it is difficult to see how disclosure by one official to another could be seen as anything else. I accept that that leaves the possibility of an accidental disclosure but, given the nature of the security concerns involved, such accidental disclosure seems unlikely and no suggestion of such an eventuality was made by Timor-Leste.

28. For these reasons, I believe that the 21 January 2014 undertaking from the Attorney-General of Australia removes the risk that the material (or information derived therefrom) will be disclosed in circumstances which would disadvantage Timor-Leste in relation to the arbitration proceedings or potential negotiations regarding the Timor Sea. The Court, however, has determined that, while the undertaking makes "a significant contribution towards mitigating the imminent risk . . . [it] does not remove this risk entirely" (Order, para. 47). On that basis, the Court has ordered Australia to seal the seized material (*ibid.*, para. 55 (2)) and ensure that its content is not in any way used to the disadvantage of Timor-Leste (*ibid.*, para. 55 (1)). This approach may reflect an understandable wish to err on the side of caution. Unfortunately, I think it goes far beyond that. While paragraph (1) of the *dispositif* can reasonably be regarded in that light, paragraph (2) goes much further. By requiring that the seized material be sealed until the final judgment of the Court, this measure deprives Australia of any opportunity (until the date of that judgment) to have its intelligence officers inspect the material for the purpose of finding out what, if anything, the former ASIS officer actually disclosed to Timor-Leste's Australian lawyer and, in particular, whether that disclosure may put in danger other ASIS or ASIO officers. It also precludes Australia from making any use of the material (even in a preliminary way) in the investigation of what it claims may be a serious offence by an Australian national. To my mind, it is clear that the right of Australia to exercise its criminal jurisdiction and its right to protect the safety of its officials must also be regarded as plausible. In deciding what provisional measures to order, the Court should have regard to the plausible rights of both parties in a case. In particular, it should be slow to adopt a measure which precludes one party (here, Australia) from *any* exercise of its plausible rights in order to protect the rights of the other party (here, Timor-Leste) against a risk which the Court itself has identified as small. Had the Court simply accepted the undertaking given by Australia or had stopped short at paragraph (1) of the *dispositif*, it would have respected the plausible rights of both Parties. Instead, it has adopted a measure that takes no account at all of the plausible rights of Australia.

29. Since one of the prerequisites for the indication of provisional measures regarding the seized material is absent, I have therefore felt obliged to vote against the measures ordered in paragraphs (1) and (2) of the *dispositif* which relate to that material. Even had I considered that the prerequisite of the existence of a real and imminent risk was satisfied, I would still have voted against paragraph (2) of the *dispositif* for the reasons given in paragraph 28 of this opinion.

30. Paragraph (3) of the *dispositif* is a different matter. This paragraph deals not with the use which might be made of the seized material or information derived from that material but with the possibility of future interference by Australia with Timor-Leste's communications with its legal advisers. In view of the seizure of papers which clearly related to legal advice and preparation for the forthcoming arbitration from Timor-Leste's lawyer, it is entirely understandable that Timor-Leste is concerned that there might be future interference and it sought an assurance from Australia that there would be no such interference. To my surprise, the undertaking from the Attorney-General makes no mention of this matter. In the absence of any undertaking not to interfere with Timor-Leste's communications with its lawyers in the future, I accept that there is a real and imminent risk of such interference which requires action on the part of the Court. I have therefore voted in favour of paragraph (3).

31. In the course of the hearings, leading counsel for Timor-Leste spoke eloquently of the need for "clear, firm and severe condemnation of what Australia has done" (CR 2014/1, p. 30 (Sir Elihu Lauterpacht QC)) but I did not understand him to expect such a statement at the present stage of the proceedings. Whether or not such condemnation is appropriate can be decided only if and when the Court rules on the merits of the present case. The purpose of provisional measures is solely to protect rights which may subsequently be adjudged to exist and to be applicable. It is not to anticipate a judgment on the merits by the expression of condemnation or approval of what either party has done. My votes in the present phase should not, therefore, be taken as suggesting that I condone what has happened.

(*Signed*) Christopher GREENWOOD.

SEPARATE OPINION OF JUDGE DONOGHUE

1. Certain circumstances giving rise to the present case are not in dispute. During the pendency of State-to-State arbitration, one State seized documents and data from the office of counsel to the opposing State (for convenience, I refer to all seized documents, data and material as "the Material"). The Court has only limited information about the content of the Material, which Timor-Leste describes as addressing not only a legal dispute that is currently the subject of arbitration (the Timor Sea Treaty Arbitration) — including communications between itself and its counsel — but also Timor-Leste's negotiating position and strategy with regard to questions of maritime delimitation between the two States.

2. This sequence of events surely should give pause to anyone concerned with the integrity of international dispute settlement. The question whether the seizure of the Material is lawful, however, is a matter for the merits and is not addressed today by the Court or by this separate opinion. I write this opinion to set out my reasons for voting with the majority of my colleagues in respect of one provisional measure, while parting company with them as to the other two provisional measures.

3. Article 41 of the Statute of the Court provides that the Court may indicate provisional measures "if it considers that circumstances so require". In recent years, the Court has followed the approach to provisional measures that it took in *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (*Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 147, para. 40; p. 151, paras. 56-57; pp. 152-153, para. 62). As today's Order indicates, the Court considers whether there appears, prima facie, to be jurisdiction, whether the rights asserted by the requesting party are at least plausible, whether there is a link between the rights that form the subject-matter of the proceedings and the provisional measures being sought and whether there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court renders its final judgment in the case.

4. There is much common ground between my own views and those expressed in the Order. I agree with my colleagues 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.

5. This brings me to the assessment of the risk of irreparable prejudice to the plausible rights asserted by Timor-Leste in this case. My approach to this question differs from the approach that the Court has taken. Recalling the standard established in Article 41, I consider that a risk of irreparable prejudice in the circumstances of this case "requires" the imposition of the third provisional measure, but not the first or the second. I have voted against the first two provisional measures because I conclude that the 21 January 2014 undertaking made by Australia's Attorney-General to the Court (the "Undertaking"), addresses the risk of irreparable prejudice that is the focus of those two measures. I have 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.

A. The First and Second Provisional Measures Indicated by the Court

6. As noted above, the Court has stated that it will exercise the power to indicate provisional measures only if there is a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court gives its final judgment (see, e.g., *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)*, pp. 21-22, para. 63). As I see it, a determination of whether there is a real and imminent risk of irreparable prejudice calls, first, for an assessment of whether any prejudice would be irreparable, and, secondly, for an evaluation of the probability that such irreparable prejudice will occur before the Court's final judgment, in the absence of provisional measures. (The urgency of the requested measures also must be taken into account, but, for present purposes, I do not focus on this additional requirement.)

7. The Court has not always been clear about whether the requesting party must address not only whether the prejudice to its asserted rights would be irreparable, but also the probability that such irreparable prejudice will occur. This case illustrates the importance of considering both aspects of the risk of irreparable prejudice. The Court has decided that if the Material is divulged to "any person or persons involved or likely to be involved" in the pending arbitration between Timor-Leste and Australia or in "future maritime negotiations" between the Parties, certain rights asserted by Timor-Leste could be irreparably prejudiced (Order, para. 42). I agree with this conclusion. I differ with the Court's decision to indicate the first and second provisional measures, however, because I believe that the Undertaking addresses the risk that such irreparable prejudice will

occur. By contrast, the Court apparently considers that, despite the Undertaking, the possibility of the information being divulged is serious enough to justify the measures indicated (Order, para. 46).

8. To explain my reasoning, it is necessary to look closely at the key elements of the Undertaking. At the outset, I recall that Australia told the Court that the Attorney-General has the authority to bind Australia as a matter of international law. I summarize below four key provisions of the Undertaking that relate to the Material (*ibid.*, para. 38).

9. First, the Attorney-General states that he has directed the Australian Security Intelligence Organisation (ASIO) not to communicate the Material or information derived from it "to any person for any purpose other than national security purposes (which include potential law enforcement referrals and prosecutions) until final judgment in this proceeding or until further or earlier order from the Court".

10. Secondly, the Undertaking states that the Attorney-General will not make himself aware of the content of the Material or information derived therefrom. It further states that should he become aware of any circumstances that "would make it necessary" for him to become informed about the Material, he "will first bring that fact to the attention of the Court, at which time further undertakings will be offered".

11. Thirdly, the Undertaking states that 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)".

12. Fourthly, the Undertaking states that,

> "[w]ithout 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 referred to [above]".

(For ease of reference, I refer to this part of the Undertaking as the "Fourth Commitment".) In response to a question posed by a Member of the Court during the hearing, Australia clarified that the phrase "without limiting the above" means that "matters concerning the Timor Sea and related negotiations, as well as the conduct of these proceedings and of the Tribunal, fall outside the 'national security' purpose" referred to in the Undertaking. This makes clear that even a national security purpose would not justify dissemination of the Material or information derived

from it to any individual for the purposes described by the Fourth Commitment.

13. The Undertaking remains in effect until final judgment in this case, a point that Australia affirmed during the oral proceedings.

14. Thus, an official with the authority to bind Australia under international law has told the Court that the Material and information derived from it will not be made available for the purposes described by the Fourth Commitment until the Court has rendered its final judgment. As the Court has stated, Australia's good faith in complying with its commitments set forth in the Undertaking is to be presumed (Order, para. 44). The scope of the Fourth Commitment encompasses all forms of dispute resolution referred to by Timor-Leste (that is, the pending arbitration, the case before this Court and potential future maritime delimitation negotiations between Timor-Leste and Australia) and thus protects rights asserted by Timor-Leste that are plausible and that, according to Timor-Leste, could be irreparably prejudiced by Australia's access to the Material. There is nothing in the record that suggests that Australia lacks capacity to give effect to the Undertaking. Under these circumstances, I consider that there is at most a remote possibility that the Material will be divulged to anyone involved in the pending arbitration, in these proceedings or in future bilateral negotiations relating to the Timor Sea.

15. In contrast to my assessment of whether the risk of irreparable prejudice merits interim protection, the Court places emphasis on the fact that Australia has stated that ASIO will keep the Material under seal only until the Court has reached its decision on the request for provisional measures (see Order, paras. 39 and 46). This observation does not change the fact that commitments made in the Undertaking, including the Fourth Commitment, will remain in effect until the Court's final judgment. It is this Fourth Commitment — not the separate, earlier decision by Australia to keep the Material under seal while the Court considers the request for provisional measures — that guards against the irreparable prejudice to the rights asserted by Timor-Leste that would result if the Material fell into the wrong hands.

16. In view of the above considerations, I conclude that the first and second provisional measures are not required to protect the plausible rights that Timor-Leste has asserted in this case and thus do not meet the applicable standard for the imposition of provisional measures. In particular, the second provisional measure requires Australia to keep the Material under seal until further decision of the Court. This means that Australia must refrain from any use of the Material, thus foreclosing possible uses of the Material that might have no implications for the rights that Timor-Leste has asserted.

17. In this regard, the second provisional measure is difficult to reconcile with the Court's statement in the Order that the imposition of provi-

sional measures has as its object "the preservation of the respective rights claimed by the parties" and 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" (Order, para. 22).

18. The Order finds certain rights asserted by Timor-Leste to be plausible, placing emphasis on Timor-Leste's asserted right to communicate freely with its counsel regarding arbitration and other matters relating to international negotiations — a right which, as the Court states, "might be derived from the principle of sovereign equality of States" enshrined in the United Nations Charter (*ibid.*, para. 27). The principle of sovereign equality is unassailable, but the precise rights and obligations that flow from it in the particular circumstances of this case remain to be addressed at the merits phase.

19. The Court does not take into account the fact that Australia responded to Timor-Leste's arguments by asserting its own "sovereign rights to protect its national security and enforce its criminal jurisdiction in its own territory", which, according to Australia, will suffer prejudice if the requested provisional measures are indicated. Thus, Australia, like Timor-Leste, has invoked a well-established principle — that a State may exercise enforcement jurisdiction within its territory. The principles on which the Parties rely do not always easily co-exist, as can be seen in the Court's Judgment in *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)* (*I.C.J. Reports 2012 (I)*, pp. 123-124, para. 57). The interplay of the two principles and the resulting rights and obligations that apply in this case are among the matters to be considered at the merits phase.

20. The régime established by the Undertaking would address the risk of irreparable prejudice to the rights asserted by Timor-Leste that the Court considers plausible. It would do so, however, without precluding Australia from using the Material in connection with efforts to enforce its criminal laws within its territory, so long as such use is consistent with the Undertaking. It thus offers a means to address the risk of irreparable prejudice to Timor-Leste with which the Court is concerned, without infringing upon rights that Australia has asserted and that may later be found to appertain to it. In contrast, the second provisional measure bars Australia from using the Material in connection with law enforcement activity, even when such activity would not prejudice plausible rights asserted by Timor-Leste.

21. It is understandable that the Court wishes to be vigilant in crafting interim relief that targets harm that is truly irreparable, such as the prejudice that Timor-Leste could face here. Given that the likelihood of such prejudice is remote, however, it is especially unfortunate that the Court

has imposed a provisional measure that appears to restrict possible uses of the Material that would not cause any irreparable prejudice to Timor-Leste.

B. The Third Provisional Measure Indicated by the Court

22. I reach a different conclusion about the probability of irreparable prejudice to the rights asserted by Timor-Leste when I consider the third provisional measure indicated by the Court, which I support. That measure states that Australia shall not interfere in any way in communications between Timor-Leste and its legal advisers in connection with the pending arbitration, the proceedings before this Court or future negotiations concerning maritime delimitation.

23. Australia's arguments opposing Timor-Leste's request for provisional measures suggest that Australia sees no legal impediment to interfering with communications between Timor-Leste and its counsel in the future, so long as such actions comply with Australian law. Australia chose not to provide assurances concerning this matter in the Undertaking or elsewhere. As a result, absent the imposition of the third provisional measure, there is no safeguard against another incident of the type that forms the core of Timor-Leste's case. Under these circumstances and in light of the plausibility of certain rights that Timor-Leste has asserted, I find the third provisional measure appropriate.

(Signed) Joan E. Donoghue.

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.

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[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.
